REPORT FOR THE HEARING

in Case E-2/20

REQUEST to the Court under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice by Borgarting Court of Appeal (*Borgarting Lagmannsrett*), in the case between

The Norwegian Government, represented by the Immigration Appeals Board (*Utlendingsnemnda – UNE*),

and

L,

concerning the interpretation of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the EU and their family members to move and reside freely within the territory of the Member States, as adapted to the Agreement on the European Economic Area.

I Introduction

1. By letter of 3 April 2020, registered at the Court on the same day, Borgarting Court of Appeal referred a request for an Advisory Opinion ("Request") in a case pending before it between the Norwegian Government, represented by the Immigration Appeals Board, and L.

2. The case concerns the validity of the Immigration Appeals Board's decision of 12 July 2017, at issue in the appeal proceedings before it. That decision concerns an expulsion order regarding a Finnish national, L, and a permanent entry prohibition under sections 122 and 124 of the Norwegian Immigration Act.

II Legal background

EEA law

3. Article 28 EEA reads:

> *1. Freedom of movement for workers shall be secured among EC Member States and EFTA States.*

2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of EC Member States and EFTA States as regards employment, remuneration and other conditions of work and employment.

3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:

(a) to accept offers of employment actually made;

(b) to move freely within the territory of EC Member States and EFTA States for this purpose;

(c) to stay in the territory of an EC Member State or an EFTA State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;

(d) to remain in the territory of an EC Member State or an EFTA State after having been employed there.

4. The provisions of this Article shall not apply to employment in the public service.

5. Annex V contains specific provisions on the free movement of workers.

4. Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 77), as corrected by OJ 2004 L 229, p. 35, OJ 2005 L 30, p. 27, and OJ 2005 L 197, p. 34, ("the Directive") was incorporated into the Agreement on the European Economic Area ("the EEA Agreement" or "EEA") by Decision of the EEA Joint Committee No 158/2007 (OJ 2008 L 124, p. 20, and EEA Supplement 2008 No 26, p. 17) ("Joint Committee Decision"), which added it at point 3 of Annex VIII, and points 1 and 2 of Annex V. Constitutional requirements were indicated by Iceland, Liechtenstein and Norway, and the decision entered into force on 1 March 2009.

5. Article 1 of the Joint Committee Decision reads:

…

The provisions of the Directive shall, for the purposes of the Agreement, be read with the following adaptations:

(a) The Directive shall apply, as appropriate, to the fields covered by this Annex.

(b) The Agreement applies to nationals of the Contracting Parties. However, members of their family possessing third country nationality … shall derive certain rights according to the Directive.

(c) The words 'Union citizen(s)' shall be replaced by the words 'national(s) of EC Member States and EFTA States'.

(d) In Article 24(1) the word 'Treaty' shall read 'Agreement' and the words 'secondary law' shall read 'secondary law incorporated in the Agreement'.

6. Recitals 23, 24 and 27 of the Directive read:

(23) Expulsion of Union citizens and their family members on grounds of public policy or public security is a measure that can seriously harm persons who, having availed themselves of the rights and freedoms conferred on them by the Treaty, have become genuinely integrated into the host Member State. The scope for such measures should therefore be limited in accordance with the principle of proportionality to take account of the degree of integration of the persons concerned, the length of their residence in the host Member State, their age, state of health, family and economic situation and the links with their country of origin.

(24) Accordingly, the greater the degree of integration of Union citizens and their family members in the host Member State, the greater the degree of protection against expulsion should be. Only in exceptional circumstances, where there are imperative grounds of public security, should an expulsion measure be taken against Union citizens who have resided for many years in the territory of the host Member State, in particular when they were born and have resided there throughout their life. In addition, such exceptional circumstances should also apply to an expulsion measure taken against minors, in order to protect their links with their family, in accordance with the United Nations Convention on the Rights of the Child, of 20 November 1989.

(27) In line with the case-law of the Court of Justice prohibiting Member States from issuing orders excluding for life persons covered by this Directive from their territory, the right of Union citizens and their family members who have been excluded from the territory of a Member State to submit a fresh application after a reasonable period, and in any event after a three-year period from enforcement of the final exclusion order, should be confirmed.

7. Chapter VI of the Directive headed “Restrictions on the right of entry and the right of residence on grounds of public policy, public security and public health” contains Articles 27 to 33.

8. Article 27(1) and (2) of the Directive, headed “General principles”, reads:

> *1. Subject to the provisions of this Chapter, Member States may restrict the freedom of movement and residence of Union citizens and their family members, irrespective of nationality, on grounds of public policy, public security or public health. These grounds shall not be invoked to serve economic ends.*
>
> *2. Measures taken on grounds of public policy or public security shall comply with the principle of proportionality and shall be based exclusively on the personal conduct of the individual concerned. Previous criminal convictions shall not in themselves constitute grounds for taking such measures.*
>
> *The personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Justifications that are isolated from the particulars of the case or that rely on considerations of general prevention shall not be accepted.*

9. Article 28 of the Directive, headed “Protection against expulsion” reads:

> *1. Before taking an expulsion decision on grounds of public policy or public security, the host Member State shall take account of considerations such as how long the individual concerned has resided on its territory, his/her age, state of health, family and economic situation, social and cultural integration into the host Member State and the extent of his/her links with the country of origin.*
>
> *2. The host Member State may not take an expulsion decision against Union citizens or their family members, irrespective of nationality, who have the right of permanent residence on its territory, except on serious grounds of public policy or public security.*
>
> *3. An expulsion decision may not be taken against Union citizens, except if the decision is based on imperative grounds of public security, as defined by Member States, if they:*
>
> > *(a) have resided in the host Member State for the previous ten years; or*
> >
> > *(b) are a minor, except if the expulsion is necessary for the best interests of the child, as provided for in the United Nations Convention on the Rights of the Child of 20 November 1989.*

10. Article 32 of the Directive, headed "Duration of exclusion orders" reads:

> *1. Persons excluded on grounds of public policy or public security may submit an application for lifting of the exclusion order after a reasonable period, depending on the circumstances, and in any event after three years from enforcement of the final exclusion order which has been validly adopted in accordance with Community law, by putting forward arguments to establish that there has been a material change in the circumstances which justified the decision ordering their exclusion.*
>
> *The Member State concerned shall reach a decision on this application within six months of its submission.*
>
> *2. The persons referred to in paragraph 1 shall have no right of entry to the territory of the Member State concerned while their application is being considered.*

11. Article 33 of the Directive, headed "Expulsion as a penalty or legal consequence" reads:

> *1. Expulsion orders may not be issued by the host Member State as a penalty or legal consequence of a custodial penalty, unless they conform to the requirements of Articles 27, 28 and 29.*
>
> *2. If an expulsion order, as provided for in paragraph 1, is enforced more than two years after it was issued, the Member State shall check that the individual concerned is currently and genuinely a threat to public policy or public security and shall assess whether there has been any material change in the circumstances since the expulsion order was issued.*

Schengen Acquis

12. Recital 28 of Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals ("Directive 2008/115/EC") reads:

> *As regards Iceland and Norway, this Directive constitutes — to the extent that it applies to third-country nationals who do not fulfil or who no longer fulfil the conditions of entry in accordance with the Schengen Borders Code — a development of provisions of the Schengen acquis within the meaning of the Agreement concluded by the Council of the European Union and the Republic of Iceland and the Kingdom of Norway concerning the association of those two States with the implementation, application and development of the Schengen acquis, which fall within the area referred to in Article 1, point C, of Council Decision 1999/437/EC on certain arrangements for the application of that Agreement.*

13. Point (6) of Article 3 of Directive 2008/115/EC headed "Definitions" reads:

> *'entry ban' means an administrative or judicial decision or act prohibiting entry into and stay on the territory of the Member States for a specified period, accompanying a return decision;*

14. Article 11(1) to (3) of Directive 2008/115/EC headed "Entry ban" reads:

> *1. Return decisions shall be accompanied by an entry ban:*
>
> *(a) if no period for voluntary departure has been granted, or*
>
> *(b) if the obligation to return has not been complied with*
>
> *In other cases return decisions may be accompanied by an entry ban.*
>
> *2. The length of the entry ban shall be determined with due regard to all relevant circumstances of the individual case and shall not in principle exceed five years. It may however exceed five years if the third-country national represents a serious threat to public policy, public security or national security.*
>
> *3. Member States shall consider withdrawing or suspending an entry ban where a third-country national who is the subject of an entry ban issued in accordance with paragraph 1, second subparagraph, can demonstrate that he or she has left the territory of a Member State in full compliance with a return decision.*
>
> *Victims of trafficking in human beings who have been granted a residence permit pursuant to Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities shall not be subject of an entry ban without prejudice to paragraph 1, first subparagraph, point (b), and provided that the third-country national concerned does not represent a threat to public policy, public security or national security.*
>
> *Member States may refrain from issuing, withdraw or suspend an entry ban in individual cases for humanitarian reasons.*
>
> *Member States may withdraw or suspend an entry ban in individual cases or certain categories of cases for other reasons.*

European Convention on Human Rights

15. Article 8 of the European Convention on Human Rights ("ECHR"), headed "Right to respect for private and family life" reads:

> *1. Everyone has the right to respect for his private and family life, his home and his correspondence.*
>
> *2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*

National law

16. The Norwegian Immigration Act[1] implements the Directive into Norwegian law.

17. Section 122 of the Norwegian Immigration Act reads:

> *EEA nationals and their family members, and foreign nationals as mentioned in section 110, fourth paragraph, of the Act who have a right of residence under section 111, second paragraph, or section 114, second paragraph, may be expelled when this is in the interests of public order or security. It is a condition for expulsion that the personal circumstances of the foreign national present, or must be assumed to present, a real, immediate and sufficiently serious threat to fundamental societal interests. The King may issue regulations containing further provisions on the definition of public order and security.*
>
> *A foreign national who may be expelled under the first paragraph may nevertheless not be expelled if the foreign national*
>
> *(a) has a permanent right of residence under sections 115 or 116, unless weighty public order or security considerations indicate that it is necessary,*
>
> *(b) is an EEA national who has resided in the realm for 10 years, unless it is compellingly necessary in the interests of public security, or*

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1 *Lov. 15. mai 2008 nr. 35 om utlendingers adgang til riket og deres opphold her* - Act of 15 May 2008 on the entry of foreign nationals into the Kingdom of Norway and their stay in the realm ("Norwegian Immigration Act"). All translations of national legal provisions are unofficial.

(c) is an EEA national who is a minor, unless it is compellingly necessary in the interests of public security. However, this does not apply to minors if expulsion of the minor is necessary in order to safeguard the child's best interests.

A foreign national who has contravened chapter 18 of the Penal Code or has provided a safe haven for a person the foreign national knows to have committed such an offence may be expelled regardless of the provisions in the second paragraph.

No expulsion decision is made under the provisions of this section if, in view of the seriousness of the offence and the foreign national's connection with the realm, it would constitute a disproportionate measure against the foreign national personally or against the family members. In the assessment of whether expulsion constitutes a disproportionate measure, weight shall be given to, among other things, the person's length of residence in the realm, age, state of health, family situation, financial situation, social and cultural integration in the realm, and connection with the country of origin. In cases concerning children, the child's best interests shall be a fundamental consideration.

18. Section 124, first and second paragraphs, of the Norwegian Immigration Act reads:

Expulsion precludes subsequent entry. The entry prohibition may be made permanent or time- limited, but not for periods shorter than two years. In the assessment, particular weight shall be given to the factors as mentioned in section 122, first paragraph.

The entry prohibition may be lifted upon application if indicated by new circumstances. If special circumstances apply, the expelled person may upon application be admitted to the realm for brief visits even if the entry prohibition is not lifted, but normally not until one year has passed since exit.

III Facts and pre-litigation procedure

Background

19. L is a Finnish national and grew up on the Åland Islands. He lived in Stockholm, Sweden before he moved to Norway in 1998, when he was 19 years old.

20. In 2003 L met his common-law partner with whom he has had two children, born in 2005 and 2007 respectively. L is a stepfather to a daughter born in 1999. L and his partner lived separately for a while beginning in 2009 due to difficulties in the relationship stemming from his partner's state of health. His partner is today categorised as 100% disabled.

21. L has been convicted on a number of occasions. By judgment of 16 November 2010, L was given a brief suspended sentence and a fine under the Norwegian Road Traffic Act (*vegtrafikkloven*). By judgment of 9 May 2011 of Stavanger District Court (*Stavanger tingrett*), he was found guilty of an offence under section 222(1) of the Norwegian Criminal Code (*straffeloven*), read in conjunction with section 232 thereof. That conviction was upheld on appeal by judgment of 29 March 2012 by Gulating Court of Appeal (*Gulating lagmannsrett*), by which the sentence was set at 11 months' imprisonment. The basis for the conviction was that L and two co-accused conspired to collect a large sum of money from a Norwegian residing in Spain who, L claimed, owed him money. Gulating Court of Appeal held that the demand for payment was "clearly threatening and aggressive" and liable to foster "considerable fear", and that L had aided and abetted that demand.

22. At the time of that judgment by Gulating Court of Appeal, L had been arrested in a major narcotics case. By judgment of 12 November 2012 of Stavanger District Court, L was convicted of three offences under the first paragraph of section 162 of the Norwegian Criminal Code, read in conjunction with the third paragraph thereof, relating to involvement with or aiding and abetting involvement with a very large quantity of narcotics. L was convicted of having acquired at least 14.4 kg of methamphetamine and around 5 kg of paramethoxymethamphetamine ("PMMA"), having sold at least 12 kg of methamphetamine and around 0.5 kg of PMMA and having aided and abetted the import of 6.98 kg of methamphetamine into Norway. Following a partial appeal, the conviction was upheld by judgment of 22 March 2013 and he was sentenced to 11 years' imprisonment.

23. L served about four years of his sentence in Stavanger Prison, some of which was spent in a section dealing with substance dependency issues, before being transferred to Bastøy Prison on 4 August 2015. In August 2018 L was transferred onwards to transitional housing in Stavanger, before being released on probation in the autumn of 2019. Since being transferred to transitional housing, he has been employed full-time and remains so currently. L maintained close contact with his family whilst serving his sentence. He was granted an increase in his leave allowance to 50 days per year, which was used solely to visit his partner and children. L received positive acclamation from the Norwegian Correctional Service (*Kriminalomsorgen*) whilst serving his sentence and was assigned tasks requiring a particularly high level of trust. The type of tasks assigned to him were given only to persons deemed not to constitute a risk of evasion or smuggling-in of narcotics.

Expulsion procedure

24. On 20 August 2013 the Norwegian police issued an advance notice of expulsion ("*forhåndsvarsel om utvisning*"). On 12 September 2013, L submitted remarks on that advance notice. Three years later, on 26 April 2016, the Norwegian Directorate of Immigration (*Utlendingsdirektoratet – UDI*) adopted an expulsion decision together with a permanent entry prohibition. L lodged an appeal against that decision on 29 September 2016. The Norwegian Directorate of Immigration did not find that there were grounds to reverse the decision and, by decision of 12 July 2017, the Immigration

Appeals Board (*Utlendingsnemnda – UNE*) upheld the decision. The Immigration Appeals Board found that L had resided lawfully in the realm for over 10 years and that letter (b) of the second paragraph of section 122 of the Norwegian Immigration Act applied. The Immigration Appeals Board found that it was compellingly necessary in the interests of public security to expel L, and that circumstances relating to L constituted a genuine, present and sufficiently serious threat affecting the fundamental interests of society. The Immigration Appeals Board further found that expulsion together with a permanent entry prohibition did not amount to a disproportionate intervention in relation to L and his family.

25. On 8 May 2019, L lodged a writ before Oslo District Court (*Oslo tingrett*) to have the decision of the Immigration Appeals Board declared invalid. In its judgment delivered on 7 November 2019, Oslo District Court held that a permanent entry prohibition is not contrary to EEA law ("the District Court judgment"). The decision of the Immigration Appeals Board was, however, declared invalid, as the majority of the judges took the view that the personal circumstances of L did not present, or could not be assumed to present, "*a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society*" within the meaning of the second sentence of the first paragraph of section 122 of the Norwegian Immigration Act. On an overall assessment, they found that the risk of new serious narcotics-related offences was so low that expulsion did not appear to be an obvious and well-founded measure. Even though the Oslo District Court did not find that the basic requirement for expulsion of an EU national was fulfilled, it nevertheless carried out an assessment under letter (b) of the second paragraph of section 122 of the Norwegian Immigration Act as to whether the expulsion would be *"compellingly necessary in the interests of public security"* and found that the criterion was fulfilled in view of the quantity of narcotics, the fact that L's involvement related to retention, sale and aiding and abetting import, and his prominent role in the operation.

26. The Norwegian Government appealed against the Oslo District Court's judgment to Borgarting Court of Appeal, which has decided to make a reference to the Court. Against this background, Borgarting Court of Appeal has referred the following questions to the Court:

> **1. Is recital 27 of the preamble to Directive 2004/38/EC to be interpreted as meaning that expulsion of an EU/EEA national together with a permanent exclusion order is contrary to Directive 2004/38/EC, even if the person in question has the possibility under Article 32(1) of applying to have the exclusion order lifted?**
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> **2. How are the words "material change" in Article 32(1) to be understood when the expulsion is based on personal characteristics of the EU/EEA national?**
>
> **3. If it is assumed that the personal characteristics of the EU/EEA national justifying the expulsion will not change, will expulsion together with a**

permanent entry prohibition in such cases be contrary to Directive 2004/38/EC?

4. How is the requirement in Article 27(2), under which expulsion must be a proportionate measure, to be understood in relation to the expulsion of an EU/EEA national together with a permanent entry prohibition when the person in question has a family and children in the country from which s/he is being expelled? Does the Directive preclude expulsion together with a permanent entry prohibition in such cases?

5. How much weight should be attached to the absence of criminal offences whilst serving a sentence and positive development following release on probation in the determination of whether there is "a genuine, present and sufficiently serious threat" as referred to in Article 27(2)?

IV Written observations

27. Pursuant to Article 20 of the Statute of the Court and Article 97 of the Rules of Procedure, written observations have been received from:

- the Government of Norway, represented by Kristin Hallsjø Aarvik, acting as Agent, and,

- L, represented by Bent Endresen, Advokat, Advokatfirma Endresen Brygfjeld Torall AS; and,

- the Government of Denmark, represented by Maria Søndahl Wolff and Mads Peder Brøchner Jespersen, acting as Agents, and,

- the EFTA Surveillance Authority ("ESA"), represented by Stewart Watson, Erlend Møinichen Leonhardsen, Catherine Howdle and Carsten Zatschler, Department of Legal & Executive Affairs, acting as Agents, and,

- European Commission ("the Commission"), represented by Elisabetta Montaguti, Legal Adviser, and Jonathan Tomkin, Member of its Legal Service, acting as Agents.

V Summary of the arguments and observations submitted to the Court

The Government of Norway

28. As regards question 1, the Norwegian Government begins by emphasising that an entry prohibition pursuant to the first paragraph of section 124 of the Norwegian Immigration Act ordering the expulsion of an EEA national requires that the conditions for expulsion be met. Secondly, the length of the entry prohibition is based on an individual assessment of the circumstances which justified the expulsion. Thirdly, where a permanent entry prohibition is ordered, that does not mean for life in the strict sense.

As will be discussed below, the entry prohibition may be lifted further to an application made by the excluded person under the second paragraph of section 124.

29. In the case before the referring court, L relies on recital 27 of the Directive to argue inter alia that an expulsion order with a permanent entry prohibition is in and of itself contrary to the Directive. In the Norwegian Government's submission, it is clear that the Directive does not per se preclude expulsion together with a permanent entry prohibition where the conditions for expulsion are met.

30. The Norwegian Government emphasises that it is settled case-law that the preamble to an EU law act has no legal force and cannot be relied upon on either as a ground for derogating from the actual provisions of the act in question or for interpreting those provisions in a manner that is clearly contrary to their wording.[2] Recital 27 cannot serve as an independent basis for derogating from the provisions of the Directive or for interpreting those provisions in a manner which is clearly contrary to their wording. Furthermore, according to settled case-law, for the purpose of interpreting a provision of EU law, it is necessary to consider not only its wording but also the context in which it occurs and the objectives pursued by the rules of which it is part.[3]

31. Recital 27 states that, in line with the case-law of the Court of Justice of the European Union ("the ECJ"), the right of a Union citizen who has been excluded from the territory of a Member State to submit a fresh application after a reasonable period should be confirmed.

32. This right is confirmed in Article 32, headed "*duration of exclusion orders*". Article 32(1) does not preclude permanent exclusion orders per se. The only requirement in respect of the duration of an exclusion order is that the Member State must consider an application for lifting the exclusion order after a reasonable period. The maximum period in which a Member State may decline to consider such an application is three years from the final exclusion order, which clearly suggests that such orders are expected to remain in force for a long time. In this respect, Article 32(1) places a limit only on how long an excluded person may be banned from entering the territory of a Member State before a reconsideration of the material circumstances must be carried out pursuant to an application made by the excluded person.

33. Recital 27 may not be relied upon to introduce other restrictions on the duration of exclusion orders or to introduce further rights for excluded persons in respect of the duration of an exclusion order than as laid down in the provisions of the Directive. It is also clear from the preparatory works that the legislature did not intend any restrictions on the duration of exclusion orders other than the right provided for in Article 32(1). The Norwegian Government observes that, in the Commission's original proposal for

[2] Reference is made to the judgment in *Skatteverket* v *Srf konsulterna AB*, C-647/17, EU:C:2019:195, paragraph 32 and the case-law cited.
[3] Reference is made to the judgment in *Liffers*, C-99/15, EU:C:2016:173, paragraph 14 and the case-law cited.

the Directive, [4] the provision concerning duration of exclusion orders was worded as follows:

> *Article 30. Duration of exclusion orders*
>
> *1. Member States may not issue orders excluding persons covered by this Directive from their territory for life.*
>
> *2. After a reasonable period, depending on the circumstances, and in any event once two years have elapsed since the decision ordering their expulsion was validly adopted in accordance with Community law, persons expelled on grounds of public policy, public security or public health, may submit a new application for leave to enter by putting forward arguments to establish that there has been a material change in the circumstances which justified the first decision ordering their expulsion.*
>
> *The Member State concerned shall reach a decision on the new application within three months of its submission.*
>
> *3. The persons referred to in paragraph 2 shall have no right of access to the territory of the Member State concerned while their new application is being considered.*

34. The article-by-article commentary states the following in respect of Article 30:

> *1. This provision incorporates into the legislation a right already recognised by the Court of Justice (judgment of 18 May 1982 in Joined Cases 115 and 116/81,* Adoui and Cornuaille*, point 12; judgment of 19 January 1999 in Case C-348/96,* Donatella Calfa*), by prohibiting life-long exclusion orders against people who have been expelled on grounds of public policy or public security.*
>
> *2. Paragraph 2 provides that the reasonable period after which a new application may be submitted, as referred to in the Court of Justice judgment in* Adoui and Cornuaille*, may not be more than two years from the date of the decision refusing leave to enter or ordering expulsion. When considering fresh applications, Member States must take into account any material changes in the circumstances which justified the first expulsion order. This provision also lays down the time limit for the Member State to decide on the new application, so as not to undermine the purpose of the first subparagraph.*
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> *3. Paragraph 3 is based on point 12 of the* Adoui and Cornuaille *judgment. This provision is needed to avoid leaving the way open for abuses of the system.*

[4] Reference is made to European Commission, Proposal for a European Parliament and Council Directive on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, COM(2001) 257 final ("Proposal COM(2001) 257 final").

35. In the Common Position adopted by the Council,[5] paragraph 1 was deleted:

> ***Article 32****: paragraph 1 has been deleted and its content included in Recital 25. In former paragraph 2 the period after which an application for lifting an exclusion order may be submitted has been set at three years instead of the proposed two.*

36. The Commission statedas follows in its Communication to the Parliament:[6]

> *Article 32(1) and (2): the first paragraph has been deleted and its content taken over in recital 27. The Commission does not see any problem with this, since the prohibition of life exclusion is a consequence of the second paragraph, which is retained in the article.* (The Government of Norway's added emphasis)

37. The legislature thus expressly rejected the Commission's proposal that Member States could not issue orders excluding Union citizens and their family members from their territory for life. The Commission accepted this as the prohibition of life exclusion is a consequence of the right to apply for the exclusion order to be lifted. Accordingly, it is clear how Article 32 should be interpreted. The only restriction on the duration of an exclusion order is that the excluded person must be able to submit an application for lifting the exclusion order after a reasonable period. Recital 27 cannot under any circumstances be relied upon to interpret Article 32 in any other way. It is, therefore, obvious that the Directive does not preclude permanent exclusion orders per se.

38. For the sake of completeness, it should be noted that nor does the case-law of the ECJ prior to the Directive and referred to in recital 27, *Adoui & Cornuaille*, preclude permanent exclusion orders per se.[7]

39. There is nothing in the answer from the ECJ in *Adoui & Cornuaille* that precludes permanent exclusion orders. Moreover, according to the ECJ in *Criminal proceedings against Donatella Calfa* ("*Calfa*"), as long as the excluded person may submit a new application after a reasonable time has elapsed, the decision expelling a person from a Member State's territory is not definite.[8]

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[5] Reference is made to Common Position (EC) No 6/2004 of 5 December 2003 adopted by the Council, acting in accordance with the procedure referred to in Article 251 of the Treaty establishing the European Community, with a view to adopting a directive of the European Parliament and of the Council on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC ("Common Position (EC) No 6/2004").

[6] Reference is made to European Commission, Communication from the Commission to the European Parliament pursuant to the second subparagraph of Article 251(2) of the EC Treaty concerning the common position of the Council on the adoption of a European Parliament and Council Directive on the right of citizens of the Union and their family members to move and reside freely within the territory of Member States, SEC(2003) 1293 final – 2001/0111 (COD).

[7] Reference is made to the judgment in *Adoui & Cornuaille*, 115/81 and 116/81, EU:C:1982:183, paragraphs 9, 11 and 12.

[8] Reference is made to the judgment in *Calfa*, C-348/96, EU:C:1999:6 paragraphs 24, and 26 to 28.

40. The principles from case-law referred to in recital 27 are all confirmed in the Directive. Article 27(2) provides that measures taken on grounds of public policy or public security are to comply with the principle of proportionality and be based exclusively on the personal conduct of the individual concerned. It further provides that previous criminal convictions are not in themselves to constitute grounds for taking such measures. Under Article 32(1), persons excluded on grounds of public policy or public security may submit an application to have the exclusion order lifted after a reasonable period. In any event, a reference to case-law in recital 27 cannot render any of the provisions in the Directive contrary to EU law.

41. Measures that may be imposed in connection with expulsion of an EEA national in other EEA and EU Member States include, depending on the seriousness of the circumstances justifying the expulsion, permanent entry prohibitions. This supports the Norwegian Government's position that expulsion together with a permanent entry prohibition is not, by and of itself, contrary to the Directive.

42. The Norwegian Government refers to the legislation in Iceland, the United Kingdom, Denmark and Sweden.

43. The Norwegian Government observes that the wording and structure of section 96 of the Icelandic Foreign Nationals Act ("*Re-entry ban on EEA or EFTA nationals or their family members*") is similar to section 124 of the Norwegian Immigration Act.[9] The Norwegian Government's understanding of the situation in the United Kingdom is that re-entry restrictions are imposed on EEA nationals following their deportation from that country.[10]

44. The Norwegian Government's understanding of the situation in Denmark is that under the Danish Aliens Act, the expulsion of an EEA national on grounds of public policy, public security or health entails a prohibition on subsequent re-entry into Denmark.[11] The Norwegian Government's understanding of the situation in Sweden is that, under the Swedish Aliens Act, an expulsion order on grounds of a criminal conviction includes a re-entry ban.[12]

45. The Norwegian Government observes that Article 32 of the Directive regulates the duration of exclusion orders and does not preclude outright permanent exclusion orders. The only requirement is that the excluded person must have the right to apply for the order to be lifted after a reasonable period. The Norwegian Government considers it obvious that expulsion together with a permanent entry prohibition is not,

[9] Reference is made to the Icelandic Foreign National Act of 2016 No. 80, 16 June, revised October 2018.
[10] Reference is made to section 23(8) of the UK Immigration (European Economic Area) Regulations 2016, and to UK Home Office, "EEA decisions on grounds of public policy and public security" version 3, 14 December 2017, in particular page 37.
[11] Reference is made to the Danish Aliens (Consolidated) Act, Consolidation Act No. 239 of 10 March 2019, section 32.
[12] Reference is made to chapter 8a, section 8 of the Swedish Aliens Act (*Utlänningslag)* (2005:716), and to Swedish Prosecution Authority guidelines, "*Utvisning på grund av brott, Vägledning för åklagare"*, in particular page 42.

by and of itself, contrary to the Directive. Recital 27 cannot be relied upon to support any other interpretation of Article 32.

46. The Norwegian Government observes that ESA has previously conducted an examination of Norwegian policy and practice regarding the expulsion of EEA nationals. ESA has not raised any concerns in respect of Norway's implementation of the Directive or submitted that the first paragraph of section 124 of the Norwegian Immigration Act is, by and of itself, contrary to the Directive.[13]

47. Under Article 27(2) of the Directive, measures taken on grounds of public policy or public security must comply with the principle of proportionality.[14] Depending on the individual circumstances in each case, expulsion together with a permanent entry prohibition may be contrary to this principle. Whether expulsion together with a permanent entry prohibition is a disproportionate measure in L's case is for the referring court to determine.

48. In the Norwegian Government's submission, question 2 is, to a certain extent, circular. Article 32(1) refers to a material change "*in the circumstances which justified the decision ordering their exclusion*". Under Article 27(2), expulsion on grounds of public policy or public security must be based exclusively on the personal conduct of the individual concerned. Furthermore, the personal conduct of the individual concerned must represent a "*genuine, present and sufficiently serious threat affecting one of the fundamental interests of society*". As such, the relevant changes in Article 32(1) must be related to the personal conduct of the excluded person, since this is what justified the original exclusion order.

49. Although the ECJ has not provided any guidance on the concept "*material change*", it has held that a "*genuine, present and sufficiently serious threat affecting one of the fundamental interests of society*" implies, in general, the existence in the individual concerned of a propensity to act in the same way in the future.[15] In the event of a serious criminal offence, one may look at whether the manner in which the offence was committed discloses particularly serious characteristics, which must be determined on the basis of an individual examination of the specific case.[16]

50. In the case before the referring court L argues, inter alia, that his expulsion is based on personal characteristics attributable to him and that, as such, he will not be able to put forward arguments in the future that there has been a "*material change*" in the circumstances which justified his expulsion. The Norwegian Government disagrees with L's position. Even if L is right, the Norwegian Government does not consider that the

[13] Reference is made to Norwegian Ministry of Justice and Public Security, Letter of 15 February 2018 to ESA: "Response to follow-up letter after Package Meeting October 2017" and ESA Decision of 16 April 2019 closing a complaint arising from an alleged failure by Norway to comply with Directive 2004/38/EC in relation to expulsion of an EEA national.

[14] This is reflected in section 122(4) of the Norwegian Immigration Act.

[15] Reference is made to the judgment in *P.I.* v *Oberbürgermeisterin der Stadt Remscheid*, C-348/09, EU:C:2012:300, paragraph 30.

[16] *Ibid*, paragraph 33.

argument establishes that an expulsion order together with a permanent entry prohibition is contrary to EEA law.

51. Whether there has been a material change in the personal conduct of the excluded person must be determined based on the specific circumstances in each individual case. The Norwegian Government submits that, although the manner in which the offence was committed generally does not change, the offender's characteristics disclosed by the manner in which the offence was committed may, in principle, change over time. A very long period of not re-offending, for instance, may establish that there has been a "*material change*" in the circumstances which justified the expulsion order, in that the individual's propensity to act in the same way in the future no longer exists. As measures taken must be based exclusively on the personal conduct of the individual concerned, evidence of a "*material change*" could also include aspects such as the excluded person having undergone rehabilitation for, e.g., a drug addiction. The Norwegian Government accordingly submits that, even where the expulsion is justified by particularly serious characteristics, those characteristics may change over time.

52. The Norwegian Government would nevertheless emphasise that it is clear from the term "*material*" in Article 32(1) of the Directive that the relevant change must be substantial or significant.

53. The Norwegian Government further submits that an exclusion order could also be lifted on the grounds that individual circumstances which made the expulsion order proportionate have changed in such a way that it has become disproportionate. If, for example, the excluded person's children are to remain in the host EEA State with their other parent, but that parent subsequently becomes no longer able to care for the children, this could be a "*material change*" entailing that the order is no longer justified and could be lifted.

54. In the Norwegian Government's submission, question 3 is rather strange and beside the point. The Directive does not per se preclude expulsion together with a permanent entry prohibition. The question seems implicitly to criticise the Directive in this respect, on the basis that an entry prohibition following expulsion will remain in force where there is no evidence of a material change in the circumstances which justified the expulsion. In the Norwegian Government's submission, this is exactly what Article 32(1) stipulates.

55. In this respect, the Norwegian Government would emphasise that Article 32(1) clearly does not give the excluded person a right to have the order lifted after a certain period. Article 32(1) requires only that the national authorities review his/her application and reconsider the material facts that justified the expulsion after a reasonable period, depending on the circumstances, and in any event after three years from the final exclusion order.

56. Lifting the exclusion order requires arguments that establish that there has been a material change in the circumstances which justified the order. This will depend on a future assessment of the relevant circumstances. Failure to put forward arguments to

establish a material change in the future cannot render the original decision contrary to the Directive.

57. Equally, that the excluded person claims that he/she in the future will not be able to put forward arguments to establish that there has been a material change in the circumstances which justified the expulsion order cannot make the order contrary to the Directive. If the circumstances justifying the order continue unchanged, the order remains proportionate and lawful. If, for the sake of argument, it is assumed that the personal characteristics of the excluded person will not change in the future, in that he/she will continue to remain "*a genuine, present and sufficiently serious threat affecting one of the fundamental interest of society*", expulsion together with a permanent entry prohibition cannot in such cases be contrary to the Directive.

58. L's argument seems to be that expulsion together with a permanent entry prohibition would be permissible only where it can be established – at the time the expulsion order is made – that in the future the excluded person will be able to put forward arguments of a material change. This argument is flawed and untenable. Whether there has been a material change in the circumstances which justified the exclusion order will depend on an assessment of future circumstances. This is a matter for the national authorities at first instance to appraise upon an application from the person excluded. The procedural rules in Articles 30 and 31 of the Directive will apply. For the sake of completeness, under Norwegian law the excluded person may appeal against a negative decision of the Norwegian Directorate of Immigration to the Immigration Appeals Board and challenge a negative decision of the Immigration Appeals Board in national courts.

59. As stated above, Article 32 does not, by and of itself, preclude permanent exclusion orders. Measures on grounds of public policy and public security must, however, comply with the principle of proportionality. In the Norwegian Government's submission, it is clear that the answer to question 4 cannot be that an expulsion order together with a permanent entry prohibition is disproportionate in all cases where the excluded person has a family and children in the host Member State. This will depend on a broad assessment of the specific circumstances in each individual case.

60. Under Article 28(1) of the Directive, before taking an expulsion decision on grounds of public policy or public security, the host Member State must take account of considerations such as how long the individual concerned has resided on its territory, his/her age, state of health, family and economic situation, social and cultural integration in the host Member State and the extent of his/her links with the country of origin. The host Member State is thus obliged to consider the individual's family situation before an expulsion order together with an entry prohibition is issued. The Norwegian Government observes that the ECJ has held that a family and children in a host Member State do not preclude the expulsion of a Union citizen from the territory of that State. A

balance must, however, be struck between the legitimate interest at issue and the respect for fundamental rights, such as protection of family life.[17]

61. The excluded person and his/her family members' right to a family life is also protected by Article 8 ECHR. Furthermore, the host Member State is obliged to consider the best interest of the child. This follows from the UN Convention on the Rights of the Child, under which the child's best interest must be paramount. This does not preclude the expulsion of the child's parent, however. There may nevertheless be other considerations which make an expulsion order necessary and proportionate.

62. In the overall assessment of the right to family life and the child's best interest, it is relevant to consider inter alia how old the children are, their care situation in the host Member State (before and after the person's expulsion), whether they have lived with the excluded person prior to the expulsion order and whether they can visit him/her in his/her country of origin. In the case before the referring court, L was expelled on grounds of public security following a conviction for a very serious drug offence. The time he has lived with his children is limited. He moved out of the family home for a period in 2009, and in 2011, he was arrested in connection with the offences for which he was sentenced, and he remained in custody following his arrest and until his final sentence in 2013. From 2013 onwards, he served a custodial sentence, and he was released on probation in 2019.

63. Where the individual is expelled on grounds of public security, a balance must be struck between this legitimate interest and his/her and the family members' right to a family life and the child's best interest. The latter may not always be decisive in the overall determination of whether expulsion and a permanent re-entry ban is proportionate. The Norwegian Government does not agree that expulsion together with a permanent entry prohibition is, by and of itself, a disproportionate measure and therefore contrary to the Directive in all cases where the excluded person has a family or children in the host EEA State.

64. The ECJ has held that a "*genuine, present and sufficiently serious threat affecting one of the fundamental interests of society*" implies, in general, the existence in the individual concerned of a propensity to act in the same way in the future.[18] In this respect, the Norwegian Government submits in relation to question 5 that the absence of criminal offences while serving a prison sentence is irrelevant. Opportunities to re-offend whilst serving a prison sentence are limited, given the strict control regime prisoners are under during that time. Furthermore, the prospect of release on probation may provide prisoners with an incentive to abstain from committing further offences while serving his or her prison sentence.

65. Similarly, the absence of criminal offences and positive developments following release on probation should not be given much weight in the determination of whether

[17] Reference is made to the judgment in *Orfanopoulos & Oliveri*, C-482/01 and C-493/01 EU:C:2004:262, paragraph 100.
[18] Reference is made to the judgment in *P.I.* v *Oberbürgermeisterin der Stadt Remscheid*, C-348/09, cited above, paragraph 30.

the individual concerned represents "*a genuine, present and sufficiently serious threat*" affecting fundamental interests of society. The consequences of committing further offences while released on probation may be the reinstatement in prison, which may incentivise the offender to abstain from committing further offences during that period. In this respect, the Norwegian Government observes that the determinations made by the national correction service for the purposes of probation are not the same as the determinations made by the national immigration authorities in relation to expulsion.

66. If the manner in which the offence was committed discloses particularly serious characteristics, the individual may represent a "*genuine, present and sufficiently serious threat affecting one of the fundamental interests of society*" even if he/she has not committed any new criminal offences whilst in prison or on probation. Expulsion does not require that the EEA national commit criminal offences whilst serving his or her prison sentence or that he or she reoffend a short time after being released on probation.

67. In the light of the foregoing, the Norwegian Government submits that, in the determination of whether the individual represents a "*genuine, present and sufficiently serious threat affecting one of the fundamental interests of society*", the absence of criminal offences whilst serving a prison sentence and positive development following release on probation are not weighty factors. This assessment should be based first and foremost on the propensity to act in the same way in the future and the seriousness of the characteristics disclosed by the offence.

68. The Norwegian Government respectfully proposes that the questions referred be answered as follows:

> *1. Article 32(1) of Directive 2004/38/EC does not, per se, preclude permanent exclusion orders. It only provides that an excluded person can submit an application for lifting the exclusion order after a reasonable period. Expulsion with a permanent entry prohibition is, therefore, not contrary to the Directive. Recital 27 cannot be relied upon to interpret Article 32(1) in any other way. However, the exclusion order must not be contrary to the principle of proportionality, as set out in Article 27(2).*
>
> *2. Expulsion on grounds of public policy and public security shall be based on the personal conduct of the individual concerned. To establish that there has been a "material change" in the circumstances which justified the decision ordering his/her expulsion, the excluded person must put forward arguments of a change in his/her personal conduct or circumstances, so that there no longer is a propensity to act in the same way in the future.*
>
> *3. If it is assumed that the personal characteristics of the EEA national will not change, in that he/she will continue to remain "a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society" in the future, expulsion with a permanent entry prohibition is not contrary to the Directive. If the circumstances justifying the expulsion order remains, the order remains lawful and proportionate.*

4. The Directive does not, per se, preclude expulsion with a permanent entry prohibition where the excluded person has a family and children in the host EEA State. Whether expulsion with a permanent entry prohibition is proportionate in such cases will depend on a broad assessment of the specific circumstances in each individual case. Where the EEA national is expelled on grounds of public security, a balance must be struck between this legitimate interest and his/her and the family members' right to a family life and the child's best interest.

5. In the assessment of whether the individual represents a "genuine, present and sufficiently serious threat affecting one of the fundamental interests of society", the absence of criminal offences while serving a prison sentence and positive development following release on probation is not a weighty factor.

L

On behalf of L it is submitted that the conditions for expulsion under section 122 of the Norwegian Immigration Act are not met. Furthermore, it is contrary to the Directive to expel L from Norway for life. This submission is being made particularly in the light of the reasons given by the Immigration Appeals Board in relation to L's personality characteristics, as the Immigration Appeals Board assumes that those characteristics will always constitute a threat. The Immigration Appeals Board bases itself solely on circumstances relating to the judgments in the two criminal proceedings. They exclude L's life beforehand and afterwards.[19]

69. The Immigration Appeals Board omits to mention L's positive traits.[20] Reference is also made to the Immigration Appeals Board's discussion of "*compellingly necessary in the interests of public security*". [21] The condition gives L protection against expulsion that the Immigration Appeals Board infringes (see recital 23 et seq. and Articles 27 and 28 of the Directive). By its decision, the Immigration Appeals Board has infringed the protection that is to be given to L and his family.[22]

70. The lifelong exclusion imposed on L by the Immigration Appeals Board is not compatible with the Directive (see, for example, recital 27 to the Directive). The crimes were committed over 10 years ago. L's life beforehand and afterwards shows that he no longer poses an immediate threat. When the professional judge (minority), states that "*[t]he minority, Deputy Judge Enger, attaches decisive weight to the seriousness and nature of the offences committed by L and accordingly finds that there are personal circumstances such as to present a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society: see the second sentence of the first paragraph of section 122 of the Immigration Act. The convictions discussed above demonstrate such a sufficiently serious lack of ability and willingness to control his own*

[19] Reference is made to the Immigration Appeals Board's Decision of 12 July 2017, page 5 et seq.
[20] Reference is made to the review of L and his personal situation in the District Court judgment.
[21] Reference is made to the Immigration Appeals Board's Decision, pages 5 to 7.
[22] Reference is made to the District Court judgment, page 13 and the discussion of the family and to the statement of the psychologist Tor Borge of 10 September 2016.

conduct that the condition for expulsion is fulfilled", it infringes the protection against expulsion under the Directive.

71. Reference is made to EU law, which emphasises positive development whilst serving a sentence. EU law has established that positive development whilst serving a sentence is important and that, for example, a person who has been released on probation is not deemed to pose a danger in the same way.[23] This must, of course, also be adapted to the individual. For a person serving a 10-year sentence, in determining whether that person poses an immediate threat, it would not be possible to get a fair assessment if no regard is had to changes that have taken place during the time of the sentence.

72. Further, L refers to page 59 of the EU's "Return handbook":[24]

> "No unlimited entry bans: The length of the entry ban is a key element of the entry-ban decision. It must be determined ex-officio in advance in each individual case. The ECJ expressly confirmed this in *Filev and Osmani*, C-297/12, (paras 27 and 34): *"It must be noted that it clearly follows from the terms '[t]he length of the entry ban shall be determined' that Member States are under an obligation to limit the effects in time of any entry ban in principle to a maximum of five years independently of an application made for that purpose by the relevant third-country national.(27) ...Article 11(2) of Directive 2008/115 must be interpreted as precluding a provision of national law ... which makes the limitation of the length of an entry ban subject to the making by the third-country national concerned of an application seeking to obtain the benefit of such a limit.*"

73. Reference is also made to point (6) of Article 3 of Directive 2008/115/EC "*'entry ban' means an administrative or judicial decision or act prohibiting entry into and stay on the territory of the Member States for a specified period, accompanying a return decision;*"

74. Article 11(2) of Directive 2008/115/EC provides: "*The length of the entry ban shall be determined with due regard to all relevant circumstances of the individual case and shall not in principle exceed five years. It may however exceed five years if the third-country national represents a serious threat to public policy, public security or national security*." This, too, shows that the Immigration Appeals Board's lifelong exclusion of L is incorrect.

75. In this context, L refers to the case-law of the European Court of Human Rights ("ECtHR") and adds that the protection for citizens has been quite congruent in relation

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[23] Reference is made to European Commission, Communication from the Commission to the European Parliament and the Council on guidance for better transposition and application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States COM(2009) 313 final ("Commission Guidelines 2009").

[24] Reference is made to European Commission, Return Handbook, https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/return_handbook_en.pdf

to respect for family life etc. (Article 8).[25] The ECtHR discusses the seriousness of the crimes, the period of residence in Switzerland, the applicant's conduct following the crimes, the links to his country of origin and to Switzerland, family ties, social ties, health, etc. Lastly, the lifelong exclusion is discussed. The ECtHR concludes as follows:

> "*86. In view of the foregoing, and particularly in consideration of the relative seriousness of the applicant's convictions, the weakness of his links with his country of origin and the permanent nature of the removal measure, the Court finds that the respondent State cannot be regarded as having struck a fair balance between the interests of the applicant and his family, on the one hand, and its own interest in controlling immigration, on the other.*
> *87. Accordingly, there has been a violation of Article 8.*"

76. The Immigration Appeals Board's decision to expel L is not in accordance with the EEA law rules which Norway is under an obligation to observe.

77. L does not propose any specific wording for the answers of the Court.

The Government of Denmark

78. Regarding questions 1 and 3, the Danish Government supports the view of the Norwegian Government that recital 27 to the Directive should not be understood as meaning that a permanent exclusion order is contrary to the Directive. Thus in the view of the Danish Government, Member States may issue permanent exclusion orders, as long as the EU/EEA citizen has a right to submit an application to have the permanent entry prohibition lifted in accordance with Article 32 of the Directive.

79. First, the Directive itself does not contain provisions setting out a prohibition on permanent exclusion orders. The preparatory documents relating to the Directive show that this was in fact originally considered during the legislative procedure. The Commission proposed an outright prohibition on lifetime entry bans on EU/EEA citizens and their family members, [26] but the Council decided to remove the ban from the enacting terms. [27] The Council's approach was followed and adopted in the current wording of the Directive. The EU legislature thus deliberately abstained from introducing a ban on permanent exclusion orders in the enacting part of the Directive and such a ban is therefore not a part of the law as it stands.

80. The view of the Danish Government also finds support in the wording and structure of recital 27, read in conjunction with Article 32. The reference to the case-law of the ECJ in recital 27, which the EU legislature chose to include,[28] cannot be read in isolation from the rest of the provisions in the Directive, but should be read together with Article 32. It clarifies that the relevant case-law of the ECJ prior to the Directive

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[25] Reference is made to the judgment in *Emre v. Switzerland* (no. 2), no 5056/10, 2 June 2015 in which the first decision is cited in English. The first decision discusses aspects of lifelong exclusion, on pages 3 – 5.
[26] The European Commission proposed the following wording of Article 30(1) (now Article 32): "Member States may not issue orders excluding persons covered by this Directive from their territory for life".
[27] Reference is made to Common position (EC) No 6/2004, cited above, page 21.
[28] Reference is made to Proposal COM(2001) 257 final, cited above, page 44.

has been consolidated within that provision. The wording and structure of recital 27 logically implies that – in line with the ECJ's case-law – permanent exclusion orders will comply with the Directive only if the permanency may be broken through an application to have the prohibition lifted.

81. In the view of the Danish Government, the conclusion drawn from the ECJ case-law by the EU legislature in recital 27 is that there should be a right to have an expulsion order re-examined. It cannot be read into the wording of recital 27 that a permanent exclusion order in itself is prohibited, as long as the right of re-examination after a reasonable period is guaranteed.

82. The wording of Article 32 also supports the view that Member States may issue permanent exclusion orders, as long as the EU/EEA citizen has the right to submit an application to have the permanent exclusion order lifted. Despite its title, Article 32 does not regulate the duration of exclusion orders. Rather, Article 32 provides EU/EEA citizens with a right to have an exclusion order reconsidered within a "reasonable period" and in any event after three years from the time of enforcement.

83. It is accordingly the Danish Government's submission that the necessary protection against the *effect* of a permanent exclusion order is catered for in Article 32 through the right to submit an application and potentially have an entry prohibition lifted after a reasonable period.

84. Second, the Danish Government's view is supported by the case-law of the ECJ. In *Adoui and Cornuaille*,[29] the ECJ stated that an application for a new residence right must be examined by the competent administrative authority in the host State, which must take into account, in particular, the arguments put forward by the person concerned purporting to establish that there has been a material change in the circumstances which justified the first decision ordering his expulsion.

85. Similarly, in *Shingara and Radiom*[30] the ECJ stated that such a decision (permanent exclusion order) cannot be of unlimited duration, and that a person against whom such a prohibition has been issued must *therefore* be entitled to apply to have his situation re-examined if he considers that the circumstances which justified prohibiting him from entering the country no longer exist. The use of the word "*therefore*" indicates that the deciding factor is the right to have a permanent exclusion order re-examined. It is the view of the Danish Government that if the ECJ wished to prohibit permanent exclusion orders in general, it would have clearly done so.

86. Thus, even before the adoption of the Directive, the ECJ had recognised that the right to submit an application to have a permanent exclusion order lifted would be a sufficient counterweight to such an order. Hence, the ECJ's statement in *Shingara and*

[29] Reference is made to the judgment in *Adoui & Cornuaille*, cited above, paragraph 12.
[30] Reference is made to the judgment in *Shingara and Radiom*, C-65/95 and 111/95, EU:C:1997:300, paragraph 40.

Radiom to the effect that "[…] such a decision (permanent exclusion order) cannot be of unlimited duration" should not be taken out of its context and read on its own.

87. In its Communication of 1999,[31] the Commission confirms this reading of the ECJ case-law. Therein it is stated that there is a right to re-apply after a reasonable time has elapsed since the last decision prohibiting a person from entering the country. It also follows from the Communication of 1999 that even if there is a set time-limit for the validity of a measure, it cannot prevent the person from re-applying before its expiry if the conditions for re-evaluation exist and the situation of the person concerned has already changed.

88. For the foregoing reasons, the Danish Government takes the view that the issuance of permanent exclusion orders is not contrary to the Directive, provided that a right of the individual concerned to submit an application to have the exclusion order lifted is guaranteed in accordance with Article 32 thereof.

89. In the light of the Danish Government's reply to question 1, a reply to question 3 is not deemed necessary.

90. By its second question, the referring court seeks guidance on what is to be understood by "material change" in Article 32(1) of the Directive. So far, neither the ECJ nor the Court has had the opportunity to provide an interpretation on that notion. The question is of importance since the key element of an application for the lifting of an exclusion order is whether there has been a *material change* in the circumstances that justified the decision ordering the exclusion. If the EU/EEA citizen can show such a change, the person concerned has a right to a renewed assessment of the lifting of the exclusion order in accordance with Article 32 of the Directive.

91. At the outset, the Danish Government takes the view that it is for the authorities and – ultimately – the national courts to determine whether there has been a "material change" in circumstances within the meaning of the Directive. The notion of "material change" necessarily requires an individual assessment of the situation at the time of the application, taking into account all the relevant facts and particularities of the case at that point in time, as compared to the assessment of the situation at the time when the decision to impose an exclusion order was adopted and more specifically an assessment of the circumstances justifying that decision. That necessarily implies an assessment of the personal conduct (threat) as well as of the personal situation of the person concerned in accordance with Articles 27 and 28 of the Directive.

92. It is noted in this regard that there is a divergence between the various language versions of the notion "material change" in Article 32 of the Directive. While the English, French and German language versions all refer to the word "material", that word is not used in the Danish, Norwegian and Swedish language versions. The Norwegian version refers to "new circumstances" (*nye omstendigheter*) and "special

[31] Reference is made to European Commission, Communication on the special measures concerning the movement and residence of citizens of the Union which are justified on grounds of public policy, public security or public health, COM (1999) 372 ("the Communication of 1999"), page 23.

circumstances" (*særskilte omstendigheter*) in a two-step assessment, the Swedish version refers to "factual circumstances" (*faktiska omständigheter*), while the Danish version refers to "any change" (*enhver ændring*). It is settled case-law that the wording used in one language version of a provision of EU law cannot serve as the sole basis for the interpretation of that provision or be made to override the other language versions. EU provisions must be interpreted and applied uniformly in the light of the versions existing in all EU languages. Where there is a divergence between the various language versions of an EU text, the provision in question must thus be interpreted by reference to the purpose and general scheme of the rules of which it forms a part.[32]

93. The Danish Government takes the view that "material change" should not be understood as any change, as the Danish version suggests, or merely as new or factual changes, as the Norwegian and Swedish versions, respectively, suggest. The wording used in the French, English and German versions, according to which the change must be material, suggests that a qualified change in the circumstances leading to the exclusion order is required. In the view of the Danish Government, this is the correct interpretation. This view is based on the fact that to impose the measure in the first place, serious or even imperative grounds were required. Conversely, it would also require a change of a certain nature or weight to trigger an obligation on the Member State to consider reversing such measure.[33] Moreover, only a qualified change in the circumstances would ensure that the scheme introduced by Article 32 strikes a fair balance between a Member State's prerogative to protect fundamental interests of its society by denying foreign nationals entry to or expelling them from its territory while ensuring an EU/EEA national's fundamental right of free movement.

94. In addition, it follows from the very word "material" used in the French, English and German versions that the nature of the change required must be such that it significantly affects the circumstances that justified the exclusion order in the first place, allowing national courts to take the view that the exclusion order would no longer be justified and proportionate.

95. The Danish Government submits that a change which would already have led to not imposing an exclusion order in the first place, or which would have led to a prohibition of shorter duration, should be regarded as "material". Conversely, a change that appears significant on its own but turns out to be without relevance to the circumstances justifying the prohibition does not fulfil the requirement of being "material".

96. In this regard, the Danish Government observes that, in a situation where a person who has been subject to expulsion and an exclusion order under Article 28(3) (*imperative grounds* of public security) subsequently applies to have the exclusion order lifted, the threshold for proof of "material change" should be higher than in a situation where the person concerned has been subject to expulsion and an exclusion order under,

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[32] Reference is made to the judgment in *Brey*, C-140/12, EU:C:2013:565, paragraph 74.

[33] Reference is made to the Opinion of Advocate General Ruiz-Jarabo Colomer in *Shingara and Radiom*, cited above, EU:C:1996:451, points 121 and 122.

say, Article 28(2) (*serious grounds* of public policy or public security) or under Article 27 (public policy or public security).

97. Accordingly, the notion of "material change" within the meaning of the Directive is linked to the circumstances justifying the exclusion order, which means that the threshold for proving that a material change has indeed occurred will invariably depend on the nature of those circumstances.[34]

98. In the case at hand, the expulsion decision was followed by a *permanent exclusion order*, which is the most serious consequence of an expulsion decision. Such a decision would normally call for weighty changes to lift the exclusion order. In such a situation, the fact that a certain amount of time has passed since the decision was adopted or the person concerned left the country should not in itself constitute a decisive element for the lifting of the exclusion order. If that were the case, it would render permanent exclusion orders pointless.

99. The Danish Government observes in this regard that Article 33(2) of the Directive imposes an obligation on Member States – in the event that an expulsion order is enforced more than two years after it was issued – to check that the individual concerned is currently and genuinely a threat to public policy or public security and to assess whether there has been a *material change* in the circumstances since the expulsion decision was issued.

100. In the case at hand, the EU/EEA national concerned has already served a considerable part of his 11-year sentence in Norway. In the event that the Norwegian authorities decide to uphold the expulsion decision together with an exclusion order on the basis of an assessment under Article 33(2), the arguments put forward by the EU/EEA national in the present case will have exhausted their role. In a future assessment of a *material change* under Article 32, which is necessarily carried out at a later stage, the EU/EEA national concerned will have to put forward new or other arguments purporting to establish that there has been a material change in the circumstances which justified the first decision ordering his expulsion.

101. The Danish Government observes in this regard that while it is up to the national courts and authorities to decide whether there has been a "material change", that assessment should be carried out on a case-by-case basis and in a manner which does not compromise the right to a renewed assessment of an application for lifting the exclusion order whilst allowing for any negative decision to be subject to appeal.

102. In conclusion, the Danish Government is of the view that a "*material change*" in circumstances justifying the exclusion order within the meaning of Article 32 of the Directive is to be understood as a change in the personal conduct or personal situation

[34] In its Communication 1999, the Commission refers as an example to the change of status as a "new factor" to be taken into account for the purpose of re-examination, i.e., a third country national family member of an EU/EEA national who was not a beneficiary of EU law at the time of the previous decision.

of the person concerned that significantly affects the circumstances which justified the issuance of the exclusion order in the first place.

103. The Danish Government observes with regard to questions 4 and 5 that it falls within the remit of the national authorities and – ultimately – the national courts to assess whether the conditions for adopting an expulsion decision combined with a permanent exclusion order are met. The principle of proportionality referred to in Article 27(2) must be read together with Article 28 of the Directive, which lists a number of considerations, e.g. the family situation, which the host Member State must take into account before taking an expulsion decision.

104. The Commission Guidelines 2009 state that the personal and family situation of the individual concerned must be assessed carefully with a view to establishing whether the envisaged measure is appropriate and does not go beyond what is strictly necessary to achieve the objective pursued, and whether there are less stringent measures to achieve that objective. Furthermore, the Commission Guidelines provide that the impact of the expulsion decision on the family members remaining in the host Member State must be taken into account. The Guidelines also state that difficulties the partner and children of the expelled person risk facing should be taken into account, if they have to follow the person expelled to his or her home country.[35]

105. The Danish Government agrees that an EU/EEA citizen's family ties must be given considerable weight as part of the proportionality assessment, before an expulsion decision under the Directive is issued. At the same time, family ties cannot in and of themselves automatically prevent national authorities from adopting an expulsion decision together with a permanent exclusion order against an EU/EEA citizen. This view finds support in *Orfanopoulos and Oliveri*.[36]

106. In the main proceedings, L has argued that the absence of criminal offences and positive development whilst serving his sentence and following release on probation must be of vital importance for the reassessment of the expulsion decision. The Norwegian Government has argued that such considerations cannot be given decisive weight.[37]

107. In *Orfanopoulos and Oliveri*,[38] the ECJ stated that national courts must take into consideration factual matters occurring after the final decision on expulsion which might show that the threat to public policy has ceased to exist or decreased. It follows from the Commission Guidelines 2009 [39] that good behaviour in prison and possible release on parole may be taken into account along with other elements, such as the time elapsed since the acts were committed, the personal behaviour, the degree of danger to society and the nature of the offending activities. The Commission Guidelines 2009 thus

[35] Reference is made to Commission Guidelines 2009, point 3.3.
[36] Reference is made to the judgment in *Orfanopoulos & Oliveri*, cited above, paragraphs 82 and 100.
[37] As argued by the Norwegian Government, see part 6.2 of the Request.
[38] Reference is made to the judgment in *Orfanopoulos & Oliveri*, cited above, paragraphs 82 and 100.
[39] Reference is made to Commission Guidelines 2009, point 3.3.

confirm that these separate elements should form part of the overall assessment and that none of those elements can stand alone.

108. The Danish Government agrees with the Norwegian Government and the Commission that good behaviour when serving prison time and after release on probation may be taken into account, but is only *one* element in the overall assessment which should not be given decisive weight in the overall determination of whether an individual represents a present and genuine threat within the meaning of Article 27(2) of the Directive.[40]

109. For the reasons set out above, the Danish Government suggests that the Court answer the questions 1, 2, 4 and 5 as follows:

> *1. Recital 27 to Directive 2004/38 is to be interpreted as meaning that expulsion of an EU/EAA national together with a permanent exclusion order is not contrary to that Directive, provided that a right of the individual concerned to submit an application to have the exclusion order lifted is guaranteed in accordance with Article 32 of the Directive.*
>
> *2. A "material change" in circumstances justifying the exclusion order within the meaning of Article 32 of Directive 2004/38 shall be understood as a change in the personal conduct or in the personal situation of the person concerned that significantly affects the circumstances which justified the exclusion order.*
>
> *4. While family ties is a relevant factor, which must be given considerable weight in the proportionality assessment to be carried out before taking an expulsion decision under Directive 2004/38/EC, such ties cannot in and of themselves automatically prevent national authorities from expelling an EU/EEA citizen with a permanent exclusion order.*
>
> *5. Absence of criminal offenses and positive development when serving prison time and after release on probation may be taken into account, but is only one element in the overall assessment which should not be given decisive weight in the overall assessment of whether an individual represents a genuine, present and sufficiently serious threat under Article 27(2) of Directive 2004/38.*

ESA

110. ESA submits that the fundamental right of free movement of EEA nationals is not unconditional, but may be subject to limitations and conditions imposed by the EEA Agreement and the measures adopted to give it effect.[41] Where an EEA State deems it necessary to impose any restrictions on EEA nationals who have exercised their right to move to and/or reside in that State, it must ensure, under Article 27(2) of the Directive,

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[40] Reference is made to the judgment in *B and Vomero*, C-316/16 and 424/16, EU:C:2018:256, paragraphs 70 and 73.

[41] Reference is made to Case E-15/12 *Jan Anfinn Wahl* [2013] EFTA Ct. Rep. 534, paragraph 80; recital 22 of the Directive.

that any such measures must be: (i) justified on grounds of public policy or public security; (ii) based exclusively on the personal conduct of the person concerned; and (iii) comply with the principle of proportionality. The Directive, in that same provision, specifies explicitly that any previous criminal convictions shall not in themselves constitute grounds for adopting restrictive measures.

111. Expulsion is, by its nature, the most restrictive measure which can be taken against an EEA national who has exercised their right of free movement under the Directive. This is recognised in recital 23 to the Directive. Further, recital 24 states that "the greater the degree of integration of [EEA nationals] and their family members in the host State the greater the degree of protection against expulsion should be". It specifies, as regards EEA nationals who have resided for many years in the host State, in particular when they were born and have resided there throughout their life, that expulsion should be permitted only in "exceptional circumstances where there are imperative grounds of public security".

112. These considerations are given concrete expression in Article 28 of the Directive, entitled "Protection against expulsion". Thus this provision imposes an increasingly strict test on the possibility of issuing an expulsion order in respect of an EEA national, depending inter alia on the duration of the EEA national's and their family members' presence on its territory and, in line with the length of their stay, their degree of assimilation into society.[42]

113. Prior to the acquisition of permanent residence, the Directive, in Article 28(1), acknowledges the possibility of an expulsion decision being taken vis-à-vis an EEA national, as such, on the grounds laid down in Article 27 and in the further circumstances enumerated in it. By contrast, Article 28(2), relating to situations where permanent residence has been acquired, is framed as a basic prohibition of expulsion, unless this measure can be justified on serious grounds of public policy or public security. This stronger degree of protection is enhanced further after 10 years of residence (Article 28(3)(a)), in which case expulsion can be justified only on imperative grounds of public security, to the exclusion of (mere) grounds of public policy.

114. As regards the grounds which may justify expulsion, reiterating Article 27(1), Article 33(1) of the Directive emphasises that an expulsion order may not be issued as a penalty or as the legal consequence of a custodial penalty, unless it conforms to the requirements of Articles 27, 28 and 29 of the Directive.

115. Furthermore, the Directive recognises that the circumstances justifying expulsion at a given moment in time may change. Where there is a gap of more than two years between the issuing of an expulsion order and the date of its enforcement, Article 33(2) requires the national authorities to verify that the expulsion is still justified by the threat that the person concerned was deemed to pose to public policy or public security and

[42] Reference is made to the judgment in *K & H.F.*, C-331/16 and C-366/16, EU:C:2018:296, paragraphs 71 to 72.

whether any material change has occurred in the circumstances since the order was issued.

116. Lastly, where recital 27 refers to case-law of the ECJ which prohibits EEA States from issuing orders excluding persons from entering their territory for life, Article 32, on the duration of expulsion orders, provides for the possibility for persons who have been the subject of an expulsion order to apply for the lifting of that order in case of a "material change" in the circumstances justifying the expulsion decision.

117. It appears that the judgment under appeal declared the expulsion of L invalid essentially on the basis that the central condition posited by Article 27(2) of the Directive as a precondition to expulsion was not satisfied. According to the judgment under appeal, UNE's decision was invalid as L's personal conduct and circumstances did not constitute, "a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society". Based on an overall assessment, the Oslo District Court found that the risk of new serious narcotics-related offences was so low that expulsion did not appear to be an obvious and well-founded measure.

118. It is further relevant to note that L qualifies for the enhanced protection under the Directive guaranteed by Article 28(3)(a) to persons having resided in the host State for 10 years.[43] Having arrived in Norway in 1998, the challenged expulsion decision was adopted only in April 2016. An expulsion could thus be based only on imperative grounds of public security.[44]

119. Moreover, since the expulsion decision and permanent exclusion order were taken in April 2016, more than four years have passed. It results in this respect from the case-law of the ECJ that, in reviewing the lawfulness of an expulsion measure, the national courts must take into consideration factual matters which occurred after the final decision of the competent authorities which may point to the cessation or the substantial diminution of the present threat which the conduct of the person concerned constitutes to the requirements of public security. That is especially so if a lengthy period has elapsed between the date of the expulsion order and that of the review of that decision by the competent court.[45]

120. What is at issue before the national court is the validity of the expulsion order in combination with the re-entry ban for life, adopted in April 2016, and not a request by L to lift the expulsion order within the meaning of Article 32(1) of the Directive. Indeed, it would appear that, pending the outcome of the appeal in the main proceedings, L has not been deported and still resides in Norway. As ESA understands Article 32(1), it applies only once the expulsion order has been put into effect. This is also confirmed by the language of recital 26 of the Directive, which refers to the right of the [EEA

[43] Reference is made to the Request, page 3.
[44] Reference is made to the judgments in *B and Vomero*, cited above, paragraph 70; *M.G.*, C-400/12, EU:C:2014:9, paragraphs 33 to 38; *K & H.F.*, cited above, paragraphs 73, 75 and 77.
[45] Reference is made to the judgment in *B and Vomero*, cited above, paragraph 94 and the case-law cited.

nationals] and their family members "who have been excluded from the territory of a[n EEA] State to submit a fresh application after a reasonable period".

121. In that regard, ESA furthermore recalls the settled case-law according to which, in the context of the judicial co-operation established by Article 34 SCA, "it is incumbent on the Court to give as complete and as useful a reply as possible and it does not preclude the Court from providing the national court with all the elements of interpretation of EEA law which may be of assistance in adjudicating the case before it, whether or not reference is made thereto in the question referred".[46]

122. ESA submits in relation to the fourth and fifth questions, as regards the meaning of the concept of "imperative grounds of public security", that it follows from established case-law that while the EEA States essentially retain the freedom to determine the requirements of public policy and public security in accordance with their own national needs, which can vary from one EEA State to another and from one era to another, the fact still remains that, in the EEA context and particularly as regards justifications for a derogation from the fundamental principle of free movement of persons, those requirements must be interpreted strictly, so that their scope cannot be determined unilaterally by each EEA State.[47]

123. It may be pointed out that, in the context of the EU, the ECJ has provided more guidance on the concept of "imperative grounds of public security" in its judgment in *P.I.* Although relating to serious criminal offences of a completely different nature to those underlying the present reference, the ECJ clarified that "it is open to the Member States to regard criminal offences such as those referred to in the second subparagraph of Article 83(1) TFEU as constituting a particularly serious threat to one of the fundamental interests of society, which might pose a direct threat to the calm and physical security of the population and thus be covered by the concept of 'imperative grounds of public security', capable of justifying an expulsion measure under Article 28(3) of the Directive, as long as the manner in which such offences were committed discloses particularly serious characteristics, which is a matter for the referring court to determine on the basis of an individual examination of the specific case before it."[48]

124. Although Article 83(1) TFEU has no direct equivalent in EEA law, it was referred to by the ECJ in order to confirm the fact that certain offences have been recognised at the European level as constituting particularly serious threats to society. As such, it may be assumed that Article 28(3)(a) of the Directive must be interpreted in a similar manner in the context of EEA law and is thus capable of covering offences such as those listed in Article 83(1) TFEU, in particular *illicit drug trafficking and organised crimes*.

125. The test for determining that a person constitutes a genuine, present and sufficiently serious threat to society becomes stricter where the person concerned has obtained permanent residence in the host Member State. In that case, expulsion is

[46] Reference is made to Case E-4/19, *Campbell*, judgment of 13 May 2020, not yet published, paragraph 45, and Case E-2/12, *HOB-vín ehf.* [2012] EFTA Ct. Rep. 1092, paragraph 38.
[47] Reference is made to *Jan Anfinn Wahl*, cited above, paragraph 83.
[48] Reference is made to the judgment in *P. I.*, cited above, paragraph 28.

prohibited, unless the national authorities demonstrate that there are serious grounds of public policy or public security which justify the removal of the person from the State's territory (Article 28(2)). After 10 years of residence prior to the date of a decision of expulsion, Article 28(3)(a) provides that this measure may only be adopted on imperative grounds of public security.

126. However, any decision taken by an EEA State to remove a national from another EEA State from its territory must, first of all, be based on the reasoned determination by the national authorities that, at the time the decision is taken, the person concerned, on the basis of his/her personal conduct, constitutes a "genuine, present and sufficiently serious threat" to society in the host EEA State, as required by Article 27(2) of the Directive. It should be emphasised that such an analysis must be based *exclusively* on the personal conduct of the individual concerned and that justifications that are isolated from the particulars of the case in question or that rely on considerations of a general nature cannot be accepted.[49]

127. Any decision to remove an EEA national must be based on an overall assessment of the personal conduct and personal circumstances of the individual concerned and, as is explicitly specified by Article 27(2), may not be the automatic consequence of a criminal conviction. This applies equally where a conviction related to offences against laws on narcotics is at stake, although the ECJ has recognised that "the fight against crime in connection with dealing in narcotics as part of an organised group is capable of being covered by the concept of 'imperative grounds of public security'".[50] In that context, it is not only the nature of the offence which is relevant, but also the personal characteristics of the offender.

128. By way of illustration, ESA further observes that the ECJ observed in *Orfanopoulos and Oliveri* that EEA law does not "preclude the expulsion of a national of another Member State who has received a particular sentence for specific offences and who, on the one hand, constitutes a present threat to the requirements of public policy and, on the other hand, has resided for many years in the host [EEA] State and can plead family circumstances against that expulsion, provided that the assessment made on a case-by-case basis by the national authorities of where the fair balance lies between the legitimate interests at issue is made in compliance with the general principles of [EEA] law and, in particular, by taking proper account of respect for fundamental rights, such as the protection of family life".[51]

129. Similarly, in *Tsakouridis*, the ECJ considered that, "in the application of Directive 2004/38, a balance must be struck more particularly between the exceptional nature of the threat to public security as a result of the personal conduct of the person concerned, assessed if necessary at the time when the expulsion decision is to be made …, on the one hand, and, on the other hand, the risk of compromising the social

[49] Reference is made to *Jan Anfinn Wahl*, cited above, paragraph 84.
[50] Reference is made to the judgments in *Tsakouridis*, C-145/09, EU:C:2010:708, paragraph 56; *Calfa*, cited above, paragraph 22; and *Orfanopoulos & Oliveri*, cited above, paragraph 67.
[51] Reference is made to the judgment in *Orfanopoulos & Oliveri*, cited above, paragraph 100.

rehabilitation of the [EEA national] in the State in which he has become genuinely integrated, which, … is not only in his interest but also in that of the European Union in general."[52]

130. In *P.I.*, the ECJ further held in this respect that the circumstance that the issue of any expulsion measure is conditional on the requirement that the personal conduct of the individual concerned must represent a "genuine, present and sufficiently serious threat" implies, in general, the existence in the individual concerned of a propensity to act in the same way in the future.[53] It may be presumed that the existence of such a "propensity to act" would need to be substantiated. Factors such as the absence of criminal offences whilst incarcerated and subsequently, under probation, together with other evidence of plausible re-integration into society are elements that may point to the absence of a propensity to engage in criminal conduct capable of posing a threat to public security; this matter being for the national court to determine.

131. These factors would supplement the more general range of factors listed in Article 28(1) of the Directive, which should be taken into account before taking an expulsion decision, which are indicative of the degree of integration into the host State. Besides the length of their residence in the host EEA State, these include their age, state of health, family and economic situation and the links with their country of origin.

132. Lastly, it should be observed that, in view of the fact that all the EEA States are parties to the ECHR, provisions of the EEA Agreement are to be interpreted in the light of the fundamental rights enshrined in that Convention, including Article 8(1) which guarantees the right to respect for private and family life.[54]

133. In this context, ESA observes that expulsion measures have been the subject of various cases before the ECtHR, e.g., in *Boultif v. Switzerland* and *Üner v. the Netherlands*.[55] Under Article 8 ECHR, the ECtHR has developed a proportionality test which aims to strike a fair balance between the rights of the individual on the one hand and the interest of the State on the other. Recognising that, in their assessment of the proportionality of the interference with the right to family life, the national authorities enjoy a certain margin of appreciation, the ECtHR set out a number of criteria[56] which it considered to be relevant in assessing whether an expulsion measure was necessary in a democratic society and proportionate to the legitimate aim pursued.

134. Those criteria include the nature and seriousness of the offence committed by the applicant, the length of the applicant's stay in the host country, the time elapsed since the offence was committed and the applicant's conduct during that period, the applicant's family situation (such as the length of the marriage, and other factors expressing the effectiveness of a couple's family life), whether there are children of the

[52] Reference is made to the judgment in *Tsakouridis*, cited above, paragraph 50.
[53] Reference is made to the judgments in *P. I.*, cited above, paragraph 34; *Bouchereau*, 30/77, EU:C:1977:172, paragraph 20; *E*, C-193/16, EU:C:2017:542, paragraph 23; and *K & H.F*, cited above, paragraph 56.
[54] Reference is made to Case E-28/15 *Yankuba Jabbi* [2016] EFTA Ct. Rep. 575, paragraph 81.
[55] Reference is made to the judgments of the ECtHR in *Üner v. the Netherlands*, Application No. 46410/99, 18 October 2006 and *Boultif v. Switzerland*, Application No. 54273/00, 2 August 2001.
[56] Reference is made to the judgment in *Boultif*, cited above, paragraph 48.

marriage and, if so, their age, the seriousness of the difficulties which the spouse and children are likely to encounter in the country to which the applicant is to be expelled, and the solidity of social, cultural and family ties with the host country and with the country of destination.

135. ESA submits that the test applied by the ECtHR under Article 8 ECHR is, in several respects, similar to the one to be conducted under EEA law in this context and pursuant to the Directive, at least as regards the proportionality test and fundamental rights. However, these two tests form part of two different legal systems, one being the EEA legal order where free movement of persons constitutes a fundamental principle, and the other being the ECHR system, where no such principle is applicable. In this respect, ESA observes that the ECtHR has on many occasions recalled that the ECHR does not guarantee the right of an alien to enter or to reside in a particular country.[57]

136. The fact that the person in question has a family and dependent children in the host State which is considering an expulsion decision constitute particularly weighty elements to be taken into account in assessing the proportionality of such a decision. In this respect, ESA also submits that the national court should take due account of the best interest of the child principle, which in ESA's submission also forms part of the general principles of EEA law.[58] This is all the more so in circumstances such as those of the present case, where the other parent is 100% disabled and may accordingly not be able to care for the children in question; this being a matter for the national court to determine.

137. Regarding the first, second and third questions, it is important to emphasise at the outset, as already observed above, that a decision to expel an EEA national for life constitutes the most restrictive measure an EEA State can adopt against such a person, potentially entailing highly damaging and disruptive consequences for that person and his/her family. As it amounts de facto to the very negation of the freedom of movement of the subject to stay in or travel to that particular EEA State,[59] such a measure may be adopted only in exceptional circumstances and in strict observance of the relevant provisions laid down in the Directive. It should further be recalled that, according to settled case-law, as derogations from one of the fundamental freedoms guaranteed by EEA law, these provisions must be interpreted strictly.

138. In the case of a person who has resided lawfully in the host EEA State for more than 10 years, the adoption of an exclusion order must be based on the criteria enunciated in Articles 27 and 28(3)(a) of the Directive.

139. This framework for deciding upon the possible expulsion of an EEA national already set out above must, by extension, also apply to the determination of the duration of an accompanying re-entry ban. In particular, to the extent that expulsion is justified on grounds of public security, the duration of the measure must be limited to what is

[57] Reference is made to the judgment in *Üner*, cited above, paragraph 54.
[58] Reference is made to the judgment for comparison in *K.A. and Others*, C-82/16, EU:C:2018:308, paragraph 93, and Case E-8/97, *TV 1000* [1998] EFTA Ct. Rep. 68, paragraph 26.
[59] Reference is made to the judgment in *Calfa*, cited above, paragraph 18.

necessary and must be commensurate with the nature and the seriousness of the threat to the fundamental interest which justifies the expulsion.

140. Article 32(1) of the Directive, which provides for the possibility of the expulsion decision being reconsidered after a reasonable period, gives effect to this principle. That an EEA national who has been deported has a right to apply for the lifting of the expulsion order implies that such an order can never be indefinite, as it will always be susceptible to periodic review as a matter of right conferred by virtue of that provision.

141. At the same time, this provision, in ESA's submission, must be regarded as conferring only a procedural right to apply for a reconsideration of the expulsion order after a given time in view of changed circumstances. Where it may be expected that the national authorities of the EEA State from which the person concerned has been expelled will be under an obligation to give serious consideration to such an application and to reach a reasoned decision within six months, as required by the second sentence of Article 32(1), it is clear that there is no right to a positive outcome. Such a decision, evidently, will be subject to the procedural safeguards laid down in Article 30 of the Directive, in particular the right to seek judicial review of the decision.

142. It cannot, therefore, be ruled out that, following subsequent applications under Article 32(1), ultimately the removal from the host State's territory may prove to be permanent, where the national authorities are able to demonstrate that the individual in question continues to pose a genuine, present and serious threat to the fundamental interests of the State.

143. ESA would not exclude that a permanent re-entry ban may be justified on grounds of public security in extreme cases where an individual poses a particularly serious and continued threat to society, such as in cases of terrorism, extreme violence or particularly damaging organised crime, and where this measure complies with the requirements flowing from the principle of proportionality.[60] However, even in such situations the person concerned would nevertheless have the right to avail themselves of the rights under Article 32(1) to apply for a review of that decision.

144. Be that as it may, the fact that the procedural possibility of applying for a periodical reassessment is available to the subject of a permanent exclusion order can have no bearing on the substantiation of that order. The fact remains that the permanent exclusion order must be solidly based on the criteria laid down in Articles 27 and 28 of the Directive and on the basis of all the relevant circumstances at the time that decision is taken. To consider that the possibility of review under Article 32(1) at an undefined moment in the future might be relevant in the context of the adoption of the original exclusion decision would imply that the decision-making authority was taking account of the possibility of a material change at a later stage. This would cast doubt on the measure of exclusion being proportionate at the very time of its adoption.

[60] Reference is made to the judgment in *P. I.*, cited above, paragraph 33.

145. As regards the notion of "material change" in Article 32(1), it is sufficient to note that this must necessarily encompass any evidence allowing to dispel the concerns regarding the existence in the individual concerned of a propensity to engage in the same criminal conduct as that which led the competent authorities to conclude that that individual posed a genuine and present threat to public security. This may include a prolonged absence of criminally relevant conduct. At the same time, this issue does not appear to be relevant to the resolution of the case pending before the referring court, as that case concerns the validity of an expulsion order rather than an application for the lifting of such an order.

146. It is likewise irrelevant, in the light of the fact that the threat to public security needs to be shown to be "present", and thus based on recent and current evidence, whether the personal characteristics of the individual concerned are considered susceptible to change. By requiring that it must be established on the basis of arguments that there has been a material change in order to justify the lifting of an exclusion order, Article 32(1) of the Directive confirms that such arguments must refer to factors which could not have been taken into account at the time the exclusion decision was taken.

147. Accordingly, ESA submits that the questions referred should be answered as follows:

> *1. Article 27(2) of the Directive is to be interpreted as precluding the competent authorities of a host State from issuing an expulsion decision in respect of a national of another EEA State who in accordance with Article 28(3)(a) of the Directive, has lawfully resided in the host State for the previous ten years and who has committed a criminal offence covered by the concept of 'imperative grounds of public security', thus in principle capable of justifying an expulsion measure under Article 28(3) of that Directive, unless they are also able to conclude, on the basis of recent and current evidence, the existence in the individual concerned of a propensity to act in the same way in the future such as to constitute a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. The person's degree of integration into society and the circumstance that the person in question has a family and dependent children in the host State, which is considering an expulsion decision, are particularly weighty elements to be taken into account in assessing the proportionality of such a decision.*
>
> *2. In the case of a person who has resided lawfully in the host EEA State for more than ten years, the adoption of a permanent exclusion order must be based on the criteria enunciated in Articles 27 and 28(3)(a) of Directive 2004/38 and the availability of the possibility to have that decision reviewed under Article 32(1) of the Directive is of no relevance to the assessment made under those provisions.*

Commission

148. The Commission begins by observing that while the first question asked refers to the requirements of recital 27 of the Directive, the specific legal basis entitling Member

States to adopt measures restricting the freedom of movement derives from the Directive's operative parts, including, in particular, Article 27 thereof (as regards restrictions inter alia on public policy and security grounds), read in conjunction with Article 28(3) (as regards persons, such as L, who have been resident for a period exceeding 10 years in a host Member State). Consequently, it is considered that the first question requires an interpretation of those provisions, albeit in the light of the recital referred to by the national court.

149. Secondly, it would appear from the Request that the question concerning the entitlement to impose a "permanent" re-entry ban is not intended to refer to the general imposition of such a ban in each and every instance, but rather refers to the entitlement to impose such a ban in the circumstances such as those of the main proceedings, namely, following the conviction of a permanent resident for a major narcotics offence.

150. Lastly, it is observed that the applicant in the main proceedings is in full-time employment and therefore a worker within the meaning of Article 28 EEA. Regarding question 1, the Commission observes, first of all, that an EEA national in the situation of the applicant in the main proceedings, who is in full-time employment, derives a right of free movement directly from the provisions of the EEA Agreement.[61]

151. Nevertheless, pursuant to Article 27 of the Directive, Member States may restrict freedom of movement of EEA nationals or their family members, on public policy, security or health grounds. As a derogation from fundamental freedom, measures restricting free movement of persons are to be interpreted narrowly.[62]

152. The Commission recalls that, pursuant to well established case-law of the ECJ, as codified in Article 27 of the Directive, restriction measures may not be issued by the host Member State in response to or as a penalty arising from a criminal conviction.[63] Rather, restrictions must be based exclusively on the personal conduct of the individual concerned and will be justified only if – and for as long as – the continued presence of the persons concerned amounts to a genuine, present and sufficiently serious threat to one of the fundamental interests of society.[64]

153. This high threshold for the adoption of restriction measures is heightened further as regards EEA nationals having permanent residence status and further still as regards those permanent residents who have resided in the host Member State for a period of 10 years. By virtue of Article 28(3) of the Directive, the latter category of persons may be subject to an expulsion order only "on imperative grounds of public security".

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[61] Reference is made to *Yankuba Jabbi*, cited above, paragraphs 59 and 60.

[62] Reference is made to the judgments in *Calfa*, cited above, paragraph 23 and *Tsakouridis*, cited above, paragraphs 24 and 25. Recital 23 of the Directive underlines that the expulsion of Union citizens and their family members can seriously harm persons who, having availed themselves of the rights and freedoms conferred on them by the Treaty, have become genuinely integrated into the host Member State.

[63] Reference is made to the judgments in *Bouchereau*, cited above, paragraph 35, and *Orfanopoulous & Oliveri*, cited above, paragraph 66.

[64] Reference is made to the judgment in *Orfanopoulous & Oliveri*, cited above, paragraphs 67 and 68.

154. Such an approach is consistent with the requirement, referred to in recitals 23 and 24 of the Directive, to ensure that expulsion measures are limited in accordance with the principle of proportionality and, in particular, that they take account of the degree of integration of the persons concerned, the length of their residence in the host Member State, their age, state of health, family and economic situation and the links with their country of origin. The greater the degree of integration of Union citizens and their family members in the host Member State, the greater the degree of protection against expulsion should be.[65]

155. Recital 27 reiterates that, in line with the case-law of the ECJ prohibiting exclusion for life, it is appropriate for applicants to be given an opportunity to submit a fresh application within a reasonable time.

156. Indeed, in *Calfa*, the ECJ had ruled that a national measure requiring courts to expel for life persons convicted of particular drugs offences was incompatible with EU law. The automaticity of the order was considered not to permit an individual examination of the degree of threat that the individual concerned posed to a fundamental interest of society.[66] The incompatibility of restrictive measures of unlimited duration was further confirmed by the ECJ in *Shingara and Radiom*.[67]

157. The ECJ has clarified that an expulsion order can be justified only if "*having regard to the exceptional seriousness of the threat, such a measure is necessary for the protection of the interests it aims to secure, provided that the objective cannot be attained by less strict means, having regard to the length of residence of the Union citizen in the host Member State and in particular to the serious negative consequences such a measure may have for Union citizens who have become genuinely integrated into the host Member State."*[68]

158. The Commission submits that it follows from the principles laid down above and the obligation to ensure respect for the principle of proportionality in particular that: (a) a restrictive measure may be taken only where the threshold provided for under Article 27 and Article 28(3) of the Directive is met; and that (b) the duration of any subsequent ban on re-entry must be limited to what is necessary to safeguard the fundamental interest that removal is intended to protect.[69]

159. Indeed, an approach that would permit bans on re-entry to be imposed for periods that are not limited by reference to the continuing existence of the threats referred to in Chapter VI, would effectively result in restrictions that extend beyond what is necessary to safeguard the legitimate objectives in the public interest identified by the Union legislature as exceptions to the exercise of the freedom of movement.

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[65] Reference is made to the judgment in *Tsakouridis*, cited above.
[66] Reference is made to the judgment in *Calfa*, cited above.
[67] Reference is made to the judgment in *Shingara and Radiom*, cited above, paragraph 40.
[68] Reference is made to the judgment in *Tsakouridis*, cited above, paragraph. 49.
[69] Reference is made by analogy to the judgment in *Byankov*, C-249/11, EU:C:2012:608, paragraph 43.

160. The Commission further submits that it also follows from the principles referred to above that the mere fact that an applicant is afforded an opportunity to apply to have a re-entry ban lifted – as is required by Article 32 of the Directive – cannot exempt an EEA State from the requirement to ensure that a restrictive measure is, *from the very outset*, taken only in circumstances provided for under Article 27 and Article 28(3) of the Directive and for a defined period that is determined in compliance with the principle of proportionality.[70]

161. It is manifest that an alternative interpretation would permit Member States to take decisions that are, at the time of their adoption, disproportionate. Such an approach would produce arbitrary and unforeseeable results, as an expelled person would not, at the time of his or her expulsion, be able to foresee with any degree of certainty the period of his or her exclusion from the territory of an EEA State. Indeed, such a Union citizen could only try to limit the duration of his expulsion by instituting repeated applications in the hope that at some point, the entry ban will be revoked.[71]

162. The Commission further submits that the assessment as to whether an individual represents a sufficiently serious threat that is genuine and "present", implies, by its nature, an assessment that takes place at a *time proximate to the proposed expulsion of the individual concerned*.[72]

163. In this regard, it is observed that a removal decision taken many years before a proposed expulsion cannot accurately assess the extent to which a person, at the time of removal, would constitute a real threat to a fundamental interest in society. Moreover, as the ECJ has observed, the obligation to ensure a timely assessment ensures that national authorities are able to take into account most recent information, including positive developments.[73] Indeed, such an approach is also implicit in the terms of Article 33(2) of the Directive, which assumes that an individual assessment which is more than two years old at the time of enforcement of an expulsion decision may well no longer be relevant and will require reassessment.

164. However, in the present case, it is apparent that the expulsion decision was proposed in September 2013, that is, approximately, five months after L's sentencing by the Court of Appeal to an 11-year term of imprisonment. The Commission submits that, even if the proposal was only finally confirmed by a decision in 2016, the timing of the decision – relatively close to the conviction and remote from the anticipated date of release – suggests that the proposed restrictive measure was based more on the serious nature of the "past offence" rather than an assessment of the current personal situation of the applicant.

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[70] Reference is made to the judgment in *Byankov*, cited above, paragraph 68.
[71] Reference is made by analogy to the judgment in *K.A.*, cited above, paragraphs 57 to 58.
[72] Reference is made to the judgment in *Orfanopoulous & Oliveri*, cited above, paragraphs 78 to 82.
[73] Reference is made to the judgments in *Santillo,* 131/79, EU:C:1980:131, and *Orfanopoulous & Oliveri*, cited above.

165. Indeed, such an approach appears to be supported by the legal analysis as summarised by the referring court in its Request. It is noted that a majority of the Oslo District Court had considered that the personal circumstances of L did not present, or could not be assumed to present, 'a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society'.[74] The Oslo District Court is stated to have formed the view that, based on an overall assessment, "the risk of new serious narcotics-related offences was so low that expulsion did not appear to be an obvious and well-founded measure".[75]

166. Rather, the decision to adopt the expulsion measure was based on the second paragraph of Section 122(b) of the Norwegian Immigration Act, applicable to individuals who have resided for over 10 years in Norway, where expulsion is found to be "*compellingly necessary in the interests of public security*". The Oslo District Court considered this criterion fulfilled in view of the past offence committed, namely the quantity of narcotics, the involvement related to both retention, sale and aiding and abetting import and also what, in the Oslo District Court's view, was L's prominent role in the operation.

167. However, without its being necessary to examine, in the present case, whether the concept of "compelling" necessity corresponds to the "imperative" threshold laid down in Article 28(3) of the Directive, it is manifest that the approach as summarised above is incompatible with the requirements of Article 27, in particular the requirement that any restrictions be based on a 'present' threat of an EEA national's future conduct as opposed to an assessment that is focusing mainly on the gravity of a past offence.

168. Indeed, the Commission considers that an expulsion order proposed immediately after conviction, and confirmed many years prior to the anticipated release date and thus possible enforcement cannot, by definition, contain an assessment as to whether a person constitutes a "genuine, present and sufficiently serious threat" to a fundamental interest of the host society.

169. Certainly, it is noted that the specific higher standard imposed by Article 28(3) of the Directive as regards the exclusion of mobile EEA nationals who have resided for over 10 years in a host Member State refers to removal on "imperative grounds of public security", without repeating the other applicable conditions and limitations laid down in Article 27 of the Directive regarding the existence of a "genuine, present and sufficiently serious threat".

170. Nevertheless, it is apparent from the logic and scheme of the Directive, as well as from the case-law of the ECJ,[76] that this more stringent test does not remove, but must be read in combination with, the conditions laid down in Article 27. The special rule applicable to persons who have resided for many years in a host Member State is intended to provide such residents with *greater* and not less protection.

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[74] Reference is made to page 4 of 9 of the English translation of the Request.
[75] Ibid.
[76] Reference is made to the judgment in *P.I.*, cited above.

Having regard to the foregoing considerations, the Commission proposes that the first question be answered to the effect that an exclusion measure against a mobile EEA worker who has been a legal resident for a period exceeding 10 years may be adopted only pursuant to Articles 27 and 28(3) of the Directive, on imperative grounds of public security, in circumstances where the personal conduct of the individual concerned is considered to represent a genuine, present and sufficiently serious threat on the basis of an assessment carried out at a time proximate to the execution of the exclusion order. The possibility for EEA nationals to introduce a subsequent application to apply to have an exclusion order lifted does not exempt Member States from the obligation to ensure that any exclusion measure adopted is, from the outset, proportionate and complies with the requirements of Articles 27 and 28(3) of the Directive.

171. The Commission observes that the second and third questions are premised on the assumption that the exclusion of an individual may be based on his or her "personal characteristics". While this concept is not explained in the Request, it would appear from the dispute between the parties, as summarised in the Request, that the term refers to a characteristic or trait of an individual that is so fundamental and intrinsic to his or her being that it may be considered unchanging in its nature.

172. In the first instance, it is recalled that, pursuant to Article 27 of the Directive, Member States may adopt restrictive measures exclusively on the basis of an individual's personal conduct, and in particular, where such conduct is considered to represent a genuine, present and sufficiently serious threat to an interest of society. The Commission maintains that it follows from the wording of this provision that exclusion cannot be based, in and of itself, on an individual's innate characteristics.

173. Certainly, it is not disputed that a causal link exists between a person's internal psychology and his or her actions. In this regard, the Commission would not exclude that a psychological assessment of an individual convicted of a serious offence may constitute one of the factors to which competent authorities may have regard when assessing whether his or her continuing presence in the territory would amount to a genuine, present and sufficiently serious threat to a fundamental interest of society.

174. Nevertheless, it is submitted that Article 27 of the Directive precludes the exclusion of an EEA national from the territory exclusively on the basis of what is assumed to be an indelible or unalterable personal characteristic. Indeed, implicit in Article 32(1) and the obligation on Member States to ensure excluded EEA nationals are afforded the opportunity to apply for the lifting of an exclusion order in the event of a "material change" is the assumption such a change is in fact possible.

175. Moreover, as highlighted in the context of the first question, it is apparent that such an assumption is also implicit in Article 33(2) of the Directive, which is premised on the view that an individual assessment which is more than two years old at the time of enforcement of an expulsion decision may well no longer be relevant and will require reassessment. Indeed, the same assumption regarding the possibility for change also underpins the case-law of the ECJ stipulating the need for removal decisions to be based

on up-to-date information and therefore to be taken at a time proximate to the proposed removal.[77]

176. In the Commission's submission, it follows from the plain wording of Article 32(1) of the Directive that the kind of "material change" that would justify the lifting of an exclusion order adopted pursuant to Article 27(1) is one that is linked to the justification for having made that order initially. Thus, where an exclusion order is based, among other things, on an assessment of an individual, leading to conclusion that he or she represents a genuine, present and sufficiently serious threat to a fundamental interest of society, the reference to a "material change" in Article 32(1) refers to a change in the assessment that supported that initial conclusion.

177. Regarding question 4, the Commission begins by observing that the provisions of Chapter VI of the Directive seek to ensure compliance with the principle of proportionality, both as regards: (1) the definition of the thresholds applicable to the adoption of restrictive measures, as well as (2) the subsequent assessment as to whether, in all the circumstances, the adoption of such a measure is justified.

178. As regards the definition of thresholds, Articles 27 and 28 of the Directive differentiate clearly between: (a) residents, (b) permanent residents, and (c) permanent residents having resided for a period exceeding 10 years. Such differentiation serves to ensure that the greater degree of integration a Union citizen and his family members have attained, the more they are protected from expulsion.[78]

179. Furthermore, even where the applicable threshold is considered met, Article 28(1) imposes a specific obligation on Member States considering adopting a restriction measure to have regard *inter alia* to the family situation of the individual concerned and his social and cultural integration into the host Member State.[79] Such an approach is consistent with the obligation to ensure that EEA rules on the free movement of persons are interpreted *inter alia* with respect for the right to family life as enshrined in Article 8 ECHR.[80]

180. Certainly, Article 8 ECHR is not an absolute right and may be subject to derogations, including on the basis of legitimate objectives in the public interest, such as public security grounds.[81] However, it follows from Article 28(1) of the Directive that an expulsion order should not be made where, in the overall circumstances, the terms of the restriction measure would result in undue interference with the right to family life

[77] Reference is made to the judgments in *Santillo*, and *Orfanopoulous & Oliveri*, both cited above.
[78] Reference is made to recital 24 of the Directive.
[79] Reference is made to the judgment in *Tsakouridis*, cited above, paragraph 49.
[80] Reference is made to the judgments in, *Carpenter*, C-60/00, EU:C:2002:434, paragraphs 38, 41 and 42; *Metock*, C-127/08, EU:C:2008:449, paragraph 79; *Baumbast and R*, C-413/99, EU:C:2002:493, paragraph 72; and *Kolonja v. Greece*, Application No. 49441/12, 19 May 2016.
[81] Reference is made to Article 8(2) ECHR interpreted for example in *Klass and Others v. Germany*, Application No. 5029/71, 6 September 1978; *Al-Nashif v. Bulgaria*, Application No. 50963/99, 20 September 2002, paragraph 116.

and where the objective of ensuring the protection of public security can be achieved through measures that interfere less with the right to the respect for family life.

181. The Commission would, however, recall that the examination of a Union citizen's individual family circumstances pursuant to Article 28(1) of the Directive will arise only if the personal conduct of the EEA national concerned meets the threshold laid down in Articles 27 and 28(3) for the adoption of a restriction measure (i.e. removal is justified on an imperative ground of public security). Nevertheless, in the Commission's submission, it follows from the proposed reply to the first four questions that it is not apparent that the basis for the adoption of the expulsion decision under review including, in particular, the decision to impose a life-long re-entry ban, meets the requirements of Article 27, read in conjunction with Article 28(3), of the Directive.

182. Regarding question 5, the Commission observes that this question arises in a context where L was released on probation in the autumn of 2019 and since then has been transferred to transitional housing and is and remains in full-time employment. In the Request, it is further stated that L received positive acclamation from the Norwegian Correctional Service whilst serving his sentence and was assigned tasks requiring a particularly high level of trust and given only to persons deemed not to constitute a risk of evasion or smuggling-in of narcotics.

183. As observed in relation to the first question, restriction measures may not be issued by a host Member State in response to or as a penalty arising from a criminal conviction.[82] Rather, restrictions must be based exclusively by reference to the personal conduct of the individual concerned. Moreover, the adoption of a restriction measure can be justified only if – and for as long as – the continued presence of the persons concerned amounts to a genuine, present and sufficiently serious threat to one of the fundamental interests of society.[83]

184. Equally, as observed in connection with the first question above, the reference to expulsion in response to a "present" threat in Article 27(2) of the Directive implies the existence of an "imminent" future risk which, in turn, implies a timely and up-to-date assessment that is proximate to the proposed date of expulsion.

185. Furthermore, as highlighted in the context of the analysis of the first and third questions, the requirement to be able to take into account all relevant evidence also underpins the case-law of the ECJ stipulating the need for an up-to-date assessment in order to ensure that national authorities are able to take into account the most recent information, including positive developments.[84] Indeed, the Commission reiterates that such an approach is implicit in the terms of Article 33(2) of the Directive, which assumes that an individual assessment which is more than two years old at the time of

[82] Reference is made to the judgments in *Bouchereau*, cited above, paragraph 35 and *Orfanopoulous & Oliveri*, cited above, paragraph 66.
[83] Reference is made to the judgments in *Bouchereau*, cited above, paragraph 35 and *Orfanopoulous & Oliveri*, cited above, paragraphs 66 to 68.
[84] Reference is made to the judgments in *Santillo*, cited above and *Orfanopoulous & Oliveri*, cited above.

enforcement of an expulsion decision may well no longer be relevant and will require reassessment.

186. The Commission submits that any assessment regarding the proposed exclusion of a Union citizen must be based on the threat the individual poses at the time the decision is made, which must take into account all relevant evidence relating to the individual's conduct. In this context, evidence regarding his conduct during his term of imprisonment and following his release on probation would be of particular relevance to determining the extent to which an individual may be considered to represent a genuine present and sufficiently serious threat.

187. For the reasons set out above, the Commission considers that the questions referred should be answered as follows:

> *An exclusion measure against a mobile EEA worker who has been resident for a period exceeding 10 years may only be adopted pursuant to Articles 27 and 28(3) of Directive 2004/38 on imperative grounds of public security in circumstances where the personal conduct of the individual conserved is considered to represent a genuine, present and sufficiently serious threat. The possibility for EEA nationals to introduce a subsequent application to have an exclusion order lifted does not dispense Member States from the obligation to ensure that any exclusion measure adopted is, at the outset, proportionate and complies with the requirements of Articles 27 and 28(3) of the Directive.*
>
> *Article 27 of Directive 2004/38 precludes the adoption of an expulsion measure that is based exclusively on an EEA national's personal characteristics, including where such characteristics are assumed to be unchanging. Where an exclusion order is based, among other things, on the basis of an assessment of the individual concerned leading to the conclusion that he or she represents a genuine, present and sufficiently serious threat to a fundamental interest, the reference to "a material change" in Article 32(1) of the Directive that would warrant the lifting of such an order, may be considered to refer to changes in the assessment that constituted a justification for the initial decision ordering his or her exclusion.*
>
> *Before adopting a restrictive measure pursuant to Article 27 read in conjunction with Article 28(3) of Directive 2004/38, Member States are required to examine inter alia the family situation of the person concerned. A Member State should not proceed to adopt a restriction measure which would entail an undue interference with the right to family life in circumstances where it is concluded that the objective of ensuring the protection of public security can be achieved through measures that interfere less with that right.*
>
> *The decision as to whether a Union citizen represents a "genuine present and sufficiently serious" threat to public security justifying his or her exclusion from the territory of an EEA State must be based on an up-to-date assessment of the threat the individual poses at the time the decision is made. Such an assessment*

requires account to be taken of all relevant evidence relating to the individual's recent conduct, including, where applicable, during a term of imprisonment or during a period of probation following his or her release. Such elements must be verified again if an expulsion order is enforced more than two years after it was adopted.

Bernd Hammermann
Judge-Rapporteur