



E-5/23-18

## REPORT FOR THE HEARING

in Case E-5/23

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 the Supreme Court of Norway (*Norges Høyesterett*) in criminal proceedings against

### LDL

concerning the interpretation of the Agreement on the European Economic Area, in particular Articles 28 and 36 thereof, and 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.

### I Introduction

1. By letter of 7 June 2023, registered at the Court on 19 June 2023, the Supreme Court of Norway (*Norges Høyesterett*) requested an Advisory Opinion in the case pending before it between LDL and the Prosecuting Authority (*Påtalemyndigheten*).

2. The case before the Supreme Court concerns whether LDL, the appellant in the main proceedings, can be convicted for having failed to undergo an ordered stay at a quarantine hotel following travel abroad. LDL was convicted for that offence in Østre Innlandet District Court (*Østre Innlandet tingrett*) and at Eidsivating Court of Appeal (*Eidsivating lagmannsrett*). The time of the indicted offence (“the material time”) was 2 May 2021.

## II Legal background

### *EEA law*

3. Article 28 of the Agreement on the European Economic Area (“the EEA Agreement” or “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. Article 33 of the EEA Agreement reads:

*The provisions of this Chapter and measures taken in pursuance thereof shall not prejudice the applicability of provisions laid down by law, regulation or administrative action providing for special treatment for foreign nationals on grounds of public policy, public security or public health.*

5. Article 36(1) of the EEA Agreement reads:

*Within the framework of the provisions of this Agreement, there shall be no restrictions on freedom to provide services within the territory of the Contracting Parties in respect of nationals of EC Member States and EFTA States who are established in an EC Member State or an EFTA State other than that of the person for whom the services are intended.*

6. Article 39 of the EEA Agreement reads:

*The provisions of Articles 30 and 32 to 34 shall apply to the matters covered by this Chapter.*

7. 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) (“the Directive” or “Directive 2004/38”) was incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 158/2007 of 7 December 2007 (OJ 2008 L 124, p. 20, and Norwegian EEA Supplement 2008 No 26, p. 17), and is referred to at points 1 and 2 of Annex V (Free movement of workers) and point 3 of Annex VIII (Right of establishment) to the EEA Agreement. Constitutional requirements indicated by Iceland, Liechtenstein and Norway were fulfilled on 9 January 2009, and the decision entered into force on 1 March 2009.

8. Article 1 of the Directive reads:

*This Directive lays down:*

*(a) the conditions governing the exercise of the right of free movement and residence within the territory of the Member States by nationals of EC Member States and EFTA States and their family members;*

*(b) the right of permanent residence in the territory of the Member States for nationals of EC Member States and EFTA States and their family members;*

*(c) the limits placed on the rights set out in (a) and (b) on grounds of public policy, public security or public health.*

9. Article 4(1) of the Directive reads:

*Without prejudice to the provisions on travel documents applicable to national border controls, all nationals of EC Member States and EFTA States with a valid identity card or passport and their family members who are not nationals of a*

*Member State and who hold a valid passport shall have the right to leave the territory of a Member State to travel to another Member State.*

10. Article 5(1) of the Directive reads:

*Without prejudice to the provisions on travel documents applicable to national border controls, Member States shall grant nationals of EC Member States and EFTA States leave to enter their territory with a valid identity card or passport and shall grant family members who are not nationals of a Member State leave to enter their territory with a valid passport.*

*No entry visa or equivalent formality may be imposed on nationals of EC Member States and EFTA States.*

11. Article 6(1) of the Directive reads:

*Nationals of EC Member States and EFTA States shall have the right of residence on the territory of another Member State for a period of up to three months without any conditions or any formalities other than the requirement to hold a valid identity card or passport.*

12. Article 7(1) of the Directive reads, in extract:

*All nationals of EC Member States and EFTA States shall have the right of residence on the territory of another Member State for a period of longer than three months if they:*

*(a) are workers or self-employed persons in the host Member State; or*

*...*

13. Article 27 of the Directive reads:

*1. Subject to the provisions of this Chapter, Member States may restrict the freedom of movement and residence of nationals of EC Member States and EFTA States 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.*

*3. In order to ascertain whether the person concerned represents a danger for public policy or public security, when issuing the registration certificate or, in the absence of a registration system, not later than three months from the date of arrival of the person concerned on its territory or from the date of reporting his/her presence within the territory, as provided for in Article 5(5), or when issuing the residence card, the host Member State may, should it consider this essential, request the Member State of origin and, if need be, other Member States to provide information concerning any previous police record the person concerned may have. Such enquiries shall not be made as a matter of routine. The Member State consulted shall give its reply within two months.*

*4. The Member State which issued the passport or identity card shall allow the holder of the document who has been expelled on grounds of public policy, public security, or public health from another Member State to re-enter its territory without any formality even if the document is no longer valid or the nationality of the holder is in dispute.*

14. Article 29(1) of the Directive reads:

*The only diseases justifying measures restricting freedom of movement shall be the diseases with epidemic potential as defined by the relevant instruments of the World Health Organisation and other infectious diseases or contagious parasitic diseases if they are the subject of protection provisions applying to nationals of the host Member State.*

15. Article 30 of the Directive reads:

*1. The persons concerned shall be notified in writing of any decision taken under Article 27(1), in such a way that they are able to comprehend its content and the implications for them.*

*2. The persons concerned shall be informed, precisely and in full, of the public policy, public security or public health grounds on which the decision taken in their case is based, unless this is contrary to the interests of State security.*

*3. The notification shall specify the court or administrative authority with which the person concerned may lodge an appeal, the time limit for the appeal and, where applicable, the time allowed for the person to leave the territory of the*

*Member State. Save in duly substantiated cases of urgency, the time allowed to leave the territory shall be not less than one month from the date of notification.*

16. Article 31 of the Directive reads:

*1. The persons concerned shall have access to judicial and, where appropriate, administrative redress procedures in the host Member State to appeal against or seek review of any decision taken against them on the grounds of public policy, public security or public health.*

*2. Where the application for appeal against or judicial review of the expulsion decision is accompanied by an application for an interim order to suspend enforcement of that decision, actual removal from the territory may not take place until such time as the decision on the interim order has been taken, except:*

*— where the expulsion decision is based on a previous judicial decision; or*

*— where the persons concerned have had previous access to judicial review; or*

*— where the expulsion decision is based on imperative grounds of public security under Article 28(3).*

*3. The redress procedures shall allow for an examination of the legality of the decision, as well as of the facts and circumstances on which the proposed measure is based. They shall ensure that the decision is not disproportionate, particularly in view of the requirements laid down in Article 28.*

*4. Member States may exclude the individual concerned from their territory pending the redress procedure, but they may not prevent the individual from submitting his/her defence in person, except when his/her appearance may cause serious troubles to public policy or public security or when the appeal or judicial review concerns a denial of entry to the territory.*

*National law and practice*

17. The national law and practice at the material time was as follows.

18. The Norwegian framework for the control of communicable diseases was set out in the Act of 5 August 1994 No 55 relating to the control of communicable diseases (*lov 5. august 1994 nr. 55 om vern mot smittsomme sykdommer (smittevernloven)*) (“the CCDA”).

19. Section 1-5 of the CCDA read:

*Measures for control of communicable diseases pursuant to this Act shall be based on a clear medical justification, be necessary for the purpose of controlling infection and appear appropriate after an overall assessment. Upon the implementation of measures for control of communicable diseases, emphasis shall be given to voluntary participation by the person or persons concerned by the measure.*

20. Section 4-3 of the CCDA read:

*The King may issue regulations to prevent communicable diseases from being brought into the country or spread to other countries (quarantine measures), including provisions regarding measures in respect of persons, animals, means of transport, goods and objects which may conceivably transmit communicable diseases. In the regulations the King may also establish further requirements for examinations, removal of sources of contagion and documentation in connection with entry into and departure from Norway and in connection with the import and export of goods.*

*In order to prevent or hinder the spread of Covid-19, the King may issue regulations governing where and how persons entering Norway shall undergo quarantine. The King may also issue regulations governing deductibles for persons in quarantine or their employers or clients to cover costs of the quarantine stay.*

*The King may issue regulations governing procedural rules for decisions taken pursuant to regulations under the second paragraph. In that connection, exceptions may be made from Chapters IV, V and VI of the Public Administration Act (forvaltningsloven).*

21. Section 4-3a of the CCDA conferred authority to enact rules on isolation of infected persons and rules governing so-called “infection-related quarantine” (*smittekarantene*) or “waiting quarantine” (*ventekarantene*). Infection-related quarantine was directed at persons having had close contact with an infected or presumably infected person, whilst waiting quarantine concerned persons living in the same household as a person placed in infection-related quarantine.

22. Section 8-1 of the CCDA provided that intentional or negligent violation of the act or measures enacted on the basis of the act constituted a punishable offence.

23. In light of the Covid-19 pandemic, Norway adopted the Regulation on measures for the control of communicable diseases during the Covid-19 outbreak (“the Covid-19 Regulation”) (*forskrift om smitteverntiltak mv. ved koronautbruddet (covid-19-forskriften)*).

24. Letter (a) of the first paragraph of Section 4 of the Covid-19 Regulation read, in extract:

*[...] persons entering Norway from an area with an obligation to quarantine as set out in Appendix A shall go into quarantine for a period of 10 days. [...]*

25. Section 4d of the Covid-19 Regulation contained requirements for testing for SARS-CoV-2 at border crossings.

26. The first paragraph of Section 5 of the Covid-19 Regulation read:

*Persons in entry quarantine shall stay at a quarantine hotel at the first point of entry in the Kingdom during the period of quarantine.*

27. Letters (a) and (c) of the second paragraph of Section 5 of the Covid-19 Regulation read:

*The obligation to stay at a quarantine hotel shall not apply in respect of persons who fulfil the conditions in Section 4d and who:*

*a. upon entry, are able to document that they are resident in Norway and that the travel was necessary, and who stay at the residence or other suitable location where it is possible to avoid close contact with others, with a separate bedroom, separate bathroom and separate kitchen or the possibility of having meals provided. [...]*

*c. upon entry, are able to document that they own or rent a permanent residence in Norway where they can undergo quarantine in a separate living space with a bedroom, bathroom and kitchen, and that the travel was necessary. A lease as referred to in the first sentence must have a minimum duration of six months. [...]*

28. The fifth paragraph of Section 5 of the Covid-19 Regulation read:

*Work-related travel will be deemed necessary under letters (a) and (c) of the second paragraph when confirmation from an employer or client is provided. For persons who are resident in Norway, see letter (a) of the second paragraph, and temporarily work abroad, study abroad or are accompanying members of the household of persons who work or study abroad, travel into and out of Norway during the period they are based abroad shall be considered necessary. Travel will also be necessary if it is justified on compelling welfare-related grounds such as spending time with minor children, visiting close relatives who are seriously ill or dying, or attendance at the burials or funerals of close relatives.*



29. The seventh paragraph of Section 5 of the Covid-19 Regulation read:

*Persons in entry quarantine may only be outside their place of residence if they can avoid close contact with people other than those with whom they reside. Persons in quarantine may not be at a workplace where other persons are also present, or at schools or kindergartens. The use of public transport is not permitted.*

30. The first paragraph of Section 22 of the Covid-19 Regulation read:

*Individuals staying at a quarantine hotel during the quarantine period under Section 5 shall pay a deductible of NOK 500 per day. If a person has an employer or client in Norway, that party shall pay the deductible of NOK 500 per day.*

31. Point 1 of the Revised Circular on quarantine hotels (G-2021-12) of 27 March 2021 (“the Circular”) provided at the material time, inter alia, that the police, in their border control, shall verify the conditions for entering Norway, and where these are met, provide guidance on the regulations, including the obligation to stay at a quarantine hotel as required under Section 5 of the Covid-19 Regulation. It is also stated that, as a general rule, it is for the individual traveller himself or herself to consider whether he or she are subject to any of the Covid-19 Regulation’s exemptions from the obligation to undergo the quarantine period at a quarantine hotel.

32. Point 4 of the Circular contained some guidance on compliance checks at quarantine hotels. Point 4(h) of the Circular stated that the municipality, in cooperation with the hotel, has to establish a control system to ensure that those in quarantine complies with the guidelines and stays at the hotel. If a breach of the quarantine obligation was revealed, the police was to be contacted to consider potential criminal sanctions. It is also stated therein that the use of coercion in the implementation of the quarantine hotel scheme is not permitted.

### **III Facts and procedure**

33. The facts and background of the criminal proceedings against LDL are summarised in the following manner in the Court of Appeal’s judgment, with references to further descriptions in Østre Innlandet District Court’s judgment:

*“The indicted is a Swedish national, but is resident together with his wife at Bruvoll in Nord-Odal (in Norway). His parents and siblings reside in Sweden. For about a week from the end of April until the beginning of May 2021, he went to Sweden to*

*visit his father in Karlstad in Värmland. The reason for the travel, as well as the further course of events, are described as follows in the District Court's judgment:*

*'His father was very distraught after his brother (the indicted's uncle) had recently passed away. In Karlstad, the indicted was also together with his brothers and his father's cohabiting partner. The indicted was to return to Norway because he has permanent residence here, where he resides with his wife.*

*On the way home, the indicted was stopped at the border at Magnormoen. He was ordered to the quarantine hotel, but instead, he opted to return home to undergo the quarantine at home. His wife was in Oslo at that time, so the indicted considered it acceptable to undergo quarantine at home. Trysil municipality attempted to contact him by telephone on 2 and 3 May but were unable to reach him."*

34. LDL has resided and worked in Norway since the autumn of 2016.

35. According to the request, Section 4 of the Covid-19 Regulation provided for a general obligation to quarantine for persons entering Norway from an area with an obligation to quarantine as set out in Appendix A. The obligation was not contingent on an individual decision having been adopted against the person concerned. Principally, depending on whether or not the travel was to be deemed necessary under Section 5 of the Covid-19 Regulation, the traveller had to undergo the period of quarantine at a quarantine hotel. This obligation was also not contingent on an individual decision having been adopted against the traveller.

36. According to the referring court, the requirements for the entry quarantine were tightened up in March 2021, by expanding the categories of persons to which the obligation to undergo entry quarantine at a quarantine hotel applied. Until 18 March 2021, the question of an obligation to undergo quarantine at a quarantine hotel had been linked to whether the traveller had a suitable location to undergo quarantine. The amendment entailed that, as from 19 March, the purpose of the travel could trigger the obligation to quarantine at a quarantine hotel irrespective of whether the traveller had a suitable quarantine location.

37. Further, the quarantine period could be shortened if the traveller could document a negative Covid-19 test result. At the material time, such a test could at the earliest be taken seven days after entry into Norway. Such a test was to be offered to persons staying at a quarantine hotel. Thus, persons under an obligation to quarantine at a quarantine hotel under Section 5 of the Covid-19 Regulation had to pay a minimum deductible for seven days – for a total of NOK 3500 – for the stay.

38. As stated in the request, violation of the provisions of the Covid-19 Regulation was largely subject to criminal sanctions. The threat of criminal sanctions followed from Section 8-1 of the CCDA, but also from Section 24 of the Covid-19 Regulation. Section 24 of the Covid-19 Regulation provided that intentional or grossly negligent violation of Section 5 of the Covid-19 Regulation – the obligation to undergo the stay at a quarantine hotel – was punishable by fine or imprisonment up to six months.

39. On 25 June 2021, the Chief of Police of Innlandet County (*Politimesteren i Innlandet*) issued LDL with an optional penalty writ (*forelegg*) for violation of Section 7-12 of the CCDA, read in conjunction with Section 24 of the Covid-19 Regulation and Section 4-3 of the CCDA, read in conjunction with a combined reading of Sections 4 and 5 of the Covid-19 Regulation. The grounds for the penalty writ were described as follows:

*“Sunday 2 May 2021, at around 20:00, he entered Norway via Magnormoen. Under the applicable provisions on control of communicable diseases, he was to stay at a quarantine hotel, and a room was organised at Kjølén hotel, but despite of this he never presented himself at Kjølén hotel.”*

40. LDL did not accept the optional penalty writ. The optional penalty writ replaced the indictment, in accordance with Norwegian law, and the case was referred to Østre Innlandet District Court for judgment.

41. On 28 February 2022, Østre Innlandet District Court delivered judgment in which LDL was convicted as charged in the optional penalty writ and ordered to pay a fine of NOK 24 000 and costs in favour of the State of NOK 4 000.

42. The District Court held that the rules on quarantine hotels were not contrary to the CCDA, the Constitution (*Grunnloven*) or the European Convention on Human Rights. Accordingly, in the District Court’s view, the order for a quarantine hotel was valid, with the result that LDL could be sanctioned for failing to undergo the quarantine period at a quarantine hotel. The District Court did not, however, consider whether the rules on quarantine hotels were compliant with Directive 2004/38 or the EEA Agreement.

43. LDL appealed to Eidsivating Court of Appeal on the point of the application of the law concerning the question of guilt. By decision of Eidsivating Court of Appeal of 29 April 2022, the appeal was referred to appeal proceedings.

44. Subsequently, on 6 July 2022, Eidsivating Court of Appeal delivered judgment in the case. In the judgment, the Court of Appeal considered whether the rules on quarantine hotels were contrary to EEA law but concluded that they were not. Like the District Court, the Court of Appeal further held that the rules were not contrary to the CCDA, the Constitution or the European Convention on Human Rights, and accordingly concluded that the rules were valid. Thus, LDL’s appeal was dismissed.

45. LDL appealed to the Supreme Court on the points of the application of the law concerning the question of guilt and the procedure before the Court of Appeal. By decision of 25 November 2022 of the Appeals Selection Committee of the Supreme Court (*Høyesteretts ankeutvalg*), LDL was granted leave to appeal “on the point of the application of the law in so far as it concerns the question whether the applicable rules in the Regulation are contrary to the rules of the [CCDA], the Constitution, the European Convention on Human Rights or EEA law”. Leave to appeal was refused as to the remainder.

46. Against this background, the Supreme Court of Norway decided to refer the following questions to the Court:

**1. Based on the information provided about the factual background to the case [as set out in the request], in the light of which provision(s) of Directive 2004/38/EC should the restriction-related questions in the present case be examined?**

**2. Provided that LDL, upon returning to Norway, could rely on his rights under Articles 4, 5, 6 and/or 7 of Directive 2004/38/EC, does a more extensive right to cross the border and reside in Norway without restrictions derive from his right of free movement as a worker under Article 28 of the Main Part of the EEA Agreement or from his right to travel to Sweden to receive services under Article 36 of the Main Part of the EEA Agreement?**

**3. If a more extensive right of entry derives from the provisions on freedom of movement under the Main Part of the EEA Agreement, ref. Question 2, and if LDL’s travel to Sweden on its own also came within the scope of his right to travel there to receive services, is the question of whether the restriction on the freedom to provide services absorbed by the question of whether the restriction on his free movement as a worker can be justified?**

**4. Does Chapter VI of Directive 2004/38/EC allow for the introduction of restrictions on rights under that directive, with the objective of safeguarding public health, in the form of general regulations, or is that option limited to individual measures based on considerations of risk of infection relating to the individual traveller?**

**5. In light of the fact that the authorities are free to determine the degree of protection, and assuming that EEA law would not have precluded the adoption of even more invasive measures such as total or partial closure of borders, or a decision to require all travellers to undergo the period of quarantine at a quarantine hotel, what implications does it have for the EEA law assessment of the suitability of the scheme chosen that only certain groups had to go to a quarantine hotel?**

**6. What significance does it have for the assessment of whether the measure is consistently implemented and therefore suitable, that the quarantine hotel scheme (was part of an overall strategy for control of communicable diseases that also) was based on prioritisations as to which groups who, out of consideration for society as a whole, should be given priority within the parameters of the overall infection burden which the authorities considered acceptable at that time?**

**7. In the drafting of the rules in a pandemic situation such as that at issue in the present case, how much weight can be attached to the need to introduce general and simple rules which can be easily understood and applied by the parties concerned and easily managed and supervised for compliance by the authorities, see C-110/05 Commission v Italy, paragraph 67?**

**8. Is it within the consideration of enforceability and control – and therefore within the legitimate aims in the assessment of whether the measure is justified – that the quarantine hotel scheme could potentially have a deterrent effect for persons contemplating travel abroad, with the consequence that the total infection pressure was reduced?**

**9. What implications does it have for the assessment of the lawfulness of the restrictions if individual legal certainty safeguards under Articles 30 and 31 of Directive 2004/38/EC apply to the present case, but were potentially not fulfilled?**

**10. In the assessment of whether the measure is proportionate under Articles 27 and 29 of Directive 2004/38/EC, and potentially also under the Main Part of the EEA Agreement, is there a requirement of proportionality in the narrow sense of the term (stricto sensu) in the present case?**

**11. If Question 10 is answered in the affirmative, what is potentially the legal content of and the legal subject matter to be examined in the assessment of whether such a requirement is fulfilled in the present case?**

#### **IV Written observations**

47. Pursuant to Article 20 of the Statute of the Court and Article 90(1) of the Rules of Procedure, written observations have been received from:

- LDL, represented by John Christian Elden and Olaf Halvorsen Rønning, advocates;
- the Prosecuting Authority, represented by Alf Butenschøn Skre, public prosecutor;

- the Norwegian Government, represented by Pål Wennerås, Ida Thue and Terje Aalia, acting as Agents;
- the EFTA Surveillance Authority (“ESA”), represented by Erlend Møinichen Leonhardsen, Kyrre Isaksen, Hildur Hjörvar and Melpo-Menie Joséphidès, acting as Agents; and
- the European Commission (“the Commission”), represented by Elisabetta Montaguti and Jonathan Tomkin, acting as Agents.

## **V Proposed answers submitted**

*LDL*

48. LDL proposes that the questions referred be answered as follows:

*Question 1:*

*The assessment of restrictions should be made in reference to Directive 2004/38 Articles 4, 5 and 7, and the assessment of lawfulness of the restrictions in reference to Directive 2004/38 Articles 27, 29, 30 and 31.*

*Question 2:*

*The EEA Agreement Articles 28 and 36 does not in this matter confer upon LDL more extensive rights than under Directive 2004/38.*

*Question 3:*

*The assessment of restriction of rights should be made in reference to Directive 2004/38.*

*Question 4:*

*The Chapter VI of the Directive 2004/38 does not allow for restriction of freedom of movement rights in the form of general regulations.*

*Question 5:*

*The EEA law assessment of the suitability of the restrictive measures taken must be assessed in the light of the general obligation for measures restricting rights to conform to the requirement of consistency. Considerations made by national authorities as to the suitability of more restrictive measures does not have any*

*bearing of the assessment of whether the chosen measures meet the requirement of consistency.*

*Question 6:*

*The EEA law assessment of the suitability of the restrictive measures taken must be assessed in the light of the general obligation for measures restricting rights to conform to the requirement of consistency. Under this assessment, note must be taken as to whether the measures in question was part of an overall strategy. Less restrictive regulation for limited and specific groups is not in principle in contravention of the requirement of consistency, but grander scale exemptions from restrictive measures will render such measures inconsistent under EEA law.*

*Question 7:*

*Drafting of rules with a view of making them easily managed and supervised by authorities will not in itself render such rules incompatible with EEA law. However, substantial legislative priorities, in particular regarding interference in fundamental individual rights, cannot be made solely with reference to the advantage of easily manageable rules. Fundamental rights such as the ones in question can in principle not be restricted solely or to a great extent with reference to the need for practicable rules.*

*Question 8:*

*The potential deterrent effect of restrictive measures in response to lawful exercise of free movement rights, which the authorities consider to be undesirable travel, does not lie within the permitted remit of national authorities when implementing measures restricting enjoyment of free movement rights, either under the assessment of enforceability and control or any other assessment under EU and EEA law.*

*Question 9:*

*If individual legal procedural safeguards under the Directive Article 30 and 31 are not fulfilled for a restrictive measure, it would render that restrictive measure unlawful under EEA law.*

*Question 10:*

*When assessing the compliance of restrictive measures with Directive 2004/38, there is a requirement to assess the proportionality strictu sensu of such restrictions.*

*Question 11:*

*The requirement of proportionality strictu sensu entails a proportionality assessment both in the abstract and in the concrete, where the proposed advantages of the restrictive measure is weighted against the disadvantages the measure entails for the individual, the functioning of the EEA and EU area, and the broader society.*

*The Prosecuting Authority*

49. The Prosecuting Authority proposes that the questions referred be answered as follows:

*Questions 1 to 3:*

*National measures such as that imposed by Section 5 of the Covid 19 Regulation on 2 May 2021 constitutes a restriction on the right of entry under Article 5 of Directive 2004/38/EC.*

*Question 4:*

*Chapter IV of Directive 2004/38/EC does not preclude measures of general application enacted for the purpose of protecting public health.*

*Questions 5 and 6:*

*In the area of public health, the State enjoys a wide margin of discretion in determining the degree of protection and the way in which that protection is to be achieved. Differentiating between abstract groups in society on the basis of different circumstances, and taking into account general public interests ordinarily involved in policy decision-making, does not in itself result in that the measures fail the requirement of attaining the objective pursued in a consistent and systematic manner.*

*Question 7:*

*When drafting rules with the purpose of infection control during a pandemic such as that at issue in the present case, it is legitimate for the State to take into consideration whether the rules are easily understood and applied by concerned parties and easily managed, supervised and enforced by the authorities.*

*Question 8:*

*The potentially deterrent effect, if any, that a requirement of staying in a quarantine hotel upon entry may have on members of the public contemplating*



*to travel to countries with high rates of infection may be taken into account in the assessment of whether the was justified.*

*Question 9:*

*Articles 30 and 31 of Directive 2004/38/EC, which are an expression of the general principle of the right to an effective remedy. In the case of measures of general application, it is a prerequisite for sanctioning violations of the measure that the general public was, at the material time, provided with adequate information in due time regarding the measures, taking into account to the nature of the measures, and that it is possible to challenge the legality of the measure and obtain judicial review.*

*Questions 10 and 11:*

*The test of proportionality under EEA law should therefore provide a protection of fundamental rights that is equivalent to that required under the European Convention on Human Rights (ECHR). Thus, if a requirement under national law to undertake quarantine, or more specifically quarantine in a hotel, is seen as an infringement of the right of the individual to respect for his private and family life under Article 8 of the ECHR, whether the measure is justified must be considered in light of the derogation clause in paragraph 2 of that Article, which requires that the measure was “necessary in a democratic society [...] for the protection of health”, while taking into account the positive obligation of States to protect human life and health.*

*The Norwegian Government*

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

*A national measure such as that at issue in the main proceedings constitutes a restriction on the right of entry provided by Article 5 of the Directive 2004/38/EC.*

*Articles 27(2) and 29 of the Directive 2004/38/EC does not preclude national authorities from protecting public health through measures of general application.*

*The requirement that a measure must be appropriate for securing the attainment of the objective pursued, including that it genuinely reflects a concern to attain that objective in a consistent and systematic manner, which constitutes the first limb of the proportionality principle enshrined in Articles 27(2) and 29 of Directive 2004/38/EC, does not preclude national measures, such as those at*

*issue in the main proceedings, according to which persons seeking to enter the State from a State experiencing increased rates of infection were as a main rule subject to hotel quarantine, while allowing exceptions for persons returning from necessary travel to those States, either for professional reasons or weighty private reasons.*

*As concerns the requirement that a measure be necessary to attain the objective pursued, which constitutes the second limb of the proportionality principle enshrined in Articles 27(2) and 29 of Directive 2004/38/EC, it is possible to envisage that measures other than a hotel quarantine, such as that at issue in the main proceedings, could guarantee a certain level of protection of public health, but the fact remains that Member States cannot be denied the possibility of attaining an objective such as protection of public health by the introduction of general and simple rules which will be easily understood and applied by the public and easily managed and supervised by the competent authorities. This covers also the deterrent effect of such rules which, in a similar vein to a prohibition, bolster the effectiveness of the rules and alleviate control concerns.*

*The principle of proportionality, as enshrined in Articles 27(2) and 29 of Directive 2004/38/EC, requires that restrictions on the right of entry must be appropriate and necessary to attain the legitimate objective being pursued. It follows that the proportionality principle does not require, in so far as these two requirements are fulfilled, and also taking into account that the Member States remain free to determine their own level of protection as concerns inter alia protection of public health, an examination of whether the benefits to protection of public health outweigh the interest of freedom of movement.*

*(The preceding proposed answer could, in the alternative, be elaborated upon as follows: However, in so far as the national measure also represents an interference with fundamental rights, which constitute general principles of EEA law, it can be justified under Article 27(2) and 29 of Directive 2004/38/EC only if it is compatible with those principles and those rights.)*

*Articles 30 and 31 of Directive 2004/38/EC do not preclude national authorities from protecting public health through measures of general application. However, the principle of effective judicial protection, which those provisions are a specific expression of, require that the public is informed of such measures and that it is possible to obtain judicial review of their compatibility with Directive 2004/38/EC and, in particular, the requirements of Articles 27 and 29.*

ESA

51. ESA submits that the Court should answer the questions referred as follows:

1. *The facts of the case should be assessed under Article 7 of Directive 2004/38. It is for the national court to examine on the basis of all facts of the case whether and to what extent any fundamental freedoms under the EEA Agreement will be additionally applicable.*

2. *Articles 27 and 29 of the Directive must be interpreted as meaning that, in a situation such as that at issue in the main proceedings, characterised by a pandemic, they do not oppose, in principle, the adoption of general measures restricting the free movement of persons for public health reasons.*

3. *Under the circumstances of the present case, where only certain groups without regard to their particular risk profile, and only with respect to travels abroad, had to go to a quarantine hotel, but where broad exceptions existed, imposing a requirement to undergo hotel quarantine only for certain travellers cannot be considered sufficiently consistent and systematic and is not suitable for attaining the objective, and does therefore not appear capable of being justified.*

4. *The need to introduce general and simple rules which can be easily understood and applied by concerned parties and easily managed and supervised for compliance by the authorities cannot come at the cost of the need to comply with the fundamental freedoms and general principles of EEA law, such as the principle of legal certainty, which must be adhered to at all times.*

5. *The potential deterrent effect for persons contemplating travel abroad could be a legitimate aim when assessing whether a restriction can be justified, provided that the measure with such a deterrent effect is suitable to achieve the legitimate objective and does not go beyond what is necessary to attain that objective. In that regard, the national court must take into account that deterrent measures are inherently wide-reaching and therefore particularly liable to go beyond that which is necessary.*

6. *Articles 30 and 31 of the Directive must be interpreted as precluding restrictions on the right to entry and the right to residence pursuant to Articles 5 and 7, respectively, which do not adhere to the procedural rights conferred by Articles 30 and 31.*

7. *The rules on free movement applicable in this case must be interpreted to include, in order to consider any restriction to be justified, a requirement of proportionality stricto sensu. This requirement entails in particular weighing the need for a high protection of public health during a pandemic against the impact those measures had upon the individual concerned in light of his circumstances, including the impact upon his fundamental rights, the economic cost and the*

*criminal sanction potentially imposed upon him as well as the potential for taking into account factors such as the fact that he had a suitable residence available.*

*The Commission*

52. The Commission proposes that the questions referred be answered as follows:

*Articles 27, 29, 30 and 31 of the Directive 2004/38/EC and Articles 28 and 36 of the EEA Agreement must be interpreted as not precluding legislation of an EEA State under which nationals of other EEA States travelling, during the COVID-19 pandemic, from certain areas of other EEA States particularly affected by SARS-CoV-2 to that EEA State for non-essential reasons are required to undergo mandatory hotel quarantine provided that such measures are non-discriminatory, proportionate, properly publicly communicated, and that any persons found in breach of such measures have access to judicial and, where appropriate, administrative redress procedures.*

Bernd Hammermann  
Judge-Rapporteur