**JUDGMENT OF THE COURT**
2 July 2024*

(*Directive 2004/38/EC – Derived rights for third-country nationals – Right of entry – National legislation restricting rights of entry and residence because of an exclusion order prior to becoming a family member of an EEA national – Article 32 of Directive 2004/38/EC – Article 36 of Directive 2004/38/EC*)

In Case E-6/23,

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

**MH**,

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 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,

THE COURT,

composed of: Páll Hreinsson, President (Judge-Rapporteur), Bernd Hammermann and Michael Reiertsen, Judges,

Registrar: Ólafur Jóhannes Einarsson,

having considered the written observations submitted on behalf of:

- MH, represented by Maral Houshmand, advocate;

- the Prosecuting Authority, represented by Mads Fredrik Baardseth and Thomas Frøberg, public prosecutors;

* Language of the request: Norwegian. Translations of national provisions are unofficial and based on those contained in the documents of the case.

- the Norwegian Government, represented by Helge Røstum and Marie Munthe-Kaas, acting as Agents;

- the EFTA Surveillance Authority ("ESA"), represented by Melpo-Menie Joséphidès, Kyrre Isaksen and Erlend Møinichen Leonhardsen, acting as Agents; and

- the European Commission ("the Commission"), represented by Elisabetta Montaguti and Jonathan Tomkin, acting as Agents,

having regard to the Report for the Hearing,

having heard the oral arguments of MH represented by Maral Houshmand; the Prosecuting Authority, represented by Mads Fredrik Baardseth; the Danish Government, represented by Josefine Farver Kronborg, acting as Agent; the Norwegian Government, represented by Helge Røstum; ESA, represented by Kyrre Isaksen; and the Commission, represented by Jonathan Tomkin, at the hearing on 22 November 2023,

gives the following

**Judgment**

## I LEGAL BACKGROUND

### EEA law

1 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; and EEA Supplement 2012 No 5, p. 243) ("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 of 7 December 2007 (OJ 2008 L 124, p. 20; and EEA Supplement 2008 No 26, p. 17) ("JCD No 158/2007"), and is referred to at point 1 of Annex V (Free movement of workers) and point 3 of Annex VIII (Right of establishment) to the EEA Agreement. Constitutional requirements were indicated by Iceland, Liechtenstein and Norway. The requirements were fulfilled by 9 January 2009, and the decision entered into force on 1 March 2009.

2 The third subparagraph of Article 1(1) of JCD No 158/2007 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 within the meaning of the Directive 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'.*

3 Together with JCD No 158/2007, the Contracting Parties issued a "Joint Declaration by the Contracting Parties to Decision of the EEA Joint Committee No 158/2007 incorporating Directive 2004/38/EC of the European Parliament and of the Council into the Agreement", which reads:

*The concept of Union Citizenship as introduced by the Treaty of Maastricht (now Articles 17 seq. EC Treaty) has no equivalent in the EEA Agreement. The incorporation of Directive 2004/38/EC into the EEA Agreement shall be without prejudice to the evaluation of the EEA relevance of future EU legislation as well as future case law of the European Court of Justice based on the concept of Union Citizenship. The EEA Agreement does not provide a legal basis for political rights of EEA nationals.*

*The Contracting Parties agree that immigration policy is not covered by the EEA Agreement. Residence rights for third country nationals fall outside the scope of the Agreement with the exception of rights granted by the Directive to third country nationals who are family members of an EEA national exercising his or her right to free movement under the EEA Agreement as these rights are corollary to the right of free movement of EEA nationals. The EFTA States recognise that it is of importance to EEA nationals making use of their right of free movement of persons, that their family members within the meaning of the Directive and possessing third country nationality also enjoy certain derived rights such as foreseen in Articles 12(2), 13(2) and 18. This is without prejudice to Article 118 of the EEA Agreement and the future development of independent rights of third country nationals which do not fall within the scope of the EEA Agreement.*

4 Article 5 of the Directive, entitled "Right of entry", reads:

*1. Without prejudice to the provisions on travel documents applicable to national border controls, Member States shall grant Union citizens 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 Union citizens.*

*2. Family members who are not nationals of a Member State shall only be required to have an entry visa in accordance with Regulation (EC) No 539/2001 or, where appropriate, with national law. For the purposes of this Directive, possession of the valid residence card referred to in Article 10 shall exempt such family members from the visa requirement.*

*Member States shall grant such persons every facility to obtain the necessary visas. Such visas shall be issued free of charge as soon as possible and on the basis of an accelerated procedure.*

*3. The host Member State shall not place an entry or exit stamp in the passport of family members who are not nationals of a Member State provided that they present the residence card provided for in Article 10.*

*4. Where a Union citizen, or a family member who is not a national of a Member State, does not have the necessary travel documents or, if required, the necessary visas, the Member State concerned shall, before turning them back, give such persons every reasonable opportunity to obtain the necessary documents or have them brought to them within a reasonable period of time or to corroborate or prove by other means that they are covered by the right of free movement and residence.*

*5. The Member State may require the person concerned to report his/her presence within its territory within a reasonable and non-discriminatory period of time. Failure to comply with this requirement may make the person concerned liable to proportionate and non-discriminatory sanctions.*

5 Article 6 of the Directive, entitled "Right of residence for up to three months", reads:

*1. Union citizens 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.*

*2. The provisions of paragraph 1 shall also apply to family members in possession of a valid passport who are not nationals of a Member State, accompanying or joining the Union citizen.*

6 Article 7 of the Directive, entitled "Right of residence for more than three months", reads, in extract:

*1. All Union citizens 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*

*(b) have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State; or*

*(c) – are enrolled at a private or public establishment, accredited or financed by the host Member State on the basis of its legislation or administrative practice, for the principal purpose of following a course of study, including vocational training; and*

*– have comprehensive sickness insurance cover in the host Member State and assure the relevant national authority, by means of a declaration or by such equivalent means as they may choose, that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence; or*

*(d) are family members accompanying or joining a Union citizen who satisfies the conditions referred to in points (a), (b) or (c).*

*2. The right of residence provided for in paragraph 1 shall extend to family members who are not nationals of a Member State, accompanying or joining the Union citizen in the host Member State, provided that such Union citizen satisfies the conditions referred to in paragraph 1(a), (b) or (c).*

*…*

7 Chapter VI of the Directive entitled "Restrictions on the right of entry and the right of residence on grounds of public policy, public security or public health" contains Articles 27 to 33. Article 27 of the Directive, entitled "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.*

*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.*

8 Article 32 of the Directive, entitled "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.*

**National law**

9 Immigration to Norway is governed by the Act of 15 May 2008 No 35 relating to the admission of foreign nationals into the realm and their stay here (*lov 15. mai 2008 nr. 35 om utlendingers adgang til riket og deres opphold her (utlendingsloven)*) ("the Immigration Act").

10 Letter c of Section 66 of the Immigration Act reads, in extract:

*A foreign national without a residence permit may be expelled*

*…*

*c. when the foreign national has in the realm received a penalty or special sanction for an offence which is punishable by imprisonment, or for violation of one of the following sections of the penal code:*

*section 323 (minor theft)*

*section 326 (minor misappropriation)*

*section 334 (minor receiving of proceeds of a crime)*

*section 339 (minor money laundering)*

*section 362 (minor document forgery)*

*section 373 (minor fraud)*

11 The first paragraph of Section 70 of the Immigration Act reads:

*A foreign national may not be expelled if, in view of the seriousness of the offence and the foreign national's connection with the realm, expulsion would be a disproportionate measure against the foreign national personally or against the closest family members. In cases concerning children, the best interests of the child shall be a fundamental consideration.*

12 Letter e of the third paragraph of Section 108 of the Immigration Act reads:

*A penalty of a fine or imprisonment for a term not exceeding two years shall be applied to any person who:*

*...*

*e. with intent or negligence contravenes the entry prohibition in section 71, second paragraph, or section 124, first paragraph. If the foreign national does not have lawful residence in a Schengen country, the violation shall be punishable by fine only, unless the person in question is expelled due to punishment, exit from the Schengen Area has taken place or the return procedure has been applied but the exit has not taken place.*

13 Section 110 of the Immigration Act reads, in extract:

*Nationals of countries covered by the EEA Agreement, hereinafter referred to as EEA nationals, are subject to the provisions of this chapter. ...*

*Family members of an EEA national are subject to the provisions of this chapter as long as they accompany or are reunited with an EEA national. Family members of a Norwegian national are subject to the provisions of this chapter if they accompany or are reunited with a Norwegian national who returns to the*

*realm after having exercised the right to freedom of movement under the EEA Agreement or the EFTA Convention in another EEA country or EFTA country.*

*'Family member' means*

*a. a spouse …*

14 Section 111 of the Immigration Act reads, in extract:

*An EEA national who holds a valid identity card or passport has a right of residence for up to three months, provided that the person in question does not become an unreasonable burden for public welfare systems.*

*The first paragraph applies correspondingly to a family member who is not an EEA national, provided that the family member accompanies or is reunited with the EEA national and holds a valid passport.*

*…*

15 Section 122 of the Immigration Act reads, in extract:

*EEA nationals and their family members … 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.*

*…*

*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.*

*…*

16 Section 124 of the Immigration Act reads, in extract:

*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 the exit.*
>
> *…*

17 More detailed rules on the right of entry and residence are laid down in the Norwegian regulation of 15 October 2009 No 1286 on the admission of foreign nationals into the realm and their stay here (*forskrift 15. oktober 2009 nr. 1286 om utlendingers adgang til riket og deres opphold her (utlendingsforskriften*)).

18 Point 7.4 of the Circular of 5 July 2010 from the Directorate of Immigration on the lifting of a prohibition on entry or access to Norway for short visits (*Opphevelse av innreiseforbud eller adgang til Norge for kortvarig besøk*), last amended 28 November 2019 (RUDI-2010-69), reads:

> *Pursuant to Article 32 of the Citizens Rights Directive, an EEA national can retrospectively apply to have a prohibition on entry lifted on grounds of changes in the circumstances that formed the basis for the expulsion decision.*
>
> *When considering whether new circumstances indicate that a prohibition on entry for an EEA national should be lifted, it must be assessed whether expulsion is still necessary on public order or security grounds. For more detailed guidelines on such assessments, reference is made to UDI 2010–022. If public order or security grounds indicate that expulsion is no longer necessary, the prohibition on entry shall be lifted.*

19 Point 2.2 of the Circular of 18 March 2016 from the Ministry of Justice and Public Security (GI-2016-5) reads:

> *When the Directorate of Immigration, in connection with a request for deletion of SIS registration, becomes aware that a foreign national has been granted residence in another member country under the EEA rules, the Directorate of Immigration shall, on its own initiative, assess whether the expulsion [from] Norway may be maintained on grounds of public order or security, see the first paragraph of Section 122 of the Immigration Act, or whether the exclusion order must be lifted.*

## II FACTS AND PROCEDURE

20 MH is an Iranian national who came to Norway as an asylum seeker in 2008. He received the final rejection of his application for asylum from the Immigration Appeals Board (*Utlendingsnemnda (UNE)*) by decision of 4 April 2011, where a time limit of 28 February 2012 was set for exiting Norway and the Schengen Area.

21 MH did not leave Norway by the expiry of that time limit. On 19 May 2016, the Directorate of Immigration (*Utlendingsdirektoratet (UDI)*) adopted a decision on expulsion and an exclusion order prohibiting entry into Norway for five years, due to MH's failure to comply with the exit time limit.

22 By judgment of 23 February 2017 of Hålogaland Court of Appeal (*Hålogaland lagmannsrett*), MH was sentenced to nine months' imprisonment for storage and transport of hashish and marijuana, and for providing a false statement and using false identity papers during a police check. On 21 April 2017, Central Hålogaland Police District (*Midtre Hålogaland politidistrikt*) issued an advance notice of expulsion with reference to the conviction.

23 On 22 June 2017, the Directorate of Immigration adopted a decision on the expulsion of MH from Norway including a permanent exclusion order prohibiting entry into Norway, and registration in the Schengen Information System, making reference to the judgment of Hålogaland Court of Appeal. As no exit time limit was set, MH was under an obligation to leave Norway and the Schengen Area immediately.

24 After MH had been verified as an Iranian national by the Iranian authorities on 27 November 2018, MH was arrested by the Norwegian police on 6 February 2019 and was held in detention under the Immigration Act to implement the expulsion decisions and to carry out the expulsion to Iran. MH was expelled to Iran on 11 March 2019.

25 In 2020 MH was granted a residence permit with refugee status in Greece and issued with Greek identity papers. According to the request, MH subsequently travelled to Sweden, where he took up residence with his wife and her daughter born in 2006, both of whom are Norwegian nationals. MH and his wife married in 2019. The marriage was registered in the Swedish population register in 2021. MH's wife gave notice of moving from Norway to Sweden in November 2021, where she is still residing together with MH. MH is employed in Sweden. MH and his wife have a daughter together, who was born in Norway in March 2022.

26 On 24 May 2022, MH was arrested by Norwegian police in Moss, south of Oslo. He was initially arrested for driving while intoxicated. His wife and two children, one of whom is his daughter, were also in the car.

27 By indictment of 31 May 2022 of the East Police District (*Øst politidistrikt*), MH was indicted with a violation of letter e of the third paragraph of Section 108 of the Immigration Act, read in conjunction with the second paragraph of Section 71, for having stayed in the realm despite having being expelled from Norway and subject to a permanent exclusion order.

28 By judgment of 6 July 2022, Søndre Østfold District Court (*Søndre Østfold tingrett*) found MH guilty of having violated the aforementioned rules of the Immigration Act and sentenced him to one year's imprisonment. MH appealed against that judgment.

29 By judgment of 7 February 2023, Borgarting Court of Appeal (*Borgarting lagmannsrett)* arrived at the same result as the District Court. MH has appealed against that judgment to the Supreme Court.

30 On 21 April 2023, the Appeals Selection Committee of the Norwegian Supreme Court granted leave to appeal, and during the case preparation, the Supreme Court decided to request an Advisory Opinion from the Court. The request, dated 22 June 2023, was registered at the Court on the same date. The Supreme Court has submitted the following questions to the Court:

1. *Must Article 5(1) and/or Article 6(2) of Directive 2004/38/EC of the European Parliament and of the Council be interpreted as meaning that a third country national, who is married to an EEA national who has exercised his or her right of free movement by moving together with the third country national to another EEA State than the EEA State of which the spouse is a national, has a right of entry and residence in the spouse's home State for up to three months, even where the third country national, in the time before the marriage was entered into, was permanently expelled from the spouse's home State in accordance with national rules applicable to third country nationals?*

2. *If Question 1 is answered in the affirmative: Does Article 32 of Directive 2004/38/EC of the European Parliament and of the Council apply, potentially by analogy, in a situation as described in Question 1, with the result that the national authorities in the State of entry may require that the third country national files an application to have the exclusion order lifted before the person in question enters that State?*

3. *Does Article 36 of Directive 2004/38/EC of the European Parliament and of the Council or other EEA law obligations restrict the EEA States' possibility to sanction violations of national decisions on exclusion orders in a situation as described in Question 1 and, if so, in what manner?*

31 Reference is made to the Report for the Hearing for a fuller account of the legal framework, the facts, the procedure and the proposed answers submitted to the Court. Arguments of the parties are mentioned or discussed hereinafter only insofar as is necessary for the reasoning of the Court.

## III ANSWERS OF THE COURT

### Question 1

32 By its first question, the referring court asks, in essence, whether the Directive grants a third-country national who is a family member of an EEA national who has exercised her right to move to and taken up residence in an EEA State other than that of her origin, a right of entry and short-term residence in the EEA national's State of origin, even where the third country national has, prior to becoming a beneficiary of the Directive,

been the subject of a decision of exclusion from the EEA national's State of origin in accordance with national rules applicable to third country nationals.

33 The Norwegian Government argues that MH's situation is governed not by the provisions of the Directive, but by the provisions of national immigration law. The Norwegian Government argues that Articles 5 and 6 of the Directive do not provide any derived rights of entry and temporary residence in a situation in which a third country national returns with a family member who is an EEA national to his or her EEA State of origin. In this respect, the Norwegian Government asserts that it is not aware of any relevant case law concerning this situation. Secondly, the Norwegian Government argues that any derived rights under Article 5 and 6 of the Directive, under no circumstances, may apply where the third country national was lawfully expelled and excluded from an EEA State prior to becoming a family member of a national of that EEA State.

34 MH, the Norwegian prosecuting authority, ESA and the Commission submit that the Directive confers derived rights on a third country national returning as a family member of an EEA national who returns to his or her home EEA State.

35 Therefore, the Court will consider first the rights conferred on third country national family members of EEA nationals with regard to the EEA State of origin and then the effect of a prior exclusion order on these rights.

*Rights conferred on third country national family members of EEA nationals with regard to the EEA State of origin*

36 The Court observes that the objective of the Directive is, above all, to facilitate and strengthen the exercise of the primary and individual right to move and reside freely within the territory of the EEA States. Recital 5 of the Directive states that that right should, if it is to be exercised under objective conditions of dignity, be also granted to the family members of EEA nationals, irrespective of nationality (see the judgment of 26 July 2011 in *Arnulf Clauder*, E-4/11, paragraph 36).

37 Whilst the provisions of the Directive do not confer any autonomous right on family members of an EEA national who are not nationals of an EEA State, any rights conferred on them by provisions of EEA law are rights derived from the exercise by an EEA national of his or her freedom of movement (see, inter alia, the judgment of 13 May 2020 in *Campbell*, E-4/19, paragraphs 51, 55 and 57 and case law cited).

38 It should further be observed that, in accordance with Article 3(1) of the Directive, EEA nationals who move to or reside in an EEA State other than that of which they are a national, and their family members, as defined in point 2 of Article 2, who accompany or join them, fall within the scope of the directive and are beneficiaries of the rights conferred by it (see the judgment in *Arnulf Clauder*, E-4/11, cited above, paragraph 37).

39 In the present case, it is common ground that MH's spouse, who is a Norwegian citizen and, accordingly, an EEA national, has exercised her freedom of movement by moving

to and taking up residence in another EEA State.

40 It is also common ground that MH, by reason of his marriage to an EEA national, lived with his spouse in Sweden by virtue of the derived right of residence conferred by the Directive on family members of EEA nationals. According to the information put before the Court, MH and his spouse are lawfully residing in Sweden.

41 It follows that MH and his spouse are "beneficiaries" of the Directive, within the meaning of Article 3(1) thereof.

42 The Court observes that MH wished to exercise a derived right of entry and short-term residence in order to accompany his spouse to the EEA State of which she is a national, namely Norway.

*Right of entry*

43 On the question of whether a third country national has a derived right of entry into the EEA State of the spouse's origin, it is to be noted that Article 5 of the Directive governs the right of entry and conditions for entry into the territory of the EEA States. The wording of Article 5(1) refers to EEA States and does not draw a distinction on the basis of the EEA State of entry. Accordingly, that provision, including the formalities connected with the exercise of the right of entry provided for therein, apply to a third-country national spouse of an EEA national. Thus, there is nothing in Article 5 indicating that the right of entry of family members of the EEA national who are not nationals of an EEA State is limited to EEA States other than the EEA State of origin of the EEA national (compare the judgment of 18 December 2014 in *McCarthy and Others*, C-202/13, EU:C:2014:2450, paragraph 41).

44 Where third-country family members seeking to accompany or join an EEA national are subject to a visa requirement, Article 5(2) of the Directive imposes an obligation on EEA States to grant such family members every facility to obtain the necessary visas. In that regard, it is settled case law that the Directive requires EEA States to issue a visa without delay and, as far as possible, at the place of entry into national territory (compare the judgment of 14 April 2005 in *Commission* v *Spain*, C-157/03, EU:C:2005:225, paragraph 33 and case law cited).

45 Furthermore, pursuant to Article 5(2) of the Directive, the EEA States are, in principle, required to recognise a residence card issued under Article 10 for the purposes of entry into their territory without a visa (compare the judgment in *McCarthy and Others*, C-202/13, cited above, paragraphs 53 and 62).

46 Accordingly, it must be held that a family member of an EEA national, such as MH in the present proceedings, is entitled to enter the territory of the EEA national's State of origin.

*Right of residence*

47 With regard to the question, as referred, on a right of temporary or short-term residence pursuant to Article 6 of the Directive, the Court recalls that it has held – in particular in *Gunnarsson*, *Jabbi* and *Campbell* – that, in the context of EEA law, the fact that no parallel to Article 21 of the Treaty on the Functioning of the European Union exists entails that the Directive must be interpreted differently in order to realise the Directive's objective, which is, above all, to facilitate and strengthen the exercise of the primary and individual right to move and reside freely within the territory of the EEA States. Consequently, in order to ensure effectiveness and to achieve homogeneity in the area of the free movement of persons, when an EEA national has created or strengthened family life with a third-country national during genuine residence in another EEA State, the provisions of the Directive apply when that EEA national returns to their EEA State of origin (see the judgment of 27 June 2014 in *Gunnarsson*, E-26/13, paragraph 82; the judgment of 26 July 2016 in *Jabbi*, E-28/15, paragraphs 77 to 80 and case law cited; and the judgment in *Campbell*, E-4/19, cited above, paragraphs 55 to 58 and case law cited).

48 Were it otherwise, an EEA national would be deterred from leaving his or her EEA State of nationality, and from exercising his or her rights under the Directive in another EEA State, if, subsequently, he or she would be unable to continue, or would be obstructed from continuing, any genuine family life formed with a third-country national in his or her home EEA State. Where an EEA national creates or strengthens family life during a genuine residence in another EEA State under Article 7 of the Directive, the effectiveness of that right requires that the family life may continue when the EEA national returns to the EEA State of origin through the grant of a derived right of residence to the third-country national family member (see the judgments in *Jabbi*, E-28/15, cited above, paragraphs 74 to 79 and case law cited; and *Campbell*, E-4/19, cited above, paragraphs 61 and 62 and case law cited).

49 The Norwegian Government argues that a potential derived right to short-term residence pursuant to Article 6 of the Directive must be construed differently since, in its view, the EEA national's family life would be less severely affected if his or her family member could not accompany him or her when they only plan to stay temporarily.

50 However, in the present case, as in *Jabbi*, it appears to the Court, and which it is for the referring court to verify, that MH's Norwegian spouse has made use of her right of free movement to move to and reside in Sweden under Article 7 of the Directive, where she has established herself and strengthened her family life with MH. In that case, as in *Jabbi*, she may not be deterred from exercising that right by an obstacle to the entry and residence of her third country national spouse, MH, in her State of origin, Norway. An obstacle to her third country national spouse's entry to and residence in Norway would as such interfere with the effectiveness of her right to move to and reside in another EEA State under Article 7 in the first place.

51 Genuine residence in the host EEA State goes hand in hand with creating and

strengthening family life in that State. As such, residence in the host EEA State pursuant to and in conformity with the conditions set out in Article 7(1) and (2) of the Directive is evidence of settling there and enables the EEA national to create or strengthen family life, giving rise to a derived right of residence. Any assessment of the condition of residence must be made bearing in mind the overall context of the Directive. In this context it may be recalled that Article 6 concerns a right of residence for an EEA national in another EEA State for up to three months while Article 7 concerns the right of residence for an EEA national in another EEA State for more than three months. Residence pursuant to Article 7 implies that the EEA national has an intention to settle there, which is not the case for residence pursuant to Article 6. Residence, which is a direct corollary to the exercise of free movement, may ultimately culminate in the right of permanent residence for the EEA national in question. The Court recalls that residence for the purpose of Article 7 does not require constant physical presence and allows temporary absences as part of the enjoyment of the right of residence itself (see the judgment in *Campbell*, E-4/19, cited above, paragraphs 62 to 65 and case law cited).

52 It follows that the Directive confers a right of residence on a third country national family member of an EEA national where an EEA national who has exercised his or her right of free movement to move to and genuinely reside in another EEA State during which he or she has created or strengthened family life, returns to his or her EEA State of origin together with a family member, such as a spouse who is a national of a third country.

*The effect of a prior exclusion order on a derived right of residence, in the light of Articles 27 and 28 of the Directive*

53 The Norwegian prosecuting authority submits that even though the derived rights would seem to arise immediately, *ipso facto*, from the time when MH married his spouse, the acquisition of this "new" legal position cannot set aside the existing entry ban and render it null and void. Consequently, the Directive may only confer derived rights in EEA States which the third country national has not been previously excluded from. The Norwegian Government, neither in its written observations nor at the oral hearing, has put forward any specific arguments in this regard.

54 ESA submits that any limitations on the derived rights must be justified according to Article 27(2) of the Directive. As MH at the time when the expulsion and exclusion order was determined did not have any derived rights pursuant to the Directive the referring court must now assess whether "upholding" the decision is compatible with the Directive. In this situation, ESA argues that the previous decisions may not be automatically invalid but that there would be a strong presumption that the previous decision is not compatible with Article 27(2) of the Directive.

55 MH and the Commission submit that the applicability of the derived rights, under no circumstances, is affected by any prior expulsion and exclusion order. Therefore, MH may not be refused entry and residence in the territory of his spouse's EEA State of origin simply by pointing to the prior expulsion and exclusion order, without first verifying compliance with the pertinent substantive and procedural requirements in

Chapter VI of the Directive.

56 The Court observes that the decision by the Norwegian authorities, penalising the family member of an EEA national for entering into and/or residing in its territory in breach of the national rules on immigration, constitutes, by its very nature, a restriction on the freedom of movement and residence of EEA nationals and their family members, as set out in the provisions of the Directive (compare the judgment of 25 July 2002 in *MRAX*, C-459/99, EU:C:2002:461, paragraph 78 and case law cited).

57 It must be pointed out that the right of free movement of nationals and their family members is not unconditional but may be subject to the limitations and conditions imposed by the EEA Agreement and by the measures adopted to give it effect (see the judgment of 22 July 2013 in *Wahl*, E-15/12, paragraph 80 and case law cited). In that regard, it should be recalled that Article 27(1) of the Directive, which falls within Chapter VI of that directive, entitled "Restrictions on the right of entry and the right of residence on grounds of public policy, public security and public health", gives concrete expression to Article 1(c) thereof. Subject to the provisions of that chapter, EEA States may restrict the freedom of movement and residence of EEA nationals and their family members, irrespective of nationality, on grounds of public policy, public security or public health, provided that those grounds are not invoked to serve economic ends (see the judgment of 21 March 2024, *LDL*, E-5/23, paragraph 52 and case law cited).

58 From the time when the national of a third country who is a family member of an EEA national derives rights of entry and residence from the Directive, that EEA State may restrict these rights only in compliance with Articles 27 and 35 of the Directive (compare the judgment in *McCarthy and Others*, C-202/13, cited above, paragraph 45 and case law cited).

59 The Court observes that no allegation of abuse of rights or fraud in relation to Article 35 of the Directive has been made in the present proceedings. The Court recalls that any assessment of fraud or abuse of rights by a national court must be conducted on a case-by-case basis (see, to this effect, the judgment of 9 February 2021 in *Kerim*, E-1/20, paragraphs 35 and following and case law cited).

60 Compliance with Article 27 of the Directive is required, in particular, where the EEA State wishes to penalise the national of a third country for entering into and/or residing in its territory in breach of the national rules on immigration before becoming a family member of an EEA national (compare the judgment of 25 July 2008 in *Metock and Others*, C-127/08, EU:C:2008:449, paragraph 96).

61 Therefore, for a decision such as that at issue in the main proceedings to be permitted under EEA law, it must be shown, inter alia, that the measure was taken on the grounds listed in Article 27(1) of the Directive (see the judgment in *Wahl*, E-15/12, cited above, paragraph 82).

62 Article 27(2) of the Directive specifies explicitly that any previous criminal convictions shall not in themselves constitute grounds for adopting restrictive measures. However,

the derogations from the free movement of persons must be interpreted restrictively, with the result that a previous conviction can justify denying entry only in so far as the circumstances which gave rise to that conviction are evidence of personal conduct constituting a present threat to the requirements of public policy and/or public security (see the judgment of 21 April 2021 in *The Norwegian Government* v *L*, E-2/20, paragraphs 31 and 32 and case law cited).

63 It is settled case law that fundamental rights form part of the general principles of EEA law. The Court has held that the provisions of the European Convention on Human Rights ("ECHR") and the judgments of the European Court of Human Rights are important sources for determining the scope of these fundamental rights. In that regard, it must be noted that the EEA States, in particular their courts, must not only interpret their national law in a manner consistent with EEA law but are also under an obligation to ensure that the interpretation and application of acts incorporated into the EEA Agreement does not result in a conflict with fundamental rights protected by EEA law (see the judgment in *Kerim*, E-1/20, cited above, paragraph 43 and case law cited). Moreover, recital 5 of the Directive links the derived family rights to the EEA national's freedom and dignity while recital 6 confirms that "maintaining the unity of the family in a broader sense" is one of the objectives of the Directive (see the judgment in *Kerim*, E-1/20, cited above, paragraph 42 and case law cited).

64 While EEA States essentially retain the freedom to determine the requirements of public policy and public security in accordance with their 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 justification 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 without any control by the EEA institutions (see the judgment in *Wahl*, E-15/12, cited above, paragraph 83 and case law cited, and compare the judgment of 17 November 2011 in *Gaydarov*, C-430/10, EU:C:2011:749, paragraph 32 and case law cited).

65 The concept of "public policy" presupposes, in any event, the existence, in addition to the disturbance of the social order which any infringement of the law involves, of a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. As regards "public security", this concept covers both the internal security of an EEA State and its external security and that, consequently, a threat to the functioning of institutions and essential public services and the survival of the population, as well as the risk of a serious disturbance to foreign relations or to peaceful coexistence of nations, or a risk to military interests, may affect public security (compare the judgment of 13 September 2016 in *Rendón Marín*, C-165/14, EU:C:2016:675, paragraph 83 and case law cited). The fight against crime in connection with drug trafficking as part of an organised group, active involvement in the intended expansion of an international organisation associated with organised crime, or against terrorism is included within the concept of "public security" (see the judgment in *Wahl*, E-15/12, cited above, paragraphs 88 to 91 and case law cited, and compare the judgment of 13 September 2016 in *CS*, C-304/14, EU:C:2016:674, paragraph 39 and case law

cited).

66 Criminal offences can constitute 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 may be covered by the concept of "imperative grounds of public security", as long as the manner in which such offences were committed discloses particularly serious characteristics. Nevertheless, the personal conduct of the individual concerned must represent a genuine, serious and present threat, which implies the propensity of the individual to act in the same way in the future (see the judgment in *The Norwegian Government* v *L*, E-2/20, cited above, paragraph 37 and case law cited).

67 In the case of a national of a third country who is the spouse of an EEA national, a strict interpretation of the concept of public policy also serves to protect the latter's right to respect for his or her family life under Article 8 ECHR (compare the judgment of 31 January 2006 in *Commission* v *Spain*, C-503/03, EU:C:2006:74, paragraph 47 and case law cited).

68 It appears from the reference that the primary basis for the decision at issue adopted in respect of MH in the main proceedings is that he infringed a prior exclusion order taken before he acquired derived free movement rights under the Directive. Indeed, it seems as if the decision in the main proceedings was taken automatically, without account being taken of the specific situation of MH.

69 The Court notes that the adoption of such a restrictive measure cannot be based on the prior exclusion order taken before the individual concerned acquired his or her derived free movement rights under the Directive. It can result where appropriate only from a specific assessment by the national authorities of all the current and relevant circumstances of the case, in the light of the principle of proportionality and of the fundamental rights whose observance the Court ensures (see the judgment in *The Norwegian Government* v *L*, E-2/20, cited above, paragraphs 32 and 52 and case law cited, and compare, to that effect, the judgments in *CS*, C-304/14, cited above, paragraph 41, *Rendón Marín*, C-165/14, cited above, paragraph 85, and *Commission* v *Spain*, C-503/03, cited above, paragraphs 52 and 53).

70 In those circumstances, subject to verification by the national court, it would seem as if the concept of public policy within the meaning of Chapter VI of the Directive does not correspond to that in the national immigration law on which the 2017 permanent exclusion order is based. As stated in the request, the exclusion order seems to be based on a national provision, according to which a foreign national without a residence permit can be expelled if he or she is convicted of an offence which is punishable by imprisonment. Thus, unlike the rules laid down by Chapter VI of the Directive, such rules seem to provide for the possibility of an expulsion and exclusion order without a specific assessment of, inter alia, the threat represented by the person concerned to a fundamental interest of Norwegian society (compare the judgment in *Commission* v *Spain*, C-503/03, cited above, paragraph 48).

71 It follows that the assessments guiding the application of that national immigration law, like those forming the basis of a criminal conviction or the issuance of an alert for a national of a third country in the Schengen Information System for the purposes of refusing entry (compare the judgment of 11 June 2015 in *Zh. and O.*, C-554/13, EU:C:2015:377, paragraph 59 and case law cited, and the judgment in *Commission* v *Spain*, C-503/03, cited above, paragraph 59), do not necessarily coincide with the assessments to be carried out from the point of view of the interests inherent in protecting public policy and public security under Article 27(2) of the Directive.

72 Thus, under such circumstances, the previous exclusion order cannot by itself constitute grounds for restricting free movement rights, since it did not individually examine whether the individual represents a genuine, present and sufficiently serious threat to one of the fundamental interests of society, which is the sole possible justification for a restriction on the rights conferred on him by EEA law.

73 The Court observes that to allow measures restricting the right of entry and residence of an EEA national or a member of his family because of a violation of national immigration law, without assessment of his personal conduct or of any present danger that he could represent for the requirements of public policy or public security, would be to render the exercise of the right to free movement subject to a limitation not provided for either by the EEA Agreement or by the Directive.

74 Thus, under such circumstances, the original expulsion decision can no longer be considered enforceable towards a person such as MH, who has become a family member under the Directive (compare the judgment in *Commission* v *Spain*, C-503/03, cited above, paragraphs 55 and 59). Consequently, in such a case, should the EEA State wish to restrict his entry into its territory it must conduct a new assessment and an expulsion can only take place provided that it is in conformity with the requirements of Article 27 of the Directive. Pending the outcome of such an assessment, his presence on the territory of the EEA State concerned is to be regarded as lawful.

75 In the light of the foregoing, the answer to the first question is that the rules laid down by Chapter VI of the Directive must be interpreted as not permitting an EEA State to refuse entry and residence in its territory to a third-country national spouse of an EEA national on the sole ground that the third-country national spouse has been the subject, in the past, of an exclusion order on the basis of national measures imposed in connection with past infringements at a time before he or she acquired derived free movement rights under the Directive, without first verifying that the presence of that person in the territory of the EEA State constitutes a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, within the meaning of Article 27(2) of the Directive.

**Question 2**

76 By its second question, the referring court asks whether Article 32 of the Directive applies, potentially by analogy, in a situation as described in the first question, with the result that the national authorities in the State of entry may require that the third-country

national files an application to have the exclusion order lifted prior to entering that State.

77 Since the freedom of movement for persons is one of the foundations of the Directive, any limitations to that freedom must be interpreted strictly. In the light of the context and the aims pursued, the provisions of the Directive cannot be interpreted restrictively, and must not in any event be deprived of their practical effect (see the judgment in *Campbell*, E-4/19, cited above, paragraph 57 and case-law cited, and compare the judgment of 22 June 2021 in *FS*, C-719/19, EU:C:2021:506, paragraph 88 and case law cited).

78 The first subparagraph of Article 32(1) of the Directive states that persons subject to a decision ordering their exclusion 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 that order, by putting forward arguments to establish that there has been a material change in the circumstances which justified the adoption of the decision.

79 Article 32(2) of the Directive states, however, that those persons have "no right of entry to the territory" of the EEA State concerned while their application is being considered. The Court observes that, for the review procedure to be available in the specific context of Article 32, the measure at issue must have been validly adopted in accordance with EEA law. Thus, such a measure must, inter alia, be adopted on grounds of public policy or public security within the meaning of the Directive and based on an individual assessment. As noted above, subject to verification by the national court, the 2017 permanent exclusion order did not include any assessment relating specifically to the genuine, present and sufficiently serious nature of any threat which MH's conduct might represent with regard to a fundamental interest of Norwegian society. Thus, Article 32 is not applicable to the dispute before the referring court (compare the judgment of 4 October 2012 in *Byankov*, C-249/11, EU:C:2012:608, paragraph 68).

80 The Court observes that to interpret Article 32 of the Directive, either directly or by analogy, as meaning that a beneficiary within the meaning of Article 3(1) who has been the subject of an exclusion order not imposed within the legal framework which implements the Directive could be obliged, in all cases, to file an application to have the exclusion order lifted in order to be able to rely on his or her rights of entry and residence, would render their exercise subject to a limitation not provided for by the Directive, and thereby deprive the Directive of its effectiveness.

81 Thus, Article 32 of the Directive has no application, directly or by analogy, in a situation, where a refusal of the right of entry and residence is not founded on the existence of a genuine, present and sufficiently serious threat to public policy or public security.

82 It should be observed that, at the hearing, the Danish and Norwegian Governments raised concerns that if Article 32 of the Directive were not to apply by analogy in a situation such as in the main proceedings, the EEA State would not be in a position to assess effectively whether the individual concerned is currently a threat to public policy

or public security.

83 However, the Court notes that EEA States have mechanisms which may allow them to consider the grounds of public policy or public security for the purpose of restricting rights in accordance with the Directive.

84 In particular, Article 5(5) of the Directive provides that the EEA State may require the person concerned to report his or her presence within its territory within a reasonable and non-discriminatory period and that any failure to comply with that requirement may be punishable by proportionate and non-discriminatory sanctions (compare the judgment of 6 October 2021 in *A (Crossing of borders in a pleasure boat)*, C-35/20, EU:C:2021:813, paragraphs 88 to 91).

85 Similarly, it should be noted that where a beneficiary of the Directive comes into contact with the authorities of the host EEA State shortly after the expiry of the period laid down for his or her voluntary departure from that territory, that EEA State may check whether the presence of that person in its territory is justified under the Directive (compare the judgment in *FS*, C-719/19, cited above, paragraph 100).

86 Moreover, in the absence of relevant EEA rules, in accordance with the principle of national procedural autonomy, it is for the national legal order of each EEA State to lay down rules governing the legal procedures to ensure the protection of the rights which individuals acquire under EEA law, while respecting the requirements of equivalence and effectiveness. This entails that the procedural rules governing the protection of rights under EEA law must thus be no less favourable than those governing similar domestic actions (principle of equivalence) and must not be framed in such a way as to render impossible in practice or excessively difficult the exercise of rights conferred by EEA law (principle of effectiveness) (see the judgment of 4 July 2023, *RS* v *Steuerverwaltung des Fürstentums Liechtenstein*, E-11/22, paragraph 55 and case law cited).

87 In the light of the foregoing, the answer to the second question is that Article 32 of the Directive has no application, directly or by analogy, where a refusal of the right of entry and residence is not founded on the existence of a genuine, present and sufficiently serious threat to public policy or public security.

**Question 3**

88 By its third question, the referring court seeks guidance, in essence, on whether Article 36 of the Directive or any other EEA law obligations restrict the EEA States' possibility to sanction violations of national decisions on exclusion orders. In particular, the Court enquires whether there are any limitations on the EEA States' use of sanctions in a case such as the present, in terms of types of sanctions and sentencing.

89 Article 36 of the Directive provides that EEA States shall lay down provisions on the sanctions applicable for breaches of national rules adopted for the implementation of the Directive and shall take the measures required for their application. Article 36,

therefore, is not applicable in a situation such as that in the present case.

90 Furthermore, the Court observes that it appears from the request that MH was required to apply for the lifting of the exclusion order before entering Norway. As stated above, to require a beneficiary of the Directive who has been the subject of an exclusion order not imposed within the legal framework which implements the Directive, in all cases, to file an application to have the exclusion order lifted in order to be able to rely on his or her rights of entry and residence rights, would render their exercise subject to a limitation not provided for by the Directive, and thereby deprive the Directive of its effectiveness.

91 EEA States cannot prohibit forms of conduct that are required by, or permitted under, EEA law and, as a consequence, cannot impose penalties on individuals that contravene those prohibitions (compare, for example, the judgment of 5 April 1979 in *Ratti*, 148/78, EU:C:1979:110, paragraph 24, and the judgment of 17 April 2008 in *Van Leuken*, C-197/06, EU:C:2008:229, paragraph 42 and case law cited).

92 In this regard it should be observed, as held above, that compliance with Article 27 of the Directive is required, in particular, where the EEA State wishes to penalise the national of a third country for entering into and/or residing in its territory in breach of the national rules on immigration before becoming a family member of an EEA national (compare the judgment in *Metock and Others*, C-127/08, cited above, paragraph 96).

93 As noted above, a person such as MH, after acquiring derived free movement rights under the Directive as a family member of an EEA national, was entitled to enter and/or reside in the territory of his spouse's EEA State of origin. Hence, in the absence of a new assessment in compliance with the Directive, his or her presence on the territory of the EEA State is lawful as a matter of EEA law. Accordingly, such a person cannot be made subject to sanctions under national law for having breached the original exclusion decision by exercising the derived rights conferred on him or her by the Directive.

94 Thus, the answer to the third question is that compliance with Article 27 of the Directive is required, in particular, where the EEA State wishes to penalise the national of a third country for entering and/or residing in its territory in breach of the national rules on immigration before becoming a family member of an EEA national. In the absence of a new assessment in compliance with the Directive, his or her presence on the territory of the EEA State is lawful as a matter of EEA law. Accordingly, such a person cannot be made subject to sanctions under national law for having breached the original exclusion decision by exercising the derived rights conferred on him or her by the Directive.

## IV COSTS

95 Since these proceedings are a step in the proceedings pending before the national court, any decision on costs for the parties to those proceedings is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties,

are not recoverable.

On those grounds,

THE COURT

in answer to the questions referred to it by the Supreme Court of Norway hereby gives the following Advisory Opinion:

1. **The rules laid down by Chapter VI of 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 must be interpreted as not permitting an EEA State to refuse entry and residence in its territory to a third-country national spouse of an EEA national on the sole ground that the third-country national spouse has been the subject, in the past, of an exclusion order on the basis of national measures imposed in connection with past infringements at a time before he or she acquired derived free movement rights under the Directive, without first verifying that the presence of that person in the territory of the EEA State constitutes a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, within the meaning of Article 27(2) of the Directive.**

2. **Article 32 of Directive 2004/38/EC has no application, directly or by analogy, where a refusal of the right of entry and residence is not founded on the existence of a genuine, present and sufficiently serious threat to public policy or public security.**

3. **Compliance with Article 27 of Directive 2004/38/EC is required, in particular, where the EEA State wishes to penalise the national of a third country for entering and/or residing in its territory in breach of the national rules on immigration before becoming a family member of an EEA national. In the absence of a new assessment in compliance with the Directive, his or her presence on the territory of the EEA State is lawful as a matter of EEA law. Accordingly, such a person cannot be made subject to sanctions under national law for having breached the original exclusion decision by exercising the derived rights conferred on him or her by the Directive.**

Páll Hreinsson Bernd Hammermann Michael Reiertsen

Delivered in open court in Luxembourg on 2 July 2024.

Ólafur Jóhannes Einarsson
Registrar

Páll Hreinsson
President