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Judgment in Case E-6/23 *Criminal Proceedings against MH*

DERIVED RIGHTS OF AN EEA NATIONAL'S THIRD-COUNTRY SPOUSE SUBJECT TO A PRIOR NATIONAL EXPULSION DECISION

In a judgment delivered today, the Court answered questions referred to it by the Supreme Court of Norway (*Norges Høyesterett*) in criminal proceedings against MH concerning the interpretation of Directive 2004/38/EC ("the Directive").

MH is an Iranian national who came to Norway as an asylum seeker in 2008. He received the final rejection of his application from the Immigration Appeals Board by decision of 4 April 2011, having until 28 February 2012 for exiting Norway and the Schengen Area. However, MH did not leave Norway before the expiry of that time limit and consequently, the Directorate of Immigration adopted a decision on expulsion and an exclusion order prohibiting MH's entry into Norway for five years. On 23 February 2017, he 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. Later that year, the Directorate of Immigration adopted a decision on the expulsion of MH from Norway including a permanent exclusion order prohibiting entry into Norway. MH was then arrested by the Norwegian police on 6 February 2019 and expelled to Iran on 11 March 2019. In 2020 MH was granted a residence permit with refugee status in Greece. He subsequently travelled to Sweden, where he took up residence with his wife and her daughter, both of whom are Norwegian nationals. MH and his wife married in 2019. MH is employed in Sweden. MH and his wife have a daughter together, who was born in Norway in March 2022.

On 24 May 2022, MH was arrested in Moss, Norway, initially for driving while intoxicated. He was subsequently indicted with a violation of the Immigration Act, for staying in the realm despite having been expelled from Norway and subject to a permanent exclusion order. By judgment of 6 July 2022, Søndre Østfold District Court (*Søndre Østfold tingrett*) found MH guilty. MH appealed against that judgment. Subsequently, Borgarting Court of Appeal (*Borgarting lagmannsrett*) arrived at the same result as the District Court. MH appealed against the latter judgment to the Supreme Court, which requested an Advisory Opinion from the Court. The Supreme Court submitted three questions on 22 June 2023.

By its first question, the referring court asked, 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 an exclusion from the EEA national's State of origin in accordance with national rules applicable to third country nationals. The Court held 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.

By its second question, the referring court asked 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. The Court held that 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.

By its third question, the referring court essentially sought guidance on whether Article 36 of the Directive or any other EEA law obligations restrict the EEA State's possibility to sanction violations of national decisions on exclusion orders. In particular, the referring court enquired 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. The Court held that Article 36 is not applicable in a situation such as in the present case. Compliance with Article 27 of the Directive is however 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 expulsion decision by exercising the derived rights conferred on him or her by the Directive.

The full text of the judgment may be found on the Court's website: www.eftacourt.int.