



E-6/23-15

REPORT FOR THE HEARING

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.

I Introduction

1. By letter of 22 June 2023, registered at the Court on the same date, the Supreme Court of Norway (*Norges Høyesterett*) requested an Advisory Opinion in the case pending before it between MH and the Prosecuting Authority (*Påtalemyndigheten*).
2. The case before the Supreme Court concerns the question whether MH, the appellant in the main proceedings, who is a third country national, can be sanctioned for violating an exclusion order (*innreiseforbud*) prohibiting entry into Norway or whether MH has derived rights as a spouse of an EEA national which preclude him from being sanctioned for violation of the exclusion order. MH was found guilty of the violation and sentenced to one year's imprisonment both in Søndre Østfold District Court (*Søndre Østfold tingrett*) and Borgarting Court of Appeal (*Borgarting lagmannsrett*).

II Legal background

EEA law

3. 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”) 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) (“Decision No 158/2007”), 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 later fulfilled on 9 January 2009, and the decision entered into force on 1 March 2009.

4. Together with the Decision of the EEA Joint Committee, the Contracting Parties adopted a Joint Declaration by the Contracting Parties to Decision 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.

5. The third subparagraph of Article 1(1) of Decision 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'.

6. Article 5 of the Directive 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.

7. Article 6 of the Directive 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.

8. 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 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.

9. Article 32 of the Directive 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.

10. Article 36 of the Directive reads:

Member States shall lay down provisions on the sanctions applicable to breaches of national rules adopted for the implementation of this Directive and shall take the measures required for their application. The sanctions laid down shall be effective and proportionate. Member States shall notify the Commission of these provisions not later than 30 April 2006 and as promptly as possible in the case of any subsequent changes.

National law and practice

11. 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”).

12. Section 70 of the Immigration Act reads, in extract:

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.

...

13. 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.

14. 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 ...

15. 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.

16. 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.

...

17. 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.

18. More detailed rules on the right of entry and residence are laid down in 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)*).

19. Point 7.4 of the Guidelines 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.

20. 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.

III Facts and procedure

21. 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.

22. 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.

23. 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 the use of 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.

24. 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 (SIS), 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.

25. Following MH being 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.

26. 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 spouse and her daughter born in 2006, both of whom are Norwegian nationals. MH and his spouse got married in 2019. The marriage was registered in the Swedish population register in 2021. The spouse gave notice of moving from Norway to Sweden in November 2021, where she is still resident together with MH. MH has employment in Sweden. MH and his spouse have a daughter together, who was born in Norway in March 2022.

27. On 24 May 2022, MH was arrested by Norwegian police in Moss, south of Oslo. He was initially arrested for driving while intoxicated. His spouse and two children, including the daughter he and his spouse have together, were also in the car.

28. 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.

29. By judgment of 6 July 2022, Søndre Østfold District Court 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.

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

31. On 21 April 2023, the Appeals Selection Committee of the Supreme Court granted leave to appeal.

32. Against this background, the Supreme Court of Norway decided to refer 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?

IV Written observations

33. 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:

- MH, represented by Maral Houshmand, advocate;
- the Prosecuting Authority, represented by Mads Fredrik Baardseth and Thomas Frøberg, public prosecutors;
- 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.

V Proposed answers submitted

MH

34. MH proposes that the questions referred be answered as follows:

Question 1:

Article 5(1) and/or Article 6(2) of Directive 2004/38/EC of the European Parliament and of the Council must 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 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.

Question 2:

Article 32 of the Directive 2004/38/EC of the European Parliament and of the Council does not apply, even by analogy, in a situation described by the answer to the first question.

Question 3:

Article 36 of the Directive 2004/38/EC of the European Parliament and of the Council or other EEA law obligations restricts the EEA States’ possibility to sanction violations of national decisions on exclusion orders in a situation as described by the answer to the first question.

The Prosecuting Authority

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

Question 1:

Article 5(1) and 6(2) of Directive 2004/38/EC do not confer upon an individual a right to enter and reside in an EEA state that the individual is previously excluded from as a third country national after he or she later becomes a family member of an EEA national.

Question 2:

Article 32(2) of Directive 2004/38/EC must apply by analogy in situations such as the present case, so that Norway legitimately and in accordance with the Directive can require the third country national family member to file an application to have the entry ban lifted before the person in question enters that state.

Question 3:

Article 36 of Directive 2004/38/EC allows EEA states to sanction non-compliance with entry bans, including through the use of criminal sanctions, as long as the sanction adheres to the principle of proportionality.

The Norwegian Government

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

Question 1:

Article 5(1) and/or 6(2) of Directive 2004/38/EC of the European Parliament and of the Council do not apply in a situation where a third country national, who is expelled and excluded from a EEA State in accordance with national rules on third country nationals, subsequently established a family life pursuant to the Directive with an EEA national of that state in another EEA State, and then returns with that EEA national to their home state.

Question 2:

Article 32 of Directive 2004/38/EC of the European Parliament and of the Council apply 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. The assessment of whether the exclusion order should be lifted must follow the rules of the Directive.

Question 3:

Article 36 does not preclude an EEA State from imposing sanctions for a breach that relates to an exclusion order adopted according to national rules on the expulsion and exclusion of third country nationals.

Article 36 does not preclude an EEA State from imposing sanctions such as imprisonment for breach of exclusion orders adopted according to national rules on expulsion and exclusion of third country nationals, where this is deemed necessary in order for the sanction to be effective and proportionate.

ESA

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

Question 1:

Third country nationals, such as MH, enjoy, from the moment they become a family member of an EEA national, the right of entry and residence in that State, pursuant to Article 5(1) and/or Article 6(2) of the Directive. Any expulsion decision and exclusion order against such a person must be in compliance with the Directive. In the present case there is strong presumption against compatibility, given that the decision was taken 6 years ago and based on a general legal basis applicable to third country nationals, allowing for expulsion and exclusion based on a wide range of criminal offences.

Question 2:

Article 32 does not apply, neither directly nor by analogy to a situation as that in the present case. Furthermore, ESA submits that the national authorities have an obligation to assess, ex officio, if an expulsion decision, including an exclusion order, adopted prior to a person obtaining rights under the Directive, is compatible with the Directive.

Question 3:

EEA law does not preclude EEA States from sanctioning violations of national decisions on exclusion orders, to the extent that the exclusion orders are in compliance with the Directive at the moment of sanctioning, and that the sanctions comply with the general principles of EEA law, in particular the principle of proportionality.

The Commission

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

Question 1:

Directive 2004/38/EC precludes legislation of an EEA State according to which a third-country national family member of an EEA national having exercised his or her right of free movement by moving together with the third-country national to an EEA State other than the EEA State of which the spouse is a national may be refused entry into the territory of the spouse's home State on the sole ground that the third-country national concerned, 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, without first verifying compliance with the pertinent substantive and procedural requirements laid down in Chapter VI of that Directive.

Questions 2 & 3:

Articles 32 and 36 of Directive 2004/38/EC have no application in a situation such as that at issue in the main proceedings.

Páll Hreinsson
Judge-Rapporteur