NORGES HØYESTERETT

EFTA Court
Rue du Fort Thüngen
1499 Luxembourg
Luxembourg

Doc 50

Case No 23-052214STR-HRET, criminal case, appeal against judgment: Request for an Advisory Opinion

1. INTRODUCTION AND BACKGROUND TO THE REQUEST

(1) The Supreme Court of Norway (*Norges Høyesterett*) hereby requests an Advisory Opinion from the EFTA Court in Case No 23-052214 MH (the appellant before the Supreme Court) against the Prosecuting Authority (*påtalemyndigheten*) (the respondent before the Supreme Court). The request is made pursuant to Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (SCA), see also Section 51a of the Norwegian Courts of Justice Act (*lov om domstolene*).

(2) The case concerns criminal sanctions for violation of a decision by the Norwegian immigration authorities on an exclusion order (*innreiseforbud*) prohibiting entry into Norway, see letter e of the third paragraph of Section 108 of the Immigration Act (*utlendingsloven*), read in conjunction with the second paragraph of Section 71. MH (hereinafter referred to as "MH") was indicted for violation of an exclusion order and was sentenced by the Court of Appeal (*lagmannsretten*) to one year's imprisonment for having violated the prohibition. In his appeal to the Supreme Court, MH relied on Article 6(2) of Directive 2004/38/EC of the European Parliament and of the Council (**the Citizenship Directive**), which confers a right of residence for up to three months on EEA nationals and certain specified family members.

(3) The request for an Advisory Opinion concerns the interpretation of Articles 5 and 6, and also Articles 27 to 32, of the EU Citizenship Directive. The question is whether MH, a third country national, has derived rights as a spouse of an EEA national which preclude him from being sanctioned for a violation of the exclusion order.

2. OVERVIEW OF THE PARTIES TO THE CASE

(4) The parties involved in the case before the Supreme Court are:

Appellant:	MH
Defence Counsel:	Advokat Maral Houshmand

Advokatfirmaet Staff AS
Akersgaten 32
0180 Oslo

Respondent:	Prosecuting Authority (*Påtalemyndigheten*)
Prosecuting Authority:	Prosecuting Associate (*Riksadvokatfullmektig*) Mads Fredrik Baardseth/ Senior Public Prosecutor (*Førstestatsadvokat*) Thomas Frøberg Director of Public Prosecutions (*Riksadvokat*) P.O. Box 2102 Vika 0125 Oslo

3. FACTS

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

(6) However, 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 exclusion order prohibiting entry into Norway for five years. The reason for the decision was MH's failure to comply with the exit time limit.

(7) 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.

(8) On 22 June 2017, the Directorate of Immigration, with reference to the judgment, adopted a decision on expulsion of MH from Norway including a *permanent* exclusion order prohibiting entry into Norway, and registration in the Schengen Information System (SIS). No exit time limit was set. MH was thus under an obligation to leave Norway and the Schengen Area immediately.

(9) After MH was verified as an Iranian national by Iranian authorities on 27 November 2018, he was arrested by the police on 6 February 2019 and requested held in detention under the Immigration Act to effectuate the expulsion decisions and to carry out the expulsion to Iran. MH was expelled to Iran on 11 March 2019.

(10) In 2020 MH was granted a residence permit with refugee status in Greece and issued with Greek identity papers. He subsequently travelled to Sweden, where he took up residence with his spouse and her daughter born in 2006, both of whom are Norwegian nationals. They 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. The couple have a daughter together, who was born in Norway in March 2022.

(11) On 24 May 2022, MH was arrested by Norwegian police in Moss, south of Oslo. He was initially arrested for driving while intoxicated. Also in the car were his spouse and two children, including the daughter they have together.

(12) By indictment of 31 May 2022 by the East Police District (*Øst politidistrikt*), MH was indicted with 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 being expelled from Norway subject to a permanent exclusion order.

(13) On 6 July 2022, Søndre Østfold District Court (*Søndre Østfold tingrett*) delivered a judgment in which MH was found guilty of having violated the aforementioned rules of the Immigration Act and was sentenced to one year's imprisonment. He appealed that judgment.

(14) On 7 February 2023, Borgarting Court of Appeal (*Borgarting lagmannsrett*) delivered a judgment with the same result as the District Court. MH has appealed the judgment to the Supreme Court.

(15) On 21 April 2023, the Appeals Selection Committee of the Supreme Court granted leave to appeal. During the case preparation for the appeal proceedings, preparatory judge Ingvald Falch decided to refer a request to the EFTA Court for an Advisory Opinion on the questions of EEA law raised by the case.

4. LEGAL BACKGROUND TO THE CASE

4.1. Relevant national law

4.1.1. Introduction

(16) Foreign nationals' right of entry and residence in Norway is regulated by Act 15 May 2008 No 35 relating to the admission of foreign nationals into the realm and their stay here (Immigration Act) (*lov 15. mai 2008 nr. 35 om utlendingers adgang til riket og deres opphold her (utlendingsloven)*). The purpose of the Act is to regulate entry and residence in accordance with Norwegian immigration policy and international obligations. The Act is also intended to facilitate lawful movement across national borders, and ensure legal protection for foreign nationals who are entering or exiting the realm, who are staying in the realm, or who are applying for a permit under the Act, see Section 1. 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 (Immigration Regulation) (*forskrift 15. oktober 2009 nr. 1286 om utlendingers adgang til riket og deres opphold her (utlendingsforskriften)*).

(17) The rules on expulsion from Norway and exclusion orders are aimed inter alia at protecting the society against persons who may pose a danger to the society and fostering respect for Norwegian laws and rules.

4.1.2. Expulsion and exclusion orders for third country nationals

(18) Chapter 8 of the Immigration Act regulates expulsion of foreign nationals who may not rely on the EEA Agreement (third country nationals). Since expulsion decisions and exclusion orders interfere with private and family life, the Act is supplemented by Article 8 of the European Convention on Human Rights, which applies as Norwegian law.

(19) An expulsion decision has as consequence that the foreign national is under an obligation to leave the country, and any valid permit to reside in Norway ceases to apply, see the first paragraph of Section 71 of the Immigration Act. An expulsion decision also entails an exclusion order prohibiting entry into Norway, which can be made temporary or permanent, see the second paragraph of Section 71 of the Immigration Act, read in conjunction with Section 14-2 of the Immigration Regulation. Expulsion decisions are adopted by the Directorate of Immigration in the first instance and a complaint may be lodged with the Immigration Appeals Board. Thereafter, proceedings may be brought before the courts.

(20) Sections 66–68 of the Immigration Act contain an exhaustive enumeration of which offences may lead to expulsion of third country nationals. Different conditions for expulsion apply, depending on whether the foreign national does not hold a residence permit (Section 66), holds a temporary residence permit (Section 67) or holds a permanent residence permit in the country (Section 68).

(21) The Directorate of Immigration's decision of 22 June 2017 to expel MH, which contained a permanent exclusion order, was adopted on the basis of letter c of the first paragraph of Section 66. Under that provision, a foreign national without a residence permit can be expelled if he has received a penalty or special sanction in Norway for an offence which is sanctionable by imprisonment.

(22) Even when the conditions for expulsion under Section 66 are met, there is a general requirement of proportionality under the first paragraph of Section 70. That provision reads as follows:

> **"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."**

4.1.3. Entry, residence and expulsion of persons covered by the EEA Agreement

(23) Chapter 13 of the Immigration Act regulates foreign nationals' right of entry and residence in the realm for persons covered by the EEA Agreement. The chapter implements the EU Citizenship Directive. Section 110 of the Immigration Act states to whom the chapter applies, and of relevance to the present case is the following passage from the first to third paragraphs:

> **"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 (…)"**

(24) The first and second paragraphs of Section 111 of the Immigration Act concern EEA nationals' and their family members' right of residence for up to three months and reads as follows:

> **"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."**

(25) The rules for expelling EEA nationals and their family members are laid down in Section 122 of the Immigration Act, the first paragraph of which provides:

> **"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."**

(26) The fourth paragraph of Section 122 further provides:

> **"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."**

(27) An expulsion decision under Section 122 also entails an exclusion order. Exclusion orders are regulated by the first paragraph of Section 124, which reads:

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

(28) A case on expulsion under Section 122 is prepared by the police, whereas the decision is adopted by the Directorate of Immigration, see the third paragraph of Section 124.

4.1.4. Lifting of exclusion order

(29) In order to have an exclusion order lifted, it is required of both third country nationals (under Section 71 of Chapter 8) and EEA nationals (under Section 124 of Chapter 13) that they apply to the immigration authorities to have the order lifted. The requirement is set out as follows in the second paragraph of Section 124 of the Immigration Act:

> **"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."**

(30) Both Section 71 and Section 124 of the Immigration Act provide that the exclusion order may be lifted if indicated by "new circumstances". Guidelines for that assessment are given in RUDI-2010-69[1] and RUDI-2010-22[2]. Point 7.4 of RUDI-2010-69, entitled "Conditions for lifting a prohibition on entry", states:

> **"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."**

(31) Relatively comprehensive guidelines for rejection and expulsion of EEA nationals are set out in RUDI-2010-22, which also provides guidance for the assessment of whether an exclusion order should be lifted.

(32) According to instructions given in GI-2016-5[3] the consistent rule is that the foreign national *must apply* to have an exclusion order lifted. An exception is however provided for in point 2.2 of the instructions:

> **"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."**

(33) The instructions were issued after the EFTA Surveillance Authority (ESA) had initiated proceedings against Norway concerning the implementation of the EU Citizenship Directive.

4.1.5. Sanctions

(34) Section 108 of the Immigration Act regulates sanctions for violations of the Act and decisions adopted pursuant to the Act. Letter e of the third paragraph of Section 108 of the Immigration Act, which is the relevant legal basis in the present case, reads as follows:

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

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[1] Guidelines from the Directorate of Immigration, *Lifting of a prohibition on entry or access to Norway for short visits (Opphevelse av innreiseforbud eller adgang til Norge for kortvarig besøk)*, 5 July 2010, last amended 28 November 2019.

[2] Guidelines from the Directorate of Immigration, *Rejection and expulsion of EEA nationals (Bortvisning og utvisning av EØS-borgere)*, 1 January 2010, last amended 5 October 2022.

[3] Circular from the Ministry of Justice and Public Security, 18 March 2016.

> **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."**

(35) Sanctions for violation of an exclusion order presupposes that a *valid* decision is adopted. This means that the court in criminal proceedings must conduct a preliminary assessment of the administrative decision establishing the exclusion order. Following the Supreme Court's judgment in HR-2019-2400-A, in that assessment the courts shall as a general rule base themselves on the circumstances as they stood *at the time of the decision*. The possibility cannot be ruled out, however, that circumstances arising subsequently may be included in the assessment.

(36) A more stringent sentencing framework for violation of an exclusion order was introduced by Act of 10 January 2014 No 1. The underlying reasons for the amendment as described in the preparatory works for the legislation are that violation of an exclusion order is viewed as an "escalating societal problem", see Prop. 181 L (2012-2013) page 5. With the amendment, guidance for sentencing was also provided. In that same proposition, the following was stated in page 17:

> **"The usual sentence for an ordinary, first-time offence of violation of an exclusion order should not be under one year's imprisonment. 'Ordinary' is understood to mean an offence having no aggravating or mitigating factors."**

4.2. EU Citizenship Directive

(37) By Decision of the EEA Joint Committee No 158/2007 of 7 December [2007], the EU Citizenship Directive was incorporated into Annex V (Free movement of workers) and Annex VIII (Right of establishment) to the EEA Agreement. In connection with that incorporation, the Contracting Parties issued the following Joint Declaration:

> **"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."**

(38) In addition, inter alia the following adaptations were introduced, see Article 1(1) of Decision No 158/2007:

> **"(a) The Directive shall apply, as appropriate, to the fields covered by this Annex.**
> **(b) The Agreement [Directive] 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'."**

(39) The EU Citizenship Directive lays down rules on entry and residence in Articles 5 to 7. The provisions confer largely the same rights on EEA nationals and certain specified family members, such as spouses. The criteria for derived rights for family members of EEA nationals under Articles 5 to 7 have been addressed by the EFTA Court and the European Court of Justice in several cases such as Case E-28/15 (Jabbi), Case E-4/19 (Campbell), Case E-33/07 (Jipa), Case C-127/08 (Metock and Others) and C-94/08 (Chenchooliah), and case law cited. The courts' case law indicates that the rights conferred by the EU Citizenship Directive are to be interpreted broadly, whilst the restrictions are to be interpreted narrowly, in order to safeguard the overall objective of free movement of persons.

(40) The rights under Articles 5 to 7 may be restricted in accordance with Articles 27 to 35. Article 32(1) of the EU Citizenship Directive provides that persons subject to an exclusion order under Article 27 may apply to have the exclusion order lifted after a reasonable period and in any event after three years from enforcement of the exclusion order. Under Article 32(2) the EEA national has no right of entry while his or her application is being considered.

(41) The EU Citizenship Directive does not, however, seem to contain any explicit rules for a case such as the present, in which the third country national is expelled and subject to an exclusion order under national rules, and then subsequently acquires rights under the Directive as a family member of an EEA national.

(42) Article 36 of the EU Citizenship Directive provides for the States' right and duty to sanction violations of national rules implementing the Directive. The European Court of Justice has in several cases, inter alia C-127/08 (Metock and Others) and C-35/20, made statements about the use of sanctions. This is the reason for question 3 below concerning 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.

5. SUBMISSIONS OF THE PARTIES ON EEA LAW

5.1. Appellant

(43) The appellant's submissions are reproduced below:

> **"MH submits that he has a right of entry, see Article 5(1) and/or Article 6(2) of Directive 2004/38/EC of the European Parliament and of the Council. The exclusion order adopted under national rules *ipso facto* ceased to apply from the time he came within the scope of Directive 2004/38/EC of the European Parliament and of the Council.**
>
> **Restrictions on the right of free movement are exhaustively regulated in Article 27-29 of the Directive, and there must in that case exist a decision on the restriction, see Article 30 of the Directive. Further, the procedural safeguards in Article 31 must also be fulfilled.**

His right of entry does not require a prior application to have an exclusion order lifted when it has been adopted under national law. Such a formality becomes in reality a constructed additional condition, contrary to the wording of the provision.

Article 32 cannot be applied by analogy, as the provision regulates situations involving a lifting of restrictions imposed on the basis of *the Directive's* provisions. MH refers to ESA's assessments in letter of 14.10.2015 in case 76560, page 9 et seq, in support of this position.

Criminal sanctions may only be applied if MH has not complied with the formality-related requirements laid down in the Directive.

If Article 32 is applicable by analogy *and* criminal sanctions may be applied, MH submits that the penalty, at most, can be a fine. The sanction cannot be of a more stringent type, as that would entail a disproportionate restriction on the right of free movement."

5.2. Prosecuting Authority

(44) The respondent's submissions are reproduced below:

"The Prosecuting Authority submits that MH can be sanctioned for his violation of the exclusion order prohibiting entry into Norway, and that EEA law do not preclude the application of criminal liability in the present case.

Norwegian authorities can impose requirements to the effect that third country nationals who are expelled with an exclusion order in their capacity as third country nationals – and subsequently come within the scope of the EEA law – must apply to have the exclusion order lifted before entering Norway. A failure to comply with such rules is sanctionable, including through the use of criminal penalties.

***To question 1*, and as the Prosecuting Authority's principal submission, it is claimed that Article 5(1) and/or Article 6(2) of Directive 2004/38/EC of the European Parliament and of the Council cannot be interpreted as meaning that acquisition of rights under the aforementioned rules renders a national exclusion order null and void, and nor does it entail that entry can be lawfully undertaken (irrespective of the exclusion order). A right of entry will, however, be capable of being exercised in all other member states than the one from which the person has been expelled. As stated on page 63 of the *Return Handbook*, "[o]nly the Member State issuing the entry ban … can lift the entry ban", [4] and any other outcome would have had to be positively stated in an authoritative source.**

***To question 2*, and as the Prosecuting Authority's alternative submission, Article 32(2) of Directive 2004/38/EC of the European Parliament and of the Council must be *applied by analogy* to a case such as the present. The situations which fall outside the direct scope of the provision have strong similarities to the situations that are covered, and the rules will thus be inconsistent if the provision is not applied by analogy. Such an approach would allow for expelled nationals subject to an exclusion order, including persons who are a serious security threat, freely and irrespective of an application, to enter a country from which they are expelled. The member states must be given the opportunity to examine whether an exclusion order is to be maintained, now under the EEA law rules, for the national prior to entry.**

***To question 3* the Prosecuting Authority submits that unlawful entry in violation of an exclusion order and/or the procedure to have that order lifted may, depending on the circumstances, be sanctioned. It cannot be claimed that sanctions *generally* will be disproportionate and that the authorities will thus be able to choose appropriate sanctions – including criminal penalties – in the individual case, see C-35/20, paragraphs 57–58. By way of comparison, reference is also made to the fact that violation of an exclusion order under the Return Directive [Directive 2008/115/EC] may be sanctioned with a criminal penalty, see**

[4] https://home-affairs.ec.europa.eu/system/files/2020-09/return_handbook_en.pdf

C-290/14 *Skerdjan Celaj*. It may, however, be questioned whether the Norwegian level of sentencing for violation of an exclusion order – in a case such as the present – must be adjusted down in some extent out of consideration of the principle of proportionality, compared with what MH was sentenced to by the District Court and the Court of Appeal."

6. Questions referred to the EFTA 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?

Oslo, 22 June 2023

Ingvald Falch
Supreme Court Justice