



EUROPEAN COMMISSION

Brussels, 25 September 2023
sj.g(2023)9744463

**TO THE PRESIDENT AND MEMBERS OF THE
EFTA COURT**

WRITTEN OBSERVATIONS

submitted by the **EUROPEAN COMMISSION**, pursuant to Article 20 of the Statute of the EFTA Court, by the European Commission, represented by Elisabetta MONTAGUTI, Legal Adviser and Jonathan TOMKIN Member of its Legal Service, acting as agents with a postal address for service in Brussels at the Legal Service, *Greffé contentieux*, BERL 1/169, 200, rue de la Loi, 1049 Brussels, and consenting to service by e-EFTACOURT

in Case E-6/23,

MH

Appellant

- and –

Påtalemyndigheten

Respondent

concerning the interpretation of Articles 5, 6, 27, 28, 32 and 36 of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the rights of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EC) 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. THE LEGAL FRAMEWORK

A. EEA Law

1. Part III of the EEA Agreement provides for the free movement of persons in the EEA. Chapter I (Articles 28 – 30) is entitled “Free movements of workers the self-employed”; Chapter II (Articles 31- 35) is entitled “The right of establishment”; Chapter III (Articles 36-39) is entitled “Services”; Chapter IV (Articles 40-45) is entitled “Capital”.
2. The detailed rules on the right of movement of Union citizens and their family members, as set out in Directive 2004/38/EC are applicable in the EEA legal order following the incorporation of that Directive into the EEA Agreement by the EEA Joint Committee Decision 158/2007 of 7 December 2007¹.
3. The Directive was incorporated into the EEA Agreement by its insertion in point 3 of Annex VIII (“Right of Establishment”) to the Agreement. Pursuant to the second paragraph of point 3:
 - a. The Directive is to apply, as appropriate, to the fields covered by Annex VIII.
 - b. The Agreement applies to nationals of the Contracting Parties. However, members of their family 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”.

¹ OJ L124, 8.5.2008, p.20.

4. Pursuant to Protocol 35 of the EEA Agreement the effect of implemented EEA law must be given precedence over national law².

5. Recital 27 of Directive 2004/38/EC states that:

“In line with the case-law of the Court of Justice prohibiting Member States from issuing orders excluding for life persons covered by this Directive from their territory, the right of Union citizens and their family members who have been excluded from the territory of a Member State to submit a fresh application after a reasonable period, and in any event after a three year period from enforcement of the final exclusion order, should be confirmed.”

6. Article 5(1) of Directive 2004/38/EC provides that:

“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.”

7. Article 6 of Directive 2004/38/EC provides that:

“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.”

² Protocol 35 to the EEA Agreement states that for cases of possible conflicts between implemented EEA rules and other statutory provisions, the EFTA States undertake to introduce, if necessary, a statutory provision to the effect that EEA rules prevail in these cases.

8. Article 27(1) and (2) of Directive 2004/38/EC provides that:

“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 a grounds for taking such measures.

The personal conduct of the individual concerned must represent a genuine, present and sufficient 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.”

9. Article 28 of Directive 2004/38/EC provides that:

“1. Before taking an expulsion decision on grounds of public policy or public security, the host Member State shall take account of considerations such as how long the individual concerned has resided on its territory, his/her age, state of health, family and economic situation, social and cultural integration into the host Member State and the extent of his/her links with the country of origin.

2. The host Member State may not take an expulsion decision against Union citizens or their family members, irrespective of nationality who have the right of permanent residence on its territory, except on serious grounds of public policy or public security.

3. An expulsion decision may not be taken against Union citizens, except if the decision is based on imperative grounds of public security, as defined by Member States, if they:

(a) *have resided in the host Member State for the previous ten years;*

or

(b) *are a minor, except if the expulsion is necessary for the best interests of the child, as provided for in the United Nations Convention on the Rights of the Child of 20 November 1989.”*

10. Article 32 of Directive 2004/38/EC provides that:

“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.”

11. Article 36 of Directive 2004/38/EC provides that:

“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.”

B. National Law

12. The Commission refers to the provisions of national law as set out at pages 3-7 of the Request for an Advisory Opinion.

II. THE FACTS AND THE PROCEDURE

13. The appellant in the main proceedings, MH, is an Iranian national, who applied for asylum in Norway in 2008. Following the rejection of his application on 4 April 2011, MH was ordered to leave Norway and the Schengen area without controls at internal borders by 28 February 2012.
14. In circumstances where MH did not comply with that order, the Norwegian Directorate of Immigration, on 19 May 2016, adopted an expulsion decision against MH. The decision was accompanied by a 5-year exclusion order.
15. By judgment of 23 February 2017, 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.
16. On 22 June 2017, the Directorate of Immigration adopted a new expulsion decision, this time accompanied by a permanent exclusion order. The expulsion decision and exclusion order was based on Section 66, first paragraph, point c, of the Immigration Act³, according to which a foreign national without a residence permit may be expelled if he or she has received a penalty or special sanction in Norway for an offence which is sanctionable by imprisonment exceeding three months. The permanent exclusion order was registered in the Schengen Information System (SIS). MH was expelled to Iran in March 2019.
17. In 2019, MH married a Norwegian national. In 2020, MH was granted refugee status in Greece and was issued with a residence permit and Greek identity papers.

³ Act No 35 of 15 May 2008 on the Entry of Foreign Nationals into the Kingdom of Norway and their stay in the Realm ("Immigration Act").

18. MH subsequently took up residence in Sweden together with his Norwegian spouse and her daughter. The marriage was registered in the Swedish population register in 2021 and the spouse gave notice of her move from Norway to Sweden in November 2021. In March 2022, MH and his spouse had a daughter, who was born in Norway and is also a Norwegian national.
19. It is understood that MH and his family continue to reside together in Sweden, where MH is also employed.
20. On 24 May 2022, during a trip to Norway, MH was arrested by Norwegian police in Moss, south of Oslo. On 6 July 2022, the Søndre Østold District Court convicted MH of having stayed in the realm despite being expelled from Norway and subject to a permanent exclusion order. MH was sentenced to one year imprisonment. The judgment was subsequently confirmed on appeal by the Borgarting Court of Appeal.
21. MH was granted leave to appeal to the Supreme Court (Norges Høyesterett). Considering that the resolution of the appeal required an interpretation of EEA law, the Supreme Court decided to submit the following questions to the EFTA Court for an Advisory Opinion:

“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?"

III. ON THE REQUEST FOR AN ADVISORY OPINION

A. Question one

(i) Preliminary observation

22. By its first question, the referring court seeks guidance on the rights of entry and residence of a third country national spouse of an EEA national who, prior to becoming a beneficiary of Directive 2004/38/EC, had been subject to an expulsion order issued by an EEA State.
23. This question arises in a context where the EEA national, a citizen of Norway, and her third country national spouse, reside with their family in another EEA State (Sweden). At the same time, the expulsion order in question was not adopted by the family's State of residence (i.e Sweden), but rather by another EEA State in which the third country national had resided previously (Norway), and which is also the State of nationality of the EEA national spouse.
24. It appears that the proceedings at the origin of the request for an Advisory Opinion, arose in circumstances where the EEA national and her spouse and children had travelled to Norway for a short stay, but that their place of residence remains Sweden.
25. In order to provide a useful reply, it is necessary, in the first instance, to clarify the provisions of EEA law that apply to the specific situation of the appellant in the main proceedings.

(ii) The applicable legal framework

26. At the outset, the Commission notes that MH, as a family member of an EEA national who has exercised free movement rights in another EEA State, is a beneficiary of Directive 2004/38/EC. More particularly, MH enjoys a derived right

of residence in Sweden pursuant to Article 2(2)(a) and Article 7(2) of Directive 2004/38/EC.

27. In his capacity as a family member of an EEA national, MH is entitled, in accordance with Article 5(1) of Directive 2004/38/EC, to enter other EEA States. Insofar as MH entered Norway for a short stay (i.e. for a period not exceeding three months), his right of residence was governed by Article 6 of Directive 2004/38/EC.
28. The Commission considers that this conclusion and the applicability of Directive 2004/38/EC is not affected by the fact that the EEA State that issued the expulsion order, happens to be the State of nationality of the EEA national who exercises free movement rights in another EEA State. Once it is established that the mobile EEA national resides in another EEA State and is a beneficiary of the Directive 2004/38/EC, his or her family members can exercise free movement rights in accordance with Articles 5 and 6 of that Directive also in the EEA national's State of nationality⁴
29. It is noted in this regard that Article 5(1) of Directive 2004/38/EC confers a general obligation on Member States to grant EEA nationals and their family members leave to enter their territory. That provision does not draw a distinction on the basis of the Member State of entry⁵.
30. However, even in a context where the subsequent right of entry and residence of MH and his EEA national spouse in Norway did not derive directly from the application of the Directive, the provisions of the Directive would still apply by analogy. It is now well established that where an EEA national has created or strengthened a family life with a third-country national during genuine residence in an EEA State other than that of which he is a national, the provisions of Directive

⁴ See, by analogy, Case C-202/13, Sean McCarthy, EU:C:2014:345. Here too, the applicant could – for the purpose of derived rights of his family member – rely on the provisions of Directive 2004/38/EC against his Member State of origin, in circumstances, where he continued to exercise free movement rights in Spain, see paragraphs: 31-38.

⁵ See Case C-202/13, *McCarthy and Others*, EU:C:2014:345, paragraph 41.

2004/38/EC will apply by analogy where that EEA national returns with the family member to his home State⁶.

31. The question therefore arises whether Articles 5 and 6 of Directive 2004/38/EC preclude a limitation on the right of a third country national family member to enter and reside in an EEA State on the ground that he or she is subject to an expulsion order adopted prior to his becoming a “family member” and thereby a beneficiary of Directive 2004/38/EC.

(iii) *On the interaction between free movement rights and the prior immigration history of a third country national*

32. The Commission recalls that the derived rights of family members of Member State nationals and the conditions in which the right of mobile EEA nationals and their family members may be restricted has been subject to extensive consideration in case-law⁷.
33. As regards the nature of the right, the Court of Justice has underlined, with reference to recital 5 of Directive 2004/38/EC, that the right of all Member State nationals to move and reside freely within the territory of the Member States should, if it is to be exercised under objective conditions of dignity, be also granted to their family members, irrespective of nationality⁸.
34. Indeed, the entitlement of Member State nationals to the company of their family members, regardless of nationality, has been recognised as ensuring respect for

⁶ Case E-28/15, *Yankuba Jabbi v The Norwegian State*, paragraph 82 and Case E-4/19, *Campbell v The Norwegian Government, represented by the Immigration Appeals Board*. See also, Case C-673/16, *Coman and Others*, EU:C:2018:385, paragraph 25 and case law cited.

⁷ Case E-28/15, *Yankuba Jabbi v The Norwegian State*, paragraph 82 and Case E-4/19, *Campbell v The Norwegian Government, represented by the Immigration Appeals Board*. As regards the EU legal order, see, among others: Case C-370/90, *The Queen v Immigration Appeal Tribunal and Surinder Singh, ex parte Secretary of State for the Home Department*, EU:C:1992:296; Case C-413/99, *Baumbast and R*, EU:C:2002:493; Case C-60/00, *Carpenter*, EU:C:2002:434; Case C-459/99, *MRAX*, EU:C:2002:461; Case C-127/08, *Metock and Others*, EU:C:2008:449; Case C-202/13, *Sean McCarthy*, EU:C:2014:345; Case C-673/16, *Coman and Others*, EU:C:2018:385.

⁸ Case C-127/08, *Metock and Others*, EU:C:2008:449, paragraph 83 and Case C-202/13, *Sean McCarthy*, EU:C:2014:345, paragraph 33.

family life, as enshrined in Article 8 of the European Convention on Human Rights and Article 7 of the Charter⁹.

35. In addition, it has been recognised that measures restricting family members of mobile EEA nationals from accompanying or joining EEA nationals in a host MS would be likely to discourage the exercise of free movement rights.¹⁰
36. Thus the derived right of family members to accompany or join an EEA national has been interpreted broadly and applies uniformly regardless of the nationality of family members and, irrespective of whether or not they have an autonomous right of residence in the EEA¹¹.
37. The Court of Justice has further held that third-country national family members are entitled to accompany, join and live with an EEA national in the host Member State, regardless of whether or not they had previously been lawfully resident in another Member State and irrespective of the date or circumstances of their entry into the host Member State. In the seminal judgment of *Metock and Others*, the Court has underlined that the definition of “family members” in Article 2(2) of Directive 2004/38/EC does not distinguish according to whether or not the family members have already resided lawfully in another Member State¹².
38. Indeed, the refusal of entry and residence based on the failure of the family member of an EEA national to comply with rules concerned with the control of aliens (as in the case of a breach of an entry ban issued to a third country national) would impair the very substance of the right of residence directly conferred by EEA law¹³.

⁹ Case C-413/99, *Baumbast and R*, EU:C:2002:493, paragraph 72; Case C-60/00, *Carpenter*, EU:C:2002:434, paragraphs 41–43; and C-673/16, *Coman and Others*, EU:C:2018:385, paragraphs 48–50.

¹⁰ Case C-370/90, *The Queen v Immigration Appeal Tribunal and Surinder Singh, ex parte Secretary of State for the Home Department*, EU:C:1992:296, paragraph 20; and Case C-459/99, *MRAX*, EU:C:2002:461, paragraph 53.

¹¹ Case C-127/08, *Metock and Others*, EU:C:2008:449, paragraph 84 and Case C-202/13, *Sean McCarthy*, EU:C:2014:345, paragraph 32.

¹² Case C-127/08, *Metock and Others*, EU:C:2008:449, paragraph 50.

¹³ See, by analogy, Case C-459/99, *MRAX*, EU:C:2002:461, paragraph 78.

39. Consequently, the immigration history of a third country national has no impact upon his or her status as a family member of a mobile EEA national and the benefit of the rights attaching to that status. Indeed, in accordance with settled case-law, the conditions for free movement are conferred directly by the Treaties. Member States may not impose additional conditions or requirements to the freedom of movement that are not provided for in Union law¹⁴.
40. Certainly, freedom of movement is not an absolute right and may be subject to restrictions. However, the conditions for the restriction have been harmonized in secondary legislation, in particular, the provision appearing under Chapter VI of Directive 2004/38/EC. Therefore, any restriction on the free movement rights of mobile EEA national and their family can only be applied by reference to the relevant provisions of that Chapter.
41. As regards Chapter VI of Directive 2004/38/EC, it is recalled that, pursuant to Article 27 of the Directive, Member States may only restrict freedom of movement of EEA nationals or their family members, on public policy, security or health grounds as referred to in that Article. Moreover, restrictions on public policy or security grounds must be based exclusively on the personal conduct of the individual concerned and will only be justified if – and for as long as – the continued presence of the persons concerned amounts to a genuine, present and sufficiently serious threat to one of the fundamental interests of society¹⁵. The assessment as to whether an individual represents a sufficiently serious threat that is genuine and “present”, implies, by its nature, an assessment that takes place at a time proximate to the proposed expulsion of the individual concerned¹⁶.

¹⁴ See, in this sense, Case C-202/13, *Sean McCarthy*, EU:C:2014:345, paragraph 65.

¹⁵ See also, prior to Directive 2004/38/EC, Article 3 of Council Directive 64/221 of 25 February 1964 on the co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health (OJ 56, 4.4.1964, p. 850) and Case 30/77, *Bouchereau*, EU:C:1977:172, paragraph 35; Case C-348/96, *Calfa*, ECLI:EU:C:1999:6, paragraph 24 and Joined Cases C-482-01 and C-493/01, *Orfanopolous and Oliveri*, EU:C:2004:262, paragraphs 66-68.

¹⁶ See in this respect, Joined Cases C-482-01 and C-493/01, *Orfanopolous and Oliveri*, EU:C:2004:262, paragraphs 78-82. See also: Case 131/79, *Santillo*, EU:C:1980:131.

42. As a derogation from a fundamental freedom, measures restricting free movement of persons are to be interpreted narrowly and respect the principle of proportionality¹⁷. In accordance with well established case-law of the Court of Justice, as codified in Article 27 of Directive 2004/38/EC, restriction measures must not be issued by the host Member State as an automatic response to, or as a penalty arising from a criminal conviction.¹⁸ Rather, restrictions must be based exclusively by reference to the personal conduct of the individual concerned.
43. Indeed, in case-law long pre-dating Directive 2004/38/EC, the Court of Justice has ruled that Member States may not adopt permanent expulsion orders in an automatic way against mobile EEA nationals. In its ruling in *Calfa* the Court of Justice found that national rules that imposed a permanent expulsion order as an automatic consequence for conviction of particular drugs offences was unlawful as it did not permit an individual examination of the degree of threat that the individual concerned posed to a fundamental interest of society.¹⁹ The incompatibility of restrictive measures of unlimited duration that did not entail a right of review, was further confirmed by that Court in Joined Cases C-65/95 and C-111/95, *Shingara and Radiom*.²⁰
44. The Court of Justice has further clarified that an expulsion order can only be justified if “*having regard to the exceptional seriousness of the threat, such a measure is necessary for the protection of the interests it aims to secure, provided*

¹⁷ Case E-4/19, *Campbell v The Norwegian Government*, paragraph 57. See also Case C-348/96, *Calfa*, ECLI:EU:C:1999:6, paragraph 23 and Case C-127/08, *Metock and Others*, EU:C:2008:449, paragraphs 83-84. As regards proportionality, see in particular, Case C-145/09, *Tsakouridis*, ECLI:EU:C:2010:708, paragraphs 24-25 as well as paragraph 49. In that case, the Court of Justice, referring to recital 23 to Directive 2004/38/EC, underlines that the expulsion of Union citizens and their family members can seriously harm persons who, having availed themselves of the rights and freedoms conferred on them by the Treaty, have become genuinely integrated into the host Member State and for that reason, the greater the degree of integration, the greater the degree of protection is warranted.

¹⁸ Case 30/77, *Bouchereau* ECLI:EU:C:1977:172, paragraph 35; Case 131/79, *Santillo*, EU:C:1980:131, paragraphs 17-19 and Joined Cases C-482-01 and C-493/01, *Orfanopolous and Oliveri*, ECLI:EU:C:2004:262, paragraph 66. See also, Case C-503/03, *Commission v Spain*, EU:C:2006:74, paragraph 44.

¹⁹ Case C-348/96, *Calfa*, ECLI:EU:C:1999:6.

²⁰ Joined Cases C-65/95 and C-111/95, *Shingara and Radiom*, ECLI:EU:C:1997:300, paragraph 40.

*that the objective cannot be attained by less strict means, having regard to the length of residence of the Union citizen in the host Member State and in particular to the serious negative consequences such a measure may have for Union citizens who have become genuinely integrated into the host Member State.”*²¹

45. It follows from the principles set out above that considerations that are not directly and intrinsically connected with the genuine, present and sufficiently serious nature of the threat posed by a beneficiary of free movement rights, but rely on historical conduct or considerations of general prevention cannot justify a restriction of free movement rights²².
46. Consequently, the Commission maintains that the simple fact that the family member of a mobile EEA national has, in the past, been subject to an exclusion order taken based on national law applicable to third country nationals, cannot, in itself, constitute a ground for restricting free movement rights. The adoption and application of a restrictive measure against a family member of an EEA national is only justified if it is in compliance with Chapter VI of Directive 2004/38/EC. This means, in particular, that the threat posed by the personal conduct of the individual concerned must meet the threshold laid down in Article 27 of the Directive and that such individual must enjoy the procedural guarantees laid down in Articles 30-33 of the Directive.
47. It is, however, apparent that the exclusion order issued in 2017 had not been qualified as a restriction on grounds of public policy, public security or public health meeting the conditions laid down in Chapter VI of Directive 2004/38/EC. The Commission recalls that when the expulsion and exclusion order against MH was issued in 2017, he had not at that stage been a beneficiary of Directive 2004/38/EC. As noted by the referring court, MH was expelled on account of the fact that he was without a residence permit and had received a penalty for an

²¹ Case C-145/09, *Tsakouridis*, ECLI:EU:C:2010:708, paragraph. 49.

²² See also, Article 27(2) of Directive 2004/38/EC and Case C-145/09, *Tsakouridis*, ECLI:EU:C:2010:708, paragraph 48.

offence sanctionable by imprisonment. At any rate, the threshold laid down in Article 27(1) of Directive 2004/38/EC was manifestly not met in the case at issue.

48. In view of the considerations set out above, the Commission submits that the rights of free movement guaranteed by Directive 2004/38/EC cannot be restricted on the basis of national measures imposed in connection with past infringements at a time before the individual concerned acquired derived free movement rights under the Directive.
49. The Commission therefore proposes that the first question of the referring court should be answered to the effect that 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 a EEA State other than the EEA State of which the spouse is a national may be refused entry and residence 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.

B. Question two

50. By its second question, the referring court seeks guidance on whether Article 32 of Directive 2004/38/EC can be applied, by analogy, to a third country national family member of a mobile EEA national in the situation of MH, who was made subject to an exclusion order prior to acquiring derived free movement rights under Directive 2004/38/EC – on the basis of national provisions that did not meet the conditions for the restriction of free movement rights under the Directive.
51. The Commission understands that according to such an approach, a third country national in the situation of MH, would be able to submit an application, after a reasonable period, to have the expulsion order against him lifted. In accordance with Article 32, second subparagraph of Directive 2004/38/EC, the Member State would then have six months within which to reach a decision on this application.

52. In the Commission's submission, it is manifest that Article 32 of Directive 2004/38/EC could have no application to a person in the situation of MH – either directly or by analogy.
53. Firstly, it follows from the analysis set out in reply to question one that the expulsion of MH was not based on the application of public policy or security grounds as defined in Article 27(1) of Directive 2004/38/EC. It follows that Article 32 of the Directive, which only applies to such expulsions, is of no relevance to a person in the situation of MH, who was excluded on different grounds (namely, violation of immigration rules at a time when he did not fall within the scope of the directive).
54. Secondly, it also follows from the considerations set out in relation to the first question that, family member of a mobile EEA national falling within the scope of the Directive may not be made subject to an expulsion order as a result of a past breach of immigration rules, where the conditions laid down in Article 27(1) have not been met.
55. Given that EEA States are required to ensure the effectiveness of rights deriving from EEA law, they are under a positive obligation to ensure the full and correct application of those rights. This entails a duty to take timely steps to ensure that such an expulsion order (or the consequences of such an order) do not take effect as regards the third country national concerned. The full and correct application of EEA law cannot be made contingent on a request in each case for compliance by an EEA national and their family members²³.
56. Indeed, it is recalled in that in Case C-503/03, *Commission v Spain*, the Court has ruled where an alert in the Schengen Information System signals that a Member State is to prevent entry to a third country national family member of an EEA national without regard to whether the specific conditions applicable to beneficiaries of free movement rights are fulfilled, the competent authorities must,

²³ As regards the obligation to positively ensure the effective application of Union law, see Case C-243/09, *Günter Fuß*, paragraphs 63-64. As regards the principle of effectiveness in the EEA legal order, see: Case E-15/12, *Wahl*, paragraph 54 and Case E-6/12, *EFTA Surveillance Authority v Norway*, paragraph 112.

on their own initiative, ensure that that alert is not acted upon, and that free movement rights are not improperly restricted²⁴.

57. In view of the considerations set out above, the Commission submits that the second question of the referring court should be answered to the effect that Article 32 of Directive 2004/38/EC has no application in a situation such as that at issue in the main proceedings.

C. Questions three

58. By its third question, the referring court seeks guidance on whether a person in the situation of MH may be sanctioned in accordance with Article 36 of Directive 2004/38/EC for violating national decisions on exclusion orders.
59. The Commission submits that such a question must also be answered in the negative.
60. Pursuant to Article 36, first sentence of Directive 2004/38/EC, Member States may 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. However, as explained in relation to the first question, the exclusion order adopted in respect of MH predated the acquisition of his status as a family member of a mobile EEA national and was not imposed in the context of the implementation of Directive 2004/38/EC.
61. Equally, for reasons explained in reply to the first question, the provisions of Directive 2004/38/EC would positively preclude the adoption of an exclusion order against a person in the situation of MH who has not been assessed as meeting the conditions laid down in Article 27(1) of Directive 2004/38/EC.
62. Consequently, Article 36 of Directive can have no application to a person in the situation of MH.

²⁴Case C-503/03, *Commission v Spain*, EU:C:2006:74, paragraphs 54-57.

63. In view of the considerations set out above, the Commission submits that the third question of the referring court should be answered to the effect that Article 36 of Directive 2004/38/EC has no application in a situation such as that at issue in the main proceedings.

IV. CONCLUSION

64. Having regard to the reasons set out above, the Commission considers that the questions referred to the EFTA Court for an Advisory Opinion by the Supreme Court of Norway (Norges Høyesterett) should be answered as follows:

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

Elisabetta MONTAGUTI

Jonathan TOMKIN

Agents for the Commission