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ORIGINAL

IN THE EFTA COURT

WRITTEN OBSERVATIONS

submitted, pursuant to Article 20 of the Statute of the EFTA Court, by the

EFTA SURVEILLANCE AUTHORITY

represented by
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and Erlend Møinichen Leonhardsen,
Department of Legal & Executive Affairs,
acting as Agents,

IN CASE E-6/23

MH

v

Påtalemyndigheten

in which the Supreme Court of Norway requests the EFTA Court to give an Advisory Opinion pursuant to Article 34 of the Surveillance and Court Agreement concerning the interpretation and application of Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.

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1 INTRODUCTION/THE FACTS OF THE CASE

1. The present Request for an Advisory Opinion submitted by the Supreme Court of Norway on 22 June 2023 ("the Request") concerns the interpretation of the EEA rules on the right of entry for third country nationals who are family members of EEA nationals.
2. The appellant in the main proceedings, MH, is an Iranian national, working and residing in Sweden with his Norwegian spouse and their child. The chronology of events, as indicated in the Request, is set out below.
3. MH came to Norway as an asylum seeker in 2008. In 2011 he received the final rejection on the application for asylum. MH did not leave Norway by the expiry of the time limit for exiting the Schengen Area, and, in 2016, was therefore subject to an expulsion and exclusion order of five years.
4. 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 use of false identity papers during a police check.
5. 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"), with an obligation to leave the Schengen Area immediately. He was arrested and detained in Norway, and finally expelled to Iran in March 2019.
6. In 2019 MH married his Norwegian spouse.
7. In 2020, MH was granted a residence permit with refugee status in Greece and issued with Greek identity papers. It is not clear from the Request whether the Greek residence permit had an impact on his registration in the SIS.
8. MH subsequently took up residence in Sweden with his Norwegian spouse, who gave notice of moving to Sweden in November 2021. The marriage was registered in the Swedish population register in 2021. It is not clear from the Request whether his taking up of residence in Sweden had an impact on any registration in the SIS. Furthermore, it is not clear from the request if MH had a residence card under Article 10 of the Directive. The couple have a daughter together, born in Norway in March 2022.

9. In May 2022, MH was arrested in Norway for driving while intoxicated, with his spouse, their child and his spouse's other daughter in the vehicle. He was sentenced to one year's imprisonment for having stayed in Norway despite being expelled subject to a permanent exclusion order.
10. The Request concerns the interpretation of Articles 5 and 6, as well as Articles 27 to 32 and 36 of Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States ("the Directive").[1]

2 EEA LAW

11. 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), as corrected by OJ 2004 L 229, p. 35, OJ 2005 L 30, p. 27, and OJ 2005 L 197, p. 34, was incorporated in the Agreement on the European Economic Area ("the EEA Agreement" or "EEA") by Decision of the EEA Joint Committee No 158/2007,[2] which added it at point 3 of Annex VIII (Right of establishment), and points 1 and 2 of Annex V (Free movement of workers).

12. Recital 23 of the Directive reads:

> *"(23) Expulsion of Union citizens and their family members on grounds of public policy or public security is a measure that 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. The scope for such measures should therefore be limited in accordance with the principle of proportionality to take account of the degree of integration of the persons concerned, the length of their residence in the host Member State, their*

[1] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ L 158, 30.4.2004, p. 77, EEA Supplement No 26 8.5.2008, p. 17).
[2] OJ 2008 L 124, p. 20, and EEA Supplement 2008 No 26, p. 17.

age, state of health, family and economic situation and the links with their country of origin."

13. Article 2(2)(a) of the Directive, entitled "Definitions", reads:

"2) "Family member" means:

(a) the spouse;"

14. Article 5(1) and 2 of the Directive, entitled "Right of entry", reads:

"1. Without prejudice to the provisions on travel documents applicable to national border controls, Member States shall grant Union citizens leave to enter their territory with a valid identity card or passport and shall grant family members who are not nationals of a Member State leave to enter their territory with a valid passport.

No entry visa or equivalent formality may be imposed on Union citizens.

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

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

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

"1. Union citizens shall have the right of residence on the territory of another Member State for a period of up to three months without any conditions or any formalities other than the requirement to hold a valid identity card or passport.

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

16. Article 27(1) and (2) of the Directive, entitled “General principles”, reads:

“1. Subject to the provisions of this Chapter, Member States may restrict the freedom of movement and residence of Union citizens and their family members, irrespective of nationality, on grounds of public policy, public security or public health. These grounds shall not be invoked to serve economic ends.

2. Measures taken on grounds of public policy or public security shall comply with the principle of proportionality and shall be based exclusively on the personal conduct of the individual concerned. Previous criminal convictions shall not in themselves constitute grounds for taking such measures.

The personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Justifications that are isolated from the particulars of the case or that rely on considerations of general prevention shall not be accepted.”

17. Article 28 of the Directive, entitled “Protection against expulsion”, reads:

“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.”

18. Article 32 of the Directive, entitled “Duration of exclusion orders”, reads:

“1. Persons excluded on grounds of public policy or public security may submit an application for lifting of the exclusion order after a reasonable period, depending on the circumstances, and in any event after three years from enforcement of the final exclusion order which has been validly adopted in accordance with Community law, by putting forward arguments to establish that there has been a material change in the circumstances which justified the decision ordering their exclusion.

The Member State concerned shall reach a decision on this application within six months of its submission.

2. The persons referred to in paragraph 1 shall have no right of entry to the territory of the Member State concerned while their application is being considered.”

19. Article 36 of the Directive, entitled “Sanctions”, 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.”

3 NATIONAL LAW

20. Letter c of the first paragraph of Section 66 of the Immigration Act,[3] entitled “Expulsion of foreign nationals without a residence permit”, reads:

“A foreign national without a residence permit may be expelled […]

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

section 323 (minor theft)

section 326 (minor misappropriation)

section 334 (minor receiving of proceeds of a crime)

[3] Lov om utlendingers adgang til riket og deres opphold her (utlendingsloven) - LOV-2008-05-15-35.

section 339 (minor money laundering)
section 362 (minor document forgery)
section 373 (minor fraud)"

21. The first paragraph of Section 70 of the Immigration Act,[4] entitled "Requirement of proportionality", reads:

"A foreign national may not be expelled if, in view of the seriousness of an 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."

22. Section 71 of the Immigration Act,[5] entitled "Effect and duration of the expulsion", reads:

"Any valid permit to reside in the realm ceases to apply when an administrative decision concerning expulsion becomes final. The King may issue regulations containing further provisions on the effect of an administrative decision concerning expulsion on residence permit applications which have yet to be decided as at the time of expulsion.

Expulsion precludes subsequent entry into the realm. The entry prohibition may be made permanent or temporary, but may not apply for a period of less than one year. Upon application, the entry prohibition may be lifted if new circumstances so indicate. If special circumstances so indicate, 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 two years have passed since the foreign national's exit."

23. The first sentence of letter e of the third paragraph of Section 108 of the Immigration Act,[6] entitled "Penalties", reads:

[4] Ibid.
[5] Ibid.
[6] Ibid.

"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."

24. For further information about Norwegian law, reference is made to the Request.

4 THE QUESTIONS REFERRED

25. The Supreme Court of Norway has referred 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?

5 LEGAL ANALYSIS

5.1 Preliminary remarks

26. The Request contains certain references to the Schengen Area[7] and the SIS.[8] As part of its "special",[9] or "privileged relationship" with the European Union,[10] Norway implements and applies the Schengen acquis, participates in the common European asylum system (Dublin) and has concluded the Agreement on the surrender procedure with the EU,[11] in addition to being party to the EEA Agreement.[12] Whilst the EEA Agreement establishes the right of free movement of persons (the right to move and reside freely within the territory of the Member States), with the objective of extending the internal market established within the European Union to the EFTA States, the Schengen acquis *inter alia* removes the internal border controls between all participating EU and associated States, thus removing practical obstacles to free movement across the EU and the EEA within the Schengen area.

27. ESA considers that the referring court's questions are to be answered based on the EEA Agreement, without the need for the Court to interpret provisions of the Schengen acquis and/or the common European asylum system.

28. In any case, ESA submits that the reference in the EEA Agreement to the privileged relationship between the EFTA States and the EU, which is based on proximity, long-standing common values and European identity, and to which the EFTA States attach a high priority (second recital), as well as the objective of homogeneity, could

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[7] Agreement concluded by the Council of the European Union and the Republic of Iceland and the Kingdom of Norway concerning the latters' association with the implementation, application and development of the Schengen acquis, signed on 18 May 1999 (OJ L 176, 10.7.1999, p. 36).

[8] Regulation (EU) 2018/1860 of the European Parliament and of the Council of 28 November 2018 on the use of the Schengen Information System for the return of illegally staying third-country nationals (OJ L 312, 7.12.2018, p. 1), Regulation (EU) 2018/1861 of the European Parliament and of the Council of 28 November 2018 on the establishment, operation and use of the Schengen Information System (SIS) in the field of border checks, and amending the Convention implementing the Schengen Agreement, and amending and repealing Regulation (EC) No 1987/2006 (OJ L 312, 7.12.2018, p. 14) and Regulation (EU) 2018/1862 of the European Parliament and of the Council of 28 November 2018 on the establishment, operation and use of the Schengen Information System (SIS) in the field of police cooperation and judicial cooperation in criminal matters, amending and repealing Council Decision 2007/533/JHA, and repealing Regulation (EC) No 1986/2006 of the European Parliament and of the Council and Commission Decision 2010/261/EU (OJ L 312, 7.12.2018, p. 56). Implemented in Norway by Lov om Schengen informasjonssystem (SIS) [SIS-loven].

[9] Case C-897/19 PPU*, I.N.*, EU:C:2020:262, paragraph 44 (by analogy).

[10] See the second recital of the EEA Agreement.

[11] Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on the surrender procedure between the Member States of the European Union and Iceland and Norway (OJ L 292, 21.10.2006, p. 2), signed on 28 June 2006.

[12] Case C-897/19 PPU*, I.N.*, EU:C:2020:262, paragraph 44.

call for the Court to consider legal instruments from other parts of that privileged relationship when interpreting EEA law, such as Schengen and other rules set out in separate Agreements concluded between the EFTA States and the EU. Such consideration should, in ESA's opinion, be of special importance when legal instruments from other parts of the privileged relationship have had an impact on the interpretation of EU legislation that also form part of the EEA Agreement and can form the context and background when the Court seeks to achieve homogeneity in the EEA directly "based on an authority included in the EEA Agreement."[13]

5.2 The first question, concerning the right of entry and residence

29. By its first question the Norwegian Supreme Court seeks guidance as to whether Article 5(1) and/or Article 6(2) of the Directive give a third country national, who is married to an EEA national, a right of entry and residence in an EEA 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 that EEA State in accordance with national rules applicable to third country nationals.
30. In essence, the referring court seeks guidance concerning the consequences that it must draw if the expulsion decision with an exclusion order is not compatible with the Directive.
31. It is uncontested that MH is a family member for the purposes of the Directive, as defined in Article 2(2)(a), as he is the spouse of an EEA national.
32. At the outset, ESA submits that it is evident that an exclusion order against a family member of an EEA national must comply with the Directive. An EEA State's obligations arising from a directive to achieve its result are binding on all the authorities of EEA States, including courts, for all matters within their competence. The same is true for the obligation under Article 3 EEA to take all appropriate measures, whether general or particular to ensure fulfilment of the obligations arising out of the EEA Agreement, as well as to abstain from any measure which could jeopardize the attainment of the objectives of the EEA Agreement. It is therefore the responsibility of all national authorities, including the Prosecuting Authority and the courts in particular to provide at all times the legal protection individuals derive from the EEA Agreement, and to ensure that those rules are fully

[13] E-28/15 *Jabbi*, paragraph 68.

effective.[14] In that respect, ESA observes that the relevance of the Directive does not appear to have been assessed at all by the District Court and the Appeals Court or, for that matter, by any other public body prior to those judgments. It would thus appear now to fall upon the Prosecuting Authority and/or the Supreme Court to safeguard the procedural and substantive rights MH has under the Directive.

33. ESA further notes that the corollary to the duty under Article 3 EEA is the principle that EEA law which has been implemented into the national legal order of the EEA States, such as the Directive, in case of conflict should prevail over other national law. This follows also from Protocol 35 to the EEA Agreement, which has been implemented into Norwegian law by Section 2 of the Norwegian EEA Act.

34. ESA moreover recalls the principle of *Nullum Crimen, Nulla Poena Sine Lege*, which it considers to be a general principle of EEA law, and which is also found in the constitutional orders of the EEA States. It entails that there can be no crime and no punishment unless there is a legal basis for that in national law. As a result of these rules and principles, if the Directive precludes an exclusion order, such as that at issue here, which in turn is the basis for the crime described in letter e of the third paragraph of Section 108 of the Immigration Act, then there would not appear to be a legal basis under national law to impose any criminal sanctions for not obeying that exclusion order. As will be elaborated on below, ESA considers that the Directive most likely precludes such an exclusion order and finds it necessary therefore also to reiterate that all authorities which are part of the Norwegian State are bound by a duty of loyalty, which includes the duty to abstain from <u>any</u> measure which could jeopardize the attainment of the objectives of the EEA Agreement.

35. Consequently, the question is if the expulsion decision with an exclusion order is compatible with the Directive. In the following ESA will set out the legal framework, and the case law against which this assessment has to be made.

36. The Directive lays down rules on entry and residence for up to three months in Articles 5 and 6.

37. Article 5(1)-(2) of the Directive concerns the right of entry for family members who are not nationals of an EEA State. Such family members could pursuant to the first sentence of Article 5(2) be required to apply for an entry visa. However, as set out in the second sentence of Article 5(2), possession of a valid residence card referred to in Article 10 of the Directive shall exempt such family members from the visa

[14] Case E-14/20 *Liti-Link AG*, paragraph 74.

requirement. According to the referral, MH obtained a residence permit with refugee status from Greece and is currently residing in Sweden with his Norwegian spouse. Based on this, ESA presumes that MH is in possession of a valid residence card in Sweden, issued pursuant to Article 10 of the Directive, but this is for the national court to verify.[15]

38. Case law has confirmed that an EEA state cannot refuse family members of an EEA national who are third country nationals, and who hold a valid residence card, issued under Article 10 of the Directive, the right to enter their territory without a visa where the competent national authorities have not carried out an individual examination of the particular case.[16] Hence, even though the Court of Justice of the European Union ("the CJEU") has held that residence permits, by nature, are declaratory,[17] the fact remains that the EEA states are required to recognize such a residence card for the purposes of entry into their territory without a visa.[18]
39. Furthermore, EEA States shall grant persons every facility to obtain the necessary entry visa, issued free of charge and on the basis of an accelerated procedure (see Article 5(2)(2)). Consequently, even if MH were to not be in possession of a valid residence card, he would still derive rights as the spouse of an EEA national.
40. Article 6 of the Directive gives EEA nationals the right of residence on the territory of another EEA State for a period up to three months without any condition or any formalities than the requirement to hold a valid identity card or passport. The same applies to family members who are not nationals of an EEA State, accompanying or joining the EEA national.
41. The right of entry and residence of a family member of an EEA national is not unconditional. The Directive does not deprive the EEA States of all possibility of controlling the entry or residence into their territory of family members of EEA nationals. However, from the time when a third country national who is a family member of an EEA national derives rights of entry and residence, an EEA State may restrict that right only in compliance with Chapter VI of the Directive and in this

[15] Request, paragraph 10.
[16] Case C-202/13 *McCarthy and others*, EU:C:2014:2450, paragraph 53.
[17] Case C-325/09, *Dias,* EU:C:2011:498, paragraph 49.
[18] Unless doubt is cast on the authenticity of that card and the correctness of the data appearing on it by concrete evidence that relates to the individual case in question and justifies the conclusion that there is an abuse of rights or fraud. Case C-202/13, *McCarthy and others*, EU:C:2014:2450, paragraph 53.

case specifically its Article 27.[19] As underlined in recitals 23 and 24 of the Directive, expulsion is the most restrictive measure which can be taken against EEA nationals who have exercised their right of free movement under the Directive.

42. By virtue of Article 27 of the Directive, EEA States may, where justified, refuse entry and residence on grounds of public policy, public security or public health. Such a refusal must be based on an individual examination of the particular case.[20]

43. Article 27(2) of the Directive states that measures taken on grounds of public policy or public security are to comply with the principle of proportionality and shall be based exclusively on the personal conduct of the individual concerned, which must represent a genuine, present and sufficiently serious treat affecting one of the fundamental interests of society. As emphasised by the Court, an expulsion is justified only if, and for as long as, those conditions are fulfilled.[21] It moreover follows from Article 27(2) that previous criminal convictions do not in themselves constitute grounds for taking measures on grounds of public policy or public security, and that any justifications that would be isolated from the particulars of the case or that would rely on considerations of general prevention, are not to be accepted.[22]

44. The Court and the CJEU have consistently emphasised that the public policy exception is a derogation from the fundamental principle of freedom of movement for persons, which must be interpreted strictly and the scope of which cannot be determined unilaterally by the EEA States.[23] Furthermore, according to settled case law, reliance by a national authority on the concept of public policy presupposes, in any event, the existence, in addition to the perturbation of the social order which any infringement of the law involves, of a genuine, present and sufficiently serious threat to one of the fundamental interest of society.[24]

45. The expulsion decision, including the exclusion order, is based on Chapter 8 of the Norwegian Immigration Act, which regulates expulsion of foreign nationals who may

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[19] Cases C-127/08 *Metock and Others*, EU:C:2008:449, paragraph 95 and C-202/13 *McCarthy and others*, EU:C:2014:2450, paragraph 45 and Case E-2/20 *The Norwegian Government v L*, paragraph 30.

[20] Cases C-127/08 *Metock and Others*, EU:C:2008:449, paragraph 74 and C-202/13 *McCarthy and others*, EU:C:2014:2450, paragraph 46.

[21] Case E-2/20 *The Norwegian Government v L*, paragraph 32.

[22] See also case E-15/12 *Jan Anfinn Wahl*, paragraph 115.

[23] See e.g. case E-15/12 *Wahl*, paragraph 83 and case C-50/06 *Commission v Netherlands*, EU:C:2007:325, paragraph 42 and the case law cited.

[24] See Case E-2/20 *The Norwegian Government v L,* paragraph 32. See also e.g. case C-50/06 *Commission v Netherlands*, EU:C:2007:325, paragraph 43 and the case law cited.

not rely on the EEA Agreement (i.e. third country nationals who are not family members of EEA nationals).

46. As set out in the Request, an expulsion decision pursuant to Chapter 8 has as consequence that the third country national is under an obligation to leave the country. An expulsion decision also entails an exclusion order prohibiting entry into Norway, which can be made temporary or permanent.[25]

47. Sections 66 to 68 of the Immigration Act set out which offences may lead to expulsion of third country nationals.[26]

48. The Directorate of Immigration's decision to expel MH, which contained a permanent exclusion order, was adopted on the basis of letter c of the third paragraph of Section 66. Under that provision, a third country national without a residence permit can be expelled if he or she has received a penalty or special sanction for an offence which is sanctionable by imprisonment, or for violation of section 323 (minor theft), section 326 (minor misappropriation), section 334 (minor receiving of proceeds of a crime), section 339 (minor money laundering), section 362 (minor document forgery) or section 373 (minor fraud) of the Norwegian Penal Code.

49. Section 70 of the Immigration Act sets out that a third country national may not be expelled if, in view of the seriousness of an 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.

50. Based on this, it is in ESA's view clear that the scope for expelling persons under letter c of the first paragraph of Section 66 of the Immigration Act is considerably wider than under Article 27 of the Directive, even when taking into account the proportionality requirement in Section 70 of the Immigration Act.

51. It appears to be uncontested that at the time of the expulsion decision, MH did not have any rights under the Directive.

52. However, as of the date MH became a family member of an EEA national, the continued application of an expulsion decision by Norwegian authorities, including an exclusion order, must be in compliance with the Directive.

53. It is for the referring court to assess whether upholding the expulsion decision, with the exclusion order, in the present case is compatible with the Directive. As regards

[25] Request, paragraph 19.
[26] Request, paragraph 20.

that assessment, ESA considers that in a situation as in the present case, where the decision was taken before a person obtained rights under the Directive, despite the difference in scope between letter c of the first paragraph of Section 66 and the Directive, such a decision is not *ipso jure* incompatible with the Directive, as letter c of the first paragraph of Section 66 also covers situations whereby a person could have been expelled in compliance the Directive. However, in ESA's view, in a case such as the present there is a strong presumption against compatibility, given that the decision was taken six years ago, following which MH has, *inter alia*, married and become a father, and was based on a general legal basis applicable to third country nationals, allowing for expulsion and exclusion based on a wide range of criminal offences, including petty crimes.

54. ESA observes that the assessment of the compatibility with Article 27 of the Directive must be based exclusively on the personal conduct of the person concerned. An expulsion is justified only if the continued presence of the person concerned amounts to a genuine and sufficiently serious threat to one of the fundamental interests of society. Consequently, an EEA State must demonstrate, first, that the individual's personal conduct in committing the offences constitutes a genuine, present and sufficiently serious threat to a fundamental interest of society; second, that the expulsion of the individual is necessary in order to safeguard that interest; and, third, that the measure is proportionate in view of the overall consequences on the individual being expelled and the impact on his family members.[27]

55. Furthermore, ESA submits that whether an individual represents a sufficiently serious treat that is *present*, implies the existence of an imminent future risk which, in turn, implies that an up-to-date assessment has to take place.[28] ESA observes that, in the present case, the expulsion decision, with the exclusion order, was taken in June 2017, more than 6 years ago.

56. As regards the consequences of non-compliance with the Directive, it is settled case law that under the principle of sincere cooperation laid down in Article 3 EEA, the EEA States are under an obligation to nullify the unlawful consequences of a breach of EEA law,[29] which may also depending on the circumstances include a

[27] Case E-2/20 *The Norwegian Government v L,* paragraph 32 and the case law cited.
[28] See, by analogy, Case E-2/20 *L,* paragraph 38 and the case law cited.
[29] See e.g. Cases C-201/02 *Wells*, EU:C:2004:12, paragraph 64 and C-177/20 *Grossmania*, EU:C:2022:175, paragraph 63.

duty to remedy such a breach.[30] This duty is owed, within their sphere of competence, by every organ of the State concerned, including national courts and administrative bodies.[31]

57. Thus, any decision under national law that is contrary to a provision of the EEA Agreement, which is or has been made part of the respective legal order, must be disapplied if the provision of EEA law in question and sufficiently precise. ESA submits that there can be no doubt that Articles 5 and 6, as well as 27 and 28, of the Directive fulfil these requirements. In that context, it must be borne in mind that national courts are bound under the principle of sincere cooperation in Article 3 EEA to ensure the full effectiveness of EEA law when they determine the disputes before them.[32]

58. In conclusion, ESA submits that 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 a 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.

5.3 The second question, concerning the application of Article 32 of the Directive

59. By its second question, the referring court asks if Article 32 of the Directive applies, potentially by analogy, in a situation as described in the first question, with the result that the national authorities in the State of entry may require that the third country national files an application to have the exclusion order lifted before the person in question enters that State.

60. ESA agrees with the referring court that the Directive does not contain any specific rules for a case such as the present, in which the third country national is expelled

[30] See e.g. Case E-11/22 *RS,* paragraph 54, in which the Court held that EEA nationals "*must also be able to benefit from remedies for breaches of their rights under EEA law, to the extent that such remedies remain available to them under national procedural law*".
[31] Case C-201/02 *Wells*, EU:C:2004:12, paragraph 64
[32] Case E-11/22 *RS*, paragraph 41 and case law cited.

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.

61. Article 32 of the Directive applies to persons "excluded on grounds of public policy or public security", and explicitly refers to a "final exclusion order which has been validly adopted in accordance with [EEA] law". Hence, and as confirmed by case law, Article 32 applies only to exclusion orders adopted under and in accordance with the Directive.[33] For that reason, Article 32 of the Directive cannot be regarded as applicable to the case before the referring court.

62. ESA furthermore submits that Article 32 is not applicable by analogy in circumstances such as the present ones. The objective of Article 32, in ESA's understanding, is to provide for legal certainty and a procedure for the lifting of an exclusion order adopted in accordance with EEA law. That objective is not, in ESA's view, transferable to a situation, such as in the present case, where an exclusion order was adopted under national law without an assessment of its compatibility with EEA law having been made, neither at the time of adoption nor later. Indeed, in ESA's understanding no such subsequent assessment has been made since MH married an EEA national. This is despite no one among the various Norwegian authorities involved in the matter—whether through immigration authority decision making, prosecutorial discretionary choices to go to trial as well as two judgments by independent courts—at no time seem to have doubted that MH is a family member of an EEA national. Since he obtained that status, he has derived rights under the Directive. That status should have given a clear and compelling obligation to undertake such an assessment.

63. Moreover, Article 32 is in ESA's view part the larger system of the Directive, where the decisions which can potentially be lifted pursuant to Article 32 have originally been taken in conformity with the strict procedural rules of Chapter VI of the Directive, and in particular in conformity with Article 27. Applying Article 32 by analogy in a case such as this would, in contrast be to introduce it as a procedural barrier for the individual without letting that individual benefit from the rest of the system, which confers rights.

64. It is settled case law that, in the absence of relevant EEA rules, it is, under the principle of procedural autonomy of the EEA States, for the domestic legal system of each EEA State to regulate the legal procedures designed to ensure the

[33] Case C-249/11 *Byankov*, EU:C:2012:608, paragraph 68.

protection of the rights which individuals acquire under EEA law.[34] This is provided, however, that they are not less favourable than those governing similar domestic situations (principle of equivalence) and that they do not render impossible in practice or excessively difficult the exercise of rights conferred by EEA law (principle of effectiveness).[35]

65. Against this background and bearing in mind the restrictiveness of an expulsion decision on the right of free movement, ESA submits that any and all competent national authorities have an obligation under the Directive and under Article 3 EEA to assess, *ex officio*, if an expulsion decision adopted prior to a person obtaining rights under the Directive, is in compliance with EEA law, from the moment those authorities become or ought to have become aware of the Directive becoming applicable. This is particularly important in circumstances where the rights of the persons are restricted by way of arrest, detention and criminal proceedings for a breach of the same exclusion decision, bearing in mind also that all Norwegian authorities have a duty to abstain from any measure which could jeopardize the attainment of the objectives of the EEA Agreement.

66. ESA notes that such an *ex officio* assessment must comply with the procedural rules and safeguards set out in the Directive, most notably Articles 30 and 31. As referred to in Recital 26 of the Directive, "[i]n all events, judicial redress procedures should be available to Union citizens and their family members who have been refused leave to enter or reside in another Member State". Such procedural “guarantees are inseparable from the rights to which they relate”.[36] Thus, without those procedural guarantees being fully ensured, the right to free movement and residence under the Directive for EEA nationals and their family members cannot be considered to be effective.

67. In this context, ESA furthermore notes that Norwegian law appears to include the possibility for national competent authorities to review exclusion orders *ex officio*,

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[34] Cases C-91/08 *Wall*, EU:C:2010:182, paragraph 63, C-249/11 *Byankov*, EU:C:2012:608, paragraph 69, E-11/12 *Beatrix Koch and Others*, paragraph 121, E-3/15 *Liechtensteinische Gesellschaft für Umweltschutz v Gemeinde Vaduz*, paragraph 82 and E-6/17 *Fjarskipti hf. v Síminn hf.*, paragraph 31.

[35] See e.g. Case C-177/20 *Grossmania*, EU:C:2022:175, paragraph 49 with further references.

[36] Case C-136/03 (1) *Georg Dörr*, (2) *Ibrahim Ünal*, v (1) *Sicherheitsdirektion für das Bundesland Kärnten*, (2) *Sicherheitsdirektion für das Bundesland Vorarlberg*, EU:C:2005:340, paragraph 67 (by analogy).

or at least without a specific request having been made by the person concerned, in particular where the person is granted residence in another EEA State.[37]

68. In a situation where a person, against whom there is an expulsion decision, including an exclusion order, exercises his rights under the Directive before that decision has been lifted, he or she runs the risk of violating the expulsion decision, if it is found to be compatible with the Directive. However, in ESA's view, this situation is in principle not different from any other situation in which an EEA national or family member seeks to rely on directly applicable EEA legislation which, if necessary, has been duly incorporated in the national order of an EEA State against a measure taken by that State under its domestic law.

69. Accordingly, ESA submits that 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.

5.4 The third question, concerning sanctions

70. By its third question, the referring court asks if Article 36 of the Directive restricts the EEA States' possibility to sanction violations of national decisions on exclusion orders in a situation as described in the first question and, if so, in what manner.

71. In ESAs view, the answer to this question depends on whether the expulsion decision is found to be compatible with the Directive.

72. At the outset, ESA notes that Article 36 applies to breaches of national rules adopted for the implementation of the Directive. Hence, it would seem that Article 36 of the Directive is not applicable in a situation as described in the first question of the Request. In any case, ESA submits that Article 36 of the Directive is an expression of the general principle of proportionality, which is applicable under EEA law.[38]

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[37] In view of the need for the legal situation of a person to be clear, in line with the principle of legal certainty, the SIS legislation provides that SIS alerts on third country nationals who are beneficiaries of the right of free movement within the EU are not to be blindly executed, but to the contrary, give rise to a consultation, whereby the person is not returned to their third country of nationality, but rather requested to go immediately to the Member State where they enjoy a right to stay (Return Handbook, section 5.4, available at: https://home-affairs.ec.europa.eu/system/files/2020-09/return_handbook_en.pdf).

[38] Case C-459/99 *MRAX*, EU:C:2002:461, paragraph 77.

73. If the expulsion decision with the exclusion order is found to be compatible with the Directive, the principle of proportionality, as set out in Article 36 of the Directive, does not prevent an EEA State from imposing sanctions, as long as those sanctions are effective and proportionate. In the absence of harmonisation at EEA level in the field of the sanctions applicable, the EEA States retain the power to choose the sanctions which seem to them to be appropriate, provided that they exercise that power in accordance with EEA law and its general principles.[39]
74. Consequently, EEA law still preserves, as it stands, the autonomy of the EEA States with regard to the penalties that may be imposed on an EEA national or a family member who fails to comply with a formality connected with the exercise of the right to free movement, provided that those penalties comply, in particular, with the principle of proportionality.[40]
75. However, it follows from settled case-law concerning non-compliance with formalities for establishing the right of residence of an individual enjoying the protection of EEA law that EEA States may not impose a penalty so disproportionate to the gravity of the infringement that this becomes an obstacle to the free movement of persons. This would be especially so if the penalty consisted of imprisonment.[41]
76. In light of the strict limitations on the EEA States when adopting expulsion decisions against EEA nationals and their family members, as set out in the Directive, allowing such decisions only on grounds of public policy or public security, ESA submits that it cannot be excluded that imprisonment could, in certain circumstances such as in connection with grave international crimes, be a proportionate sanction for breach of an exclusion order adopted in accordance with EEA law. However, ESA submits that in a situation as that in the present case no such circumstances appear to be present and that a prison sentence of one year clearly would constitute an obstacle to the free movement of persons and appear not be proportionate.
77. If on the other hand the expulsion decision, including the exclusion order, is found to be incompatible with the Directive, ESA submits that MH cannot be sanctioned for an alleged violation of it in so far as that alleged violation concerns acts or omissions from the period after he had become a family member of an EEA

[39] Case C-35/20 *A*, EU:C:2021:813, paragraphs 56-57.
[40] Cases C-35/20 *A*, EU:C:2021:813, paragraph 58 and C-378/97 *Wijsenbeek*, EU:C:1999:439 paragraph 44.
[41] C-378/97 *Wijsenbeek*, EU:C:1999:439 paragraph 44 and the case law cited.

national. It is settled case law that from the time when the third country national who is a family member of an EEA national derives rights of entry and residence from the Directive, an EEA State may restrict that right only in compliance with Articles 27 and 35 of the Directive.[42] Furthermore, compliance with Article 27 is required in particular where the EEA State wishes to penalise the third country national for entering into and/or residing in its territory in breach of the national rules on immigration before becoming a family member of an EEA national.[43] In ESA's view, the same applies, *a fortiori*, when the EEA State wishes to penalise a person for breaches of national rules committed *after* becoming a family member of an EEA national.

78. Based on this, ESA submits that 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.

6 CONCLUSION

Accordingly, the Authority respectfully proposes that the Court respond to the Request for an Advisory Opinion as follows:

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 a 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.

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

[42] Case C-127/08 *Metock and Others*, EU:C:2008:449, paragraph 95.
[43] Case C-127/08 *Metock and Others*, EU:C:2008:449, paragraph 96.

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.

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.

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