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EFTA Court

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Sent via e-EFTACourt

Oslo, 25. september 2023

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(H) Møterett for Høyesterett

WRITTEN OBSERVATIONS

submitted, pursuant to article 20 of The Statute of the EFTA Court, by

MH

represented by

Maral Houshmand

Defense Counsel

in

Case E-23/6 – *MH v. Påtalemyndigheten*

1. INTRODUCTION

1) The Supreme Court of Norway (*Norges Høyesterett*) has, by application dated 22 June 2023, requested the EFTA Court to give an advisory opinion pursuant to Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice.

2) The questions have arisen after the appellant was sentenced to one year imprisonment for violation of an exclusion order (hereinafter *entry ban*) according to Chapter 8 of the Norwegian Immigration Act[1], issued at a time before the appellant was entitled the rights of Directive 2004/38/EC of the European Parliament and the Council.

3) The appellant's principal submission is that the entry ban ceased to apply *ipso facto* from the time he was accorded the rights conferred on him by Directive 2004/38/EC. Furthermore, if the Norwegian Government wishes to uphold an entry ban on a third-country national family member of an EEA national, who, prior to falling under the protection of EEA law, has been issued an entry ban, the Government must issue a new decision in accordance with the rules of restrictions on freedom of movement, as outlined in Article 27-29 of Directive 2004/38/EC.

4) As stated in the request, the appellant's arguments also include the assertion that Article 32 of Directive 2004/38/EC cannot be applied by analogy. This is due to the fact that the provision pertains to cases concerning lifting a ban based on the provisions of the Directive 2004/38/EC, as opposed to national legislation applied in the current case.

5) If the EFTA Court finds that Article 32 is applicable by analogy, the submission is that the appellant cannot be imposed sanctions, since he has not breached national legislation that *implements* the provisions of the directive, cf. Article 36 of Directive 2004/38/EC.

[1] Act of 15 May 2008 on the entry of foreign nationals into the Kingdom of Norway and their stay in the realm (Immigration act).

6) Presuming that the appellant may be subjected to sanctions, the argument is moreover that the most severe penalty should be a fine. Imposing a stricter sanction would constitute a disproportionate restriction on his right to free movement.

2. FACTS

7) Reference is made to the Supreme Court of Norway's statement of the facts in their letter of 22 June 2023, which the appellant finds correct.

8) The appellant will however provide additional details by submitting, and referencing, the judgements from Søndre Østfold District Court (*Søndre Østfold tingrett*) and Borgarting Court of Appeal (*Borgarting lagmannsrett*) regarding the criminal proceedings against the appellant.

9) The Søndre Østfold District Court's judgment references the appellant's understanding upon entering Norway. This understanding was rooted in his international protection status and the refugee travel document he possessed from Greece, as well as his residence in Sweden with his Norwegian wife and their children.

10) The relevant paragraph from the abovementioned judgement reads in an unofficial translation[2]:

"A did not do any research prior to the trip to Norway. He seems to have based his entry on an appointment with the Tax Office in Hamar on 24 May 2022 (ref. sign a declaration of paternity. He was not in contact with the Norwegian immigration authorities, despite the fact that, in the court's view, he was aware that he had a permanent entry ban. He should have sought clarification as to whether his stay in Sweden / passport from Greece entailed any changes to the entry ban to Norway."

11) As in regard to Borgarting Court of Appeal's assessment of the appellant's submissions in the court, it may be read from the judgment in an unofficial translation[3]:

[2] Appendix 1, page 5.
[3] Appendix 2, page 3.

"The defense counsel has shown that A is covered by the entry rules for EEA citizens because he has derived rights through his spouse, cf. the Immigration Act §§ 110 and 111. It is stated that at the time of the offense in the indictment he was covered by the entry rules that apply to EEA citizens citizens and that the entry ban in the 2017 decision is then "zeroed out" and is no longer effective and valid. Since A is protected by the rules that apply to EEA citizens through the exercise of family life with his spouse in Sweden, the defense counsel has stated that he can freely travel to Norway without applying to the Norwegian authorities to have the entry ban lifted. It is further shown that A can only be expelled in accordance with the stricter rules in Section 122 first paragraph of the Immigration Act. The deportation rules in Chapter 8 of the Immigration Act, on which the 2017 decision is based, do not apply at the time of the offense and are overridden by the rules in the Immigration Act that apply to EEA citizens.

The Court of Appeal cannot see how this argument can succeed. In the Court of Appeal's view, there is no basis for considering the conditions at the time of the crime – when A entered Norway on 24 May 2022 – as a basis for the preliminary examination of the validity of the deportation decision, as the defense counsel has stated. The defense counsel has not been able to point to relevant case law that is based on such a legal opinion but has shown on a more general basis that the validity test, in the same way as the assessment of whether other criminal liability conditions have been met, must be based on the conditions at the time of the offense when it is a criminal case.

In the Court of Appeal's view, it is clear from the case law that the preliminary review of the decision's validity in the criminal case must be done in the same way and follow the same principles as in a civil action regarding the review of the decision's validity. This means that it is the actual conditions at the time of the decision that must be used as a basis for testing the decision's validity. The court can nevertheless give weight to evidence that illuminates the conditions as they were at the time of the decision, but subsequent factual conditions cannot be weighed, cf. Rt-2012-1985 sections 67 and 98."

12) For the sake of the context around the fact that the appellant was arrested for driving while intoxicated (paragraph 11 in the request), it must be noted that this was a matter of alcohol consumption during dinner earlier that day with friends, and that the alcohol level in the blood was measured to 0,42 (limit in Norway is 0,2). Consequently, a waiver of prosecution was granted.[4]

3. RELEVANT NATIONAL LAW

13) The request contains an overview of the provisions in the Immigration Act, namely chapter 8 which only apply to third country nationals, and chapter 13 which only applies to EEA nationals and their family members in compliance with Directive 2004/38/EC.

14) The appellant will nevertheless provide a description of section 66 under chapter 8 of the Immigration Act, which in detail describes on what grounds a third national without a permit may be expelled.

15) Section 66 reads as follows:

"Section 66. Expulsion of foreign nationals without a residence permit
A foreign national without a residence permit may be expelled

a. when the foreign national has grossly or repeatedly breached one or more provisions of this Act, has with intent or gross negligence provided materially incorrect or manifestly misleading information in a case falling under the Act, or evades implementation of an administrative decision requiring him or her to leave the realm,

b. when the foreign national, less than five years previously and abroad, has served or received a penalty for an offence which under Norwegian law is punishable by imprisonment. The same applies when a special sanction has been imposed as a result of a criminal offence as mentioned,

c. when the foreign national has in the realm received a penalty or special sanction for an offence which is punishable by imprisonment, or for violation of

[4] *"Påtaleunnlatelse»* in Norwegian, refers to a waiver of prosecution issued even though the Prosecuting Authority considers that all the criteria for criminal liability are met. Typically issued for minor offences.

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 Penal Code,

d. when an administrative authority in a Schengen country has made a final decision on rejection or expulsion of the foreign national due to failure to comply with the country's provisions on foreign nationals' entry or residence,

e. when the foreign national has contravened chapter 18 of the Penal Code or has provided a safe haven for a person the foreign national knows to have committed such an offence, or

f. when the foreign national's application for protection has been refused examined on its merits under section 32, first paragraph, (a) or (d), and the applicant's application has also previously been refused examined on its merits, and the application appears to represent misuse of the asylum system.

Unless it would constitute a disproportionate measure, see section 70, a foreign national without a residence permit shall be expelled

a. when the foreign national has not complied with the obligation to leave the realm by the time limit given under section 90, sixth paragraph, or

b. when the foreign national has not been given a time limit for return because

- there is a risk of absconding; see section 90, sixth paragraph, (a), and section 106 a,

- an application has been rejected as manifestly unfounded or as a result of materially incorrect or manifestly misleading information; see section 90, sixth paragraph, (b),

- the foreign national has been found to pose a threat to public order; see section 90, sixth paragraph, (c), or

- the foreign national has been found to pose a threat to fundamental national interests; see section 129, fifth paragraph.

<...>

16) As stated in the request, paragraph 17: "*The rules on expulsion from Norway and exclusion order 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.*"

17) In addition, it must be noted that the rules on expulsion are also presumed to have general preventive effect cf. the legal history in Ot. Prp no. 75 (2006-2007) point 15.6.1.[5]

18) As in this case, it is stated in the decision that, general preventive considerations, amongst others, justify expulsion.

4. RELEVANT EEA LAW

19) In accordance with recital 5 in the preamble to the Directive 2004/39/EC, "(the) right of all Union citizens to move and reside freely within the territory of the Member States should, if it is to be exercised under the objective conditions of freedom and dignity, be also granted their family member, irrespective of nationality."

20) Furthermore, in accordance with recital 9 in the preamble to the Directive 2004/39 "Union citizens should have the right of residence in the host Member State for a period not exceeding three months without being subject to any conditions or any formalities other than the requirement to hold a valid identity card or passport, without prejudice to a more favourable treatment applicable to job-seekers as recognised by the case-law of the Court of Justice."

21) Additionally, in accordance with recital 11, "the fundamental and personal right of residence in another Member State is conferred directly on Union citizens by the Treaty and is not dependent upon their having fulfilled administrative procedures".

22) Article 5 of Directive 2004/38/EC, headed "Right of entry", states:

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.*

[5] Appendix 3: https://www.regjeringen.no/no/dokumenter/otprp-nr-75-2006-2007-/id474152/?ch=15#kap15-6-1

<...>

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. <...>"

23) As regards the right of residence for up to three months, Article 6 of Directive 2004/38/EC provide:

"Article 6
Right of residence for up to three months

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."

24) Chapter VI of Directive 2004/38/EC, headed "Restrictions on the right of entry and the right of residence on grounds of public policy, public security or public health, provides in Articles 27, 32 and 36:

"Article 27
General principles
1. Subject to the provisions of this Chapter, Member States may restrict the freedom of movement and residence of Union citizens and their family members, irrespective of

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

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

3.In order to ascertain whether the person concerned represents a danger for public policy or public security, when issuing the registration certificate or, in the absence of a registration system, not later than three months from the date of arrival of the person concerned on its territory or from the date of reporting his/her presence within the territory, as provided for in Article 5(5), or when issuing the residence card, the host Member State may, should it consider this essential, request the Member State of origin and, if need be, other Member States to provide information concerning any previous police record the person concerned may have. Such enquiries shall not be made as a matter of routine. The Member State consulted shall give its reply within two months.

25) Article 32 of Directive 2004/38/EC headed "*Duration of exclusion orders*" states:
"Article 32
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."

26) Article 36 of Directive 2004/38/EC headed "Sanctions" provides:

"*Article 36*

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 than15 and as promptly as possible in the case of any subsequent changes."

5. LEGAL ANALYSIS

Question 1 – regarding the right of entry and/or residence up to three months even with an entry ban issued in accordance with national rules applicable to third country nationals.

27) The government argues that entry to a member state cannot be lawfully undertaken when there is issued an entry ban in accordance with national rules applicable to third country nationals. In these instances, the Government argues, the third country national must apply to lift the ban prior to entry.

28) However, this claim does not have support in either the wording of the provisions in the Directive 2004/38/EC., its purpose, nor in the Court of Justice's or the EFTA Court's case law.

29) It is rather clear from a literal interpretation of the provisions in article 5 and 6, that the conditions laid down in the provisions are exhaustive. In support of this view reference is made to case C-157/03 *Commission v Spain*, paragraphs 29 and 30.

30) As pointed out in the opinion by Advocate General in case C-35/20 paras 91:

"<...> a Member State may not impose on a Union citizen, as a condition for entry into its territory, any requirement other than that of being in possession of a valid identity card or passport".

31) This is in accordance with recital 9 in the preamble as well as the judgments in case C-333/13, paragraph 70, and C-299/14 paragraph 42.

32) In "*The EU Citizenship Directive: A Commentary*", by Elspeth Guild; Steve Peers; Jonathan Tomkin, page 100, the authors write with reference to case law[6] that:

"The Court has consistently held that the right of Union citizens to move to the territory of another Member State for the purposes intended by the Treaty is a right conferred directly by the Treaty or, as the case may be, by the provisions of secondary law adopted for its implementation. As a consequence, national administrative procedures do not create, but only give effect to existing rights."

33) Consequently, once the conditions laid down in the provisions of entry and/or residence are met, the third country national can enter the EEA-state without being subjected to additional requirements, or administrative formalities. The EEA states are therefore precluded from imposing additional requirements on EEA-nationals and their family members who exercise free movement rights.

34) Any other interpretation, i.e., accepting that member states set additional requirements, would deprive the provisions of their effectiveness, see Case C-162/09 *Lassal*, paragraph 30 – 31, which reads:

With regard to Directive 2004/38, the Court has already had occasion to point out that that directive aims to facilitate the exercise of the primary and individual right to move and reside freely within the territory of the Member States that is conferred directly on Union citizens by the Treaty and that it aims in particular to strengthen that right, so that Union citizens cannot derive less rights from that directive than

[6] Case 48/75 Royer [1976] ECR 497, paras 31–33; Case C-357/89 Raulin [1992] ECR I-1027, paras 36 and 42; Case C-459/99 MRAX [2002] ECR I-6591, para 74, and Case C-215/03 Oulane [2005] ECR I-1215, paras 17 and 18.

from the instruments of secondary legislation which it amends or repeals (see Case C-127/08 Metock and Others [2008] ECR I-6241, paragraphs 82 and 59).

The Court has also observed that, having regard to the context and objectives of Directive 2004/38, the provisions of that directive cannot be interpreted restrictively, and must not in any event be deprived of their effectiveness (see Metock and Others, paragraph 84).

35) From the time when the national of a non-member country who is a family member of a Union citizen derives rights of entry and residence in the host Member State from Directive 2004/38, that State may restrict that right *only* in compliance with Articles 27 and 35 of that Directive (See Case C-127/08 *Metock and Others*, paragraph 95).

36) Reference is also made to Case E-2/20 *Norwegian Government v L*, paragraph 30, which reads:

"Expulsion of an EEA national can seriously harm persons who, having availed themselves of the rights and freedoms conferred on them by the EEA Agreement, have become genuinely integrated into the host State. As also mentioned in recitals 23 and 24, expulsion is the most restrictive measure which can be taken against EEA nationals who have exercised their right of free movement under the Directive. Any limitations on EEA nationals who have exercised their right to move to and/or reside in that State must be consistent with Article 27 of the Directive. This provision provides that EEA States may restrict the freedom of movement of EEA nationals and their family members on grounds of public policy, public security or public health, based exclusively on the conduct of the person concerned; and in compliance with the principle of proportionality (see Case E15/12 Jan Anfinn Wahl [2013] EFTA Ct. Rep. 534, paragraph 81)."

37) Given the Government agrees that the grounds for expulsion under Chapter 8 of the Immigration Act do not correspond to the concept of public policy within the meaning of Article 27 of Directive 2004/38/EC[7], it follows that the restrictions in the

[7] See the reference in EFTA Surveillance Authority's (ESA) letter of formal notice 14. October 2015, paragraph 33. Case no. 76560. Appendix 4, eftasurv.int/cms/sites/default/files/documents/gopro/2451-762924.pdf

free movement right can only be given effect once a decision is issued in accordance with Article 27, *and* the procedural safeguards in Article 28 og 30 have been fulfilled.

38) Additionally, reference is made to EFTA Surveillance Authority's view in the letter of formal notice in case 76560 which reads[8]:

"62. The Authority notes that as soon as a TCN falls under the protection of EEA law as a family member of an EEA national, he must be accorded all the rights conferred on him by Directive 2004/38/EC, unless, based on an individual examination of the case, an EEA State restricts those rights on the grounds in Article 27 of the Directive 2004/38/EC.

63. That means in practice that such a TCN should be allowed to enter Norway without any conditions and formalities other than the requirement to hold a valid passport and, as the case might be, an entry visa or a valid residence card referred to in Article 10 of the Directive 2004/38/EC. Norway is however not banned from assessing, after the entry was granted, whether the rights of this TCN should be restricted on grounds of public policy, public security or public health or whether the rights of such a TCN should not be refused, terminated or withdrawn in the case of abuse or fraud. As stated in article 35 of Directive 2004/38/EC, any such measure by an EEA State should be proportionate and subject to the procedural safeguards provided for in Articles 30 and 31 of this directive."

39) Pursuant to the observations set out above, the appellant's submission is that the Kingdom of Norway cannot restrict the appellant's freedom of movement based on the issued entry ban.

Question 2- Application of Article 32 by analogy

40) The Prosecuting Authority argues that Article 32(2) of Directive 2004/38/EC must be applied by analogy to a case such as the present. It is stated that *«The situations which*

[8] Ibid, paragraph 62-63

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".

41) Firstly, it must be emphasized that the situations do not have strong similarities. An entry ban in compliance of Article 27 of Directive 2004/38/EC is based on an assessment of the *personal conduct* and moreover the *threat* represented by the person concerned.

42) On the other hand, as stated above regarding the national legislation, an entry ban according to the Immigration Act chapter 8 varies greatly and may be based on the grounds of non-compliance with the Norwegian or other Schengen Country's rules on entry or residence of third country nationals or on a conviction of an offence punishable under Norwegian law by imprisonment.

43) Secondly, the entry ban in accordance with the Immigration Act chapter 8 is also based on grounds of general prevention, which contradicts Article 27(2) of the Directive 2004/38/EC. This provision explicitly states that general preventative grounds cannot justify an expulsion.

44) Moreover, member states do indeed possess the opportunity to assess whether an individual poses a societal threat. This directly emanates from Article 27 (3).

45) As in this case the Prosecuting Authority could have easily conferred with the immigration authorities which by its own initiative would have assessed whether the entry ban should be lifted or whether a new decision should be issued in compliance with Article 27. Demanding such an evaluation *prior* to entry contradicts the specific wording of Article 27 (3).

46) Additionally, the Prosecuting Authority's approach will effectively imply that a specific category of third-country nationals, subject to an entry ban under Chapter 8 of the Immigration Act, is automatically regarded as a societal threat. However, as stated above, the justifications for expulsion under Chapter 8 are highly diverse and, more importantly, do not align with the provisions of Article 27.

47) Finally, it's worth noting that the stance articulated by the Norwegian government in their letter dated December 14, 2015, responding to ESA in case 76560 on page 5, stands in contrast to the claims made in this case[9]:

"We have so far experienced just a handful of cases where the TCN has travelled to Norway without having the entry ban lifted before entry and applies for a Norwegian residence card.

In these situations UDI makes a specific assessment of each individual case and do not automatically ask the TCN to leave Norway and apply for a lifting of the entry ban from abroad. When this situation occurs, and it its evident that the TCN falls under the EEA regulations and does not represent at threat to public order, UDI will lift the entry ban even though the TCN is residing in Norway at the time of the application. To clarify and make the practice predicable, the Ministry will in new circular instruct UDI to formalize this routine."

48) The circular as mentioned was formalized and entered into force 18 mars 2016. Reference is made to point 2.3 which in an unofficial translation reads[10]:

"If a third-country national who has been deported under chapter 8 of the Immigration Act nevertheless travels to Norway and submits an application for a residence card, and it is obvious that the person is covered by the directive and does not pose a threat to public order or security, the application must nevertheless be processed , and the decision on expulsion is revoked, without undue delay.

[9] Appendix 5, https://www.eftasurv.int/cms/sites/default/files/documents/gopro/2422-786200.pdf
[10] Appendix 6, GI-05/2016 - Instruks om behandling av saker som gjelder opphevelse av innreiseforbud for tredjelandsborgere som er omfattet av utlendingsloven kapittel 13 mv. - regjeringen.no

The third-country national will then have access to stay in Norway pending processing of an application for a residence card".

49) Finally it must be recalled, and as noted by ESA[11], The Court of Justice and the EFTA Court have emphasized that the public policy exception is a derogation from the fundamental principle of freedom of movement for persons which must be interpreted strictly and that its scope cannot be determined unilaterally by the EEA States (see C-50/06 *Commission v. Netherlands*, paragraph 41 and the case law sited therein and Case E-15/12 *Wahl* paragraph 83 and the case law cited therein). This alone speaks strongly against an application of Directive 2004/38/EC Article 32 by analogy.

Question 3 – sanctions

50) The Prosecuting Authority's submission is 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.

51) While it is accurate that the above mentioned may be subject to sanctions cf. Article 36 of Directive 2004/38/EC, it should be evident that any sanctions imposed on (a family member of) an EEA national must be linked to non-compliance with the stipulated requirements and formal procedures established in the provisions *implementing* Directive 2004/38/EC (as highlighted in case C-35/20, paragraphs 55-56).

52) This is rather clear by a literal interpretation of Article 36 which 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."

53) An application to lift the ban in this case will not be based on a national rule that implements a provision of Directive 2004/38/EC. The lifting of the ban in this case is

[11] Appendix 4, paragraph 28: eftasurv.int/cms/sites/default/files/documents/gopro/2451-762924.pdf

regulated by the Immigration Act section 71, and not section 124 (which implements article 32 in Directive 2004/38/EC).

54) Furthermore, the sanction is regulated by the Immigration Act section 108 (3), letter e, which refers to the penalty for breaching an entry ban, whereby it is clearly distinguished between the entry bans regulated respectively in section 71 and section 124 of the Immigration Act. This distinction is an absolute necessity because the conditions under each section are entirely different.

55) Based on the abovementioned, member states are precluded to penalise persons who enjoys the rights under 2004/38/EC, and who have failed to follow the procedures for lifting an entry ban established by national legislation, when this is unrelated to and does not align with the *implementation* of Directive 2004/38/EC.

56) If the EFTA Court concludes that Article 32 may be applied by analogy and permits the imposition of criminal sanctions, the maximum penalty allowable would be a fine. A more stringent penalty cannot be imposed, as it would constitute a disproportionate restriction on the appellant's right of free movement (see Case C-127/08, *Metock and others* paragraph 97).

57) It must be recalled that it is not disputed that the appellant is within the scope of the Directive 2004/38/EC, even in the light of the entry ban. A failure to undergo the procedures for having the ban lifted prior to entry must therefore be considered as a formal violation.

58) For comparison reference is made to case C-35/20, in which the Court concluded that a fine by way of an example, amount to 20% of the offender's net monthly income, was not proportionate to the seriousness of the offence (failure to carry a passport or a valid identity cf. Article 6 of the Directive 2004/38/EC). The breach was considered of a minor nature.

59) The same must apply for the present case, hereby the fine must reflect the seriousness of the offence.

60) Regarding the Prosecuting Authority's reference to Case C-290/14 *Skerdjan Celaj*, the appellant perceives the reference indicating a view that violation of an entry ban in this case may be sanctioned by imprisonment as a form of penalty.

61) As stated above, the sanction can not be of any more stringent type than a fine cf. C-127/08, *Metock and others* paragraph 97.

62) Nevertheless, it must be recalled that Case C-290/14 *Skerdjan Celaj* cannot be compared to the present case, as it was related to the interpretation of Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals.

63) Directive 2008/115/EC and Directive 2004/38/EC have completely different – and to a degree opposite objectives.

64) For the sake of factual accuracy, it must be emphasized that the person concerned had been deported out of the Schengen area and illegally entered Schengen and Italy in breach of the entry ban issued by Italy prior. As opposed to the present case, where the appellant is granted refugee status in Greece, and furthermore is within the scope of Directive 2004/38/EC.

65) Moreover, the Directive 2008/115/EC does not apply to the appellant cf. Article 2 of Directive 2008/115/EC. And even if it did, the member states cannot permit third country nationals in respect of whom the return procedure established by Directive 2008/115 has not yet been completed to be imprisoned merely on account of illegal entry, (See case C-47/15, *Affum*, paragraph 63).

66) Consequently, an interpretation of the Directive 2008/115/EC in this context speaks rather against a sanction by imprisonment.

6. ANSWER TO THE QUESTIONS

67) Based on the foregoing, the answers to the questions posed by the Norwegian Supreme Court, are respectfully proposed to be as follows:

1. Article 5 (1) and/or Article 6 (2) of Directive 2004/38/EC of the European Parliament and of the Council must be interpreted as meaning that a third country national, who is married to an EEA national who has exercised his or her right of free movement by moving together with the third country national to another EEA State, than the EEA State of which the spouse is a national, has a right of entry and residence in the spouse's home State for up to three months, even where the third country national, in time before the marriage was entered into, was permanently expelled from the spouse's home State in accordance with national rules applicable to third country nationals.

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

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

Oslo, 25. September 2023

Maral Houshmand

Lawyer

APPENDIXES

Appendix 1:	Judgement delivered by Søndre Østfold District Court, 7. June 2022
Appendix 2:	Judgement delivered by Borgarting Court of Appeal, 7. February 2023
Appendix 3:	Ot.prp no. 75 (2006-2007). (Legal history to the Immigration Act).
Appendix 4:	Letter of formal notice to Norway, by EFTA Surveillance Authority (ESA) 14. October 2015.
Appendix 5:	Reply to the letter of formal notice, by the Norwegian ministry of Justice and Public Security, 14. December 2015.
Appendix 6:	Circular GI-05/2016, entered into force 18. March 2016.