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ATTORNEY GENERAL FOR CIVIL AFFAIRS

To the EFTA Court

OSLO, 25 September 2023

Written Observations by the Kingdom of Norway

represented by Helge Røstum, advocate at the Office of the Attorney General for Civil Affairs, and Marie Munthe-Kaas, adviser at the Norwegian Ministry of Foreign Affairs, submitted pursuant to Article 20 of the Statute and Article 90 (1) of the Rules of Procedure of the EFTA Court, in

Case E-6/23 – MH v Påtalemyndigheten

in which the Supreme Court of Norway has 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.

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1 INTRODUCTION

(1) The request for an advisory opinion concerns the interpretation of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States ("Directive 2004/38" or "the Directive").

(2) The request is made in a criminal case pending before the Supreme Court of Norway between MH (the appellant) and the Prosecuting Authority (the respondent). The case concerns criminal sanctions imposed on MH for violating a decision by the Norwegian Immigration authorities on expulsion and exclusion, prohibiting further entry into Norway.

(3) The main facts of the case are set out in paragraphs 5-15 of the request for an advisory opinion, and it suffices to provide a summary here. MH is an Iranian national who was expelled and excluded from Norway in 2016 after failing to comply with the time limit for leaving Norway and the Schengen area following a rejection of his application for asylum. In

2017, MH was sentenced to imprisonment for storage and transport of hashish and marijuana, and for providing a false statement and the use of false identity papers. On 22 June 2017, the Directorate of Immigration adopted a decision of expulsion, including a permanent exclusion order from Norway. MH was transported to Iran in 2019.

(4) In 2020, MH was granted residence permit with a refugee status in Greece. He travelled to Sweden where he took up residence with his spouse, whom he married in 2019. The spouse is a Norwegian national who moved to Sweden in 2021 and is residing there with MH. MH has employment in Sweden. The couple have a daughter together, who was born in March 2022.

(5) On 24 May 2022, MH was arrested by Norwegian police, initially for driving while intoxicated. His spouse and their daughter were also in the car. MH was indicted for having violated the exclusion order. In a judgment 6 July 2022, Søndre Østfold District Court found MH guilty of violating the exclusion order and sentenced him to one year of imprisonment. Borgarting Court of Appeal upheld that result in its judgment 7 February 2023. The Appeals Selection committee of the Supreme Court then granted leave to appeal 21 April 2023.

(6) The Supreme Court of Norway decided to stay the proceedings and refer the following questions on the interpretation of Directive 2004/38 to the EFTA Court:

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

2 QUESTION 1

(7) By question 1, the referring court essentially asks to what extent the rights of entry and residence in Articles 5 and 6 of the Directive apply for a third country national who was

expelled and excluded from an EEA State according to national rules on third country nationals, and then subsequently returns with an EEA national and citizen of the State from which he is excluded after marrying while residing together in another EEA State.

(8) This raises the need for the EFTA Court's clarification in two respects. First, in respect of the applicability of the derived rights of entry and residence under Articles 5 and 6 of the Directive in the "return situation" in the case at hand. Second, in respect of the applicability of the derived rights in a situation where a third country national was expelled and excluded from an EEA state *prior* to becoming a family member of a national of that EEA State.

(9) To the Government's knowledge, the question of derived rights to entry and residence for a third country national under Articles 5 and 6 of the Directive in a "return situation" has not been subject to interpretation by either the EFTA Court or the CJEU.

(10) However, both the EFTA Court and the CJEU has dealt with a similar question in the context of Article 7 of the Directive.

(11) In *O. and B.*[1], which concerned the right of residence for more than three months under Article 7 of the Directive, the CJEU held that a derived right of entry and residence for a third-country national who is a family member of an EU citizen in the home state of the latter could not be based on the Directive. The CJEU stated in paragraph 42 that:

> *"[...] Directive 2004/38 is intended only to govern the conditions of entry and residence of a Union citizen in a Member State other than the Member State of which he is a national."*[2]

(12) Instead, the CJEU based a derived right of residence for the third country national in the home state of the EU citizen on the Union citizenship established in Article 21 TFEU. The CJEU held that where an EU citizen has created or strengthened a family life with a third country national through genuine residence in another EU State, in accordance with the conditions of Articles 7 and 16 of the Directive, those provisions apply by analogy when the EU citizen returns to his home state to reside there with the third country national.[3]

(13) The EEA Agreement does not contain provisions corresponding to Article 21 TFEU and its right to move and reside freely based on the Union citizenship. Directive 2004/38 was therefore made part of the EEA Agreement with the explicit reservation that the concept of Union citizenship has no equivalence in the EEA Agreement.[4]

(14) The EFTA Court confirmed in *Gunnarsson* that "*the incorporation of Directive 2004/38/EC cannot introduce rights into the EEA Agreement based on the concept of Union citizenship*".[5] In

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[1] Case C-456/12 *O. and B.*

[2] Subsequently upheld by the CJEU in several cases, see inter alia case C-673/20 *Coman,* para. 20.

[3] *O. and B.*, para. 51-56 and 61.

[4] See decision NO 158/2007 of the EEA Joint Committee and the Joint Declaration by the Contracting Parties to Decision NO 158/2007 incorporating Directive 2004/38/EC.

[5] Case E-26/13 *Gunnarsson*, para. 80

other words, similar rights are acknowledged in the EEA as in the EU in so far as they are based on Directive 2004/38, while rights inferred in the EU from Article 21 TFEU cannot, for lack of an equivalent provision, be recognised in the EEA.

(15) In *Nordic Info*[6], Advocate General Emilou recently expressed the same view on the relationship between the Directive and Article 21 TFEU. In para. 48 of the opinion he states that:

> *"Accordingly, only those rights which have no legal basis in the directive itself, and which stem solely from Articles 20 and 21 TFEU, are not applicable within the EEA, due to the lack of an equivalent provision in the EEA Agreement."*

(16) In *Jabbi*[7] and *Campbell*[8], the EFTA Court had to decide a similar question as the CJEU in *O. and B*. The EFTA Court held that no parallel to Article 21 of the TFEU exists in EEA law. However, the EFTA Court found that the Directive must be interpreted differently in the EEA, in order to "[…] *ensure effectiveness and to achieve homogeneity in the area of free movement of persons*" and to "*realize the objective of the Directive, which is, above all, to facilitate and strengthen the exercise of the right to move and reside freely within the territory of the EEA States*."[9]

(17) The EFTA Court therefore concluded that when an EEA national has created or strengthened family life with a third country national during genuine residence in another EEA State in accordance with Article 7 of the Directive, then Article 7 of the Directive apply by analogy when the EEA national returns to their EEA State of origin with the family member to reside there.[10]

(18) The interpretation in *Jabbi* and *Campbell* concerned the distinct situation of derived rights of residence for third country nationals under Article 7 upon the EEA citizen's return to his or hers home state. In none of those cases did the EFTA Court express the view that the Directive should apply by analogy in all cases where the EEA national "return" with a family member who is a third country national. *Jabbi* and *Campbell* did not concern the rights under Articles 5 and 6 of the Directive.

(19) Furthermore, when *Jabbi* and *Campbell* were decided, the CJEU had already handed down its judgment in *O. and B.* The EFTA Court rulings in *Jabbi* and *Campbell* may, therefore, be understood as specifically linked to achieving homogeneity in result with *O. and B.*

(20) In any event, the EFTA Court's reasoning and interpretation of the Directive should be understood as limited to the characteristics of the return situation at issue in those two cases. In the view of the Government, there is no legal basis for extending the interpretive approach in *Jabbi* and *Campbell* to the situation at hand, concerning Articles 5 and 6. Thus,

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[6] Opinion delivered on 7 September 2023 in case C-128/22 *Nordic Info*
[7] Case E-28/15 *Jabbi*
[8] Case E-4/19 *Campbell*
[9] Campbell, para. 55 and 57
[10] *Jabbi*, para. 77-82 and *Campbell*, para. 55-59

and considering the ruling of *O. and B.,* and the CJEU's subsequent case law on the interpretation of the Directive, the Government submits that Articles 5 and 6 of Directive 2004/38 do not apply.

(21) Moreover, a derived right to entry and residence for the third country national in the case at hand may not be based on the primary rights of the EEA Agreement.

(22) An EEA national who exercises the right of freedom of movement to seek employment or has been employed in an EEA State other than that of residence, falls within the scope of Article 28 EEA. This also applies to EEA nationals, who, while residing in another EEA State, find employment in their State of origin. In such situations, family members of the EEA national may have a derived right of entry and residence upon return to the EEA national's state of origin, cf. *Campbell*, where the EFTA Court stated in para. 51:

> *When an EEA national makes use of their right as a worker under Article 28 EEA, and establishes in another EEA State a genuine residence which creates or strengthens family life, the effectiveness of that right requires that the EEA national's family life may continue on their return to the EEA State of origin. Accordingly, a worker may not be deterred from exercising that right by an obstacle to the entry and residence of the worker's family members in the EEA State of origin. Thus, EEA law requires that a worker's family members are granted a derived right of residence in that State. This also applies when the family member is a third-country national.* [11]

(23) The request at hand does not clarify whether the EEA national is employed as a worker or is self-employed in the host EEA State (Sweden). If that is not the case, then a right to entry and residence for the third country national cannot be based on the EEA Agreement. If, however, that is the case, the requirement of "*genuine residence which creates or strengthens family life*" in the host State must also be fulfilled.[12]

(24) In any event, the Government submits that in the present case the third country national does not have a right of entry and residence in his spouse's EEA state of origin pursuant to the EEA Agreement (or the Directive, if applicable to the "return situation" in the case at hand).

(25) Firstly, *Campbell* and the case law referred to there is based on the rationale that the effectiveness of the right as a worker under EEA law requires that the family life that the EEA national has established in another EEA State "*may continue on their return to the EEA State of origin*", cf. para. 51 of *Campbell*. In this respect the CJEU has underlined that it would have a deterrent effect on that right if the EEA national would not be able "*on returning to his Member State of origin, a way of family life which may have come into being in the host Member State as a result of marriage or family reunification* [...]".[13]

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[11] *Campbell* para. 50-51, with further references to case law of the CJEU.
[12] *Campbell*, para. 51 and 52.
[13] *O. and B*., para. 46

(26) The case at hand, however, does not concern a situation where the EEA national returns to establish herself in her home state or aims to take up long-term residence there with her family. Residence pursuant to Article 7 implies that the EEA national has an intention to settle there, which is not the case for residence pursuant to Article 6 of the Directive.[14] The case at hand case concerns the right to entry and short-term residence for up to three months in accordance with Articles 5 and 6. According to the referral, the EEA national is still residing in the host State with MH, where the latter also has employment.[15] In the view of the Government, that situation cannot be juxtaposed with the situation where the EEA national returns to her state of origin to establish herself or to take up long-term residence with her family.

(27) Secondly, and perhaps more importantly, the family life in the case at hand was established when MH was already expelled and excluded from the home State of which the spouse is an EEA national.[16] Further, MH was expelled both prior to becoming her family member pursuant to the Directive and prior to the residence in the host EEA State which (presumably) created or strengthened the family life. In such a situation, the EEA national could not have had any reasonable expectation to continue family life with the third country national in her home state and certainly not that he could accompany her on every short-term residence in her home state.

(28) In any event, the Government fails to see that not granting leave to entry and residence in the specific situation at hand, could have the effect of deterring EEA nationals from leaving their state of origin to pursue an activity as a worker or a self-employed in another EEA State.

(29) Drawing the lines together: the Government submits that Articles 5 and 6 of Directive 2004/38 do not apply to the situation at hand, as there is no legal basis for extending the interpretive approach in *Jabbi* and *Campbell*. Furthermore, a derived right of entry and residence for the third country national cannot be based on the rights under the EEA Agreement (or the Directive, if applicable to the return situation in the case at hand), as the third country national was expelled and excluded prior to any family life pursuant to the Directive and prior to any residence in the host EEA State which created or strengthened the family life.

3 QUESTION 2

(30) By question 2, the referring court asks whether Article 32 of the Directive apply, potentially by analogy, 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 entering that State.

[14] *Campbell* para. 64
[15] The referral, para. 10.
[16] See question 1 of the referral.

(31) Article 32 of the Directive regulates the duration of exclusion orders. According to subparagraph 1, persons that are excluded from an EEA State on grounds of public policy or public security may apply to have the exclusion order lifted, by putting forward arguments to establish that there has been a material change in the circumstances which justified the decision ordering their exclusion.[17] According to subparagraph 2, persons that fall under the scope of the Article, shall have no right of entry into the territory of the EEA State concerned while that application is being considered.

(32) As to the applicability of Articles 5 and 6 of the Directive, the Government refers to its position set out under question 1 above. For the sake of answering question 2, the Government will in the following assume that the third country national, in principle, may have a derived right of entry or residence, either under the Articles of the Directive or the EEA Agreement.

(33) At the outset, the Government notes that there seems to be no decisive case law from the EFTA Court or the CJEU that resolves the question of whether Article 32 can be applied by analogy to third country nationals who are excluded from an EEA state prior to becoming a family member of a national of that EEA State.

(34) In the view of the Government, the Directive cannot be interpreted as giving a third country national who has been excluded from an EEA State in accordance with national rules, a right of entry and residence, unhindered of the limitations set out in Article 32, merely because he subsequently has married a citizen of that EEA State and may come under the scope of the Directive. The Government submits that if the third country national has a right of entry and residence under EEA law, Article 32 of the Directive must be applied by analogy in that situation.

(35) The wording of Article 32 sets out the conditions for the lifting of exclusion orders adopted "*in accordance with Community law* [....]. The wording indicates that it does not intend to regulate exclusion orders that has been adopted in accordance with national rules on third country nationals. Conversely, nothing in the wording of Article 32, therefore, precludes that it is applied by analogy in the situation at hand.

(36) Furthermore, none of the provisions in the Directive states that exclusion orders adopted in accordance with national rules on third country national are annulled or ceases to apply if a third country national subsequently comes under the scope of the Directive. Neither does the preamble lend support to such a position.

(37) As to the purpose of Article 32, it seems to be twofold: First it safeguards the right of EEA nationals and their family members to have their applications on lifting of the exclusion orders considered anew within certain time limits, thereby ensuring that they are not excluded for life from the territory of an EEA State, cf. recital 27 of the preamble of the Directive.

[17] Case E-2/20 *UNE v L* para. 42

(38) Second, there might be compelling public policy and security reasons for an exclusion order, regardless of whether it was based on EEA law or national rules in the first place. By prohibiting persons under an exclusion order from entering the territory of the State of entry while their application is being considered, Article 32 evidently also aim to meet the legitimate need of an EEA State to assess beforehand whether the exclusion order should be upheld or lifted.

(39) That purpose would, at least in part, be undermined if a third country national who has been excluded according to national rules, has a right of entry unhindered by the requirements in Article 32, simply because he or she later comes within the scope of the Directive. The EEA State's legitimate need to assess whether the exclusion order should be upheld or lifted before the person enters its territory, also applies in that situation.

(40) If Article 32 is not applicable by analogy, that would paradoxically entail that Article 32 places a restriction on EEA nationals who have been excluded in accordance with EEA law, but not on third country nationals in the situation at hand. An EEA national would have no right to enter the territory of the EEA State concerned while an application for lifting the exclusion order is considered, while the third country national would have an unhindered right to enter. That seems unfounded, considering that the exclusion orders in both cases might be based on grounds of public policy and public security. Nothing in the preamble or the context of the Directive suggests that such an outcome has been the intention of the EU legislator.

(41) On that background, the Government submits that Article 32 of the Directive must apply by analogy, with the result that the authorities in the State of entry may require that a third country national who has been excluded according to national rules, files an application to have the exclusion order lifted before entering that State. Furthermore, the assessment of whether the exclusion order should be lifted must follow the rules of the Directive, and not the national rules for third country nationals, even though the latter rules were the original basis for the exclusion order.

4 QUESTION 3

(42) By question 3, the referring court asks whether Article 36 of the Directive, or other EEA-law obligations, restrict the EEA States possibility to sanction breaches of exclusion orders in situations such as in the case at hand.

(43) At the outset, the Government refers to its position set out under question 1 above concerning the applicability of Articles 5 and 6 of the Directive and the EEA Agreement in the case at hand. For the sake of answering question 3, the Government will nevertheless in the following assume that the Directive is applicable.

(44) In that case, the first issue raised by question 3, is whether Article 36 precludes an EEA State from imposing sanctions if the breach relates to an exclusion order adopted according to

national rules on the expulsion and exclusion of third country nationals, and not to such orders imposed according to EEA law.

(45) According to the wording of Article 36, it regulates "*the sanctions applicable to breaches of national rules adopted for the implementation of this Directive* […]".

(46) The wording indicates that Article 36 only governs sanctions issued for breach of rules that has been adopted for the implementation of the Directive, and not for breach of national rules on third country nationals, which is the issue in case at hand.

(47) However, this cannot entail that Article 36 also precludes an EEA State from sanctioning breach of an exclusion order as the one in the case at hand, simply because a third country national subsequently has married a citizen of that EEA State and come under the scope of the Directive. That would render the possibility of imposing sanctions non-existent as soon as the third-country national changes status and falls under the scope of the Directive. Nothing in the wording of Article 36 or its preamble suggests that this was the intention of the legislator.

(48) Neither does the wording of Article 36 explicitly prohibit an EEA state from imposing sanctions in situations such as the case at hand. Obviously, there are legitimate reasons for sanctions, also where the breach relates to an exclusion order according to national rules on the expulsion and exclusion of third country nationals.

(49) In the view of the Government, it would be arbitrary if an EEA national can be sanctioned for breach of an exclusion order that has been adopted under EEA law, while a third country national can go unsanctioned for a similar breach, simply because he or she subsequently comes within the scope of the Directive.

(50) Consequently, the Government submits that Article 36 does not preclude an EEA State from imposing sanctions for a breach that relates to an exclusion order adopted according to national rules for third country nationals.

(51) Question 3 also raises the issue of what limitations apply to the authorities of the EEA States when imposing such sanctions.

(52) According to Article 36 the sanctions shall be "*effective and proportionate*".

(53) Firstly, that requirement must apply regardless of whether the breach relates to exclusion orders adopted based on national rules on the expulsion and exclusion of third country nationals or based on EEA law.

(54) Secondly, the wording of Article 36 shows that the legislator has refrained from harmonising which sanctions the EEA States may impose. That is confirmed by the CJEU in its' judgment in *Syyttäjä.*[18]

[18] Case C-35/20 *Syyttäjä*, para. 57-58

(55) The wording of Article 36 further indicates that the EEA states may choose to impose fairly severe sanctions if that is deemed necessary, cf. "*effective* […]". Imprisonment is, therefore, not at such precluded.

(56) In that regard, it should be noted that when the sanctions for breach of the Immigration Act were heightened in Norway in 2014, the Norwegian legislature expressed that breach of exclusion orders constitute a criminal activity that represents a growing societal issue. Further, it pointed to the fact that crime statistics indicate a significant increase in breaches of exclusion orders and that there was reason to believe that the increase in the number of exclusion orders violations may continue, in part due to increased globalization and mobility.[19]

(57) Consequently, there seem to be good reasons for allowing EEA States to impose sanctions, such as imprisonment, to the degree that it is deemed necessary for the sanction to be effective and proportionate.

5 ANSWER TO THE QUESTIONS

(58) Based on the foregoing, the Norwegian Government respectfully submits that question 1 posed by the referring court should be answered as follows:

Question 1:

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

(59) If Article 5(1) and/or Article 6(2) of the Directive is applicable, the Government respectfully submits that question 2 and 3 should be answered as follows:

Question 2:

Article 32 of Directive 2004/38/EC of the European Parliament and of the Council apply by analogy, in a situation as described in question 1, with the result that the national authorities in the State of entry may require that the third country national files an application to have the exclusion order lifted before the person in question enters that State. The assessment of whether the exclusion order should be lifted must follow the rules of the Directive.

Question 3:

[19] Prop 181 L (2012-2013) page 5-6.

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

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

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Oslo, 25/09/2023

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