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EFTA Court
1 Rue du Fort Thüngen
L-1499 Luxembourg
Luxembourg

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WRITTEN OBSERVATIONS
BY
THE NORWEGIAN PROSECUTING AUTHORITY

represented by Mr. Mads Fredrik Baardseth and Mr. Thomas Frøberg, prosecutors at the Office of the Director of Public Prosecutions, submitted pursuant to Article 20 of the Statute of the EFTA Court and Article 90(1) of the Rules of Procedure of the EFTA Court, in

Case E-6/23 *MH v. Påtalemyndigheten*

concerning the Supreme Court of Norway's request (hereinafter referred to as "the Request") 22 June 2023 for 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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Table of Contents

1) Introduction

1) The case concerns the interpretation of directive 2004/38/EC of the European Parliament and of the Council 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 Citizens' Rights Directive) in a Norwegian criminal case relating to the offence of entering Norway in contravention of an entry ban.

2) The main proceedings in Norway concern a criminal charge brought by the Prosecuting Authority[1] against MH due to non-compliance with an entry ban issued by Norwegian immigration authorities. As part of the proceedings, a question arose as to whether the imposition of criminal liability under Norwegian law for breaching the entry ban is compatible with Norway's commitments under EEA law. This is the basis for the Request.

3) The essence of the matter is, as explained in the Request, which rights the Citizens' Rights Directive confers upon a third country national[2] (MH) who is expelled from Norway and issued a ban on re-entry, who thereafter marries a Norwegian citizen living in Sweden. All the questions in the Request are related to the existence and possible exercise of such rights. More precisely: (1) if the directive confers rights of entry and residence in Norway upon MH despite the entry ban (*the substantial content*); (2) if the directive does confer such rights upon MH, if the directive allows national authorities to require the TCN to file a request to have the entry ban lifted *before* entering Norway and exercising his rights (*the procedural approach*); and (3) the state's competence to impose sanctions (including criminal sanctions) for non-compliance with such procedural requirements.

[1] The Prosecuting Authority is hereafter referred to as "the PA".
[2] A third country national is hereafter referred to as a "TCN".

RIKSADVOKATEN

Godkjent digitalt
Mads Fredrik Baardseth (MFB011) 25.09.2023

2) Background – relevant facts and applicable national law

4) The Request provides a comprehensive presentation of the relevant facts and national framework, and the PA refers to the Request with respect to the relevant actions undertaken by MH that provide the factual basis for criminal liability, the criminal proceedings before national courts, and the applicable legal framework under Norwegian law.

5) For the sake of completeness, the PA will provide some supplementary observations below.

a) Facts

6) Firstly, the PA would like to draw the Court's attention to the fact that attempts made by the parties to shed light on the actions taken by the Greek authorities in 2020 in connection with MH being granted a residence permit with refugee status in Greece, as referred to in the Request para. 10, have been unsuccessful. Further elucidation in this regard could potentially have legal implications, since the expulsion and entry ban were registered in the Schengen Information System.[3] Regrettably, at the present time we do not know which considerations were taken by Greek authorities.

7) Secondly, the PA would like to provide additional background information regarding the prosecution of MH on the basis of driving under the influence of alcohol on 24 May 2022.[4] The criminal case against HM for non-compliance with the entry ban arose as a result of him being encountered and apprehended by Norwegian police in the city of Moss on that day. A breath test taken at 02:12 on 24 May showed an alcohol concentration in exhaled air of 0.21 milligrams per litre of air, which is above the statutory *per se* limit 0.1.[5] This is regarded as a criminal offence under Section 31(2) litra a of the Road Traffic Act, cf. Section 22(2). However, the alcohol

[3] The Request para. 8.
[4] The Request para. 11.
[5] cf. Section 22(2) of the Road Traffic Act (Nor. "Vegtrafikkloven").

Godkjent digitalt
Mads Fredrik Baardseth (MFB011) 25.09.2023

concentration was in the lowest sentencing category under that provision, and thus only qualified for a pecuniary penalty (criminal fine)[6] – that is, the level of alcohol concentration could not warrant incarceration. If the violation of the Road Traffic Act (driving under the influence of alcohol) had been adjudicated together with the offence of violating an entry ban, the first offence would only have resulted in a modest increase, if any, of the overall penalty. Consequently, the public prosecutor in the Norwegian Police decided to settle the violation of the Road Traffic Act with a waiver of prosecution,[7] and on 30 May 2022 issued such a decision in accordance with Section 70 of the Norwegian Criminal Procedure Act.[8] A prerequisite for settling the matter in this way is that all the criteria for criminal liability have been met. This charge was thus resolved in May 2022, and therefore not included in the criminal court proceedings against MH.

8) Lastly, the PA would like to draw the Court's attention to the wording of the expulsion decision and entry ban issued on 22 June 2017 (see paragraph 8 of the Request). On page 4 of the decision, under the heading "Consequences of the decision", the following information was provided to MH (in Norwegian):

> "SIS-innmeldingen gjelder så lenge innreiseforbudet gjelder. Selv om utlendingens SIS-innmelding opphører fordi vedkommende får tillatelse i et annet Schengen-land, gjelder fortsatt innreiseforbudet til Norge." //"The SIS alert remains in effect as long as the entry ban is in force. Even if the foreign national's SIS alert ceases because they are granted permission in another Schengen country, the ban on entering Norway still applies."[9]

b) Applicable Norwegian Law

9) The following remarks will be limited to what the PA considers a necessary supplement to the Supreme Court's presentation in section 4.1 of the Request.

[6] Nor. "bot".
[7] Nor. "påtelunnlatelse".
[8] Nor. "Straffeprosessloven".
[9] The Prosecuting Authority's translation from Norwegian to English.

Further details on other relevant rules of immigration law

10) Section 3 of the Immigration Act states that the act "shall be applied in accordance with international rules that Norway is bound by when these are intended to strengthen the individual's position". The Immigration Act is supplemented by the requirements arising from the European Convention on Human Rights (including, but not limited to, Article 8). The European Convention on Human Rights applies as Norwegian law, in accordance with the Human Rights Act,[10] cf. Section 2(1). In cases of conflict between Norwegian domestic law and the European Convention on Human Rights, section 3 of the Human Rights Act states that the European Convention on Human Rights "shall prevail over provisions in other legislation".

11) The Supreme Court states in the paragraph 19 of the Request that expulsion orders and entry ban orders for TCN may be the subject of an administrative complaint *and* be brought before the courts. The Prosecution Authority wishes to emphasize that this also applies to orders issued on the basis of Chapter 13 of the Immigration Act.

12) Under section 109(4) of the Immigration Act, the King (the Government) has the authority to issue regulations that supplement the provisions in Chapter 13, including procedural rules and safeguards that apply to the handling of individual cases. Such a provision is issued in Regulation of 15 October 2009 No 1286 on the admission of foreign nationals into the realm and their stay here (the Immigration Regulation)[11] section 19-2. Subsection 8 of this provision stipulates that the procedural rules of the Immigration Act apply to cases covered by Chapter 13, with some minor exceptions that are not material to this case. Therefore, and in a manner similar to the procedure in cases that concern TCNs, decisions by the Norwegian Directorate of Immigration (UDI)[12] can be appealed to the Immigration Appeals Board (UNE),[13] and decisions can also be challenged through legal action before the courts.

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[10] Nor. Lov 21 mai 1999 nr. 30 om styrking av menneskerettighetenes stilling i norsk rett (menneskerettsloven). An unofficial English transaltion is available here: https://app.uio.no/ub/ujur/oversatte-lover/data/lov-19990521-030-eng.pdf
[11] Nor. Utlendingsforskriften.
[12] Nor. Utlendingsdirektoratet.
[13] Nor. Utlendingsnemnda.

Further details on relevant rules of Norwegian Criminal law

13) For the sake of completeness, the PA will provide some supplementary observations on Norwegian Criminal law to complement the Request.[14]

14) According to the Norwegian Immigration Act, both EEA nationals and TCNs must apply to have the entry ban lifted.[15] Under Norwegian law, it is irrelevant whether a person's status changes from TCN to EEA national; he or she must initiate a process before the immigration authorities. Non-compliance with the entry ban is subject to criminal liability, cf. the Immigration Act Section 108(3) litra e.

15) As emphasised in the Request para. 35, a prerequisite for criminal liability under Norwegian criminal law is that the administrative decision is valid, cf. case-law from the Norwegian Supreme Court (HR-2022-2171-A para. 33 *Korona I* and HR-2019-2400-A *Innreiseforbud* para. 30–31). Thus, in the course of criminal proceedings where criminal liability is based on contravention of a decision from the Immigration Authorities (such as an entry ban), questions related to the legality of the order, raised either by the parties or the court *ex officio*, must be reviewed by the court as a preliminary matter. This means that the court must review the legality of the administrative decision as part of the criminal case.

16) Moreover, the PA finds it particularly important to give a more in-depth explanation of the Norwegian rules for determining the sentencing for criminal offences.[16] A fundamental principle in Norwegian criminal law is that the punishment should be reasonable and proportionate to the offense, cf. e.g. the Supreme Court judgment HR-2022-2225-A para. 17. In the assessment of the case and the offence, there is generally room to consider both aggravating and mitigating circumstances, cf. the Norwegian Penal Code Sections 77 and 78.[17] The aim is to impose a just and *suitable* reaction,

[14] The Request para. 34–36.
[15] Cf. the Request para. 29.
[16] Nor. Straffutmåling.
[17] Straffeloven 2005.

66
24/10/23

Godkjent digitalt
Mads Fredrik Baardseth (MFB011) 25.09.2023

based on the character and seriousness of the offense(s). The Norwegian Supreme Court has stated in HR-2022-731-A para 43:

> "Straffen skal være rimelig og forholdsmessig. Synet på hva som er en riktig straff, er preget av allmenne retts- og verdioppfatninger i samfunnet og vil kunne endre seg over tid. Verdisyn som er uttalt av Stortinget, må anses som et autoritativt uttrykk for den alminnelige rettsfølelsen. Det er på denne bakgrunn bred enighet om at domstolene må følge opp signaler om straffutmåling fra Stortinget som er gitt i forbindelse med en lovgivningsprosess. …" //"The punishment must be reasonable and proportionate. The consideration of what constitutes an appropriate punishment is influenced by general legal considerations and value judgments in society and may change over time. Value judgments expressed by the Parliament must be considered as an authoritative expression of the common legal sentiment. It is broadly agreed that the courts must follow signals regarding sentencing from the Parliament given in connection with the legislative processes. ..."[18]

17) The Supreme Court has reiterated this statement in HR-2023-298-A. Sentencing signals from the Parliament can be conveyed in various formats, ranging from assessments of the seriousness of the offense to clearer signals about the appropriate levels for particular forms of punishment. In all cases, the Parliament's assessments are of great significance and are given considerable weight.

18) The maximum sentence for violations of section 108(3) litra e of the Immigration Act is a fine or imprisonment for up to two years, in accordance with the more stringent sentencing framework that was introduced in 2014. The Norwegian Supreme Court summarized and explained the underlying reasons for this framework in the judgment Rt. 2015 p. 51 para. 11, which states:

> "I forarbeidene – Prop.181 L (2012–2013) – er det gitt anvisning på et vesentlig høyere «normalstraffenivå» enn tidligere. Om bakgrunnen heter det på side 6 i proposisjonen at en skjerping av straffenivået «må kunne forventes å

[18] The Prosecuting Authority's translation from Norwegian to English.

66

Godkjent digitalt 2/10/23
Mads Fredrik Baardseth (MFB011) 25.09.2023

> ha en allmennpreventiv og individualpreventiv effekt». Videre fremheves betydningen av «å styrke respekten for utvisningsinstituttet og ilagt innreiseforbud», og at det er et viktig mål «å sikre at kriminelle utlendinger ikke returnerer til Norge for å begå ny kriminalitet».'//"The preparatory works – Prop. 181 L (2012–2013) – prescribe a significantly higher 'normal penalty level' than before. The background is stated on page 6 of the proposition, namely that an increase in the penalty level 'can be expected to have a general preventive and individual preventive effect.' Furthermore, the importance of 'strengthening respect for the institution of expulsion and imposed entry bans' is emphasized, and an important goal is 'to ensure that criminal foreigners do not return to Norway to commit new crimes.'"[19]

19) The preparatory works states that the normal penalty level should be imprisonment for no less than one year, see Prop. 181 L (2012–2013) on p. 18. The Norwegian Supreme Court has used this penalty level as the point of departure for sentencing, see e.g. HR-2019-2044-A para. 25. Based on the preparatory works, a more stringent sentencing practice has developed, thus leaving less room for general (and broad) judicial discretion in the overall sentencing. In the Norwegian Supreme Court's decision Rt. 2015 p. 51, which has formed a precedent for subsequent decisions, the following is stated in para. 16:

> "Etter mitt syn må forarbeidene forstås slik at rommet for dommerskjønn skal være markert mindre enn det som ellers har vært vanlig."//"In my opinion, the preparatory works must be understood in such a way that the room for judicial discretion should be significantly smaller than what has otherwise been customary."[20]

3) The questions referred

20) As mentioned above, the Norwegian Supreme Court has referred three questions to the EFTA Court – which read as follows:

[19] The Prosecuting Authority's translation from Norwegian to English.
[20] The Prosecuting Authority's translation from Norwegian to English.

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 I and, if so, in what manner?

4) Legal Analysis

21) By all three questions, the Norwegian Supreme Court in essence requests advice from the EFTA Court as to the legal status of an excluded TCN who subsequently, by marriage, acquires rights under the Citizens' Rights Directive. Does the fact that the TCN acquires right affect the entry ban, and if so, in what way?

22) The PA submits that MH can be sanctioned for his violation of the exclusion order prohibiting entry into Norway, and that EEA law does not preclude the application of criminal liability in the present case. In short, the PA submits that Norwegian authorities can deny the TCN to re-enter Norway until he or she has successfully

applied for the entry ban to be lifted, and that re-entering before the entry ban has been lifted is sanctionable, including through the use of criminal penalties.

23) As the Norwegian Supreme Court notes in para. 41 of the Request, the Citizen's Rights Directive does not seem to contain any explicit rules for a case such as the present, in which the third country national is expelled and subject to an exclusion order under national rules, and then subsequently acquires rights under the directive as a family member of an EEA national. Furthermore, as far as the PA is aware, available legal sources provide sparse guidance, if any, on these issues.

a) Question 1

24) MH's travel from Sweden to Norway together with his wife by necessity entails (1) entering Norway, and (2) residing in Norway during their visit. Therefore, the Norwegian Supreme Court seeks guidance on the interpretation of article 5(1) and 6(2) of the EU Citizenship Directive.

25) The PA does not dispute that MH, on account of being the spouse of an EEA national, acquired derived rights of entry and residence under Article 5(1) and Article 6(2). It follows that MH, unless he had been permanently expelled from Norway, would have a right to enter into and stay in Norway, the home state of MH's wife, cf. E-4/19 *Campbell* para. 54–59 and E-28/15 *Jabbi*. The derived rights arise immediately, *ipso facto*, from the marriage with the spouse, cf. C-82/16 *K.A. and others* para. 89.

26) However, the PA submits that the acquisition of such a new legal position – with derived rights – does not set aside an existing entry ban or render it null and void. Consequently, the directive does not confer upon MH a right to entry and residence under the Citizen's Rights Directive in every EEA country, but is limited to confer upon him rights in states he is not excluded from. Therefore, due to the entry ban that was still in force at the material time in the present matter, MH is not permitted to enter Norway.

27) As a starting point for the legal analysis, the PA reiterates that each country – in accordance with international public law– can decide to expel citizens of other countries; this applies to both TCNs and nationals covered by EEA law. National and international rules can and do set limits on this authority, including the European Convention on Human Rights (e.g., Article 3 and the *non-refoulement* principle, and Article 8 on the right to family life) and EEA law. Nevertheless, the starting point is the state's sovereignty – which is a well-established principle, see e.g. paragraph 66 of the European Court of Human Rights' judgment 28 June 2011 in *Nunez v. Norway* (application no. 55597/09). The provisions of the Citizens' Rights Directive must be interpreted against this background.

28) The key issue in this case is whether Article 5(1) and Article 6(2) of the Citizen's Rights Directive confer a substantive right to travel to a country which one has been excluded and banned entry from, and overriding such a decision due to subsequent derived rights as a family member of an EEA national.

29) In the PA's view, the directive does not give such a substantive right. This view is primarily based on two arguments.

30) Firstly, the PA argues that a rule stating that the Directive overrides existing entry bans and renders them void would require express and clear support in the wording of the Directive itself. Such an interpretation, with far-reaching consequences for each country's sovereignty in immigration matters, would have to be expressly stated – which it is not. Therefore, the Directive must be interpreted as not conferring a right to entry and residence in a country that the EEA nationals' family member is excluded from. The wording – "right of" (entry and residence) – should be read as being contingent on there being no other grounds to preclude such a right. This approach finds some support in the view taken in Case 41/74 *van Duyn* para. 22, which states that the extent to which a rule deviates from general international (public) law and related requirements should be taken into consideration.

31) Secondly, consideration should be given to the rules in 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 (the Return Directive) when interpreting the EU Citizenship Directive. Article 11(4) is based on a premise that only the issuing state can lift an entry ban. As stated in the *Return Handbook*:

> "Only the Member State issuing the entry ban (Member State A) can lift the entry ban. If another Member State (Member State B) decides to issue a residence permit to the same person (after having carried out consultation with the Member State which had issued the entry ban), Member State A is obliged to withdraw the alert (Article 25(2) SIC) – but may nevertheless put the third country national on its national list of alerts. …"[21]

32) In the interest of uniform interpretation of adjacent regulations within the same area of law, this established prerogative for the issuing state should be taken into account when interpreting the Citizens' Rights Directive. As a supporting argument, the PA notes that this interpretation does not represent an undue infringement of the freedom of movement of nationals of EEA states. In this regard, it is worth noting that the rights conferred upon the family member are *derived*. Their purpose is to enable the EEA citizen to exercise his or her rights. The EEA nationals' family member will be able to apply to have the entry ban lifted, and the application must be assessed based on the individual's status as a spouse of a citizen of an EEA state.

33) In sum, the PA submits that the prior decision to permanently expel MH from Norway has the effect of excluding Norway from the area within which MH can enter and stay on the basis of his acquisition of derived rights under the Citizens' Rights Directive as a TCN family member.

[21] Page 63.

b) Question 2

34) By its second question, the referring court asks, in essence, whether Directive 2004/38/EC precludes national authorities from requiring the TCN to file an application to have the entry ban lifted before entering the country. In other words, if the Directive allows for such a procedure.

35) If question 1 is answered in the affirmative, and MH has the right to enter and reside in Norway despite the entry ban, the Prosecution Authority submits that Norway legitimately and in accordance with the Directive can require the TCN family member to file an application to have the entry ban lifted before the person in question enters that state.

36) In the PA's view, Article 32 furnishes the legal basis for such an approach. The PA does not contest that exclusion and entry bans can *only* be given and upheld for TCN family members if they are compliant with the substantive and procedural rules of the Directive.[22] But the question referred to the EFTA Court does not concern this aspect – it concerns the question of whether the Directive allows the Government to make such an assessment, in accordance with the Directive, *before* the individual enters the state by demanding an application.

37) *Linguistically*, the wording of Article 32(1) indicates that only decisions of exclusion taken under the provisions of the Directive fall within the scope of the Article. This is indicated by the referral to the terms "public policy or public security," and "Community law". Thus, the scope of Article 32 appears to be limited to persons excluded on the basis of the provisions in the Directive, that is, the exclusion of EEA citizens or family members with *existing* derived rights *at the time of the decision*.[23] Therefore, Article 32 does not directly apply in our case. As the PA argues below, it should, however, be applied per analogy.

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[22] Cf. Case C-503/03 *Commission v Spain* para. 52–53.
[23] See also Guild and others in The EU Citizenship Directive. A Commentary, Second Edition, p. 300 ("against an EU citizen").

66

Godkjent digitalt 21/01/23
Mads Fredrik Baardseth (MFB011) 25.09.2023

38) The second paragraph of Article 32 reads:

> "The persons referred to in paragraph 1 shall have no right of entry to the territory of the Member State concerned while their application [for having the exclusion order lifted] is being considered."

39) Accordingly, the Directive does not allow for the entry of an excluded person *qua* EEA national while his or her application for lifting the order is being considered. The rule covers two factual situations: Firstly, the rule applies to those who were excluded *qua* EEA national or family member of an EEA national at the time of exclusion. Secondly, the rule applies directly to TCN family members who have since the exclusion order become covered by EEA law, and the expelling authorities have decided to uphold the exclusion in accordance with the Directive. The provision reflects case law of CJEU, see Joined Cases 115/81 and 116/81 *Adoui and Cornuaille* para. 12. There is no provision that allows for entry pending the processing of the application in these situations.

40) The PA submits that in the present case Article 32(2) must apply by analogy.

41) Firstly, if Article 32(2) is not applicable by analogy, citizens who have been expelled as a TCN (without any connection to the EEA or EEA nationals) and are subsequently covered by the Directive could freely enter the country where they are excluded, even if the substantive conditions for upholding the exclusion under the Directive are met. Such an approach would allow for expelled nationals subject to an exclusion order, including persons who are a serious security threat, to enter a country from which they are excluded freely and without having to submit an application. The member states must be given the opportunity to examine whether an exclusion order, originally decided under the rules applicable to TCNs without rights under EEA law (i.e., not under the provisions that implement EEA in national immigration law), should be upheld on the basis of the rules applicable under EEA law, before the TCN enters the state. If the Court does not allow member states the opportunity to take due considerations prior to the TCN entering its territory, it would raise serious concerns

for the protection of public policy and public security, particularly since there are no internal borders within Europe. The competent national authorities have a significant and practical need to assess the implications of a person's possible entry and the question of whether an entry ban should be lifted or not, before the person enters the territory of the state. It is also noteworthy, as mentioned above, that according to the Return Directive Article 11(4) the national entry ban and national alert, still stand even if the international alert has to be withdrawn.

42) Moreover, the situations that 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. The purpose of and justification for such a rule as Article 32(2) is compelling also when examining the present matter. In the PA's view it would be arbitrary and contrary to the spirit and purpose of the provisions if persons who were excluded before they had rights to entry and residence under EEA law were to be in a better position than persons who did have such rights at the time of the decision to expel them.

43) It may be objected that the Directive sets out stricter definitions of the circumstance in which EEA nationals and their family members may be expelled. However, expulsion orders are frequently based on severe and significant factual grounds. Moreover, the authorities have to take a decision within six months of submission of the application, as provided for both in Article 32(1) *in fine* and Section 19-30(3) of the Norwegian Immigration Regulation.

44) The analogy is also, in the PA's view, supported by the fact that the Citizens' Rights Directive is built on the idea that individuals do not have a right to reside in a state's territory pending a (final) decision, see Article 31(4). The possibility of drawing on an analogy must also be considered in light of the fact that neither the Citizens' Rights Directive nor the Return Directive contain explicit provisions that expressly state that the person may enter before the ban has been lifted.

45) Finally, when assessing whether there is a basis for an analogy, one must also consider that the rights for a TCN family member are *derived*. As stated in C-94/18 *Chenchooliah* para. 61:

> "As the Court has observed, that requirement, which is also set out, inter alia, in Article 6(2) and Article 7(2) of Directive 2004/38, is consistent with the purpose of and justification for derived rights of entry and residence which that directive provides for family members of Union citizens. The purpose of and justification for such derived rights are based on the fact that a refusal to allow such rights would be such as to interfere, in particular, with the effective exercise by the Union citizen concerned of his right to freedom of movement and the exercise and effectiveness of the rights which Article 21(1) TFEU confers on such a citizen (see, to that effect, judgments of 8 November 2012, Iida, C-40/11, EU:C:2012:691, paragraphs 62 and 63, and of 14 November 2017, Lounes, C-165/16, EU:C:2017:862, paragraph 48)."

46) Applying Article 32(2) by analogy, and thereby requiring the TCN family member to file an application to have the entry ban lifted, does not impair the EEA national's rights under the Directive in a significant way.

47) In conclusion, the PA submits that Article 32(2) must be taken to apply by analogy in a situation such as in the present case.

c) Question 3

48) By its third question, the Norwegian Supreme Court ask for guidance on whether EEA law restricts the EEA States' possibility to sanction violations of national decisions on exclusion orders. Consequently, the court does not seek guidance on sanctioning violations of rules that are incompatible with EEA law. In such a case, the penalty will be as incompatible with community law as the rule itself, see Cases 179/78 *Rivoira* para. 14–15, and 157/79 *Pieck* para. 16.

Godkjent digitalt
Mads Fredrik Baardseth (MFB011) 25.09.2023

49) If, as submitted by the PA, question 1 is answered in such a way that the Directive does not confer upon MH a material right to enter and reside in Norway, EEA law does not restrict the Norwegian authorities' possibility to impose sanctions on MH for non-compliance with the entry ban. The following analysis is therefore limited to the situation where MH does not comply with the relevant *procedures*, namely filing an application to have the entry ban lifted before entering Norway.

50) In response to question 3 the PA submits that unlawful entry in violation of the procedure to have an entry ban lifted may, depending on the circumstances, be sanctioned. Sanctions will not generally will be disproportionate. The authorities will thus be able to choose appropriate sanctions – including criminal penalties – based on an assessment of the individual case, see C-35/20 para. 57–58.

51) Article 36 of the Citizens' Rights Directive regarding sanctions reads as follows:

> "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. …"

52) As emphasized in Case C-35/20 para. 56, member states have the "power to lay down the sanctions applicable to infringements of the national provisions adopted pursuant to that directive". The wording in the provision is *sanctions*, and the article does not limit itself to specific type of sanctions.

53) The authorities' discretion is emphasized partly through the wording "lay down". This appears more clearly in the Danish language version's use of "[m]edlemsstaterne *fastlægger* de sanktioner, der skal anvendes".[24] Consequently, national authorities have a high degree of discretion to ascertain the nature and severity of sanctions. The CJEU has underscored this in its decision in case C-35/20. Para. 57 states that in the absence of "harmonisation at EU level in the field of the sanctions applicable,"

[24] Emphasis added.

Member States "retain" "the power to choose the sanctions which seem to them to be appropriate". This statement illustrates the wide latitude given to the authorities, see also Case C-77/20 *K.M.* para 36.

54) Authorities must assess what is a reasonable and appropriate sanction, which is even clearer in the Danish versions of the above-mentioned cases – both of which use "de finder rimelige" ("they find reasonable"). However, this competence is not unrestricted. The CJEU states in Case C-35/20 para. 57 that authorities must "exercise that power in accordance with EU law and its general principles (see, by analogy, judgment of 11 February 2021, *K. M. (Penalties imposed on the master of a vessel)*, C-77/20, EU:C:2021:112, paragraph 36 and the case-law cited)". Moreover, the CJEU states in para. 58:

> "Consequently, and notwithstanding the developments that have taken place since the judgment of 21 September 1999, *Wijsenbeek* (C-378/97, EU:C:1999:439), EU law still preserves, as it stands, the autonomy of the Member States with regard to the penalties that may be imposed on a Union citizen who fails to comply with a formality connected with the exercise of the right to free movement. As the Court observed in paragraph 45 of that judgment, the Member States may, in such a case, provide for criminal penalties, provided that those penalties comply, in particular, with the principle of proportionality. That principle is now enshrined in Article 49(3) of the Charter of Fundamental Rights of the European Union ('the Charter'), according to which the severity of penalties must not be disproportionate to the offence."[25]

55) Accordingly, the EEA states may sanction failure to comply with procedural requirements with criminal penalties, such as the Norwegian Immigration Act does. It is worth noting, that failure to comply with such formalities means that the person has no material right to enter the country. By way of comparison, reference is also made to the fact that violation of an exclusion order under the Return Directive (Directive

[25] Emphasis added.

2008/115/EC) may be sanctioned with a criminal penalty, see C-290/14 *Skerdjan Celaj*.

56) Failure to comply with an entry ban is a serious crime, and as stated in the Norwegian preparatory works (as citied above) the Parliament has taken the view that a severe penalty can be expected to have a general preventive and individual preventive effect. Moreover, it is proportionate to sanction such an offence with imprisonment. It may, however, be questioned whether the Norwegian level of sentencing for violation of an exclusion order (normally a one-year imprisonment in a case such as the present) must be adjusted slightly out of consideration of the principle of proportionality in EEA law, compared with what MH was sentenced to by the District Court and the Court of Appeal.

57) The PA accordingly submits that the use of criminal sanctions, including imprisonment, against persons who enter Norway in contravention of an exclusion order cannot *per se* be considered disproportional under the Citizens' Rights Directive, although considerations of proportionality might favor somewhat mitigating the applicable sentence in the present case.

5) Proposed responses to the preliminary questions submitted by the Supreme Court of Norway

58) Based on the foregoing considerations, the Prosecuting Authority respectfully submits that the questions referred should be answered as follows:

Question 1: Article 5(1) and 6(2) of Directive 2004/38/EC do not confer upon an individual a right to enter and reside in an EEA state that the individual is previously excluded from as a TCN after he or she later becomes a family member of an EEA national.

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Question 2: Article 32(2) of Directive 2004/38/EC must apply by analogy in situations such as the present case, so that Norway legitimately and in accordance with the Directive can require the TCN family member to file an application to have the entry ban lifted before the person in question enters that state.

Question 3: Article 36 of Directive 2004/38/EC allows EEA states to sanction non-compliance with entry bans, including through the use of criminal sanctions, as long as the sanction adheres to the principle of proportionality.

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An electronic copy of this pleading is lodged electronically (scanned PDF of the signed document) via e-mail to registry@eftacourt.int. The signed original document together with five certified copies will be delivered to the Registry no later than 10 days from today, cf. Article 54(7) of the Rules of Procedure.

Oslo, 25 September 2023

Mads Fredrik Baardseth
Junior Public Prosecutor
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Thomas Frøberg
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Mads Fredrik Baardseth (MFB011) 25.09.2023

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Annexes

i. Decision regarding expulsion and entry ban issued by the Directorate of Immigration (UDI) on 22 June 2017 (dok. 00,03)
ii. Waiver of prosecution (påtaleunnlatelse) issued on 30 May 2022 (dok. 12,03)

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