SUPREME COURT OF NORWAY

J U D G M E N T

given on 17 March 2025 by a grand chamber of the Supreme Court, composed of

Chief Justice Toril Marie Øie
Justice Bergljot Webster
Justice Henrik Bull
Justice Wenche Elizabeth Arntzen
Justice Ingvald Falch
Justice Espen Bergh
Justice Cecilie Østensen Berglund
Justice Erik Thyness
Justice Knut Erik Sæther
Justice Thom Arne Hellerslia
Justice Are Stenvik

HR-2025-490-S, (case 23-052214STR-HRET)
Appeal against Borgarting Court of Appeal's judgment 7 February 2023

A	(Counsel Thomas Horn, Maral Houshmand)
v.	
The Prosecution Authority	(Counsel Mads Fredrik Baardseth)
Attending by analogy from section 30-13 of the Dispute Act:	(The Office of the Attorney General represented by Kristin Hallsjø Aarvik)
The State represented by the Ministry of Justice and Public Security	

(1) Justice **Hellerslia:**

Issues and background

(2) The case concerns punishment for violating an exclusion order. The key question is whether the defendant, after the order was imposed, has acquired a right to enter and reside in Norway under EEA law, which would mean that the violation cannot be punished.

(3) The defendant, A, is an Iranian national who came to Norway as an asylum seeker in 2008. His asylum application was rejected in 2011, and the deadline for departure was set to 28 February 2012. The defendant did not leave Norway within the deadline. By Hålogaland Court of Appeal's judgment of 23 February 2017, he was sentenced to nine months of imprisonment for a serious drug offense and for providing a false statement. On these grounds, the Norwegian Directorate of Immigration (UDI) adopted on 22 June 2017 a decision on expulsion of A including a permanent exclusion order. On 11 March 2019, the defendant was expelled to Iran.

(4) On 3 May 2019, the defendant was married in Iran to a Norwegian national, who at that time had permanent residence in Norway.

(5) The defendant left Iran for Greece in 2020, where he was granted a residence permit with refugee status. In the spring of 2021, he moved to Sweden and settled there. In May 2021, his spouse entered into an agreement with an employer in Sweden for work starting in August 2021. In July the same year, she and her child from a previous relationship moved together with the defendant to Sweden.

(6) Early in August, his spouse discovered that she was pregnant. According to information provided, she was concerned about losing rights if she started working in Sweden. Instead, she started in a 60 percent position in Norway from 13 September 2021. Since it was a rotational position, she could stay in Sweden during her free periods. From 1 October 2021, she lived in a shared housing in Norway during the periods she worked here.

(7) From 1 February 2022, the defendant's spouse was on maternity leave and mainly residing in Sweden. The couple's child was born in Norway in March 2022.

(8) On 24 May 2022, the defendant and his spouse had an appointment with the Norwegian Tax Administration to declare paternity for the child. He was arrested the same day after being stopped by Norwegian police in a traffic control, and was later indicted for violating the exclusion order under section 108 subsection 3 (e) see section 71 subsection 2 of the Immigration Act.

(9) On 6 July 2022, Søndre Østfold District Court handed down a judgment convicting the defendant according to the indictment and sentencing him to one year of imprisonment, with a deduction of nine days for time spent in custody on remand. He was also ordered to pay legal costs.

(10) The defendant appealed to Borgarting Court of Appeal, which, on 7 February 2023, ruled as follows:

> "1. A, born 00.00.1985, is convicted of violating section 108 subsection 3 (e) see section 71 of the Immigration Act and sentenced to one year of imprisonment. A deduction of nine days is granted for time spent in custody on remand, see section 83 of the Penal Code 2005.
>
> 2. A is ordered to pay costs to the public authorities of NOK 5,000, within two weeks of the service of this judgment."

(11) The defendant has appealed to the Supreme Court, challenging the application of the law.

(12) In a written submission to the Supreme Court, the defence counsel contended that the defendant cannot be punished for violating the exclusion order because he has acquired a derived right to enter and reside in Norway through his marriage to an EEA national. This submission was also presented to the Court of Appeal, but like the District Court, the Court of Appeal ruled exclusively based on national law. Therefore, the EEA law issues constituting the core of the case in the Supreme Court have not been considered by the lower instances.

(13) After granting leave to appeal, the Supreme Court requested an advisory opinion from the EFTA Court. The EFTA Court issued its opinion on 2 July 2024, in Case E-06/23 *MH*.

(14) In September 2024, the State represented by the Ministry of Justice and Public Security asked to participate in the case by analogy from section 30-13 of the Dispute Act. The request was made to clarify the EEA law issues. The Appeals Selection Committee granted the request.

(15) On 17 October 2024, the Chief Justice decided that the case should be heard in a grand chamber under section 5 subsection 4, see section 6 subsection 2, of the Courts of Justice Act.

(16) Since the lower instances have not considered the EEA law issues and these have not been central to the prosecution authority, relevant factual circumstances have barely been addressed. Therefore, the Public Prosecution Authority decided to conduct further investigations after the case was referred to the Supreme Court. This has generated some new information, but the investigations were still ongoing at the time of the hearing in the Supreme Court.

(17) The parties have prepared a joint memorandum on agreed facts. However, they have expressed doubt about the extent to which the Supreme Court can rely on the information in the memorandum. I will return to the Supreme Court's jurisdiction in the case.

(18) Following the appeal hearing, the Public Prosecution Authority has stated that the investigation has confirmed that the defendant married a Norwegian national in Iran on 3 May 2019.

The parties' and the State's contentions

(19) The appellant – *A* – contends:

(20) Principally, the defendant has a derived right to enter and reside in Norway as a result of his spouse exercising her right to free movement as a worker under Article 28 of the EEA

Agreement. This applies regardless of whether her employment has been in Sweden or Norway. It follows from EEA law that family members cannot be denied entry and residence in the EEA national's State of origin – in this case, Norway – as such denial would render the right to free movement ineffective. Rights under EEA law take precedence over national law, which means that the defendant cannot be punished for violating the exclusion order, see section 2 of the Penal Code and section 3 of the Immigration Act.

(21) In the alternative, the defendant has the same right even if the spouse is considered economically inactive; that is, she is neither a worker nor a self-employed person, as the EFTA Court has concluded in its present opinion and in several previous opinions. Although the EEA Agreement does not have a general provision corresponding to the EU Treaty provision on the free movement of Union citizens, there is a sufficient legal basis in the EEA Agreement for a corresponding freedom of movement for economically inactive persons. This right must also have effective content.

(22) In the second alternative, the rules are too unclear to satisfy the principle of legality, there is no basis for criminal liability in the Immigration Act in this case and punishment would be in violation of Article 14 taken in conjunction with Article 8 of the European Convention on Human Rights (ECHR).

(23) If the Supreme Court should not find a sufficient factual basis for acquittal, the Court of Appeal's judgment must be set aside.

(24) A asks the Supreme Court to rule as follows:

> "Principally: A is acquitted.
>
> In the alternative: The Court of Appeal's judgment and appeal hearing are set aside."

(25) The respondent – *the Public Prosecution Authority* – contends:

(26) In all material respects, the defence counsel and the prosecution authority agree on the legal principles for the derived right to enter and reside for the spouse of a worker who is an EEA national. The same applies to the spouse of an economically inactive EEA national. The advisory opinion of the EFTA Court must be given significant weight, as it is based on a correct interpretation of EEA law.

(27) However, the factual basis presented to the Supreme Court is not sufficient to hand down a new judgment on the merits of the case. The Court of Appeal did not address whether the defendant had acquired derived rights under EEA law, and the facts relevant to this issue were therefore not sufficiently clarified. This primarily concerns the question of whether the spouse's stay in Sweden was of such a nature that it could grant the defendant a derived right. The judgment must therefore be set aside outside the appeal due to procedural errors.

(28) The Public Prosecution Authority asks the Supreme Court to rule as follows:

> "Borgarting Court of Appeal's judgment 7 February 2023 and the appeal hearing are set aside."

(29) *The State represented by the Ministry of Justice and Public Security* – participating in the case in analogy from section 30-13 of the Dispute Act – contends:

(30) Workers have freedom of movement under Article 28 of the EEA Agreement. Therefore, the spouse of a worker who has exercised the freedom of movement may have a derived right to reside in the worker's State of origin. However, this presupposes that there has been a prior working relationship in the host State. Also, it is not clear that the derived right applies to short-term stays in the State of origin.

(31) For economically inactive persons, there is no corresponding basis in the EEA Agreement for a derived right. The EFTA Court's opinion for this group is based on a misapplication of the homogeneity principle. This principle implies that the Citizens' Rights Directive should be interpreted consistently in both the EEA and the EU, while the EFTA Court has interpreted it differently from the European Court of Justice (ECJ) to achieve a homogenous result. The ECJ has based its result on a treaty provision in the EU on the freedom of movement for Union citizens. The EEA Agreement has no corresponding provision. An interpretation based on the premise that economically inactive persons have the same rights under the EEA Agreement as in the EU would thus imply incorporating rights into the EEA Agreement without the required process, which would raise questions regarding the principle of sovereignty. This provides a basis for disregarding the EFTA Court's opinion.

(32) If the EFTA Court's interpretation is accepted, the conditions for a derived right must still be met for EEA law to preclude punishment. The stay in the host State must be genuine and meet the time requirement set by the ECJ, and it must involve a return to the State of origin. Furthermore, exceptions must be possible based on the general restriction doctrine, regardless of the conditions for exceptions in the Citizens' Rights Directive. A requirement to first apply for the lifting of the exclusion order could be justified within the scope of the restriction doctrine.

(33) The State represented by the Ministry of Justice and Public Security has not made any specific contentions.

My opinion

National law and the key issue in the Supreme Court

(34) Section 108 subsection 3 (e) of the Immigration Act stipulates that any person who intentionally or negligently violates an exclusion order under section 71 subsection 2 of the Act may be subject to fines or imprisonment for up to two years.

(35) It is a condition for conviction that the immigration authorities' decision on expulsion and exclusion is valid, see HR-2019-2400-A *Exclusion order*, paragraph 31. The validity assessment is based on the facts at the time of the decision, including the courts' preliminary examination of the validity in a criminal case, see paragraph 42 and Rt-2012-1985 *Long-term resident children I*, paragraph 81. If the decision is valid, the general rule is that the person targeted by the ban may thus be punished for violating it, even if circumstances have arisen after the decision that could have led to its lifting upon application, see section 71 subsection 2 third sentence.

(36) The Court of Appeal concluded that the decision was valid when it was made, on which the parties in the Supreme Court agree. The Court also found that the other objective and subjective conditions for punishment were met. This is also not disputed.

(37) The key issue before the Supreme Court is whether EEA law dictates, nonetheless, that a violation of the exclusion order cannot be punished. I refer to section 2 of the Penal Code, which states that criminal legislation applies subject to limitations that follow from agreements with foreign states. The same is expressed in section 3 of the Immigration Act.

(38) This primarily raises the question of whether the defendant, after the exclusion order was issued but before the entry occurred, had acquired a right to enter and stay in Norway under EEA law. If he had acquired such a right, the question is whether this takes precedence over the exclusion order.

(39) Since the Court of Appeal has not addressed whether the defendant had a right to enter and stay under EEA law, evidence of relevance to the individual application of the law has not been examined. The parties largely agree on the facts, but on certain points, the Public Prosecution Authority believes the information is too uncertain for the Supreme Court to rely on. Therefore, before addressing the central issues, I will comment on the Supreme Court's competence in evaluating evidence related to the defendant's rights under EEA law.

(40) The Supreme Court cannot review the evaluation of evidence related to the issue of guilt, see section 306 subsection 2 of the Criminal Procedure Act, but it may review the application of the law. The general application of the law may also require an evaluation of the facts, which the Supreme Court can review, see HR-2022-2171-A *The Oslo Regulations*, paragraph 39, which concerned the validity of regulations. The evaluation of evidence related to the individual application of the law; specifically, whether the conditions under EEA law for derived rights are met in this case, is part of the evaluation of evidence related to the issue of guilt, which the Supreme Court cannot review. Although these are civil law issues that the Supreme Court would have had full competence to review in a civil case, they nonetheless constitute conditions for criminal liability in a criminal case.

Central starting points for the EEA issues

Overview of the EEA issues

(41) The defendant is a national of a state outside the EEA, referred to as a third-country national. Nationals of states outside the EEA do not have the same right to enter and reside in Norway as EEA nationals. However, to strengthen the freedom of movement for EEA citizens, third-country nationals who are close family members of an EEA national are granted certain derived rights to accompany or join an EEA national exercising this freedom.

(42) The freedom of movement for EEA nationals and their family members is regulated in detail in the *Citizens' Rights Directive* – European Parliament and Council Directive 2004/38/EC. The Directive was incorporated into the EEA Agreement by decision of 7 December 2007, and implemented in Norwegian law through Chapter 13 of the Immigration Act. EEA law does not operate with "Union citizenship", as this term refers to a collection of rights related to the union concept in the EU, which also includes political rights. It is therefore specified in

the EEA Committee's decision that the concept of "Union citizenship" is not included in the EEA Agreement, see the eighth recital of the Preamble, and that in the EEA, the term shall be replaced by the words "national(s) of EC Member States and EFTA States", see the decision's Article (1) (c). For the sake of simplicity, I will refer to these as EEA nationals.

(43) The Directive is applicable to EEA nationals with family members who move to or reside in an *EEA State other than* that of which they are a national, see Article 3 (1). This EEA State is hereafter referred to as the *host State*, which is different from the EEA national's *State of origin*.

(44) Family members are defined in Article 2 (2), and include the spouse. The right of entry is regulated in Article 5. Regarding the specific conditions for residence, the Directive distinguishes between three levels: residence for up to three months, see Article 6; residence for more than three months, see Article 7; and permanent residence, see Article 16.

(45) For residence for up to three months, the EEA nationals only need a valid identity card or passport, and family members need a valid passport and must accompany or join the EEA national, see Article 6. For residence for more than three months, Article 7 (1) requires that the EEA nationals are either workers or self-employed persons, see (a), or have sufficient resources for themselves and their family, as well as sickness insurance, see (b), or are enrolled as a student at a private or public establishment and have sufficient resources for themselves and a sickness insurance, see (c). If these conditions are met, the right of residence beyond three months extends to family members who are not nationals of a Member State, accompanying or joining the EEA national, see Article 7 (2).

(46) The question in this case, however, is whether the defendant has a derived right to accompany his spouse to her *State of origin*. The right of an EEA national to enter and reside in his own State of origin is not regulated by the Directive, as it is governed by other rules of international law of a human rights nature, for instance Article 3 of Protocol 4 of the ECHR. The equivalent in Norwegian law is Article 106 subsection 2 second sentence of the Constitution. Family members who are not nationals of the State of origin are not protected by these rules.

(47) However, the right of EEA nationals to reside in a host State would be less effective if they could not also return to their State of origin with their family. As I will come back to, the ECJ has therefore established that the State of origin cannot prevent its own nationals from returning with their family after exercising the freedom of movement. For economically active nationals, such as workers, the ECJ has derived this from treaty provisions found in the EEA Agreement. For economically inactive nationals, the ECJ has derived this from the treaty provision on the freedom of movement for Union citizens, which is not reflected in any corresponding overarching and general provision in the EEA Agreement. A key question is therefore whether a derived right for third-country nationals still has a sufficient basis in EEA law if the EEA national is economically inactive. In that case, the justification must differ slightly from the ECJ's justification in the EU, raising questions about the application of the "homogeneity principle" – the idea that rules should be interpreted and applied uniformly in the EU and the EEA.

(48) If there is a basis for a derived right for third-country nationals in EEA law, the question arises of which conditions and frameworks apply, both related to the stay in the State to which the EEA national travelled, and the subsequent return to the State of origin.

(49) In this case, it is also important to assess the significance of the exclusion order decision being made before the time the defendant may have acquired derived EEA rights.

The homogeneity principle

(50) It follows from Article 1 (1) of the EEA Agreement, and also the fourth recital of the Preamble, that the objective is to create a "homogeneous" European Economic Area. An important basis for this is a uniform interpretation and application of the rules throughout the EEA, and through that, equal treatment of individuals and market participants. I refer to the fifteenth recital of the Preamble, which states that the objective of the Contracting Parties...

> "… is to arrive at, and maintain, a uniform interpretation and application of this Agreement and those provisions of Community legislation which are substantially reproduced in this Agreement and to arrive at an equal treatment of individuals and economic operators as regards the four freedoms and the conditions of competition; …"

(51) The homogeneity principle has been established by both the ECJ and the EFTA Court. As for the ECJ, I refer to judgment of 2 April 2020, in Case C-897/19 PPU *I.N.*, paragraph 50 with further references, while the EFTA Court has expressed the principle as follows in its advisory opinion of 8 July 2008, in Case E-09/07 and E-10/07 *L'Oréal*, paragraph 27:

> "The main objective of the EEA Agreement is to create a homogeneous EEA, cf. *inter alia* Article 1(1) EEA and the fourth and the fifteenth recitals of the Preamble to the Agreement. Homogeneous interpretation and application of common rules is essential for the effective functioning of the internal market within the EEA. The principle of homogeneity therefore leads to a presumption that provisions framed in the same way in the EEA Agreement and EC law are to be construed in the same way. However, differences in scope and purpose may under specific circumstances lead to a difference in interpretation between EEA law and EC law …"

(52) Consequently, an implication of the homogeneity principle is that a ruling by the ECJ on the interpretation of EEA-relevant rules will carry significant weight. Article 6 of the EEA Agreement establishes the significance of case law from the ECJ, stating that rulings given prior to the conclusion of the EEA Agreement should be followed – "[w]ithout prejudice to future developments of case law". For subsequent rulings, it follows from Article 3 (2) of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice that the EFTA Court shall pay due account to the principles therein. The same must apply to national courts. In practice, no distinction has been made between rulings given before and after the conclusion of the EEA Agreement – case law from the ECJ has been considered guiding regardless of when it was issued, see Rt-2005-1601 *Yellow pages*, paragraph 43 and Henrik Bull, *Høyesteretts bruk av EU- og EØS-rett* [The Supreme Court's application of EU and EEA law] in Tore Schei et al. (eds.), *Lov, sannhet, rett. Norges Høyesterett 200 år* [Law, truth, justice, the bicentennial of the Supreme Court of Norway], 2015, page 367.

(53) As follows from the quote from the advisory opinion in *L'Oréal*, a legal act incorporated into the EEA Agreement must be interpreted in its EEA law context. In some cases, this may lead to the legal act being interpreted differently than the EU legal act, see Torje Sunde et al., *EØS-lovgivningen. Fra EU-rett til EØS-rett og norsk rett* [EEA law. From EU law to EEA law and Norwegian law], 2024, page 193.

(54) Since the conclusion of the EEA Agreement, there has been an increasing difference – often referred to as "the widening gap" – between the legal basis in the EU pillar and the EFTA pillar. This is due to a series of treaty amendments towards increased integration among the EU Member States, while the EEA Agreement has not been amended correspondingly. Articles 20 to 25 of the Treaty on the Functioning of the European Union (TFEU) on Union citizenship are an example of this. If the treaty amendments in the EU affect regulations that are also part of the EEA Agreement, the question arises whether EEA law should still be interpreted as EU law would have been interpreted without the amendments, even though this leads to different outcomes in the EU and EFTA parts of the EEA. The alternative is to interpret EEA law with the aim of achieving equal treatment; that is, equal rights and obligations throughout the EEA, even though the legal basis is not the same. This is often referred to as the difference between homogeneity in *interpretation* and homogeneity in *results*.

(55) If, in areas where EU law has developed through treaty amendments and new legal acts that have not been incorporated into the EEA Agreement, great emphasis is placed on achieving homogeneity in results, it could, as the State[1] has emphasised, be an interference with state sovereignty. In this regard, the State has pointed out the procedural requirements for amending the EEA Agreement or incorporating new legal acts, and the constraints this must be considered to impose on the EFTA Court and national courts when interpreting new obligations for the states. Predictability and other due process considerations may also argue against a dynamic interpretation aimed at achieving a uniform result.

(56) In my view, although it is essential to achieve equal treatment within the EU and EEA, this consideration alone cannot support a uniform result. The consideration of state sovereignty requires that the interpretive result must be sufficiently grounded in the EEA Agreement, including the incorporated legal acts.

(57) I find it difficult to describe more accurately the extent to which the goal of equal treatment is balanced against the principle of sovereignty. When assessing whether an interpretive result is grounded in the Agreement, attention should be given not only to the specific provision or legal act, but also the EEA Agreement as a whole, including its fundamental objectives and considerations, see Rt-2005-1365 *Finanger II, paragraph* 52. The decisive factors will be the basis in the EEA Agreement for the result that provides equal treatment as in EU law, and the significance of the consideration of sovereignty.

The EFTA Court's advisory opinion and its impact

(58) As mentioned initially, the Supreme Court has requested the EFTA Court to issue an advisory opinion in the case. The EFTA Court was first asked whether the Citizens' Rights Directive

[1] The State represented by the Ministry of Justice and Public Security

should be interpreted to confer a derived right of entry and residence on a third-country national married to an EEA national, despite an exclusion order decision being made. The question was answered as follows in the EFTA Court's advisory opinion of 2 July 2024, in Case E-06/23 *MH*:

> "The rules laid down by Chapter VI 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 must be interpreted as not permitting an EEA State to refuse entry and residence in its territory to a third-country national spouse of an EEA national on the sole ground that the thirdcountry national spouse has been the subject, in the past, of an exclusion order on the basis of national measures imposed in connection with past infringements at a time before he or she acquired derived free movement rights under the Directive, without first verifying that the presence of that person in the territory of the EEA State constitutes a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, within the meaning of Article 27(2) of the Directive. "

(59) The second question was whether Article 32 of the Directive applies to expulsion decisions like in the case at hand, which are made under the general conditions for expulsion in the Immigration Act with the consequence that the third-country national must apply to have the exclusion order lifted before entry. According to Article 32, it is possible to apply for lifting of an exclusion order, but there is no right of entry while the application is being considered. The EFTA Court concluded that Article 32 only applies if a decision is made that complies with Article 27.

(60) The third question was whether Article 36 of the Directive on sanctions or any other EEA law obligations restrict the EEA State's possibility to sanction violations of an exclusion order as in this case. The answer was that without a new assessment of whether the exclusion order is in conformity with Article 27, presence on the territory of the EEA State concerned is lawful under EEA law and cannot be sanctioned.

(61) Thus, the EFTA Court's statement in our case is particularly related to the significance of the exclusion order being issued prior to the acquisition of derived EEA rights. Regarding the possibility at all for individuals in the defendant's situation to obtain derived rights towards the spouse's State of origin, the EFTA Court refers in paragraphs 47–48 to its statements of 27 June 2014, in Case E-26/13 *Gunnarsson*, 26 July 2016, Case E-28/15 *Jabbi* and 13 May 2020, in case E-04/19 *Campbell*, and maintains its previous view, see paragraph 52.

(62) In *Jabbi*, which concerned the spouse of an economically inactive EEA national, the EFTA Court concluded as follows in its response to the Oslo District Court:

> "… where an EEA national, pursuant to Article 7(1)(b) and Article 7(2) of the Directive, has created or strengthened a family life with a third country national during genuine residence in an EEA State other than that of which he is a national, the provisions of that directive will apply by analogy where that EEA national returns with the family member to his State of origin."

(63) The answer was upheld towards the Supreme Court in *Campbell*. However, specific circumstances led to both *Jabbi* and *Campbell* being resolved on a different basis nationally, while *Gunnarsson* concerned a request from the Supreme Court of Iceland. Therefore, the

Supreme Court of Norway has not previously considered the statements in the mentioned cases.

(64) Advisory opinions from the EFTA Court are not formally binding for national courts, see Article 34 subsection 1 of Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice. As stated in HR-2016-2554-P *Holship*, paragraph 76, this means that national courts must independently consider how to interpret and apply EEA law.

(65) However, when interpreting EEA law, national courts must "attach considerable importance to the opinions of the EFTA Court concerning the interpretation of EEA law", see *Holship*, paragraph 77. This is expressed in the same paragraph partly as requiring "special circumstances" and partly as requiring "weighty and compelling reasons" to disregard the EFTA Court's interpretation of EEA law.

(66) If the EFTA Court has gone far in interpreting EEA law with the aim to achieve homogeneity with EU law, sovereignty considerations may, depending on the circumstances, provide weighty and compelling reasons to disregard the advisory opinion.

Does a third-country national who is a family member of an EEA national have a derived right to enter and reside in the EEA national's State of origin?

Development of freedom of movement of persons in the EU

(67) To determine the derived rights of third-country nationals towards the EEA national's State of origin, it is necessary to address the development of the freedom of movement in the EU and the EEA. I will first outline the development in the EU.

(68) Initially, the central objectives of the European Economic Community (EEC) were to establish a common market and abolish the obstacles to the free movement of persons, services and capital, see Articles 2 and 3 (c) of the Treaty establishing the European Economic Community (TEEC) from 1957, also known as the Treaty of Rome. However, the substantive provisions of the TEEC only concerned persons connected to an economic activity, such as workers, see Article 48. The specific conditions for free movement were laid down in a series of secondary legal acts, which also conferred derived rights on family members. Self-employed persons and service providers – and according to case law, eventually also service recipients – had similar rights. A right derived directly from primary law, however, required the involvement of an economic activity, see the ECJ's judgment of 17 September 2002, in case C-413/99 *Baumbast*, paragraph 81.

(69) The Single European Act of 1986, effective from 1987, was the first major revision of the TEEC and aimed to establish a European internal market by the end of 1992. In this context, a new Article 8a was adopted regarding the "progressive establishment" of a market without internal frontiers, which would include the free movement of persons.

(70) In 1990, three Council directives were adopted that granted freedom of movement for economically inactive persons: Directive 90/366/EEC on the right of residence for students, Directive 90/365/EEC on the right of residence for pensioners, and Directive 90/364/EEC "on

the right of residence", which applied to other economically inactive persons. The right of residence in another Member State depended on the national of the Member State having sufficient resources and a sickness insurance, but in that case, family members were also covered, see Article 1 of the Directives.

(71) The Preamble to the Directives states that they were adopted with reference to Articles 3 (c), Article 8a and Article 235 TEEC. The latter provision is a general authorisation for the Council to enact the appropriate provisions for the functioning of the Common Market when the other provisions of the Treaty do not provide for the requisite powers of action. Additionally, unanimity is required.

(72) In February 1992, the Maastricht Treaty was adopted. It entered into force on 1 November 1993, leading to the formation of the European Union (EU). The TEEC was continued as the Treaty establishing the European Community (TEC), but with several amendments. Among these amendments, Union citizenship was established in Article 8, and the freedom of movement in Article 8a. Consequently, it was only with the adoption of Article 8a that the freedom of movement for economically inactive persons was firmly established in primary law.

(73) The Citizens' Rights Directive, adopted in 2004, replaced among others Directive 90/364/EEC on the right of residence, and is primarily a consolidation of the content of previous directives. The adoption also brought certain amendments, neither of which is of particular interest to this case. It follows from the ECJ's judgment of 25 July 2008, in Case C-127/08 *Metock et al.* that the Citizens' Rights Directive cannot be interpreted to confer less extensive rights than the previous directives, see paragraph 59.

(74) The Treaty of Lisbon of 2007, in force from 2009, brought new amendments to the TEC, and the treaty was also renamed the Treaty on the Functioning of the European Union (TFEU). The former Article 8 on Union citizenship was continued in Article 20 TFEU, while the former Article 8a on the freedom of movement for Union citizens was continued in Article 21.

The right to free movement of persons under the EEA Agreement

(75) The EEA Agreement was concluded to give the EFTA States access to the EU's internal market. A main goal was for the EEA Agreement to mirror EU law in the areas within the EU that the Agreement would cover. Article 1 (1), stating that the aim is "respect of the same rules, with a view to creating a homogenous European Economic Area, hereinafter referred to as the EEA" must be read in this context. According to Article 1 (2), the cooperation covers the four freedoms, including "the free movement of persons", see (b). Neither here nor in the fifth recital of the Preamble, which also mentions the four freedoms, does the wording imply that the free movement of persons is restricted to economically active individuals. However, the substantive provisions in the main part are limited to economic activity, see Article 28 on workers, Article 30 on self-employed persons and Article 36 on service providers.

(76) However, the three mentioned directives from 1990 on free movement for economically inactive persons, including Directive 90/364/EEC on the right of residence, were also initially incorporated into the EEA Agreement. For systemic purposes, they were placed in Annex

VIII on the right of establishment, see Article 31 of the main part, but their content is not limited to this.

(77) In Proposition to the Storting no. 100 (1991–1992) on the ratification of the EEA Agreement, Directive 90/364/EEC on the right of residence is mentioned as one of the most important legal acts on the free movement of persons, see page 251. In the same place, it is specified that the freedom of movement not only includes workers and self-employed persons, but also persons who "for other reasons" reside in another Member State, including "economically inactive/non-working" persons, provided that the conditions for sufficient resources and sickness insurance are met.

(78) When the Citizens' Rights Directive was incorporated into the EEA Agreement in 2007, a joint declaration was issued by the Contracting Parties, stating among other things:

> "The concept of Union Citizenship as introduced by the Treaty of Maastricht (now Articles 17 seq. EC Treaty) has no equivalent in the EEA Agreement. The incorporation of Directive 2004/38/EC into the EEA Agreement shall be without prejudice to the evaluation of the EEA relevance of future EU legislation as well as future case law of the European Court of Justice based on the concept of Union Citizenship …
>
> Residence rights for third country nationals fall outside the scope of the Agreement with the exception of rights granted by the Directive to third country nationals who are family members of an EEA national exercising his or her right to free movement under the EEA Agreement as these rights are corollary to the right of free movement of EEA nationals.."

(79) While it is emphasised that the concept of Union citizenship in the EU has no equivalent in the EEA, it is also expressed that the Contracting Parties are aware that the Directive grants rights to third-country nationals who are family members of an EEA national exercising his or her right to free movement under the EEA Agreement. These were not new rights, even for economically inactive individuals.

The Singh doctrine

(80) The freedom of movement primarily involves the possibility to travel to a host State. As mentioned, it follows from other international rules that a state cannot deny entry to its own citizens, but these rules do not confer derived rights on family members who are nationals of another state. At the same time, the inability to return to the State of origin with one's family could be a real obstacle to exercising the freedom of movement.

(81) The issue was addressed by the ECJ in a plenary judgment of 7 July 1992, in case C-370/90 *Singh*. The case concerned the right of residence in the United Kingdom for an Indian national who had married a British national. After working in Germany, the couple returned to the United Kingdom to run a self-employed business there. The following is stated in paragraphs 23 and 25:

> "However, this case is concerned not with a right under national law but with the rights of movement and establishment granted to a Community national by Articles 48 and 52 of the Treaty. These rights cannot be fully effective if such a person may be deterred from exercising them by obstacles raised in his or her country of origin to the entry and

> residence of his or her spouse. Accordingly, when a Community national who has availed himself or herself of those rights returns to his or her country of origin …
>
> The answer to the question referred for a preliminary ruling must therefore be that Article 52 of the Treaty and Directive 73/148, properly construed, require a Member State to grant leave to enter and reside in its territory to the spouse, of whatever nationality, of a national of that State who has gone, with that spouse, to another Member State in order to work there as an employed person as envisaged by Article 48 of the Treaty and returns to establish himself or herself as envisaged by Article 52 of the Treaty in the territory of the State of which he or she is a national. The spouse must enjoy at least the same rights as would be granted to him or her under Community law if his or her spouse entered and resided in the territory of another Member State."

(82) In other words, the consideration for effective freedom of movement for workers and self-employed persons means that the Member States are obliged to allow entry and residence for spouses of own nationals who have exercised the right to free movement, on at least the same terms as for residence in another Member State. Reference is made to Article 48 TEEC on the freedom of movement for workers and Article 52 on the right of establishment, as well as Directive 73/148/EEC, which provided more detailed rules on the freedom of movement for self-employed persons and providers and recipients of services.

(83) The question arose once more in the Grand Chamber judgment of 11 December 2007, in case C-291/05 *Eind*, with the same conclusion. In that case, the reference person had been a worker in the host State, but was unemployed when he returned to his State of origin. In that case, also, the inability to return with a family member would constitute an unlawful obstacle to the freedom of movement for workers.

The ECJ's judgment in O and B

(84) In a Grand Chamber judgment of 12 March 2014 in case C-456/12 *O and B*, the ECJ addressed the derived right for third-country nationals to enter and reside in the Member State of origin of a Union citizen who had not been economically active in the host Member State. Both O and B were third-country nationals who had married a Union citizen and were denied residence in the Union citizen's State of origin following the Union citizen's return to that Member State.

(85) The Court found that it follows from a literal, systematic and teleological interpretation that the Citizens' Rights Directive does not establish a derived right of residence for third-country nationals in the Union citizen's State of origin, see paragraphs 37–43. It referenced in particular Article 3(1) on the scope, Articles 6, 7, and 16 on the conditions for residence, and the purpose provision in Article 1(a).

(86) The Court then assessed whether such a right can be derived from Article 21(1) TFEU on the freedom of movement for Union citizens. With reference to *Singh* and *Eind*, the Court concluded that without a derived right for third-country nationals to enter and reside in the Union citizen's State of origin, it would interfere with the Union citizen's freedom to travel to another Member State as conferred by Article 21(1), see paragraphs 44–49. The ruling has been followed up in several subsequent judgments.

Basis in EEA law for derived rights for third-country nationals when the EEA national is a worker

(87) As I understand the State, it is not disputed that a family member of an EEA national who has exercised the right to free movement and has worked in another EEA State – a host State – under EEA law has the right to reside in the EEA national's State of origin, provided that the stay is not intended to be of short duration.

(88) *Singh* and *Eind*, as mentioned, are based on the right to free movement in the EU as a worker. Regarding the free movement of workers, Article 28 of EEA Agreement has a similar content to Article 45 TFEU and Article 48 of the preceding TEEC. Therefore, I find it clear that the Singh doctrine applies in cases where the EEA national has been a worker in the host State. For the freedom of movement for workers to be effective, there must be no obstacles in the State of origin that deter the EEA national from exercising his right to free movement. Therefore, upon return to the State of origin, the EEA national's family must have the same right to reside there as in the host State.

(89) I will return to the specific conditions for third-country nationals to assert derived rights. I mention nonetheless that, in the State's view, there must have been a work relationship in the host State for the rights to derive from the right to free movement for workers – it is not sufficient that the EEA national has moved to the host State and works in the State of origin, as in the case at hand. The defence counsel and the prosecution authority argued that these cases, also, fall under the right to free movement for workers. However, I do not need to address this issue if family members have corresponding derived rights when the EEA national is economically inactive.

Basis in EEA law for derived rights for third-country nationals when the EEA national is economically inactive

(90) In *O and B*, the ECJ based its result on Article 21 TFEU on the freedom of movement for Union citizens. As mentioned, the EEA Agreement – unlike what regulates the freedom of movement of workers – does not have a provision equivalent to Article 21 TFEU. The question then becomes whether there exists another basis in EEA law to justify a corresponding derived right for family members of an economically inactive EEA national. This is also the starting point for the EFTA Court's assessments, see *Jabbi,* paragraph 68.

(91) The State contends that the principle of homogeneity means that the Citizens' Rights Directive must be interpreted in the same way in EEA law as in EU law, and that this prevents the derivation of corresponding rights. I see it differently. Although the ECJ, with emphasis on the wording, does not find a basis for deriving the rights in the EU from the Directive, I do not interpret *O and B* to mean that the wording prevents the Directive from providing a basis for derived rights in the EEA.

(92) As I read *O and B*, it is central to the ECJ's reasoning that the Citizens' Rights Directive does not establish the right to free movement for Union citizens, but only the conditions for exercising the right. In paragraph 41, a reference is made to Article 1(a) of the Directive, establishing "the *conditions* governing the *exercise of the right* to free movement and residence within the territory of the Member States" (my emphasis). At the time of adoption,

the right to free movement itself followed from primary law, specifically the provision currently found in Article 21 TFEU. Since the right to free movement itself does not explicitly follow from the Directive, it is natural that the ECJ bases its assessment on the fundamental and overarching provision in primary law when considering whether rights can be derived for third-country nationals towards the State of origin of the Union citizen, meaning rights that are not explicitly stated in the Directive.

(93) In an EEA context, this assessment will be different.

(94) I start by pointing out that, although the EEA Agreement has a main part largely corresponding to EU primary law, the significance of the hierarchical structure is not quite the same, since the EEA cooperation is not based on the same supranational decision-making mechanisms as that in the EU. Legal acts incorporated into the EEA Agreement form "an integral part" of the Agreement, see Article 119.

(95) The Citizens' Rights Directive is incorporated into the EEA Agreement, and when the EFTA States thereby accept the conditions laid down in the Directive for the exercise of a right to free movement for economically inactive persons, see Article 7(1)(b), this must imply that the States have also accepted that there is a corresponding underlying right. The right established in Article 7(1)(b) existed in the EEA even before the incorporation of the Citizens' Rights Directive. As I have outlined, such a right has existed in the EEA from the beginning, see Directive 90/364/EEC on the right of residence. The Citizens' Rights Directive therefore only consolidated a right that already existed in the EEA.

(96) Without a more general fundamental rights provision, such as Article 21 TFEU, this means that in an EEA context, the Citizens' Rights Directive must be considered to provide the basis for the right to free movement for economically inactive persons. I read the EFTA Court's advisory opinion in *Jabbi* to express the same in paragraph 74, stating that Article 7 of the Citizens' Rights Directive reflects the fact that an EEA national has a right under EEA law to reside in other EEA States.

(97) According to its wording – both in the Directive on the right of residence and the Citizens' Rights Directive – the right only applies towards the host State. Therefore, the question is whether a right that, in the EEA, is based on a directive may provide a basis for deriving rights towards the State of origin in the same way as Article 21 TFEU does in the EU. In my view, the question must be answered affirmatively.

(98) Article 21 TFEU links the right to free movement of persons to the Union citizenship. As my outline shows, however, Directive 90/364/EEC on the right of residence was adopted before Union citizenship was introduced in the EU. The right to free movement for economically inactive persons was therefore originally not derived from the Union citizenship, but was later incorporated into such a scope through treaty amendments and the Citizens' Rights Directive. It follows, as mentioned, from *Metock* that the Citizens' Rights Directive did not entail less extensive rights. The changed scope for the rights through the Union citizenship can thus not restrict what would have been a natural interpretation prior to these amendments, as also pointed out by the EFTA Court in *Gunnarsson*, paragraphs 79–80.

(99) As further expressed in paragraph 81 of this opinion, I also do not consider it decisive whether the right follows from an overarching provision such as Article 21 TFEU or from a secondary

legal act. When Directive 90/364/EEC on the right of residence was adopted, there was also no express legal basis for the right in the EU beyond the Directive itself. This is reflected in Article 1 of the Directive, which states that Member States "shall grant the right of residence to nationals of Member States who do not enjoy this right under other provisions of Community law".

(100) This means that when the general Directive on the right of residence was adopted, the regulation of the right to free movement in the then EC largely corresponded to the current situation in EEA law. As mentioned, the Directive's background in primary law was stated to be Article 3 (c), Article 8a and Article 235 TEEC. Article 3 (c) corresponded to Article 1 (2) (b) of the EEA Agreement, establishing the free movement of persons as one of the four freedoms in the internal market covered by the substantive scope of the EEA Agreement. Article 8a concerned the establishment of an internal market and can be viewed in the light of Article 1 (1) and (2) of the EEA Agreement, while Article 235 constituted the general legal basis for such measures where such a basis was not found in the TEEC. I have difficulty seeing any reason to interpret the right of residence in another Member State less effectively given the legal situation of the EC at that time, considering the objective of removing obstacles to free movement.

(101) Regardless of how the right is grounded, the Singh doctrine is decisive for deriving rights towards the State of origin. Also when it comes to Article 21 TFEU, the ECJ's basis in *O and B* was that the key factor is the right to enter and reside in the host Member State, which, through the Singh doctrine, provides the basis for derived rights in the State of origin. The question before the ECJ, compared to what was already clarified through *Singh* and *Eind*, was primarily whether the effectiveness principle would apply correspondingly to economically inactive persons, see paragraphs 47–48. The ECJ's answer was that "[t]his is indeed the case", see paragraph 49.

(102) There is no reason for this to be different in an EEA context, see *Jabbi*, paragraph 79. The Singh doctrine also originates from before Union citizenship was introduced. The effectiveness principle from which the doctrine springs is expressed in the EEA Agreement, see Article 3 (2). In the context of our case, there is no basis for the effectiveness principle to have less impact in the EEA than in the EU, see Rt-2005-1365 *Finanger II,* paragraph 58.

(103) The joint declaration made in connection with the incorporation of the Citizens' Rights Directive must be understood as the EFTA States' intention to limit the consequences of incorporating the Citizens' Rights Directive into the EEA Agreement. Nonetheless, I do not see that the declaration prevents derived rights for third-country nationals towards the State of origin of an EEA national, as it links derived rights for third-country nationals precisely to the right to free movement, which existed before the Directive was incorporated, and not to Union citizenship.

(104) The State argues that a right to enter and reside in Norway for family members corresponding to the rights in the EU would imply a lack of control options. However, limitations on the possibility of control already follow from the Schengen Agreement and the Citizens' Rights Directive. The situation in our case, for example, is no different from that of a spouse of a national of an EEA State other than Norway, who takes up residence in Norway.

(105) Against this background, I have concluded that the EEA Agreement confers a derived right on third-country nationals who are married to an EEA national, to enter and reside in the EEA national's State of origin, even when the EEA national is economically inactive.

Summary

(106) It is my view that family members of an economically inactive EEA national, not just family members of an EEA national who is a worker or self-employed, may acquire derived rights to enter and reside in the EEA national's State of origin under EEA law. My reasoning largely aligns with that of the EFTA Court in *Gunnarsson*, *Jabbi*, and *Campbell*, which forms the basis for EFTA Court's opinion in our case. I have reached the same conclusion and see no reason to disregard the EFTA Court's findings thus far.

(107) The interpretive result springs from the commitments made by the EFTA States through the EEA Agreement and the legal acts incorporated into it, interpreted in the context of the EEA. The interpretation results in equal treatment within the EEA as in the EU. Although the legal basis differs between the EU and the EEA, and the reasoning for the interpretive result is therefore distinct from that relied on by the ECJ, it involves interpreting a right to free movement enshrined in the EEA Agreement from the start, in the light of the effectiveness principle and in the same manner as the right to free movement for workers. I do not see that sovereignty considerations may prevent this. It could be viewed as a minor legal development, but not a significant leap. The interpretation also does not entail any substantial expansion of the obligations of the State.

The scope of a derived right for third-country citizens

Family relationship

(108) A fundamental condition is that there is a family relationship between the third-country national and the EEA national that meets the definition in Article 2 (2) of the Citizens' Rights Directive. As mentioned, it is now clarified that the defendant had married a Norwegian national before entering Norway, see Article 2 (2) (a).

Conditions related to residence in the host State

(109) According to *O and B, paragraph* 51, not every stay in another Member State can give rise to derived rights. The effectiveness principle can only justify a derived right if the Union citizen's "stay in the host Member State has genuinely enabled the person concerned to create or strengthen family life in that Member State". A Union citizen exercising his rights under Article 6 of the Citizens' Rights Directive, i.e., a stay of less than three months, does not intend to settle in the host State in a way that meets the condition, see paragraph 52. This may be different if the Union citizen intends to exercise his rights under Article 7, as a stay under Article 7 is evidence of the Union citizen' "genuine residence" in the host State and "goes hand in hand with creating and strengthening family life", see paragraph 53. The EFTA Court has applied the same conditions within the EEA, see *Jabbi*, paragraph 80, and *Campbell*, paragraphs 62–64. I agree.

(110) Therefore, it is required that the EEA national has stayed in the host State for more than three months, or intended such a stay, and that the stay is otherwise suited to creating or strengthening family life. I note that Article 7 (1) (b) also requires that the EEA national has sufficient resources for himself and his family and has comprehensive sickness insurance, but it is not disputed that these conditions are met in this case.

(111) In *O and B*, the ECJ established that weekend and holiday stays in the host State are not sufficient, even if these are combined, see paragraph 59. In *Campbell*, the EFTA Court stated that the requirement for residence under Article 7 must nonetheless be interpreted as allowing reasonable periods of absence, and that the circumstances of the situation as a whole must be suited to creating or strengthening family life, see paragraph 67. This view is upheld in the EFTA Court's opinion in our case, see paragraph 51. I do not see that the statements contradict the O and B judgment, and find the view convincing.

(112) In our case, the defendant's spouse has had employment in Norway. She has lived in Norway during the working periods and also stayed in Norway in connection with childbirth. Therefore, a closer assessment must be made of whether the stay in Sweden, taken as a whole, had a duration and nature that meet the criteria set in *O and B* and *Campbell*. As mentioned, the Supreme Court cannot evaluate the evidence related to the issue of guilt and therefore has no basis to assess this.

Which stays in the EEA national's State of origin are covered

(113) According to *O and B*, paragraph 50, the conditions for a derived right of residence for third-country nationals in the Union citizen's State of origin should not be stricter than the conditions for residence together with the Union citizen in the host State. The same is expressed in *Singh*, paragraph 23, which I have cited. Therefore, in *O and B*, the ECJ concluded that although the Citizens' Rights Directive does not regulate return to the State of origin, the conditions should be applied analogously, see also paragraph 45 of *Eind*. Like the EFTA Court, I trust that the same principle applies in the EEA, see paragraph 47 of the advisory opinion in the case at hand, with further references.

(114) Under the Citizens' Rights Directive, third-country nationals can accompany or join the EEA national in a host State either for a short-term stay under Article 6 or for a longer-term stay under Article 7.

(115) The case at hand only concerned entry and a short-term stay to make a declaration of paternity. The State has disputed that derived rights towards the State of origin can include such short stays. It has been noted that the cases addressed by the ECJ concern return to the State of origin with the intention of settling there, and that the consideration of family life does not come into play in the same way with short stays. Reference has also been made to the fact that stays under Article 7 requires the issue of a residence card, see Article 10 of the Citizens' Rights Directive, which gives better control of the conditions than stays under Article 6, which only require a valid passport.

(116) The EFTA Court's basis in its advisory opinion is that derived rights for third-country nationals also apply to short-term stays, see paragraphs 49–52.

(117) I find this issue slightly less clear than the issues I have discussed thus far, but I have concluded that the State's arguments are not sufficiently strong and compelling reasons to disregard the EFTA Court's view. The statements in the ECJ's case law on the analogical application of the Directive to stays in the State of origin are general and do not exclude stays under Article 6 as is the case for the preceding stay in the host State. In *Singh*, the term "entry and residence" is used, see paragraph 23, and in *O and B*, "right of residence", see paragraph 50. The possibility for spouses to visit relatives and friends together in the EEA national's State of origin, for example in connection with family celebrations, is also part of normal family life. Although it would not have the same deterrent effect on the exercise of the right to free movement if a derived right did not include short-term stays, such a right would, on the other hand, interfere less with the State of origin's immigration regulation. Long-term stays can also start as short-term stays, and a different solution could present legal challenges.

The significance of the exclusion order

(118) As I mentioned in the introduction, the clear starting point under Norwegian national law is that a person who has been issued an exclusion order is obliged to respect it until it is lifted, even if circumstances have arisen that provide grounds for revocation. However, rights under EEA law arise immediately, see for example *Metock*, paragraphs 95–96, and the EFTA Court's opinion in this case, paragraph 58. This means that a violation of the exclusion order cannot be sanctioned if the third-country national had a right to enter and reside under EEA law at the time of entry, see section 2 of the Penal Code and section 3 of the Immigration Act. I understand that both the Prosecution Authority and the State agree on this.

(119) The question is therefore whether the exclusion order is valid under EEA law, possibly until it is lifted.

(120) Since the conditions in the Citizens' Rights Directive must be applied when an EEA national returns with family members to his State of origin, it must be assumed that Chapter VI of the Citizens' Rights Directive also regulates the right to impose restrictions on the right to enter and reside on grounds of public policy, public security or public health. I refer to the EFTA Court's opinion in this case, paragraphs 57–58, and in *Jabbi*, paragraph 80.

(121) Article 27 (2) stipulates that measures taken on grounds of public policy or public security must comply with the principle of proportionality and be based solely on the personal conduct of the individual concerned. Previous criminal convictions alone should not justify such measures. This provision is implemented in section 122 of the Immigration Act. The conditions in Article 27 (2) are stricter than the general conditions for expulsion in Chapter 8 of the Immigration Act, see HR-2022-533-A, paragraph 41.

(122) This means that a decision on expulsion made under Chapter 8 of the Immigration Act before the third-country national acquired derived EEA rights cannot prevent the right to enter and reside under EEA law as long as a new expulsion decision meeting the stricter conditions in Article 27 has not been made. I refer to the EFTA Court's discussion in this case, paragraphs 61–75.

(123) It can be questioned whether a decision under Chapter 8 that is justified in such a way that the conditions under section 122 of the Immigration Act are also met can be considered a decision

under Article 27. The clear starting point must be that a new assessment and a new decision are required, see the EFTA Court's opinion, paragraph 74. However, it cannot be ruled out that this may be different in special cases – the wording of the answer in paragraph 75, see paragraph 61, does not completely dismiss this possibility. In our case, the question is not prominent, as it cannot be clearly considered that the conditions in Article 27 are met based on the reasoning in the decision. I refer to the expulsion decision from 2017, which is largely justified by the preceding criminal conviction. I understand that the Prosecution Authority agrees with that.

(124) According to Article 32 (2) of the Citizens' Rights Directive, a previously issued expulsion decision that is being appealed must be respected until a new decision is made. As mentioned, the EFTA Court was asked whether Article 32 could be applied to a previous expulsion decision as in our case. The answer was that the provision only applies when applying to revoke a decision justified under Article 27. After the advisory opinion was issued, the Prosecution Authority withdrew the argument that Article 32 implies that lawful entry in this case could not occur until the expulsion decision was revoked. Since the State has also not argued for such a view, I confine myself to stating that I agree with the EFTA Court on this point.

(125) However, the State argues since the ECJ has established derived rights based on the primary law provisions on freedom of movement, the general restriction doctrine will regulate the exceptions, not Article 27 of the Directive, see the Grand Chamber judgment of 5 June 2018 in Case C-673/16 *Coman and Others.* For this reason, it would be appropriate to require an application for revocation of the decision before entry. If derived rights in the EEA are grounded in the Directive, and Article 27 regulates the exceptions, the rules will be stricter for EFTA States than for EU states, which would be contrary to the principle of homogeneity.

(126) I have a different view. As mentioned, the ECJ's case law establishes that the conditions must be at least as favourable as those in the Directive, and therefore that the conditions in the Directive apply analogously. No reservation has been made for the exclusion order conditions. It is correct that the ECJ applied the restriction doctrine in *Coman*, but that ruling concerned different restrictions than measures on grounds of public policy, security or health, namely discrimination against same-sex marriage. The same applies to the EFTA Court's opinion of 12 December 2024 in Case E-15/24 *A and B*, which concerned the requirement to obtain consent from a parent with shared parental responsibility for a child to relocate abroad. Such circumstances are not regulated by the Directive, and the restriction doctrine thus applies in the usual manner, unlike restrictions on grounds of public policy, security or health, see Chapter VI of the Directive. This is consistent in both the EU and the EEA and does not imply stricter rules for the EFTA States.

(127) I have therefore, like the EFTA Court, concluded that a previously issued exclusion order does not in itself prevent the exercise of a subsequently acquired right to enter and reside as a result of marriage to an EEA national. If the conditions for a derived right are met for the defendant, the violation of the exclusion order cannot be punished.

Other grounds invoked for acquittal

(128) Firstly, it is contended that if the Supreme Court disregards the EFTA Court's opinion, punishment cannot be applied as that would violate the requirement of predictability inherent in the legality principle, see Article 96 of the Constitution. Since I have reached the same conclusion as the EFTA Court, I see no reason to address this issue further.

(129) Secondly, the defendant argues that there is no legal basis in the Immigration Act to punish him for violating section 71 subsection 2, which the indictment concerns. This provision is found in Chapter 8 of the Act and prohibits entry for persons who have been expelled under the same chapter. The defendant has pointed out that even if his spouse's stay in Sweden had a duration and nature that would not give him rights under EEA law, he will fall under Chapter 13 of the Immigration Act because he is the spouse of a Norwegian national who has exercised her right to free movement, see section 110 subsection 2 second sentence of the Act. He also notes that, according to section 19-2 subsection 9 of the Immigration Regulations, the Act's section 108 on penalties only applies to violations of the provisions that apply to this group, and that subsection 5 states that the Act's Chapter 8 on expulsion, where section 71 is found, does not apply.

(130) I do not agree that there is a lack of a national legal basis for punishment in our case. The provisions in Chapter 13 of the Immigration Act implement Norway's EEA obligations under the Citizens' Rights Directive, see Proposition to the Odelsting no. 72 (2007–2008). It follows from section 109 subsection 1 of the Act that Chapter 13 regulates the right to enter and reside "for foreign nationals covered by the EEA Agreement". The defendant is covered by the EEA Agreement only in cases where he meets the conditions therein, which I have outlined.

(131) Section 110 subsection 2 second sentence stipulates as a condition for being covered by Chapter 13 that the Norwegian national returns to the realm "after having exercised the right to freedom of movement under the EEA Agreement". In the light of section 109 subsection 1, this must be interpreted as a reference to the conditions under the EEA Agreement, including the conditions for acquiring derived rights. Consequently, if it turns out that the defendant does not meet the requirements of EEA law for derived rights, he will not be covered by Chapter 13 with the result that section 71 applies. I do not see that this interpretation of section 110, see section 109, contravenes the requirement for a clear legal basis in Article 96 of the Constitution.

(132) Against this background, it is not necessary to address the question of whether the rules in the Immigration Regulations also provide a national legal basis for applying section 71 of the Act in this case.

(133) Finally, it is contended that if the defendant is treated worse as the spouse of a Norwegian national than he would be as the spouse of a national of another EEA State, this would be contrary to the prohibition of discrimination in Article 14 taken in conjunction with Article 8 of the ECHR. However, my outline has shown that the defendant is generally treated the same. Admittedly, conditions for entry and residence in Norway are slightly less strict for the spouse of another EEA national. In such a case, Norway would be the host State, which means that it is not required that the EEA national has exercised the right to free movement in a way that is suitable for creating or strengthening family life before entering Norway. However, the requirement applies similarly for entry and residence in the State of origin of

the respective EEA national, and the defendant, as a third-country national, does not have a stronger connection through his citizenship to any particular EEA State. The difference can be justified based on the background of the rules, namely that the rights of third-country nationals are derived from the rights of EEA nationals, and that these rights are derived from the right to travel to a country that is not the EEA national's State of origin. Therefore, this alternative contention can also not succeed.

Conclusion

(134) The Court of Appeal's basis was that new information on the right to reside under EEA law could not lead to acquittal, but that this information – like other new information – had to be submitted to the immigration authorities in an application for lifting of the expulsion decision. As follows from my outline, this an error of law. The Court of Appeal should have assessed whether the defendant, at the time of entry, had acquired a derived right to enter and reside in Norway based on his marriage to an EEA national who had exercised the right to free movement. If his spouse's stay in Sweden at that time had a duration and nature suitable for creating or strengthening family life with the defendant, the violation of the exclusion order would not be punishable, see section 2 of the Penal Code and section 3 of the Immigration Act.

(135) Since the facts presented in the Court of Appeal's judgment are not sufficient for the Supreme Court to determine whether the spouse's stay in Sweden was of such a nature that the defendant had acquired a derived right, the Court of Appeal's judgment must be set aside, see section 345 subsection 2 of the Criminal Procedure Act. The other grounds invoked for acquittal have not succeeded.

(136) As there may be a need for new evidence, the appeal hearing must also be set aside, see section 347 subsection 1 of the Criminal Procedure Act.

(137) I vote for this

J U D G M E N T :

The Court of Appeal's judgment and appeal hearing are set aside.

(138) Justice **Webster:** I agree with Justice Hellerslia in all material respects and with his conclusion.

(139) Justice **Bull:** Likewise.

(140) Justice **Arntzen:** Likewise.

(141) Justice **Falch:** Likewise.

(142) Justice **Bergh:** Likewise.

(143) Justice **Østensen Berglund:** Likewise.

(144) Justice **Thyness:** Likewise.

(145) Justice **Sæther:** Likewise.

(146) Justice **Stenvik:** Likewise.

(147) Justitiarius **Øie:** Likewise.

(148) Following the voting, the Supreme Court gave this

J U D G M E N T :

The Court of Appeal's judgment and appeal hearing are set aside.