

Wednesday, 5 December 2012

No. 191/2012.

**Jan Anfinn Wahl**

(Oddgeir Einarsson, Supreme Court Attorney)

v

**the Icelandic State**

(Óskar Thorarensen, Supreme Court Attorney)

EFTA Court. European Economic Area. Advisory opinion.

*J, a Norwegian citizen and member of the motorcycle club Hell's Angels, brought an action against I and demanded compensation for non-financial damage as he had been denied entry into Iceland when he intended to make a three-day visit to the country. The denial of entry was based on item c of the first paragraph of Article 41 of the Foreign Nationals Act, No. 96/2002 cf. the first paragraph of Article 42 of the same Act. The district court acquitted I of J's demands, but he appealed against the judgement to the Supreme Court, which on its own initiative delivered a ruling to the effect that an advisory opinion was to be sought from the EFTA Court regarding matters specified in further detail, in particular regarding Article 27 of Council Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.*

#### **Decision by the Supreme Court.**

This decision is taken by Supreme Court Justices Viðar Már Matthíasson, Benedikt Bogason and Þorgeir Örlygsson.

The appellant referred the case to the Supreme Court on 21 March 2012. He demands that the defendant be ordered to pay him compensation for non-financial damage amounting to ISK 1,000,000, with arrears interest according to the first paragraph of Article 6 of the Interest and Indexation Act, No. 38/2001, from 7 November 2010 to the date of payment. In addition, he demands, as a principal claim, legal costs at the district court and Supreme Court levels, and as a reserve claim that legal costs before the Supreme Court be waived.

The defendant demands, as a principal claim, that the Court uphold the judgement against which the appeal has been made, and legal costs before the Supreme Court; as a reserve claim, it demands that the appellant's compensation claim be reduced and that legal costs be waived.

In the hearing of the case before the Supreme Court on 5 November 201[2], the Court requested the parties' legal counsels, under the second paragraph of Article 1 of the Act No. 21/1994 on Applications to the EFTA Court for Advisory Opinions on the Interpretation of the EEA Agreement, to express their positions as to whether there was occasion to apply to the EFTA Court for an advisory opinion. Both of them stated that they had not considered

there was occasion to take the initiative on applying for such an opinion, but they were not opposed to it being done.

## I

The background of the case is that the appellant, who is a Norwegian citizen, came to Iceland on Friday, 5 February 2010, probably at about 12 noon, by air, on flight No. SK-4787 from Oslo. He was stopped by customs officers at the air terminal and his luggage was searched. In this search, a vest and other items of clothing marked with the name of the motorcycle club Hell's Angels were found. At the request of the customs officers, the appellant showed a passport, which was Norwegian and bore the number 21144753. The customs officers called the police, who later called in detectives. The police took an 'interview statement' from the appellant, who said he was a member of the Hell's Angels motorcycle club in Drammen, Norway. He informed them that he had a clean criminal record and that this was his first trip to Iceland. He said he intended to do some sightseeing and also to make social contact with his friends in the Icelandic motorcycle club Fáfñir.

Another statement, called an investigation statement, was taken from the appellant later the same day. In this statement the appellant also gave information about the matters mentioned above, and in addition said that he had a return flight booked to Oslo on Monday, 8 February 2010. He also announced that he was planning to visit members of the motorcycle club Fáfñir and was going to be staying at Grand Hotel Reykjavík during his visit. He said that a friend of his (whom he named) had bought his ticket to Iceland.

The appellant was held at the airport and was not allowed to enter the country. The police informed him that he could exercise his right to be heard. He said he objected to not being allowed to enter the country and said his membership of the motorcycle club Hell's Angels was not sufficient reason for the Icelandic authorities to restrict his movements. He requested to be allowed to telephone his family and let them know of his situation, and was permitted to do so. The appellant signed forms which had been filled out regarding the questioning sessions and statements that had been taken from him.

On the same day, the appellant was served a decision by the Directorate of Immigration denying him entry into the country; this was based on item c of the first paragraph of Article 41 of the Foreign Nationals Act, No. 96/2002. The appellant was informed that he was entitled to demand the reasons for this decision, and also that he could appeal against the decision to the Ministry of the Interior (at the time, to the Ministry of Justice and Human Rights) under Article 30 of the Act No. 96/2002. A piece of paper which appears to have been enclosed with this decision, and which was initialled by the appellant and by two police officers, states that citizens of an EEA Member State could be denied entry into Iceland if this were necessary in view of public order or public security (*cf.* item c of the first paragraph of Article 41 of the Foreign Nationals Act, No. 96/2002).

## II

The appellant referred the decision by the Directorate of Immigration to the Ministry of the Interior on 17 February 2010. In his referral, he stated amongst other things, that he was a 36-year-old university student from Norway and was a motorcycle enthusiast. He said he was a registered member of a motorcycle club "with legal objectives". None of the clubs he belongs to, he said, had broken the law and he himself had never "been involved with the law, either in Iceland or in his home country." The objective of his visit to Iceland had been

peaceful. Never before had he been denied entry into any foreign country he had visited. In the light of this, there was nothing to indicate that the appellant had exhibited any conduct of the type that could entail the necessity, in view of public order or public security, to deny him entry into the country. Thus, he argued, the Directorate of Immigration's decision, which was being referred to the ministry, should be set aside.

Both the Directorate of Immigration and the appellant submitted detailed observations to the Ministry of the Interior in connection with the appellant's referral. Of the substance of these observations, mention will be made here only of the fact that the Directorate of Immigration revealed that, on the same day as the appellant arrived in Iceland, i.e. 5 February 2010, it received materials from the Commissioner of the Suðurnes Police together with a request that the directorate take a decision as to whether item c of the first paragraph of Article 41 of the Foreign Nationals Act, No. 96/2002, should be applied in order to deny the appellant entry to country. This request was accompanied by the following materials: Copies of two police reports, a photocopy of the appellant's passport, an "Open danger assessment by the Intelligence Department of the Office of the National Commissioner of Police regarding the arrival of a member of Hell's Angels in Iceland, dated 5 February 2010", and photographs of the appellant's luggage.

The danger assessment stated, amongst other things, that it had been produced in connection with the arrival of a Norwegian member of the motorcycle club Hell's Angels in Iceland. In all likelihood, it was stated, his arrival in Iceland was connected with the planned entry of "MC Iceland into the Hell's Angels motorcycle club. When this entry was effected, the Icelandic group would acquire the status of a full and independent division within Hell's Angels." It was furthermore stated that everywhere that Hell's Angels had managed to establish itself, an increase in organized crime had followed. Organized crime was directed against the public interest, and the offences involved in it affected the community and public security. MC Iceland, which had previously been called Fáfñir, had earlier received recognition as a supportive division of Hell's Angels in Iceland, and the process of admission of the club into the foreign association was at the final stage. This admission process had been directed from Norway.

### III

The Ministry of the Interior delivered a ruling on the case on 16 June 2010. This stated, amongst other things, that the decision against which the appeal had been made had been taken under item c of the first paragraph of Article 41 of the Foreign Nationals Act, No. 96/2002, as amended by the Act No. 86/2008, "the decision being based on the danger assessment by the Intelligence Department of the Office of the National Commissioner of Police of 5 February 2010." The ministry furthermore stated in its conclusion that it was unable to concur with the appellant that the investigation of the case had been wanting, so violating the principle of Article 10 of the Administrative Procedure Act, No. 37/1993. One of the materials in the case had been the danger assessment by the Intelligence Department of the Office of the National Commissioner of Police, which had evidently been based on various items of information which the National Commissioner had obtained about the association Hell's Angels and well-known facts about the association, in addition to information about the status of the procedure being followed by MC Iceland in the direction of full membership of the association. When questioned, the appellant had admitted being a

member of the association Hell's Angels and confirmed that one of the reasons he had come to Iceland was to visit his friends in MC Iceland. Moreover, the appellant had been given the opportunity of stating his views before the decision in his case was taken. Thus, a satisfactory basis had been laid for the decision by the Directorate of Immigration and sufficient information had been gathered concerning the matter.

It was also stated in the ruling that the ministry was unable to concur with the appellant that the decision had violated the rule of law. In this connection, the ministry referred to the fact that in accordance with Article 66 of the Constitution, provision is made in paragraph 1 of Article 41 of the Act No. 96/2002, *cf.* also the first paragraph of Article 42 of the same Act, on the circumstances in which it is permissible to refuse EEA or EFTA foreign nationals entry into Iceland. The ministry pointed out that this legislation was based on Iceland's obligations under the EEA Agreement and Council Directive No. 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, which has been incorporated into the EEA Agreement. When interpreting these aforementioned legal provisions, stated the ministry, it was necessary to take account of the case law of the Court of Justice of the European Union (European Court of Justice) in this area, *cf.* Article 6 of the EEA Agreement and the second paragraph of Article 3 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice. In its judgement in Case No. 41/74 (Van Duyn), the European Court of Justice established that an individual may be refused entry into a country if he is a member of a society or association which threatens public order or public security, and that it is not necessary that the society or association be prohibited in the country in question. This interpretation, argued the ministry, had been further confirmed in a communication from the European Commission to the European Parliament and Council of Ministers of the European Union on 2 July 2009. Thus, it is clear, argued the ministry, that when interpreting and applying rules on public order and public safety, the authorities have a discretion to define their own needs in further detail and to define when circumstances are such as to necessitate restriction of the freedom of movement in order to protect such interests. This assessment must nevertheless at all times be based on relevant considerations and also take account of Iceland's obligations under the EEA Agreement.

In the danger assessment by the Intelligence Department of the Office of the National Commissioner of Police it was stated that in the Nordic countries, "organised criminal associations of motorcyclists" such as Hell's Angels were viewed as a growing threat to the community and that the national police commissioners of these countries had formulated a clear policy of fighting against such activities. Since 2002 the National Commissioner of the Icelandic Police had instructed local police commissioners to implement this policy. Accordingly, members of Hell's Angels had repeatedly been denied entry on arrival in Iceland with reference to public order and public security. Thus, the Icelandic authorities had taken the view that, with reference to the nature of the association and its links with organised crime, it was necessary to prevent its members from coming to Iceland in the interest of the community.

In its ruling, the ministry concurred with the view that in the light of the nature and activities of Hell's Angels, individuals belonging to the association constituted a real threat to public order and public security in Iceland. The arrival of members of the association in

Iceland was intended to open the way for the full membership of MC Iceland of the association. Such membership would strengthen the influence of the association in Iceland and the spread of organised crime. The ministry was obliged to consider that it had been sufficiently demonstrated that the appellant's visit was connected with the full membership of MC Iceland in the association Hell's Angels; his membership of the association demonstrated that he had aligned himself with the association's aims, intentions and those activities of the association which were regarded as threatening public order and public security. The appellant's own personal conduct was therefore the reason why he had been expelled from the country on 5 February 2010. The appellant's arrival in Iceland constituted a serious and real threat to the community's fundamental interest in protecting public order and public security. Hence, the ministry's view was that the condition of item c of the first paragraph of Article 41 of the Act No. 96/2002 had been met in the case.

The ministry also stated in its ruling that it was not possible to interpret the third paragraph of Article 87 of the Regulation No. 53/2003, on Foreign Nationals, as constituting a demand that it must be possible to expel an Icelandic citizen from the country under comparable circumstances; this provision refers to other lawful measures that must be available to the authorities when an Icelandic citizen's conduct is considered as threatening public order or public security.

Finally, the ministry points out that nothing has been revealed in this case to suggest that the principle of equality, stated in Article 11 of the Administrative Procedure Act, was violated; the response of the police had normally been to deny members of Hell's Angels entry into the country. Nor did the ministry consider that the principle of proportionality, stated in Article 12 of the same Act, had been violated, since no other or less stringent means would have sufficed to achieve the aim of the measures that were taken. Thus, the ministry upheld the decision by the Directorate of Immigration, against which the appeal had been made.

#### IV

Following the ruling by the Ministry of the Interior, the appellant instituted the present action claiming compensation for non-financial damage and compensation for financial loss. The district court acquitted the defendant of the appellant's demands on the grounds that authorisation had existed for denying the appellant entry into the country and that there were no flaws, from the point of view of Administrative Law, in the decision by the Directorate of Immigration or the ruling by the Ministry of the Interior regarding the case.

The appellant lodged his appeal with the Supreme Court and has changed his original claim; now he demands only compensation for non-financial loss resulting from the Icelandic authorities' treatment of him from 5 February 2010 until he was expelled from the country. As a result of the decision, he was deprived of his freedom as he was placed in a prison cell until he was sent back to Norway. Such deprivation of freedom, without reason, is, he argues, a serious violation of his freedom. Furthermore, the appellant says that it harms his reputation, having a clean criminal record, to be expelled from the country and have the insinuation made that he constitutes a threat to the public order and public security of another state.

The appellant bases his claim on the view that the Directorate of Immigration's decision was unlawful. He considers that serious criticism is to be made of the danger

assessment by the National Commissioner of Police, which contains unsubstantiated assertions about the motorcycle associations Hell's Angels and MC Iceland and the connections between them, and also about the purpose of his trip. The assessment by the National Commissioner of Police applied to all members of the association, while the appellant himself had done nothing worthy of blame other than to be a member of the association and to own its uniform. The appellant points out that he was not allowed access to the materials on which the assessment by the National Commissioner of Police had been based, and consequently it was extremely difficult to present a defence against the assertions in the assessment, which formed the basis of the decision against which he appealed. Neither the Directorate of Immigration, the ministry nor the district court had reviewed the basis on which the danger assessment had been made. The appellant considers that the rule of Article 10 of the Administrative Procedure Act, regarding investigation, was violated, since the Ministry of the Interior did not investigate the basis of the assertions stated in the danger assessment by the Intelligence Department of the Office of the National Commissioner of Police. The appellant also argues that the authorisations in law to which reference was made when he was expelled were insufficient in view of the principle of legality in Administrative Law. Thus, he argues, item c of the first paragraph of Article 41 of the Act No. 96/2002 does not constitute sufficient authorisation in law for the taking of a decision of such an encumbering nature. It is imprecise, and too open-ended to make it possible to assess when people should be expelled from the country. Also, the appellant argues that the conditions stated in this item, *cf.* the first and second paragraphs of Article 42 of the Act No. 96/2002, are not met in his case. There is nothing, he argues, to indicate that the provisions of this act can be applied against individuals who are members of associations which the government considers are undesirable for the Icelandic community; furthermore, no real and sufficiently serious threat was posed to the public interest of the Icelandic state by his three-day visit to Iceland.

The third paragraph of Article 87 of the Regulation No. 53/2003 states, amongst other things, that in order for it to be possible to expel a foreign national from Iceland, the authorities must be able to take measures of some sort against an Icelandic citizen in the same position. The sole reason for the appellant's expulsion was his membership of the motorcycle club Hell's Angels. Thus, he argues, it is necessary to answer the question of what administrative measures can be taken in the case of an Icelandic citizen who is a member of Hell's Angels.

Furthermore, the appellant considers that no successful demonstration has been made that he was in any way involved with the admission of the motorcycle club MC Iceland (previously Fáfñir) into Hell's Angels; no evidence connects his name with the club's admission process. The decision to deny him entry appears to have been taken on the basis of general preventive considerations, and to have been based on his membership of Hell's Angels, and not on his own personal conduct.

## V

The claims of the defendant, the Icelandic State, before the Supreme Court are, as is stated above, principally that it be acquitted of the appellant's claim, and as a reserve measure that his claim be reduced. In this connection, the defendant refers to the legally-prescribed role of the National Commissioner of Police and the specialised knowledge which that office

possesses. Thus, under item b of the second paragraph of Article 5 of the Police Act, No. 90/1996, one of the functions of the National Commissioner of Police is to maintain a police investigation department and an intelligence department which is to investigate, amongst other things, the danger of organised criminal activity. This department produced a danger assessment in connection with the appellant's visit to Iceland. The finding of this assessment was that in all likelihood, the appellant's visit to Iceland was connected with the planned admission of MC Iceland into Hell's Angels, which would create a danger of increased organised crime in Iceland, and thus constituted a threat to the community. The letter from the National Commissioner of Police to the Ministry of the Interior specified the information on which this danger assessment was based, and a police report, in addition to the assessment, formed the basis for the decision. The danger assessment was completely lawful, argues the defendant, and was conducted in a normal way in every respect. The National Commissioner of Police was legally competent to carry out such an assessment. There was no need to specify in further detail the sources of the information given in the assessment; public and private interests might argue against doing so.

The defendant rejects the view that the Ministry of the Interior violated the rule regarding investigation which is stated in Article 10 of the Administrative Procedure Act. The defendant points out that it is the legally-prescribed role of the National Commissioner of Police to assess the danger of organized crime and there was therefore no need for the ministry to review this assessment. The appellant admitted, when he was questioned by the police, that he was a member of Hell's Angels, and he confirmed that one of the purposes of his visit to Iceland was to visit his friends in MC Iceland. Furthermore, the appellant was given the opportunity of making comments before the decision was taken. Thus, a satisfactory basis was laid for the decision by the Directorate of Immigration and the ministry's ruling, and sufficient information was available in the case. The defendant also rejects the appellant's assertions that the authorisations in law to which reference was made when he was expelled did not meet the requirement of legality. In addition, the defendant does not concur with the appellant's view that these provisions are imprecise and unclear. The district court judge came to the conclusion, says the defendant, that the authorities have the discretion to define what is meant by the terms 'public order' and 'public security' and considered that the authorities must be given a measure of discretion to assess the conditions of these terms in accordance with the authorities' needs, which may vary over time. In making this assessment, relevant considerations, and also Iceland's obligations under the EEA Agreement, must be taken into account. The defendant considers that the provisions of item c of the first paragraph of Article 41, and of the first paragraph of Article 42, of the Act No. 96/2002, are in accordance with the Constitution, enacted statutes and other sources of law, and also with Iceland's obligations. The conditions stated in these legal provisions applied in this case, and thus relevant considerations were taken into full account in the handling of the case by the authorities.

The defendant also argues that the third paragraph of Article 87 of the Regulation No. 53/2003 cannot be interpreted as meaning that it must be permissible to expel (or to deny entry to) an Icelandic citizen under comparable circumstances; rather, the wording of this provision refers to other lawful measures available to the authorities when the conduct of an Icelandic citizen is considered as threatening to public order or public safety.

The defendant rejects the appellant's claim for compensation for non-financial damage, his views concerning a violation on his freedom and the harm of reputation entailed in being expelled from the country and it being alleged that he constituted a threat to public order and public security in Iceland. The appellant spent a short time in a prison cell while the decision in his case was taken and while he waited for the next flight to Norway. A person who comes to another country and is not permitted to enter it is not free; the appellant was not arrested. The way the police handled the matter was completely normal and lawful.

## VI

The following are the main provisions of law and administrative regulations to be considered in the resolution of this case.

Under the second paragraph of Article 66 of the Constitution of the Republic of Iceland, No. 33/1944, an Icelandic citizen cannot be barred from entering Iceland or expelled therefrom. The rights of aliens to enter and reside in Iceland, and the reasons for which they may be expelled, are to be laid down by law. This states the general rule that the legislature is to be in control of setting rules in this area, including conditions for denying foreign nationals entry into the country.

Article 22 of the Act No. 96/2002 contains rules on administrative procedures when decisions are taken, including decisions on denial of entry to foreign nationals, and the division of responsibilities between the Directorate of Immigration and the police. Articles 41 and 42 of the same Act contain provisions on the denial of entry to, and expulsion of, foreign nationals; the substance of these will be examined below.

In addition, Articles 7, 10, 11 and 12 of the Administrative Procedure Act are relevant; these include provisions on the handling of administrative matters, referring in particular to the protection of the citizen's rights in the handling of such matters. Article 26 of the Tort Damages Act, No. 50/1993, sets forth requirements for the award of compensation for non-financial damage. Article 5 of the Police Act, No. 90/1996, contains provisions on the role of the Office of the National Commissioner of Police in this connection. Article 87 of the Regulation No. 53/2003 contains rules on the denial to foreign nationals of entry into Iceland, and their expulsion from the country with reference to public order and public safety. Article 4 of the Regulation No. 404/2007, on the Intelligence Department of the Office of the National Commissioner of the Icelandic Police, contains provisions on a nationwide information and intelligence centre and the connection between the Intelligence Department and the local police forces in Iceland.

## VII

Under item c of the first paragraph of Article 41 of the Act No. 96/2002, *cf.* the first paragraph of Article 42 of the same Act, an EEA or EFTA foreign national may be refused the right to enter Iceland on arrival, or for up to seven days after arrival, if this is necessary in view of public order or public security. The provisions of the Act No. 96/2002 draw a distinction between whether the foreign national is denied entry into the country or expelled from the country; the latter measure entails that the foreign national is prevented from returning to the country for a specific period. Thus, refusal of entry is a more lenient measure than expulsion, since no such prohibition on return is imposed on a foreign national who is denied entry.



Further provisions on the denial of entry to, and expulsion of, EEA and EFTA nationals on grounds of public order or public security are found in Article 87 of the Regulation No. 53/2003; under the third paragraph, a decision on denial of entry or expulsion on these grounds may only be based on the conduct of the foreign national in question, and the decision may only be put into practice if it is possible to take measures against an Icelandic citizen under comparable circumstances. Thus, the wording of the regulation goes further than the wording of the Act No. 96/2002, limiting to some extent the range of circumstances in which it is possible to apply denial of entry, or expulsion, in cases involving EEA or EFTA foreign nationals. The provisions of Articles 41 and 42 of the Act No. 96/2002, and of Article 87 of the Regulation No. 53/2003, are based on Article 27 of Council Directive 2004/38/EC, on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, which has been incorporated in the EEA Agreement, *cf.* the Decision of the EEA Joint Committee, No. 158/2007, of 7 December 2007.

In the hearing of this case by the district court, the appellant argued that the decision by the Directorate of Immigration had been based in part on Article 175 a of the General Penal Code, No. 19/1940, *cf.* Article 5 of the Act No. 149/2009. The first paragraph of this provision states that any person who connives with another person on the commission of an act which is punishable by at least 4 years' imprisonment, the commission of which is part of the activities of a criminal organisation, shall be imprisoned for up to 4 years unless a heavier punishment for his offence is prescribed in other provisions of the Act or in other statutes. The second paragraph of the article contains a definition of a criminal organisation; the term refers to an association of three or more persons, the principle objective of which is, for motives of gain, directly or indirectly, deliberately to commit a criminal act that is punishable by at least 4 years' imprisonment, or a substantial part of the activities of which involves the commission of such an act. This provision took effect on 1 January 2010; up to the present time, no person has been found guilty of a violation against it. The defendant therefore considers that the reference to Article 175 a of the General Penal Code in the reasoning given in the Directorate of Immigration's report to the Ministry of the Interior cannot be of crucial significance regarding the decision, and the decision cannot be considered unlawful because of it.

It is not disputed that membership of a motorcycle club such as Hell's Angels is not unlawful as such, and the activities of such associations have not been prohibited in Iceland. Thus, it is clear that the Icelandic authorities cannot take certain measures against an Icelandic citizen on the sole grounds that he is a member of a motorcycle club like Hell's Angels. On the other hand, the Icelandic authorities can take general measures in their fight against organised crime, *cf.*, for example, the enactment of Article 175 a of the General Penal Code.

It should also be mentioned that MC Iceland appears to have received full membership of the Hell's Angels club on 4 March 2011.

As has been stated above, the appellant is a Norwegian citizen. He is now 39 years old and works, according to what was stated when he gave testimony for the hearing by the district court, as an assessor of state property in Norway, and has received university education as such. The appellant is a member of the motorcycle club Hell's Angels in Drammen; at the time of his being denied entry into Iceland he had a clean criminal record. Nothing has come to light in this case other than that the purpose of his trip to Iceland was

twofold: to do some sightseeing and to visit members of the motorcycle club Fáfñir, which at the time appears to have been in some sort of process of gaining admission to the motorcycle club Hell's Angels.

There is an inconsistency between the conditions for expelling EEA and EFTA foreign nationals from Iceland under item c of the first paragraph of Article 41, *cf.* the first paragraph of Article 42 of the Act No. 96/2002, on the one hand, and the conditions stated in Article 87 of the Regulation No. 53/2003 on the other. With reference to the connections which these provisions have with the provisions of Council Directive 2004/38/EC and the obligation under Article 3 of Act No. 2/1993 on the European Economic Area, to interpret laws and regulations to the extent appropriate in conformity with the EEA Agreement and the rules based on it, the Supreme Court considers there is reason to seek an advisory opinion from the EFTA Court regarding the interpretation of some points relating to the rules on the denial of entry to, or expulsion from Iceland of, citizens from an EFTA state. Questions on these matters will take the form that appears in the conclusion below.

Legal costs are not determined in this part of the case.

#### **Conclusion:**

An advisory opinion is sought from the EFTA Court on the following questions.

1. Do Member States which are parties to the Agreement on the European Economic Area have, with regard to Article 7 of the Agreement, the choice of form and method of implementation when making the provisions 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, part of their internal legal order?
2. Should paragraph 1 of Article 27 of Directive 2004/38/EC be interpreted as meaning that the mere fact, by itself, that the competent authorities in an EEA Member State consider, on the basis of a danger assessment, that an organisation to which the individual in question belongs, is connected with organised crime and the assessment is based on the view that where such organisations have managed to establish themselves, increased and organised crime has followed, is sufficient to consider a citizen of the Union to constitute a threat to public order and public security in the state in question?
3. For answering the second question, is it of significance whether the Member State has outlawed the organisation of which the individual in question is a member and membership of such organisation is prohibited in the state?
4. Is it sufficient grounds for considering public order and public security to be threatened in the sense of paragraph 1 of Article 27 of Directive 2004/38/EC that a EEA Member State, party to the Agreement on the European Economic Area, has in its legislation defined as punishable, conduct that consists of conniving with another person on the commission of an act, the commission of which is part of the activities of a criminal organisation, or is such legislation considered as general prevention in the sense of paragraph 2 of Article 27 of the Directive? This question is based on the fact that 'organised crime' in the sense of domestic law refers to an association of three or more persons, the principle objective of which is, for

motives of gain, directly or indirectly, deliberately to commit a criminal act, or when a substantial part of the activities involves the commission of such an act.

5. Should paragraph 2 of Article 27 of Directive 2004/38/EC be understood meaning that a premise for the application of measures under paragraph 1 of Article 27 of the Directive against a specific individual is that the Member State must adduce a probability that the individual in question intends to indulge in activities comprising a certain action or actions, or refraining from a certain action or actions, in order for the individual's conduct to be considered as representing a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society?

