JUDGMENT OF THE COURT

22 July 2013[*]

(Article 3 EEA – Article 7 EEA – Form and method of implementation of directives – Directive 2004/38/EC – Free movement of EEA nationals – Restrictions on right of entry – Procedural safeguards)

In Case E-15/12,

REQUEST to the Court under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice by Hæstiréttur Íslands (the Supreme Court of Iceland), in the case between

Jan Anfinn Wahl

and

the Icelandic State

concerning the interpretation of Article 27 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,

THE COURT,

composed of: Carl Baudenbacher, President and Judge-Rapporteur, Per Christiansen, and Páll Hreinsson, Judges,

Registrar: Gunnar Selvik,

having considered the written observations submitted on behalf of:

- Jan Anfinn Wahl ("the Plaintiff"), represented by Oddgeir Einarsson, Supreme Court Attorney;

[*] Language of the request: Icelandic.

- the Icelandic State ("the Defendant" or "Iceland"), represented by Óskar Thorarensen, Supreme Court Attorney, Office of the Attorney General (Civil Affairs), acting as Agent;
- the Norwegian Government ("Norway"), represented by Pål Wennerås, Advocate, Office of the Attorney General (Civil Affairs), and Janne Tysnes Kaasin, Senior Advisor, Ministry of Foreign Affairs, acting as Agents;
- the EFTA Surveillance Authority ("ESA"), represented by Xavier Lewis, Director, Auður Ýr Steinarsdóttir and Catherine Howdle, Officers, Department of Legal & Executive Affairs, acting as Agents;
- the European Commission ("the Commission"), represented by Christina Tufvesson and Michael Wilderspin, Legal Advisers, acting as Agents,

having regard to the Report for the Hearing,

having heard oral argument of the Plaintiff, represented by Oddgeir Einarsson; the Defendant, represented by Óskar Thorarensen; the Norwegian Government, represented by Pål Wennerås; ESA, represented by Xavier Lewis and Auður Ýr Steinarsdóttir; and the Commission, represented by Michael Wilderspin, at the hearing on 23 May 2013,

gives the following

Judgment

I Legal background

EEA law

1 Article 7 EEA reads as follows:

> *Acts referred to or contained in the Annexes to this Agreement or in decisions of the EEA Joint Committee shall be binding upon the Contracting Parties and be, or be made, part of their internal legal order as follows:*
>
> *(a) an act corresponding to an EEC regulation shall as such be made part of the internal legal order of the Contracting Parties;*
>
> *(b) an act corresponding to an EEC directive shall leave to the authorities of the Contracting Parties the choice of form and method of implementation.*

2 In the fourth recital in the preamble to the EEA Agreement, the Contracting Parties express their consideration for

... the objective of establishing a dynamic and homogeneous European Economic Area, based on common rules and equal conditions of competition and providing for the adequate means of enforcement including at the judicial level, and achieved on the basis of equality and reciprocity and of an overall balance of benefits, rights and obligations for the Contracting Parties;

3 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 amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC ("the Directive") (OJ 2004 L 158, p. 77) was incorporated into Annex V to the EEA Agreement at point 1 and Annex VIII at point 3 by Decision of the EEA Joint Committee No 158/2007 ("the Decision") (OJ 2008 L 124, p. 20, and EEA Supplement No 26, 8.5.2008, p. 17). The Decision entered into force on 1 March 2009.

4 Article 5 of the Directive as adapted for the purposes of the EEA Agreement reads as follows:

Right of entry

1. Without prejudice to the provisions on travel documents applicable to national border controls, Member States shall grant nationals of EC Member States and EFTA States leave to enter their territory with a valid identity card or passport and shall grant family members who are not nationals of a Member State leave to enter their territory with a valid passport.

No entry visa or equivalent formality may be imposed on nationals of EC Member States and EFTA States.

…

5 Article 27 of the Directive as adapted for the purposes of the EEA Agreement reads as follows:

General principles

1. Subject to the provisions of this Chapter, Member States may restrict the freedom of movement and residence of nationals of EC Member States and EFTA States and their family members, irrespective of nationality, on grounds of public policy, public security or public health. These grounds shall not be invoked to serve economic ends.

2. Measures taken on grounds of public policy or public security shall comply with the principle of proportionality and shall be based exclusively on the personal conduct of the individual concerned. Previous criminal

convictions shall not in themselves constitute grounds for taking such measures.

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

6 Article 31 of the Directive reads as follows:

Procedural safeguards

1. The persons concerned shall have access to judicial and, where appropriate, administrative redress procedures in the host Member State to appeal against or seek review of any decision taken against them on the grounds of public policy, public security or public health.

2. Where the application for appeal against or judicial review of the expulsion decision is accompanied by an application for an interim order to suspend enforcement of that decision, actual removal from the territory may not take place until such time as the decision on the interim order has been taken, except:

where the expulsion decision is based on a previous judicial decision; or

where the persons concerned have had previous access to judicial review; or

where the expulsion decision is based on imperative grounds of public security under Article 28(3).

3. The redress procedures shall allow for an examination of the legality of the decision, as well as of the facts and circumstances on which the proposed measure is based. They shall ensure that the decision is not disproportionate, particularly in view of the requirements laid down in Article 28.

4. Member States may exclude the individual concerned from their territory pending the redress procedure, but they may not prevent the individual from submitting his/her defence in person, except when his/her appearance may cause serious troubles to public policy or public security or when the appeal or judicial review concerns a denial of entry to the territory.

7 Article 37 of the Directive reads as follows:

> *The provisions of this Directive shall not affect any laws, regulations or administrative provisions laid down by a Member State which would be more favourable to the persons covered by this Directive.*

8 The preamble to the Decision reads as follows:

> *THE EEA JOINT COMMITTEE,*
>
> *Having regard to the Agreement on the European Economic Area, as amended by the Protocol adjusting the Agreement on the European Economic Area, hereinafter referred to as 'the Agreement', and in particular Article 98 thereof,*
>
> *Whereas:*
>
> *(1) Annex V to the Agreement was amended by Decision of the EEA Joint Committee No 43/2005 of 11 March 2005.*
>
> *(2) Annex VIII to the Agreement was amended by Decision of the EEA Joint Committee No 43/2005 of 11 March 2005.*
>
> *(3) 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 amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, as corrected by OJ L 229, 29.6.2004, p. 35, OJ L 30, 3.2.2005, p. 27 and OJ L 197, 28.7.2005, p. 34, is to be incorporated into the Agreement.*
>
> …
>
> *(8) The concept of 'Union Citizenship' is not included in the Agreement.*
>
> *(9) Immigration policy is not part of the Agreement.*
>
> …

9 Article 1 of the Decision reads as follows:

> *Annex VIII to the Agreement shall be amended as follows:*
>
> *(1)* …
>
> *The provisions of the Directive shall, for the purposes of the Agreement, be read with the following adaptations:*
>
> *(a)* …
>
> *(b)* …
>
> *(c) The words 'Union citizen(s)' shall be replaced by the words 'national(s) of EC Member States and EFTA States'.*
>
> …

10 The Joint Declaration by the Contracting Parties to the Decision reads as follows:

> *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. The EEA Agreement does not provide a legal basis for political rights of EEA nationals.*
>
> *The Contracting Parties agree that immigration policy is not covered by the EEA Agreement. 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. The EFTA States recognise that it is of importance to EEA nationals making use of their right of free movement of persons, that their family members within the meaning of the Directive and possessing third country nationality also enjoy certain derived rights such as foreseen in Articles 12(2), 13(2) and 18. This is without prejudice to Article 118 of the EEA Agreement and the future development of independent rights of third country nationals which do not fall within the scope of the EEA Agreement.*

National law[1]

11 Article 22 of the Foreign Nationals Act No 96/2002 reads as follows:

> *A commissioner of police shall decide on denial of entry as provided for in Article 18, the first paragraph, subparagraphs (a) – (i). The Directorate of Immigration shall take other decisions in accordance with this Article. Police shall prepare the cases to be decided on by the Directorate of Immigration. If the police consider that the conditions for denial of entry or expulsion are fulfilled, they shall send the case file to the Directorate of Immigration for its decision.*

12 Article 41 of the Foreign Nationals Act, which implements Article 27 of the Directive, reads as follows:

> *An EEA or EFTA foreign national may be refused the right to enter Iceland on arrival in the country or for up to seven days after arrival if:*
>
> *a.* …
>
> *b.* …
>
> *c. he conducts himself in a way referred to in the first paragraph of Article 42, or*
>
> *d. this is necessary in view of the security of the state, urgent national interests or public health.*
>
> *A police commissioner shall take the decision on refusal of entry under items a and b of the first paragraph; the Directorate of Immigration shall take decisions under items c and d. It shall be sufficient that the processing of the case begin[s] before the end of the seven-day period.*
>
> *If the processing of a case under the first paragraph does not begin within seven days, the EEA or EFTA foreign national may be expelled from Iceland by a decision of the Directorate of Immigration in accordance with items b, c and d within three months of his arrival in Iceland.*

13 Article 42 of the Foreign Nationals Act provides as follows:

> *(1) An EEA or EFTA foreign national, or a member of his family, may be expelled from Iceland if this is necessary in view of public order or public safety.*
>
> *(2) Expulsion under the first paragraph of this Article may be effected if the foreign national exhibits conduct, or may be considered likely to*

[1] Translations of national provisions are unofficial and based on those contained in the documents of the case.

engage in conduct, that involves a substantial and sufficiently serious threat to the fundamental attitudes of society. If the foreign national has been sentenced to punishment or special measures have been decided, then an expulsion on these grounds may only be effected if the conduct involved may indicate that the foreign national will again commit a criminal action.

14 The Directive was further implemented by Article 87 of Icelandic Regulation No 53/2003, which reads as follows:

An EEA or EFTA foreigner may be denied entry or expelled if necessary with a view to public order and public safety, cf. Article 42, the first paragraph (c), and Article 43, the first paragraph, of the Foreign Nationals Act.

Denial of entry or expulsion as provided for in the first paragraph is, for example, allowed if a foreigner:

a. is dependent upon drugs of abuse or other illicit substances, and has become thus dependent before his first permit to stay was issued, or

b. suffers from a serious psychiatric disturbance, or a psychiatric disturbance characterised by agitation, delirium, hallucinations or thought disorders, provided this condition developed before his first permit to stay was issued.

A decision on denial of entry or expulsion by reference to public order or public safety shall be exclusively based on the personal conduct of the foreigner in question, and may only be carried out if measures are allowed with respect to Icelandic nationals in comparable situations.

15 Article 175a of the General Penal Code No 19/1940, as inserted by Article 5 of Act No 149/2009, provides as follows:

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 this Act or in other statutes.

'Criminal organisation' here 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.

16 Article 10 of the Administrative Procedure Act No 37/1993 reads as follows:

> *An authority shall ensure that a case is sufficiently investigated before a decision hereon is reached.*

17 Article 12 of the Administrative Procedure Act provides as follows:

> *A public authority shall reach an adverse decision only when the lawful purpose sought cannot be attained by any less stringent means. Care should then be taken not to go further than necessary.*

18 According to Article 3 of Act No 2/1993, "[s]tatutes and regulations shall be interpreted, in so far as appropriate, to accord with the EEA Agreement and the rules based thereon".

II Facts and procedure

19 By a letter of 5 December 2012, registered at the Court on 17 December 2012, the Supreme Court of Iceland made a request under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ("SCA") in a case pending before it between Jan Anfinn Wahl and the Icelandic State.

20 On 5 February 2010, the Plaintiff, a Norwegian national, having arrived in Iceland by air, was stopped by a customs officer and his luggage was searched. Items marked with the name of the motorcycle club Hells Angels were found.

21 The Plaintiff was held at the airport while he was asked to provide statements about his background and the purpose of his visit to Iceland. He stated that he was a member of the Hells Angels motorcycle club in Drammen, Norway, and that he held a clean criminal record. The Plaintiff indicated that the purpose of his visit was to go sightseeing and engage in social contact with befriended members of an Icelandic motorcycle club – Fáfnir (subsequently renamed MC Iceland). He also said that he had a return flight to Oslo booked for 8 February 2010. He was subsequently denied entry to Iceland by a decision of the Directorate of Immigration which was served to him on the same day. The police informed him that he could exercise his right to be heard. It appears that a paper was enclosed, initialled by the Plaintiff and two policemen, in which it was stated that nationals of EEA States could be denied entry into Iceland on grounds of public policy and public security.

22 The Plaintiff filed an administrative appeal against the decision of the Directorate of Immigration with the Ministry of the Interior. He stated, *inter alia*, that he was a 36-year old university student from Norway and a member of a motorcycle club with lawful objectives. The motorcycle club he belonged to had never broken the law, neither in Iceland nor in his home country, and pursued lawful purposes.

23 The Plaintiff and the Directorate of Immigration submitted observations to the Ministry of the Interior. The Directorate of Immigration revealed that it had received a request from the Commissioner of Suðurnes Police on the day of the Plaintiff's arrival requesting a decision on a denial of entry to the country pursuant to item (c) of the first paragraph of Article 41 of the Foreign Nationals Act No 96/2002. The request was accompanied by copies of two police reports, a photocopy of the Plaintiff's passport, photographs of the Plaintiff's luggage and an "Open danger assessment by the Intelligence Department of the Office of the National Commissioner of Police regarding the arrival of a member of Hells Angels in Iceland, dated 5 February 2010" ("the danger assessment").

24 This assessment stated, *inter alia*, that it had been produced in connection with the arrival of a Norwegian member of the motorcycle club Hells Angels in Iceland. In all likelihood, it was stated that the arrival of the Plaintiff was connected to the planned entry of the said Icelandic motorcycle club into the Hells Angels. The admission process had been directed from Norway and was in its final stage. Following completion of that entry, the Icelandic group would acquire the status of a full and independent charter within Hells Angels. The assessment further stated that everywhere that this association had established itself, an increase in organised crime had followed.

25 MC Iceland acquired full membership of the Hells Angels MC on 4 March 2011. The proposal by the Norwegian charter of Hells Angels was accepted in February 2011 at the "European Officers Meeting" in Manchester, England.

26 On 16 June 2010, the Ministry of the Interior gave reasons for the decision at issue and rejected the appeal. It stated that the decision had been taken on grounds of item (c) of the first paragraph of Article 41 of the Foreign Nationals Act No 96/2002, as amended by Act No 86/2008. The Ministry considered that this provision in conjunction with the first paragraph of Article 42, laying down the circumstances in which it is permissible to refuse EEA or EFTA foreign nationals entry into Iceland, was the correct legal basis for the decision. That legislation was based on Iceland's obligations under the EEA Agreement and Directive 2004/38.

27 The Ministry of the Interior stated that under the EEA Agreement and Directive 2004/38 it is permissible to refuse an EEA national entry into Iceland if he is a member of a society or association that threatens public policy or public security and that it is not necessary for the society or organisation to be prohibited. It explained that its assessment had taken due account of the case law of the Court of Justice of the European Union ("ECJ") and was supported further by a communication from the European Commission to the European Parliament and Council of Ministers of the European Union of 2 July 2009.

28 The Ministry also argued that, when interpreting and applying rules on public order, the authorities have discretion to define their own needs in further detail and to define when circumstances require a restriction on freedom of movement in order to protect such interests. It stressed all the same that this assessment had

to be based on relevant considerations and take account of Iceland's obligations under the EEA Agreement.

29 The Ministry indicated that "organised criminal associations of motorcyclists" such as Hells Angels were viewed as a growing threat to the community and that the national police commissioners of the Nordic countries had formulated a policy to fight such activities. Since 2002, the National Commissioner of the Icelandic Police had instructed local police commissioners to implement this policy as a result of which foreign members of Hells Angels had been repeatedly denied entry on arrival to Iceland by reference to public policy and public security.

30 The Ministry concurred with the view that, in light of the activities and the nature of Hells Angels, individuals belonging to that 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 full membership of MC Iceland. In the view of the Ministry, such membership would strengthen the influence of the association in Iceland and the spread of organised crime.

31 The Ministry considered that it had been sufficiently demonstrated that the Plaintiff's visit was connected to the membership of MC Iceland in the association of Hells Angels. His membership demonstrated that he had aligned himself with the association's aims, intentions and those activities of the association which were regarded as threatening to public order and public security. Thus, according to the Ministry, it was as a result of the Plaintiff's own personal conduct that he had been expelled from Iceland on 5 February 2010. His arrival in Iceland constituted a serious and real threat to the community's fundamental interest in ensuring public policy and public security.

32 The Plaintiff's action before the district court, claiming compensation for non-pecuniary damage and compensation for financial loss, was rejected, with the denial of entry considered to comply with the requirements of administrative law.

33 The Plaintiff then lodged an appeal with the Supreme Court now seeking compensation simply for alleged false imprisonment and the resulting damage to his reputation. His claim was based on the view that the Directorate of Immigration's decision was unlawful. The Plaintiff contends that the danger assessment contained unsubstantiated allegations and pertained to the organisation as a whole, whereas his personal conduct was lawful and extended only to membership of the organisation and owning its uniform. Furthermore, he alleged that the basis for the assertions of the Directorate was never investigated by the Ministry.

34 The Defendant stated that the visits by foreign members were intended to further the full membership of the local motorcycle club in the association, which would strengthen its influence and contribute to organised crime. In its view, it had been sufficiently demonstrated that the visit of the Plaintiff was connected to the intended membership of the club in this association. Furthermore, as a result of

his membership, the Plaintiff had demonstrated his alignment with the association's aims, intentions and activities. The latter were considered to constitute a threat to public policy and public security. It was this personal conduct which led to the denial of entry, the conditions of the relevant national provision having been met. In addition to the assessment, a police report was part of the basis for the decision. However, further details could not be divulged.

35 Membership of a motorcycle club such as Hells Angels is not unlawful as such, and the activities of such associations have not been prohibited in Iceland. At the same time, Article 175a of the General Penal Code makes it a punishable offence to connive with another person in the commission of certain acts which form part of the activities of a criminal association.

36 As the Supreme Court considered the Icelandic provisions on refusal of entry inconsistent in that, on the one hand, they permit authorities to deny entry if this proves necessary in view of public policy or public security concerns, but, at the same time, prescribe that EEA and EFTA nationals can only be denied entry if it is possible to take measures against an Icelandic citizen under comparable circumstances, it decided to stay the proceedings to request an Advisory Opinion from the Court on the interpretation of certain rules of EEA law on which the relevant national provisions are based.

37 At an oral hearing on 5 November 2012, the Supreme Court requested legal counsel of each party to indicate their views on whether there was reason to seek an Advisory Opinion from the Court. Neither party objected to the application.

38 On 17 December 2012, the Supreme Court of Iceland decided to make a request under Article 34 SCA and posed 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 policy 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 policy 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?*

39 Reference is made to the Report for the Hearing for a fuller account of the legal framework, the facts, the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only insofar as is necessary for the reasoning of the Court.

III Answers of the Court

The first question

40 By its first question, the referring court seeks to establish whether EEA/EFTA States have, with regard to Article 7 EEA, the choice of form and method of implementation when making the act corresponding to Directive 2004/38/EC part of their internal legal order.

Observations submitted to the Court

41 In the Plaintiff's view, it follows from Article 7 EEA that EEA/EFTA States have the choice of form and method of implementation when transposing a directive. However, the discretion afforded to the EEA States is limited by Article 27 of the Directive. It follows from this provision that legislation based on the discretion of the EEA State must favour the Plaintiff.

42 The Defendant submits that Article 7 EEA leaves the choice of form and method of implementation to the Contracting Parties – whether through primary law or administrative measures – without prejudice to the duty of national courts to interpret national law in conformity with EEA law and in light of the purpose of the EEA rules in accordance with Article 3 EEA.

43 The Norwegian Government contends that it results from Article 7 EEA that the Contracting Parties have the choice of form and method of implementation. It follows from case law that it is not always necessary to formally enact the requirements of a directive in a specific and express legal provision in light of the general legal context and the interpretation given to national provisions by the national court.

44 ESA submits that, pursuant to Article 7 EEA, the authorities of the Contracting Parties have the choice of form and method of implementation when making the provisions of Directive 2004/38/EC part of their internal legal order. In doing so, they must take account of the principle of effectiveness and must ensure that the objectives pursued by the Directive are fulfilled.

45 The Commission contends that it is apparent from Article 7 EEA that EEA/EFTA States have the choice of form and method of implementation when transposing a directive, subject to their obligation to ensure that national law faithfully enacts the terms of the directive and that provision is made in national law to ensure that, in the event of conflict between implemented EEA rules and other statutory provisions, the EEA rules prevail.

Findings of the Court

46 At the outset, it is recalled that there are three main points at which a directive gains effect under the EEA Agreement (see Case E-11/12 *Koch and Others*, judgment of 13 June 2013, not yet reported, paragraph 118). The first arises where a decision of the EEA Joint Committee has entered into force and becomes binding pursuant to Article 104 EEA and the directive must be implemented (see Case E-2/12 *HOB-vín III* [2012] EFTA Ct. Rep. 1092, paragraph 128). This must have taken place at the latest on the implementation date in the EU or when the Joint Committee Decision enters into force, whichever is later. Any later date constitutes an infringement of the EEA Agreement (see Case E-6/06 *ESA* v *Liechtenstein* [2007] EFTA Ct. Rep. 238, paragraph 19).

47 The second is where a directive is implemented pursuant to Article 7 EEA, in which case it shall prevail over national provisions regardless of the form and method of implementation (see *Koch and Others*, cited above, paragraph 119, and case law cited).

48 The third is where a decision of the EEA Joint Committee becomes provisionally applicable pursuant to Article 103 EEA, unless a Contracting Party notifies that such a provisional application cannot take place (see Case E-17/11 *Aresbank*

[2012] EFTA Ct. Rep. 916, paragraphs 76 and 77, and *Koch and Others*, cited above, paragraph 120).

49 As regards the second point, the implementation of a directive, it follows from Article 7 EEA that an act corresponding to an EU directive referred to in the Annexes to the EEA Agreement or in decisions of the EEA Joint Committee shall be binding, as to the result to be achieved, upon the Contracting Parties and be made part of their internal legal order leaving the authorities of the Contracting Parties the choice of form and method of implementation. The Court notes that the implementation of a directive does not necessarily require legislative action in each EEA State, as the existence of statutory provisions and general principles of law may render the implementation by specific legislation superfluous (compare, *mutatis mutandis*, Case 29/84 *Commission* v *Germany* [1985] ECR 1661, paragraph 23).

50 Accordingly, the implementation of a directive into domestic law does not necessarily require the provisions of the directive to be enacted in precisely the same words in a specific, express provision of national law and a general legal context may be sufficient provided it actually ensures the full application of the directive (compare Case C-427/07 *Commission* v *Ireland* [2009] ECR I-6277, paragraph 54 and case law cited).

51 However, provisions of directives must be implemented with unquestionable binding force and the specificity, precision and clarity necessary to satisfy the requirements of legal certainty (compare, *mutatis mutandis*, Case C-159/99 *Commission* v *Italy* [2001] ECR I-4007, paragraph 32). EEA States must ensure full application of directives not only in fact but also in law.

52 It is essential that the legal situation resulting from national implementing measures be sufficiently precise and clear and that individuals be made fully aware of their rights so that, where appropriate, they may rely on them before the national courts. The latter condition is of particular importance where the directive in question is intended to confer rights on nationals of other EEA States, as is the case here, as those nationals may not be aware of provisions and principles of national law (compare, *mutatis mutandis*, Case C-478/99 *Commission* v *Sweden* [2002] ECR I-4147, paragraph 18 and case law cited).

53 In that regard, it must also be borne in mind that it is clear from case law with regard to the implementation of directives that mere administrative practices, which by their nature are alterable at will by the authorities and are not given the appropriate publicity, cannot be regarded as constituting the proper fulfilment of an EEA/EFTA State's obligations under the EEA Agreement (see, in particular, Case C-259/01 *Commission* v *France* [2002] ECR I-11093, paragraph 17, and case law cited).

54 Moreover, Article 3 EEA requires the EEA States to take all measures necessary, regardless of the form and method of implementation, to ensure that a directive which has been implemented and satisfies the conditions set out above prevails

over conflicting national law and to guarantee the application and effectiveness of the directive. The Court has consistently held that it is inherent in the objectives of the EEA Agreement that national courts are bound to interpret national law in conformity with EEA law. Consequently, they must apply the methods of interpretation recognised by national law in order to achieve the result sought by the relevant EEA rule (see, to that effect, Cases E-1/07 *Criminal Proceedings against A* [2007] EFTA Ct. Rep. 246, paragraphs 38 and 39, E-13/11 *Granville* [2012] EFTA Ct. Rep. 400, paragraph 52, and Case E-18/11 *Irish Bank Resolution Corporation* v *Kaupthing Bank* [2012] EFTA Ct. Rep. 592, paragraphs 123 and 124). The Court recalls that the EEA States may not apply rules which are liable to jeopardise the achievement of the objectives pursued by a directive and, therefore, deprive it of its effectiveness (see, *mutatis mutandis*, to that effect, Case E-4/11 *Clauder* [2011] EFTA Ct. Rep. 216, paragraph 46).

55 Finally, it must be added that it is inherent in the general objective of the EEA Agreement of establishing a dynamic and homogeneous market, in the ensuing emphasis on the judicial defence and enforcement of the rights of individuals, as well as in the public international law principle of effectiveness, that, when interpreting national law, national courts will consider any relevant element of EEA law, whether implemented or not (Case E-4/01 *Karlsson* [2002] EFTA Ct. Rep. 240, paragraph 28).

56 The answer to the first question must therefore be that, under Article 7 EEA, an EEA/EFTA State has the choice of form and method when implementing an act corresponding to Directive 2004/38/EC into its legal order. Depending on the legal context, the implementation of a directive does not necessarily require legislative action, as long as it is implemented with unquestionable binding force and the specificity, precision and clarity necessary to satisfy the requirements of legal certainty.

The second question

57 By its second question, the referring court essentially seeks to establish whether it is sufficient to base a decision under Article 27 of the Directive not to grant an individual who is a national of an EEA State leave to enter its territory on grounds of public policy and/or public security only on a danger assessment that concludes that the organisation to which the individual belongs is connected with organised crime and that where such organisations have managed to establish themselves, increased and organised crime has followed.

Observations submitted to the Court

58 The Plaintiff considers that entry can only be denied under Article 27 of the Directive if the person concerned has engaged in conduct that is considered a threat to public policy and public security within the meaning of Article 27(2). Membership of an organisation, regardless of its characteristics, can never by itself lead to a member of such organisation being considered a threat to public

policy and public security if a general rule or practice taking action against all individuals who are members of such an organisation is in effect without examining the personal conduct of the individual in question.

59 In order for membership in an organisation to be considered personal conduct within the meaning of Article 27 of the Directive, a certain level of participation going beyond simple membership must be present. Only members in positions of leadership and active participants in the activities considered to constitute a threat to public policy and public security can be regarded as being associated with the organisation.

60 The Plaintiff refers to the ECJ's judgment in *Van Duyn* (Case 41/74 *Van Duyn* [1974] ECR 1337) to support the view that membership of an organisation, regardless of the position authorities have towards it and regardless of the manner of participation of an individual in its activities, can never lead to an individual being considered a threat to public security and public policy unless administrative measures have been taken against the organisation and the standpoint of the government regarding this organisation has been defined. It must, at the very least, be foreseeable to a person entering the country that he could be denied entry to the country on the grounds of his membership of an organisation.

61 The Plaintiff contends that the criterion of a connection of an organisation to organised crime is too broad and elastic to serve as the basis for a refusal of entry. In addition, the correlation between the establishment of an organisation and an increase in organised crime does not imply a causal link between the two, as the latter can be the result of unrelated factors.

62 The Defendant refers to case law regarding the interpretation of Directive 64/221/EEC which must apply in the present case by parity of reasoning. The ECJ's judgment in *Van Duyn*, cited above, paragraph 18, establishes the area of discretion that States enjoy in determining the circumstances that justify recourse to public policy and public security, for example regarding the nature of an organisation considered to be socially harmful. EEA law does not impose on the Contracting Parties a uniform scale of values as regards the assessment of conduct which may be considered contrary to public policy, and they retain the freedom to determine the requirements of public policy and public security in accordance with their national needs subject to the requirements of EEA law. According to Article 27(2) of the Directive, this requirement is fulfilled by the existence of a genuine, present and sufficiently serious threat to one of the fundamental interests of society.

63 The Defendant submits that the authorities of the Nordic countries have formulated a clear strategy of fighting organised crime by motorcycle gangs and that the national commissioners of police are working jointly towards this goal. National efforts have included a policy of preventing outlaw motorcycle gangs from establishing a foothold in order to carry out crime. The Icelandic authorities established that cooperation existed between the Icelandic motorcycle club and

the Hells Angels organisation. Various task forces were created to gather intelligence on these activities and to combat the activities of these groupings.

64 The Defendant considers that, in assessing the threat to public policy and public security posed by groups associated with organised crime, the same criteria must be relevant as those communicated by the Commission in relation to individual cases, that is, the nature of the offence and the damage or harm caused. Consequently, a measure refusing entry to a declared member of a certain organisation in circumstances such as those of the present case may fall within the concepts of public policy and public security.

65 The Defendant contends that when organisations pose a threat to the social order, active membership in such a group suffices to establish personal conduct representing a sufficiently serious threat to the social order, and thus fulfilling the requirement of posing, in addition to the social perturbation of the social order which any infringement of the law involves, a genuine and sufficiently serious threat to a fundamental interest of society.

66 The Norwegian Government considers that the ECJ's judgment in *Van Duyn* is of particular significance for the interpretation of the relevant provisions, which, although decided on the interpretation of Article 3 of Council Directive 64/221/EEC, must apply to Article 27 of Directive 2004/38 by parity of reasoning. Consequently, according to the Norwegian Government, which refers to *Van Duyn*, cited above, paragraph 17, it is clear that the "present association, which reflects participation in the activities of the body or of the organisation as well as identification with its aims and its designs, may be considered a voluntary act of the person concerned and, consequently, as part of his personal conduct" within the meaning of Article 3 of Directive 64/221 and, by parity of reasoning, of Article 27(2) of Directive 2004/38.

67 ESA takes the view that the concept of public security includes both internal and external security, whereas public policy is generally interpreted as covering the prevention of the disturbance of social order. In addition, it considers EEA States to enjoy a certain margin of appreciation in determining the requirements of public policy and public security.

68 ESA considers that, in the case before the national court, the decision was taken by the Directorate of Immigration on the basis of information provided by police including an open danger assessment on the date of entry. This action was part of an established and consistent practice of the National Commissioner of Icelandic Police; hence, the denial was not a random act. ESA observes that the organisation in question is considered by authorities in other States to constitute a criminal organisation. At the time the assessment was established, information was obtained showing that the club whose members the individual concerned planned to meet was intending to accede to said organisation. The threat the Icelandic authorities were dealing with at the time was not motorcycle gangs or the Hells Angels in general. Instead, the threat was that MC Iceland would become a full charter member of the Hells Angels. The general practice in

accession procedures was for the acceding association to adopt the practices of the one to which it acceded, and to which the individual concerned belonged, likely to lead to an increase in organised crime. ESA contends, therefore, that, in light of the said margin of appreciation, Iceland was entitled to consider that the public policy and public security requirements were fulfilled.

69 The Commission notes that the Plaintiff has been denied entry and was not expelled. As stated in recital 23 in the preamble to the Directive, expulsion is limited by the principle of proportionality and account must be taken of the degree of integration. Conversely, and notwithstanding the wording of Article 27 of the Directive, if a person is not integrated in the host State, the authorities of that State have a wider margin of appreciation to refuse entry than in the case of expulsion.

70 The Commission notes that the Icelandic authorities appear to regard organised motorcycle gangs as a considerable threat and have consistently taken measures against this phenomenon without banning membership as such. There appears to be a regular practice of denying entry to foreign members of the Hells Angels motorcycle clubs. The Commission submits that, a priori, there appear to be adequate grounds to allow the national authorities to deny entry to a person in the position of the Plaintiff.

71 In the Commission's view, the prohibition on taking measures of a general preventive nature does not preclude the authorities of an EEA State from acting pre-emptively to stop a threat from materialising, if they do this on reasonable grounds and in accordance with the principle of proportionality. In this context, the Commission notes that the arrival of the applicant in Iceland was thought to be linked to the preparation for full membership of the association, which would instigate the spread of organised crime.

72 The Commission asserts that, in comparison with the situation in *Van Duyn*, in which the applicant was only intending to carry out low-level tasks for the Church of Scientology, which was not associated with organised crime albeit considered undesirable, in the present case, the Plaintiff is thought to play a leading role in the activities of an association presumed to be connected to organised crime. There is no evidence that the Plaintiff was coming to Iceland to commit crime on that particular day. However, the link here is more indirect. The Plaintiff was coming to Iceland in order to assist with the systemic organisation of organised crime.

Preliminary remarks concerning the Joint Declaration by the Contracting Parties to Joint Committee Decision No 158/2007

73 At the outset, it is noted that it is for the EEA Joint Committee to incorporate new Union legislation in the EEA by adopting amendments to the Annexes and Protocols to the EEA Agreement (see Case E-3/97 *Jæger* [1998] EFTA Ct. Rep. 1, paragraph 30).

74 The Directive was incorporated into the EEA Agreement by the adoption of Joint Committee Decision No 158/2007 ("the Decision"). According to the Decision, the concept of 'Union Citizenship' and immigration policy are not included in the Agreement. That is further stipulated in the accompanying Joint Declaration by the Contracting Parties ("the Declaration").

75 However, these exclusions have no material impact on the present case. Nevertheless, the impact of the exclusions must be assessed on a case-by-case basis and may vary accordingly.

76 In this regard, it must be noted that, as is apparent from Article 1(a) and recital 3 in its preamble, the Directive aims in particular to strengthen the right of free movement and residence of EEA nationals (see *Clauder*, cited above, paragraph 34). To this end, it lays down the conditions governing the exercise of the right of free movement and residence within the territory of the EEA.

77 The impact of the exclusion of the concept of citizenship has to be determined, in particular, in cases concerning Article 24 of the Directive which essentially deals with the equal treatment of family members who are not nationals of a Member State and who have the right of residence or permanent residence. At the oral hearing, the Norwegian Government submitted in this respect that, since the concept of citizenship is not part of the EEA Agreement, a series of complex and controversial questions has to be answered in such cases. ESA and the Commission reserved their position on the interpretation of the exclusions stipulated in the Decision and the Declaration.

Findings of the Court

78 Article 5 of the Directive establishes, *inter alia*, that EEA States shall grant EEA nationals leave to enter their territory with a valid identity card or passport without prejudice to the provisions on travel documents applicable to national border controls.

79 A situation such as that of the applicant in the main proceedings, who seeks to travel from the EEA State of which he is a national to another EEA State, is covered by the right of nationals of EEA States to move and reside freely in the EEA.

80 Nevertheless, the right of free movement of nationals of EEA States is not unconditional but may be subject to the limitations and conditions imposed by the Agreement and by the measures adopted to give it effect (see, *mutatis mutandis*, to that effect, Cases C-356/98 *Kaba* [2000] ECR I-2623, paragraph 30, C-466/00 *Kaba* [2003] ECR I-2219, paragraph 46, and C-398/06 *Commission* v *Netherlands* [2008] ECR I-56, paragraph 27).

81 Those limitations and conditions stem, in particular, from Article 27(1) of the Directive, which provides that EEA States may restrict the freedom of movement of nationals of EEA States and their family members on grounds of public

policy, public security or public health. However, those grounds cannot, according to the same provision, be invoked to serve economic ends.

82 Therefore, for a decision such as that at issue in the main proceedings to be permitted under EEA law, it must be shown, *inter alia*, that the measure was taken on the grounds listed in Article 27(1) of the Directive.

83 While EEA States essentially retain the freedom to determine the requirements of public policy and public security in accordance with their national needs, which can vary from one EEA State to another and from one era to another, the fact still remains that, in the EEA context and particularly as regards justification for a derogation from the fundamental principle of free movement of persons, those requirements must be interpreted strictly, so that their scope cannot be determined unilaterally by each EEA State without any control by the EEA institutions (compare, to that effect, Cases 36/75 *Rutili* [1975] ECR 1219, paragraphs 26 and 27; 30/77 *Bouchereau* [1977] ECR 1999, paragraphs 33 and 34; C-54/99 *Église de scientologie* [2000] ECR I-1335, paragraph 17; and C-36/02 *Omega* [2004] ECR I-9609, paragraphs 30 and 31).

84 It follows from Article 27(2) of the Directive that, in order to be justified, measures taken on grounds of public policy or public security must be based exclusively on the personal conduct of the individual concerned. Justifications that are isolated from the particulars of the case in question or that rely on considerations of general prevention cannot be accepted.

85 Article 27(2) of the Directive requires such personal conduct of the individual in question to represent a genuine, present and sufficiently serious threat to one of the fundamental interests of society (compare, *mutatis mutandis*, *Rutili*, paragraph 28, and *Bouchereau*, paragraph 35, both cited above, and Joined Cases C-482/01 and C-493/01 *Orfanopoulos and Oliveri* [2004] ECR I-5257, paragraph 66).

86 Moreover, according to Article 27(2) of the Directive, a measure which restricts the right of free movement may be justified only if it respects the principle of proportionality (compare Joined Cases C-259/91, C-331/91 and C-332/91 *Allué and Others* [1993] ECR I-4309, paragraph 15, Case C-413/99 *Baumbast and R* [2002] ECR I-7091, paragraph 91, and Case C-100/01 *Oteiza Olazabal* [2002] ECR I-10981, paragraph 43).

87 It is for the national court to determine on a case-by-case basis whether, on the basis of the relevant matters of fact and of law, those requirements are met and, if not, to draw the necessary conclusions in order to ensure the effectiveness of the Directive (see, by analogy, *Koch and Others*, cited above, paragraph 121, and case law cited). When making such an assessment, the national court will also have to determine whether that restriction on the right to entry is appropriate to ensure the achievement of the objective it pursues and does not go beyond what is necessary to attain it.

88 However, the Court may, where appropriate, provide clarification designed to give the national court guidance in its interpretation. As regards a situation such as that in the main proceedings – where it appears from the reference that the applicant was at the material time a member of an organisation associated with organised crime – it is clear from case law that present association, which reflects participation in the activities of the body of the organisation as well as identification with its aims and its designs, may be considered a voluntary act of the person concerned and, consequently, as part of the applicant's personal conduct within the meaning of Article 27(2) of the Directive (compare *Van Duyn*, cited above, paragraph 17).

89 For the sake of order, it is noted that present association with an organisation associated with organised crime can only be taken into account in so far as the circumstances of the membership are evidence of personal conduct constituting a genuine, present and sufficiently serious threat to one of the fundamental interests of society (see, to that effect, *Bouchereau*, cited above, paragraph 28).

90 In the present case, however, it appears from the reference that the personal conduct of the Plaintiff is not limited to mere membership in a particular organisation associated with organised crime. The national authorities based their decision mainly on the danger assessment of the National Commissioner of Police concerning the Plaintiff's presumed role in the final accession stage of a national motorcycle club becoming a new charter in an international organisation associated with organised crime. In this assessment, the Plaintiff's visit was linked to the said process which would subsequently ferment the spread of organised crime in Iceland. The assessment was also based on the fact that the process in general had been directed from the applicant's home State. It furthermore appears from the reference that the information and evidence was gathered and/or compiled specifically on the Plaintiff's planned entry into Iceland.

91 Consequently, the Plaintiff's conduct appears to constitute a genuine, present and sufficiently serious threat to one of the fundamental interests of society. Nevertheless, it is for the court in the main proceedings to make the necessary findings in the individual case, on the basis of the matters of fact and law as well as the evidence adduced to it, whether the restriction on the Plaintiff's right to be granted leave to enter Iceland is justified.

92 The answer to the second question must therefore be that it is sufficient for an EEA State to base a decision under Article 27 of the Directive not to grant an individual who is a national of another EEA State leave to enter its territory on grounds of public policy and/or public security only upon a danger assessment, which assesses the role of the individual in the accession of a new charter to an organisation of which the individual is a member and which concludes that the organisation is associated with organised crime and that where such an organisation has managed to establish itself, organised crime has increased. It is further required that the assessment is based exclusively on the personal conduct of the individual concerned. Moreover, this personal conduct must represent a

genuine, present and sufficiently serious threat to one of the fundamental interests of society, and the restriction on the right to entry must be proportionate. In the light of the relevant matters of fact and law, it is for the national court to determine whether those requirements are met.

The third question

93 By its third question, the referring court essentially seeks to establish whether it is of significance that the EEA State denying leave to enter its territory pursuant to Article 27 of the Directive has outlawed the particular organisation of which the individual in question is a member and membership in such organisation is prohibited in that State.

Observations submitted to the Court

94 The Plaintiff submits that, in order to invoke Article 27 of the Directive, Iceland needs to declare both the operations and the membership of an organisation illegal. If not, an individual cannot be considered a threat to public policy and public security. According to the Plaintiff, the finding in *Van Duyn* on this point was based on international law which precluded a State from refusing the right of entry or residence to its own nationals. He asserts that, according to recent case law, it is not permissible to discriminate between nationals and EEA citizens who carry out the same conduct and, thus, the reasoning in *Van Duyn* on this point can no longer be considered relevant. The Plaintiff also relies on the ECJ's finding in Case C-268/99 *Jany and Others* [2001] ECR I-8615, paragraph 61, that "conduct which a Member State accepts on the part of its own nationals cannot be regarded as constituting a genuine threat to public order".

95 The Defendant submits that, in order to restrict the right to free movement, it is not necessary that an organisation, of which a member is refused entry, is prohibited by national law or otherwise, as long as the State has taken some administrative measures to counteract the activities of that organisation. This is a consequence of the area of discretion that EEA States enjoy in having recourse to public policy, which presupposes only a clear definition of the authorities' standpoint regarding an organisation the activities of which are considered socially harmful. The criterion is not whether the same measure was adopted in respect of its own nationals, as no authority exists to expel a national, but whether repressive measures or other genuine and effective measures intended to combat the conduct were taken.

96 The Norwegian Government submits that EEA States are not required to outlaw the activities of an organisation in order to restrict the movement of its members, provided that they have taken administrative measures to counteract these activities. A refusal of entry to a citizen of another EEA State is not precluded simply because similar restrictions are not placed on nationals.

97 ESA submits that national authorities are not obliged to outlaw the activities of an organisation as long as administrative measures have been taken to counteract

its activities. This follows from the margin of appreciation national authorities enjoy in the choice of measures taken to counteract the activities of criminal organisations. ESA contends that national authorities are best placed to determine the most effective measures and also to assess their potentially damaging effects.

98 Furthermore, ESA notes that, due to the fact that there were no Hells Angels in Iceland at the time, MC Iceland needed a foreign, in this case a Norwegian, organisation to second them and propose them for membership in order to become a Hells Angels organisation. Therefore, the measures of the Icelandic authorities could only target foreigners. ESA argues that there would be a serious loophole in the arsenal of the law enforcement authorities if the authorities of a State could not take such measures against foreigners who intended to propose membership to an international organisation such as the Hells Angels.

99 The Commission contends that EEA law does not require EEA States to outlaw an organisation before it may restrict the free movement of its members that are citizens of other EEA States and before the public policy proviso can be invoked. However, the authorities of that State must take effective measures against that organisation and the threat it and its members represent. It also stresses the ECJ's finding in *Van Duyn* that a State is not precluded from refusing, on grounds of public policy, an individual's entry to the territory of the State and to taking up residence and working there simply because the host State does not place such a restriction on its own nationals. The Commission adds, however, that recourse to the public policy exception may not be used to permit covert discrimination.

Findings of the Court

100 Given its margin of appreciation to define the requirements for public policy and public security in accordance with its national needs (see paragraph 83 of this judgment), an EEA State cannot be obliged to declare the organisation in question and membership therein unlawful before it can deny a member of that organisation who is a national of another EEA State leave to enter its territory pursuant to Article 27 of the Directive, if recourse to such a declaration is not thought appropriate in the circumstances. In many circumstances, an outright prohibition could drive that organisation underground, thus making it difficult for the authorities to monitor its conduct.

101 However, given the limitations of said margin of appreciation, the competent authorities of an EEA State must have clearly defined their standpoint as regards the activities of the particular organisation in question and, considering the activities to be a threat to public policy and/or public security, they must have taken administrative measures to counteract these activities (compare *Van Duyn*, cited above, paragraph 17).

102 It is a matter for the national court to determine whether those requirements are met in the present case. However, it would appear to be common ground that the motorcycle organisation in question is viewed as a threat by the competent national authorities in the Nordic countries in general. Accordingly, a policy to

resist the activities of such organisations was formulated by the national authorities of the Nordic countries. Moreover, it appears from the reference that since 2002 the head of the national Police of Iceland has instructed local police commissioners to implement this policy. In other words, the national authorities have been taking measures over a considerable period to prevent the national motorcycle club in question from becoming a charter of the Hells Angels, *inter alia*, by repeatedly denying foreign members of Hells Angels entry on arrival to Iceland by reference to public policy and public security.

103 The third question also raises the issue whether measures against nationals of the host State in a similar position to the individual in question are also required in order not to preclude recourse to the public policy and public security exceptions under Article 27 of the Directive.

104 The reservations contained in Article 27 of the Directive permit EEA States to adopt, with respect to the nationals of other EEA States and on the grounds specified in those provisions, in particular grounds justified by the requirements of public policy, measures which they cannot apply to their own nationals, inasmuch as they have no authority to expel the latter from the national territory or to deny them access thereto. Although that difference of treatment, which bears upon the nature of the measures available, must therefore be allowed, it must be emphasized that the national authority of an EEA State empowered to adopt such measures must not base the exercise of its powers on assessments of certain conduct which would have the effect of applying an arbitrary distinction to the detriment of nationals of other EEA States (compare, *mutatis mutandis*, Joined Cases 115/81 and 116/81 *Adoui and Cornuaille* [1982] ECR 1665, paragraphs 7 to 9).

105 For the sake of order it is also recalled that the reservations contained in Article 27 of the Directive do not entitle EEA States to restrict the right of EEA nationals to move and reside freely on the basis of conduct unless such conduct on the part of its own nationals gives rise to repressive or other genuine and effective measures (compare, *mutatis mutandis*, *Adoui and Cornuaille*, cited above, paragraphs 7 to 9, and Joined Cases C-65/95 and C-111/95 *Shingara and Radiom* [1997] ECR I-3343, paragraph 28).

106 In the present case, however, the threat the national authorities were facing was the final stage in the process of a national motorcycle club acceding to become a full charter member of an international motorcycle club associated with organised crime. Moreover, based on the authorities' assessment, it was considered very likely that accession would lead to an increase in serious crime.

107 Furthermore, it appears from the reference that the national motorcycle club needed the support of an established charter of Hells Angels in order to become a full charter itself and, for that reason, the measures in question could only target foreigners. Since there was no such charter in Iceland, the support of a foreign member was a prerequisite. Thus, *prima facie*, it appears that in the particular situation of the present case only a foreigner could represent a genuine, present

and sufficiently serious threat affecting one of the fundamental interests of society.

108 The answer to the third question must therefore be that an EEA State cannot be obliged to declare an organisation and membership therein unlawful before it can deny a member of that organisation who is a national of another EEA State leave to enter its territory pursuant to Article 27 of the Directive if recourse to such a declaration is not thought appropriate in the circumstances. However, the EEA State must have clearly defined its standpoint as regards the activities of that organisation and, considering the activities to be a threat to public policy and/or public security, it must have taken administrative measures to counteract those activities.

The fourth question

109 By its fourth question, the referring court essentially seeks to establish whether for the purposes of considering public policy and/or public security threatened within the meaning of Article 27(1) of the Directive it suffices under EEA law that, in its legislation, an EEA State has defined as punishable, conduct that consists of conniving with another person in the commission of an act, the commission of which is part of the activities of a criminal organisation, or whether such legislation must be considered general prevention within the meaning of Article 27(2) of the Directive.

Observations submitted to the Court

110 The Plaintiff submits that the provision of the Icelandic Penal Code was enacted to fulfil Iceland's obligation to implement the United Nations Convention against Transnational Organized Crime of 2000 and is not connected to rules of national law on the refusal of entry on grounds of public policy and public security. Consequently, it is not foreseeable to an individual concerned that he could be denied entry into the State on the grounds of his membership of an organisation. The Plaintiff notes that the provision does not make it illegal to establish a criminal organisation, but increases the mandatory sentence. As the provision does not pertain to the conduct of the Plaintiff, it cannot be relevant in deciding whether the requirements of Article 27 of the Directive have been fulfilled. According to the Plaintiff, for a provision to justify a restriction on the right to free movement, it would have to refer to particular organisations. As it is, the content of the provision constitutes simply general prevention within the meaning of Article 27. As case law has established, expulsion or refusal of entry cannot be justified on grounds of general prevention.

111 The Defendant submits that, as follows from its answers to the second and third questions, for the purposes of imposing a restriction on free movement it is not relevant whether the conduct against which measures are taken on grounds of public policy and public security is criminalised. However, the enactment of criminal sanctions against particular conduct can be relevant in assessing whether

conduct is of a sufficiently serious nature to justify restrictions on the entry of nationals of other EEA States.

112 ESA notes that the Icelandic authorities did not base their decision to deny entry on the provision of national law specified in the question. Nonetheless, a national provision such as that at issue can constitute proof of an established practice to counteract organised crime. ESA submits, however, that a general reference to provisions of national law defining organised crime as punishable cannot, as such, constitute sufficient grounds for denying entry. In accordance with Article 27(2) of the Directive, national authorities are obliged to undertake a specific assessment as to whether the personal conduct of the individual concerned can be considered to represent a threat.

113 The Commission underlines the role of the procedural safeguards contained in the Directive, in particular Article 31. This guarantee of judicial redress procedures provides for the possibility of review before a court within the procedural autonomy of the State concerned, subject to compliance with the principles of equivalence and effectiveness. It is for the national court to determine whether the administrative authorities have discharged the burden of showing that sufficient evidence exists to entitle them to come to the conclusion that the applicant was likely to engage in such activities. It must also determine whether the decision taken complies with the principle of proportionality in that it must be appropriate for securing the attainment of the objective which it pursues and must not go beyond what is necessary to achieve it.

Findings of the Court

114 At the outset, the Court notes that the national authorities did not base their decision to deny entry on the provision specified in the fourth question.

115 Pursuant to Article 27(2) of the Directive, “measures taken on grounds of public policy or of public security shall be based exclusively on the personal conduct of the individual concerned” and “justifications that are isolated from the particulars of the case or that rely on considerations of general prevention shall not be accepted”. Moreover, “previous criminal convictions shall not in themselves constitute grounds for the taking of such measures”.

116 As departures from the rules concerning the free movement of persons constitute exceptions which must be strictly construed, the concept of “personal conduct” expresses the requirement that a decision denying leave to enter the territory may only be made for breaches of public policy and public security which might be committed by the individual affected.

117 A criminal sanction, such as the one in question, can be relevant in demonstrating whether conduct is of a sufficiently serious nature to justify restrictions on the entry of nationals of other EEA States where the individual in question is convicted of that crime and that particular conviction is part of the assessment on which the national authorities base their decision. However, the derogations from

the free movement of persons must be interpreted restrictively, with the result that a previous conviction can justify denying entry only in so far as the circumstances which gave rise to that conviction are evidence of personal conduct constituting a present threat to the requirements of public policy and/or public security (compare, to that effect, Case C-348/96 *Calfa* [1999] ECR I-11, paragraphs 22 to 24). It is clear that this has to be assessed by the national court on a case-by-case basis.

118 The Court therefore concludes that in order to invoke a public policy and/or public security threat under Article 27(1) of the Directive it does not suffice that an EEA State has defined as punishable, conduct that consists of conniving with another person in the commission of an act, the commission of which is part of the activities of a criminal organisation.

The fifth question

119 By its fifth question, the referring court essentially seeks to establish whether Article 27(2) of the Directive should be understood as meaning that a premise for the application of measures under Article 27(1) of the Directive against a specific individual is that national authorities of an EEA State must adduce a probability that the individual in question intends to indulge in certain activities in order for the individual's conduct to be considered a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society.

Observations submitted to the Court

120 The Plaintiff asserts that the burden of proof in relation to Article 27 lies with the EEA States. According to the ECJ's judgment in *Bouchereau*, cited above, in particular paragraph 35, recourse to the concept of public policy and public security presupposes conduct that poses a genuine, imminent and sufficiently serious threat affecting one of the fundamental interests of society. It is for the national court to determine whether the administrative authorities have discharged the burden of proof in this regard.

121 The Defendant submits that, pursuant to the provisions of the Directive, citizens of the Union, even long-term residents, may be expelled on the basis of a criminal conviction for a particular criminal activity. It follows from the ECJ's judgments in *Orfanopoulos and Oliveri*, cited above, and Case C-50/06 *Commission* v *Netherlands* [2007] ECR I-4383 that only expulsion which is an automatic consequence of an imposed prison sentence without any individual assessment infringes the requirements of Article 27 of the Directive.

122 Restrictions on free movement can be imposed if an individual assessment has been undertaken. The Defendant argues that a general assessment, based on past conduct and predictions of future conduct, is sufficient to establish a threat resulting from individual conduct. Therefore, in order to take restrictive measures on grounds of public policy and public security, there is no requirement on the

public authorities to demonstrate the probability that the individual in question intends to indulge in certain activities.

123 ESA contends that in order to demonstrate that personal conduct represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, it suffices that the individual in question is a member of an organisation that is assumed to practise activities that are considered harmful to society, as the person in question has by his participation identified with the aims of the organisation in question. That an individual has a clean criminal record does not preclude the national authorities from concluding that he represents a threat.

124 The Commission underlines the role of the procedural safeguards contained in the Directive, in particular Article 31. This guarantee of judicial redress procedures provides for the possibility of review before a court within the procedural autonomy of the State concerned, subject to compliance with the principles of equivalence and effectiveness. It is a matter for the national court to determine whether the administrative authorities have discharged the burden of showing that sufficient evidence exists to entitle them to come to the conclusion that the applicant was likely to engage in activities considered to represent a genuine, present and sufficiently serious threat. The national court must also determine whether the decision taken complies with the principle of proportionality in that it must be appropriate for securing the attainment of the objective which it pursues and must not go beyond what is necessary to achieve it.

Findings of the Court

125 In order to restrict rights of an EEA national under Article 27 of the Directive, the national authorities are required to demonstrate the existence of a genuine and sufficiently serious threat to one of the fundamental interests of society (compare *Rutili*, paragraph 28; *Bouchereau*, paragraph 35; *Orfanopoulos and Oliveri*, paragraph 66, and *Commission* v *Germany*, paragraph 35, all cited above).

126 As has been rightly emphasised by the Commission, Article 31 of the Directive obliges the EEA States to lay down, in domestic law, the measures necessary to enable EEA nationals and members of their families to have access to judicial and, where appropriate, administrative redress procedures to appeal against or seek review of any decision restricting their right to move and reside freely in the EEA States on the grounds of public policy, public security or public health (compare, to this effect, Case C-249/11 *Byankov*, judgment of 4 October 2012, not yet reported, paragraph 53).

127 In accordance with Article 31(3) of the Directive, the redress procedures must include an examination of the legality of the decision, as well as of the facts and circumstances on which the proposed measure is based (compare, to that effect, Case C-300/11 *ZZ*, judgment of 4 June 2013, not yet reported, paragraph 47).

128 In the context of the judicial review of the legality of the decision taken under Article 27 of the Directive, it is incumbent upon the EEA States to lay down rules enabling the court entrusted with such review to examine both all the grounds and the related evidence on the basis of which the decision was taken (compare, to that effect, *ZZ*, cited above, paragraph 59).

129 Thus, subject to compliance with the principles of equivalence and effectiveness (see *Koch and Others*, cited above, paragraph 118), it is a matter for the national court to determine whether the administrative authorities have discharged the burden of showing that there is sufficient evidence to conclude that the individual in question engages or is likely to engage in personal conduct, such as actual membership in a motorcycle club associated with organised crime, that represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society.

130 The Court therefore holds that the national administrative authorities must ensure that there is sufficient evidence to conclude under Article 27(2) of the Directive that the individual concerned was likely to engage in personal conduct that represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. It is for the national court to determine, in compliance with the principles of equivalence and effectiveness, whether this is the case.

IV Costs

131 The costs incurred by the Norwegian Government, ESA and the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are a step in the proceedings pending before Hæstiréttur Íslands, any decision on costs for the parties to those proceedings is a matter for that court.

On those grounds,

THE COURT

in answer to the questions referred to it by Hæstiréttur Íslands hereby gives the following Advisory Opinion:

1. **Under Article 7 EEA, an EEA/EFTA State has the choice of form and method when implementing an act corresponding to Directive 2004/38/EC into its legal order. Depending on the legal context, the implementation of a directive does not necessarily require legislative action, as long as it is implemented with unquestionable binding force and the specificity, precision and clarity necessary to satisfy the requirements of legal certainty.**

2. **It is sufficient for an EEA State to base a decision under Article 27 of the Directive not to grant an individual who is a national of another EEA State leave to enter its territory on grounds of public policy and/or public security only upon a danger assessment, which assesses the role of the individual in the accession of a new charter to an organisation of which the individual is a member and which concludes that the organisation is associated with organised crime and that where such an organisation has managed to establish itself, organised crime has increased. It is further required that the assessment is based exclusively on the personal conduct of the individual concerned. Moreover, this personal conduct must represent a genuine, present and sufficiently serious threat to one of the fundamental interests of society, and the restriction on the right to entry must be proportionate. In the light of the relevant matters of fact and law, it is for the national court to determine whether those requirements are met.**

3. **An EEA State cannot be obliged to declare an organisation and membership therein unlawful before it can deny a member of that organisation who is a national of another EEA State leave to enter its territory pursuant to Article 27 of the Directive if recourse to such a declaration is not thought appropriate in the circumstances. However, the EEA State must have clearly defined its standpoint as regards the activities of that organisation and, considering the activities to be a threat to public policy and/or public security, it must have taken administrative measures to counteract those activities.**

4. **In order to invoke a public policy and/or public security threat under Article 27(1) of the Directive it does not suffice that an EEA State has defined as punishable, conduct that consists of conniving with another person in the commission of an act, the commission of which is part of the activities of a criminal organisation.**

5. **The national administrative authorities must ensure that there is sufficient evidence to conclude under Article 27(2) of the Directive that the individual concerned was likely to engage in personal conduct that represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. It is for the national court to determine, in compliance with the principles of equivalence and effectiveness, whether this is the case.**

Carl Baudenbacher Per Christiansen Páll Hreinsson

Delivered in open court in Luxembourg on 22 July 2013.

Michael-James Clifton
Acting Registrar

Carl Baudenbacher
President