ROYAL NORWEGIAN
MINISTRY OF JUSTICE AND PUBLIC SECURITY

EFTA Surveillance Authority
rue Belliard 35

Belgium

Your ref.	Our ref.	Date
	15/1261 - LMK	21.10.2021

Regarding request for information Norway's expulsion practice concerning EEA nationals who commit minor criminal offences

The Ministry of Justice and Public Security ("the Ministry"), refer to the Internal Market Affairs Directorate's ("the Directorate") of the EFTA Surveillance Authority ("the Authority") request of 20 September 2021, concerning Norway's expulsion practice towards EEA nationals who commit minor criminal offences.

We hereby submit our observations and comments on the content of the Directorate's letter, answered in the same order as the inquires were presented to us.

1. **What is the relevant legal framework in Norway when the immigration authorities decide whether to expel an EEA national because of a minor criminal offence?**

The relevant legal framework in Norway regarding expulsion of an EEA national is Section 122 of the Norwegian Immigration Act and Section 19-29 of the Norwegian Immigration Regulation. The provisions implements Articles 27(1), 27(2) and 28 of Directive 2004/38.

Section 122 first, second and fourth paragraph of the Norwegian Immigration Act reads:

> "EEA nationals and their family members, and foreign nationals as mentioned in section 110, fourth paragraph, of the Act who have a right of residence under section 111, second paragraph, or section 114, second paragraph, may be expelled when this is in the interests of public order or security. It is a condition for expulsion that the personal circumstances of the foreign national present, or must be assumed to present, a real, immediate and sufficiently serious threat to fundamental societal interests. The King may issue regulations containing further provisions on the definition of public order and security.

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> A foreign national who may be expelled under the first paragraph may nevertheless not be expelled if the foreign national
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> (a) has a permanent right of residence under sections 115 or 116, unless weighty public order or security considerations indicate that it is necessary,
> (b) is an EEA national who has resided in the realm for the previous ten years, unless it is compellingly necessary in the interests of public security, or
> (c) is an EEA national who is a minor, unless it is compellingly necessary in the interests of public security. However, this does not apply to minors if expulsion of the minor is necessary in order to safeguard the child's best interests.
>
> (…)
>
> No expulsion decision is made under the provisions of this section if, in view of the seriousness of the offence and the foreign national's connection with the realm, it would constitute a disproportionate measure against the foreign national personally or against the family members. In the assessment of whether expulsion constitutes a disproportionate measure, weight shall be given to, among other things, the person's length of residence in the realm, age, state of health, family situation, financial situation, social and cultural integration in the realm, and connection with the country of origin. In cases concerning children, the child's best interests shall be a fundamental consideration."

The Norwegian Immigration Regulation Section 19-29 first and second paragraph reads:

> "Rejection or expulsion in the interests of public order or security, see section 121 and section 122, first paragraph, of the Act may only be grounded in the foreign national's personal circumstances and may only take place where there is provision for sanctions against Norwegian nationals for corresponding offences. Previous convictions cannot alone form the basis for rejection or expulsion.
>
> Rejection or expulsion in the interest of public order presupposes the presence of a real and sufficiently serious threat to a fundamental societal interest, beyond the disturbance of social order entailed by any breach of the law."

2. What is the purpose of Circular GI-02/2013 and why was it adopted? Please also explain the Circular's connection with Circulars RS 2010-022 and RS 2010-024.

The main Circular regarding rejection and expulsion of EEA nationals and their family members is RS 2010-022, published by The Directorate of Immigration ("UDI"). The parallel Circular regarding third country nationals falling outside the scope of the EEA-agreement, is RS 2010-024.

Circular GI-02/2013 was published by the Ministry of Justice and Public Security in 2013. It supplements RS 2010-022 and RS 2010-024 and instructs UDI *to consider* whether there is grounds for expulsion when a foreign national without any special connection to Norway has been penalized for theft or minor theft.

Circular GI-02/2013 was adopted due to major challenges related to cross border crime, in particular related to crime of profit. Theft and minor theft (now sections 321 and 323 of the Penal Code 2005, previously section sections 257 and 391a of the Penal Code 1902) constitutes a large proportion of the crimes of profit that are committed and have a scope that affects the general security of society. This form of profiteering crime also requires a disproportionate share of police resources. The purpose of the Circular was to

ensure that the immigration authorities always *consider* whether there may be grounds for expulsion within the framework of Directive 2004/38 in cases of theft or minor theft.

The guiding principles in the circulars have no legal binding on the practice of the Immigration Appeals Board ("UNE").

3. Please explain the scope of Circular GI-02/2013 in relation to both EEA nationals and third-country national family members of EEA nationals.

Circular GI-02/2013 applies to third country nationals without residence permit, and EEA nationals without a right of residence beyond three months according to Directive 2004/38 Article 7, and without other special ties to Norway.

A third-country national family member of an EEA national may in accordance with section 122 of the Immigration act, be expelled on the same conditions as an EEA national.

However, since Circular GI-02/2013 mainly applies to foreign nationals without any particular connection to the realm, it will presumably have little bearing on cases concerning foreign nationals who have family ties here.

4. What is the threshold for expelling an EEA national on the basis of the Circular and how is it applied in the practice of the immigration authorities/national courts?

Circular GI-02/2013 states that UDI "shall consider" if there is grounds for expulsion in cases where the foreign national has been penalized for a breach of section 321 (theft) or section 323 (minor theft) of the Penal code.

Each case concerning an EEA national (or the family member of an EEA national) must be assessed in accordance with the principles outlined in section 122 of the Immigration Act, section 19-29 of the Immigration Regulation and Directive 2004/38.

Accordingly there are two basic conditions that needs to be fulfilled. Firstly, the expulsion has to be justified on the basis of public policy or public security. According to the Circular the crime comitted must "reach a certain level of seriousness" [1]. Secondly, the personal circumstances of the EEA national must pose, or be assumed to pose, a real, immediate and sufficiently serious threat to fundamental interests of the society. The Circular provides guidance on which factors that may be relevant when assessing the risk that the foreign national may reoffend:

- the foreigner is homeless and lacks other connection to Norway
- the foreigner is without means to support himself/herself
- the foreigner cannot document the purpose of the stay and there are no indications that the person is going to work or has arrived as a tourist
- the criminal act was committed shortly after entry
- the criminal act is committed in collaboration with others

[1] In Norwegian: «være av en viss alvorlighetsgrad».

- the foreigner has been registered as having been found in criminal environments or together with others who have been punished for criminal offenses
- there is other information that indicates that there is a risk of repetition of similar offences

In addition, the EEA national may not be expelled if, taking into consideration the seriousness of the offense and the EEA national's connection with Norway, this would constitute a disproportionate measure against the EEA national or his/her closest family members.

For information on how the Circular is applied in practice, see examples outlined below (question 5).

5. Is the Directorate's understanding that the immigration authorities have previously expelled EEA nationals because of a single minor criminal offence correct?

There have been expulsion cases were the EEA national has been penalized for a single minor criminal offence. However, as stated in section 19-29 of the Immigration Regulation, a committed offence cannot alone form the basis for expulsion. All expulsion decisions concerning foreign nationals falling within the scope of the EEA agreement, must be grounded on an assessment of both the severity of the crime in question and the risk that the foreign national may reoffend, as well as an assessment of whether the decision constitutes a disproportionate measure.

From 2016 until today, UNE has identified seven cases where an EEA national has been expelled following just *one* account of theft or minor theft. The Ministry emphasize that there are important nuances in the cases that will not appear in a summary. Due to technical difficulties, it is not possible to get the same specific overview from the UDI`s caseload. Furthermore, there are some cases that are never appealed and thus are not assessed by UNE, including cases where the EEA national has commited a minor criminal offence.

Of the seven cases identified by UNE, two of the cases concerned theft with a relatively high value of the stolen goods; clothing and sports equipment and a full wheelbarrow with copper pipes from a construction site. One of the cases was brought before the court (see question 9). Of the remaining five cases, three of them was committed in collaboration with others and had a professional character. In two of the cases the amount of the stolen goods indicated that the goods were intended for resale and that the theft therefore was motivated by profit. In the last case, a backpack had been adapted in advance of the theft to facilitate the execution of the theft. In the last two cases, the EEA citizens had stolen food for a minor value from a grocery store. However, in one of the cases UNE had information from the police that the EEA national had previously been convicted several times in the UK, including several cases of theft and fraud.

Nevertheless, in all cases, the immigration authorities have made an overall assessment and established that it is necessary in the interest of public order to expel the EEA national and that the EEA national pose, or is assumed to pose, a real, immediate and

sufficiently serious threat to fundamental interests of the society. Also that a decision to expell with an entry ban is not considered to constitute a disproportionate measure towards the EEA national.

Common for all the cases has been that the EEA national has not had a job or prospects for work, has been homeless and with no means to stay and has not been able to explain the purpose of the stay. Also, many of the criminal offenses were committed shortly after arriving in Norway. In all of the cases the EEA national has either not had a connection to the realm or the connection has been weak, and neither of the EEA nationals has been considered integrated in Norway. Furthermore, they have not had any legal base for a continuous stay in Norway longer than three months.

6. **If question 5 is answered affirmative, please explain how the requirements of Article 27 of Directive 2004/38 are fulfilled in such circumstances.**

We refer to our answer given under question 5.

7. **What public policy or public security issue does the Norwegian Government seek to protect when an EEA national is expelled because of a minor criminal offence?**

We refer to our answer given under question 2.

8. **Does the Norwegian Government consider that an EEA national who commits a criminal offence in breach of Sections 321 or 323 of the Criminal Code constitutes a genuine, present and sufficiently serious threat to fundamental interests of society?**

Expulsion entails a restriction on free movement and can therefore only be justified on the grounds that the EEA national constitutes a threat to fundamental societal interests. Crime can pose such a threat, especially where it is of such an extent that it affects the general security of society (we refer to our answer given under question 2 regarding why Circular GI-02/2013 was adopted). The Ministry, however, emphasize that restrictions on free movement can only be based on the personal conduct of the EEA national.

As follows from section 19-29 of the Immigration Regulation, a committed offence, cannot alone form the basis for expulsion. All expulsion decisions concerning foreign nationals falling within the scope of the EEA agreement, will have to be grounded on an overall assessment of both the severity of the crime in question and the risk that the foreign national may reoffend, as well as an assessment of whether the decision constitutes a disproportionate measure.

As mentioned above, Circular GI-02/2013 contains two main elements; it instructs UDI *to consider* whether there are grounds for expulsion and outline factors that may be particularly relevant in the assessment of the risk that the foreign national may reoffend.

9. Are there any cases before Norwegian courts where the Circular or related issues have been dealt with? If so, please provide the Directorate with copies of the judgements.

The Ministry has knowledge of *one* judgment where Circular GI-02/2013 has been discussed – Borgarting Court of Appeals' judgment of 25 August 2021 – which is enclosed with this letter. The judgment is not legally binding as it has been appealed.

In the mentioned case a Romanian citizen was expelled from Norway with a two-year entry ban after accepting a fine of NOK 5000 for the theft of sportswear worth approx. NOK 19 000. He had previously been arrested for a minor theft. The amount of the stolen goods indicated that the goods were intended for resale and that the theft therefore was motivated by profit. Furthermore, the theft occurred only two months after the EEA national had entered the realm and it was comitted in collaboration with another person and while he was in an employment relationship.

The Court of Appeal, like the district court, concluded that the conditions for expulsion pursuant to the Immigration Act section 122 first paragraph were met. Expulsion with a two-year entry ban was also not considered disproportionate.

As a concluding remark, we avail ourselves of the opportunity to inform that we are in the process of updating Circular GI-02/2013.

Yours sincerely

Kenneth Adale Baklund (p.p)
Acting Deputy Director General

Lene Marie Knudsen
Senior Adviser

The document is approved electronically, as such no handwritten signatures are required.