



JUDGMENT OF THE COURT

30 June 2021*

(Social security – Regulation (EC) No 883/2004 – Articles 7, 63 and 64 – Unemployment benefits – Requirement to stay in the competent EEA State – Unemployed person going to another EEA State)

In Case E-13/20,

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 the Norwegian National Insurance Court (*Trygderetten*), in the case between

O

and

The Norwegian Government, represented by the Labour and Welfare Directorate (*Arbeids- og velferdsdirektoratet*),

concerning the interpretation of Articles 28, 31 and 36 of the Agreement on the European Economic Area, Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, and 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: Páll Hreinsson, President (Judge-Rapporteur), Per Christiansen and Bernd Hammermann, Judges,

* Language of the request: Norwegian. Translations of national provisions are unofficial and based on those contained in the documents of the case.

Registrar: Ólafur Jóhannes Einarsson,

having considered the written observations submitted on behalf of:

- O, represented by Hanne Krogenæs and Helge Hjort, advocates;
- the Norwegian Government, represented by Simen Hammersvik and Torje Sunde, acting as Agents;
- the Netherlands Government, represented by Mielle Bulterman and Joost Hoogveld, acting as Agents;
- the EFTA Surveillance Authority (“ESA”), represented by Erlend Møinichen Leonhardsen, Ewa Gromnicka, Catherine Howdle and Carsten Zatschler, acting as Agents; and
- the European Commission (“the Commission”), represented by Denis Martin and Bernd-Roland Killmann, acting as Agents,

having regard to the Report for the Hearing,

having heard the oral arguments of O, represented by Hanne Krogenæs; the Norwegian Government, represented by Simen Hammersvik and Torje Sunde; the Netherlands Government, represented by Joost Hoogveld; ESA, represented by Carsten Zatschler, Erlend Møinichen Leonhardsen and Ewa Gromnicka; and the Commission, represented by Denis Martin and Bernd-Roland Killmann; at the remote hearing on 9 February 2021,

gives the following

Judgment

I Legal background

EEA law

- 1 Article 28(1) and (2) of the Agreement on the European Economic Area (“the EEA Agreement” or “EEA”) reads:

1. Freedom of movement for workers shall be secured among EC Member States and EFTA States.

2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of EC Member States and EFTA States as regards employment, remuneration and other conditions of work and employment.

2 Article 31(1) EEA reads:

Within the framework of the provisions of this Agreement, there shall be no restrictions on the freedom of establishment of nationals of an EC Member State or an EFTA State in the territory of any other of these States. This shall also apply to the setting up of agencies, branches or subsidiaries by nationals of any EC Member State or EFTA State established in the territory of any of these States.

Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of Article 34, second paragraph, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of Chapter 4.

3 Article 36(1) EEA reads:

Within the framework of the provisions of this Agreement, there shall be no restrictions on freedom to provide services within the territory of the Contracting Parties in respect of nationals of EC Member States and EFTA States who are established in an EC Member State or an EFTA State other than that of the person for whom the services are intended.

4 Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (OJ 2004 L 166, p. 1), as corrected by OJ 2004 L 200, p. 1, (“the Regulation”) was incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 76/2011 of 1 July 2011 (OJ 2011 L 262, p. 33, and EEA Supplement 2011 No 54, p. 46), which entered into force on 1 June 2012, and is referred to at point 1 of Annex VI (Social security) to the EEA Agreement.

5 Article 1 of the Regulation, headed “Definitions”, reads, in extract:

For the purposes of this Regulation:

...

(j) ‘residence’ means the place where a person habitually resides;

(k) ‘stay’ means temporary residence;

...

6 Article 3 of the Regulation, headed “Matters covered”, reads, in extract:

1. This Regulation shall apply to all legislation concerning the following branches of social security:

...

(h) unemployment benefits;

...

7 Article 5(b) of the Regulation, headed “Equal treatment of benefits, income, facts or events”, reads, in extract:

Unless otherwise provided for by this Regulation and in the light of the special implementing provisions laid down, the following shall apply:

...

(b) where, under the legislation of the competent Member State, legal effects are attributed to the occurrence of certain facts or events, that Member State shall take account of like facts or events occurring in any Member State as though they had taken place in its own territory.

8 Article 7 of the Regulation, headed “Waiving of residence rules”, reads:

Unless otherwise provided for by this Regulation, cash benefits payable under the legislation of one or more Member States or under this Regulation shall not be subject to any reduction, amendment, suspension, withdrawal or confiscation on account of the fact that the beneficiary or the members of his/her family reside in a Member State other than that in which the institution responsible for providing benefits is situated.

9 Article 63 of the Regulation, headed “Special provisions for the waiving of residence rules”, reads:

For the purpose of this Chapter, Article 7 shall apply only in the cases provided for by Articles 64, 65 and 65a and within the limits prescribed therein.

10 Article 64 of the Regulation, headed “Unemployed persons going to another Member State”, reads:

1. A wholly unemployed person who satisfies the conditions of the legislation of the competent Member State for entitlement to benefits, and who goes to another Member State in order to seek work there, shall retain his/her entitlement to unemployment benefits in cash under the following conditions and within the following limits:

(a) before his/her departure, the unemployed person must have been registered as a person seeking work and have remained available to the employment services of the competent Member State for at least four weeks after becoming unemployed. However, the competent services or institutions may authorise his/her departure before such time has expired;

(b) the unemployed person must register as a person seeking work with the employment services of the Member State to which he/she has gone, be subject to the control procedure organised there and adhere to the conditions laid down under the legislation of that Member State. This condition shall be considered satisfied for the period before registration if the person concerned registers within seven days of the date on which he/she ceased to be available to the employment services of the Member State which he/she left. In exceptional cases, the competent services or institutions may extend this period;

(c) entitlement to benefits shall be retained for a period of three months from the date when the unemployed person ceased to be available to the employment services of the Member State which he/she left, provided that the total duration for which the benefits are provided does not exceed the total duration of the period of his/her entitlement to benefits under the legislation of that Member State; the competent services or institutions may extend the period of three months up to a maximum of six months;

(d) the benefits shall be provided by the competent institution in accordance with the legislation it applies and at its own expense.

2. If the person concerned returns to the competent Member State on or before the expiry of the period during which he/she is entitled to benefits under paragraph 1(c), he/she shall continue to be entitled to benefits under the legislation of that Member State. He/she shall lose all entitlement to benefits under the legislation of the competent Member State if he/she does not return there on or before the expiry of the said period, unless the provisions of that legislation are more favourable. In exceptional cases the competent services or institutions may allow the person concerned to return at a later date without loss of his/her entitlement.

3. Unless the legislation of the competent Member State is more favourable, between two periods of employment the maximum total period for which entitlement to benefits shall be retained under paragraph 1 shall be three months; the competent services or institutions may extend that period up to a maximum of six months.

4. The arrangements for exchanges of information, cooperation and mutual assistance between the institutions and services of the competent Member State and the Member State to which the person goes in order to seek work shall be laid down in the Implementing Regulation.

National law and practice

11 Section 4-2 of the National Insurance Act, headed “Stay in Norway”, reads:

In order to be entitled to unemployment benefits, the member must stay in Norway.

The Ministry may issue regulations providing for exemptions from the requirement to stay in Norway.

12 Section 4-3 of the National Insurance Act gives right to partial coverage for a loss of income from employment in the event of unemployment. There are conditions for the benefit. The person concerned must have lost income from employment as a worker due to unemployment and the usual working time must be reduced by at least 50 per cent.

13 The first paragraph of Section 4-5 of the National Insurance Act, headed “Genuine job-seekers”, reads:

In order to be entitled to unemployment benefits, the member must be a genuine jobseeker. A genuine job-seeker includes a person who is able to work and is willing to:

(a) accept any employment that is paid in accordance with a collective wage agreement or customary practice;

(b) accept employment anywhere in Norway;

(c) accept employment irrespective of whether it is full-time or part-time;

(d) participate in labour market measures.

- 14 Section 4-8 of the National Insurance Act, headed “Obligation to register and report and obligation to attend”, reads:

In order to be entitled to unemployment benefits, the member must register with the Labour and Welfare Administration as a job-seeker.

The member must report in every 14 days (the reporting period). The Labour and Welfare Administration shall determine how the reporting is to take place.

The Labour and Welfare Administration may decide that the member is to attend on days other than the scheduled reporting days.

If the member, without reasonable cause, fails to report in on the scheduled day, entitlement to unemployment benefits shall be lost as from the day on which the member ought to have reported in until such time as he or she reports in once again.

- 15 The first paragraph of Section 4-20 of the National Insurance Act, headed “Temporary loss of unemployment benefits”, reads:

Entitlement to unemployment benefits shall be lost for a limited time if the member, without reasonable cause, refuses to:

(a) accept an offer of employment that is paid in accordance with a collective wage agreement or customary practice;

(b) accept an offer of employment anywhere in Norway;

(c) accept an offer of employment irrespective of whether it is full-time or part-time;

(d) participate in labour market measures;

(e) attend meetings with the Labour and Welfare Administration when called upon to do so, or fail to attend after being called into such a meeting.

- 16 Section 4-21 of the National Insurance Act provides that entitlement to unemployment benefits lapses when the member does not fulfil the condition of being a genuine job-seeker.

- 17 The first and fourth paragraphs of Section 22-15 of the National Insurance Act, headed “Recovery after incorrect payment”, read, in extract:

A payment which the Labour and Welfare Administration, the Directorate of Health (Helsedirektoratet) or a body reporting to the Directorate of Health has made to someone who was not entitled thereto may be ordered recovered if the person who

has received the payment (the recipient) or someone acting on behalf of the recipient understood or ought to have understood that the payment was attributable to an error. The same shall apply if the person concerned has caused the payment to be made by intentionally or negligently providing inaccurate or incomplete information.

...

A recovery order shall be issued under the first to third paragraphs unless specific reasons weigh against it. Emphasis shall be placed inter alia on the degree of negligence on the part of the person against whom the order is directed, the size of the amount paid in error, how long a time has passed since the payment took place and whether the error may be attributed in whole or in part to the Labour and Welfare Administration, the Directorate of Health or a body reporting to the Directorate of Health. The recovery order may be fixed pursuant hereto at part of the amount paid in error. When the person against whom the order is directed has acted intentionally, an order shall always be issued and the amount may not be reduced.

- 18 The first paragraph of Section 22-17 a of the National Insurance Act, headed “Interest and interest surcharges on recovery of incorrect payments”, reads:

In the event of a recovery order under the first and second paragraphs of Section 22-15 on the basis of intention or gross negligence on the part of the person against whom the order is directed, an interest surcharge of 10 per cent of the amount ordered recovered shall be calculated.

- 19 Section 1-3 of Norwegian Regulation No 890 of 16 September 1998 on Unemployment Benefits (*Forskrift om dagpenger under arbeidsløshet*) (“the Unemployment Benefits Regulation”) provides that a person who receives unemployment benefits while establishing their own business may apply for an exemption from the requirement to stay in Norway if the stay outside Norway is an integral part of the process of establishing the business.

- 20 Section 1-4 of the Unemployment Benefits Regulation reads:

A member who is attending a job interview in another EEA country may, upon application, be exempted from the requirement in the National Insurance Act Section 4-2 on residence in Norway for up to three days.

21 Section 1-5 of the Unemployment Benefits Regulation reads:

A member who has received unemployment benefits for more than 52 weeks may stay outside Norway in connection with holiday absence pursuant to the fourth paragraph of the National Insurance Act Section 4-5.

22 Section 4-1 of the Unemployment Benefits Regulation reads:

A member who receives unemployment benefits must engage actively in seeking employment or in other activity with a view to obtaining employment, in order for that person to be deemed to be a genuine job-seeker pursuant to the first paragraph of Section 4-5 of the National Insurance Act.

The Labour and Welfare Administration and the member shall agree on which specific activities the member is to complete. If no agreement is reached as to activity or where otherwise deemed appropriate, the Labour and Welfare Administration may order the member to complete a specified activity.

The Labour and Welfare Administration may require the member to document the completed activity.

23 The first paragraph of Section 13-4 of the Unemployment Benefits Regulation reads:

There shall be exemptions from the requirement in Section 4-2 of the National Insurance Act on stays in Norway for members who:

- a. have availed themselves of the opportunity to export unemployment benefits, see Section 13-9;*
- b. are frontier workers who are partially unemployed or laid off from employment in Norway; or*
- c. are partially or intermittently unemployed and during their last employment were resident in another EEA country or Switzerland, and are not considered to be frontier workers, who work several consecutive days in a week and then are off for several days in a row (in a recurring rotation or rotation scheme), and who travel home to their country of residence during free periods.*

24 Section 13-9 of the Unemployment Benefits Regulation reads:

Wholly unemployed recipients of unemployment benefits who are seeking employment in other EEA countries or Switzerland may retain Norwegian unemployment benefits for up to three months, provided that, after they become

unemployed, they have been registered with the Labour and Welfare Administration as a genuine person seeking work for at least four weeks prior to departure, with entitlement to unemployment benefits under Chapter 4 of the National Insurance Act.

The requirement of being a genuine job-seeker must have been fulfilled for at least four of the last 12 weeks prior to departure. Exemptions to the four-week requirement may be granted where the unemployed person is to follow their spouse or common-law partner to another EEA country where that person has accepted employment.

In order to be entitled to unemployment benefits for the entire three-month period, the member must register as a job-seeker for the employment services in that country to which he or she travels and be subject to the prevailing control and follow-up routines there. Registration must take place within seven days after departure from Norway. In exceptional cases, the Labour and Welfare Directorate may grant an extension to the seven-day time-limit.

The possibility of seeking employment with unemployment benefits in other EEA countries or Switzerland shall be limited to a three-month period per benefits period.

A person who returns to Norway before or upon expiry of the three-month period may continue with payment of unemployment benefits from Norway if the other conditions for entitlement to unemployment benefits are fulfilled.

II Facts and procedure

- 25 According to the request, O is a Norwegian national. He resided and worked in Norway until November 2012, when he became unemployed and registered as a job-seeker. He received unemployment benefits from December 2012 until October 2014. Unemployment benefits are a cash benefit.
- 26 From January 2013, O was registered at an address with his family in Norway. In January 2016, he registered as having moved to Germany.
- 27 While he was receiving unemployment benefits, O had a number of stays at an apartment available to him in Germany. The parties agree that those stays cover the following periods: 05.12.2012–11.12.2012, 05.01.2013–29.01.2013, 31.01.2013–18.02.2013, 28.02.2013–25.03.2013, 17.04.2013–21.05.2013, 18.07.2013–24.07.2013, 09.08.2013–20.11.2013, 05.12.2013–18.12.2013, 28.12.2013–05.02.2014, 17.02.2014–18.03.2014, 28.03.2014–14.04.2014, 24.04.2014–05.05.2014, 13.05.2014–21.05.2014 and 30.05.2014–26.10.2014.

O did not inform the Norwegian Labour and Welfare Administration (“NAV”) of the stays in Germany.

- 28 Aside from the stays referred to above, the parties agree that O remained in Norway.
- 29 O reports that the stays in Germany were of a temporary nature. He had family and a social network in Norway and wished to return to permanent employment in Norway as soon as possible. There is disagreement as to whether, and, if so, to what extent, O sought employment in Norway.
- 30 O has a one-man firm that was registered in the Register of Legal Entities in 2004. There were no activities in the undertaking before he became unemployed. There were activities in the undertaking in the weeks 46/2013, 06/2014, 08/2014, 34/2014, 36/2014 and 42/2014. During these weeks, O worked a total of 172.5 hours, which he reported to NAV on an ongoing basis. Therefore, his unemployment benefits were subject to a pro rata reduction. Of that work, 157.5 hours were performed while he stayed in Germany, while the rest was performed in Norway. O provided services solely to Norwegian clients. O was deemed to be liable to pay tax in Norway because the activities were not operated from a permanent place of business in Germany. O explains that he did not intend to operate self-employed activities from Germany over an extended period.
- 31 O’s stays in Germany were discovered when NAV carried out a check on whether he fulfilled the conditions for receiving unemployment benefits. On 28 August 2015, NAV adopted a decision to order the recovery of the unemployment benefits paid during the period from December 2012 until October 2014. O appealed against that decision.
- 32 The NAV Appeals Body ruled on the appeal on 8 June 2016. It held that O was resident in Norway and that he was subject to Norwegian legislation pursuant to the Regulation for the entire period relevant to the case. The NAV Appeals Body concluded that O was not entitled to retain the unemployment benefits during the stays in Germany on the ground that he did not fulfil the condition of staying in Norway laid down in Section 4-2 of the National Insurance Act. The recovery order was reduced to the amount paid to O in the periods when he stayed in Germany. A sanction was levied on O in the form of a 10 per cent interest surcharge on the ground that he had been grossly negligent in failing to report his stays outside Norway.
- 33 O appealed against that decision on 1 March 2018. In a ruling of 25 March 2019, the National Insurance Court held that the appeal was to be heard on its merits, even though the time-limit for appeal had been exceeded. The case was referred to NAV for appeal preparation before being referred back to the National Insurance Court.
- 34 According to the request, O was subsequently convicted in criminal proceedings for having failed to mention his stays abroad in reports to NAV.

35 Against this background, the National Insurance Court decided to stay the proceedings and make a reference to the Court. The request, dated 9 September 2020, was registered at the Court on 10 September 2020. The National Insurance Court has referred the following questions to the Court:

1. *Is it compatible with the provisions of Regulation (EC) No 883/2004, including Article 5(b), for entitlement to a cash benefit in the event of unemployment to be subject to the condition that the unemployed person stay in the competent State in cases where Articles 64, 65 or 65a are not applicable?*
2. *Does Article 36 of the EEA Agreement apply in the case of temporary stays in another EEA State as described in this case?*
3. *Does a condition as described in question 1 constitute a restriction on the right of free movement under Article 31 or Article 36 of the EEA Agreement?*
4. *If so, can the restriction be justified on the ground that:*
 - *a stay in the competent State provides the unemployed person with better incentive and opportunities for seeking and finding employment?*
 - *a stay in the competent State ensures that the unemployed person is available for the employment services, so that they (the employment services) are able to monitor whether the unemployed person fulfils the requirements for the unemployment benefit?*
 - *a stay in the competent State provides the employment services with better opportunities in assessing whether the unemployed person is being followed up in a suitable manner?*
 - *the requirement of a stay ensures the economic equilibrium of the social security scheme?*
5. *If the condition can be justified, is it compatible with Articles 31 and 36 of the EEA Agreement that a person who has had a stay in another EEA State than the competent State without complying with the obligation to inform the competent institution about the stay may be ordered to repay the benefit, which was thus received unlawfully under national law? If so, is it compatible with Articles 31 and 36 of the EEA Agreement for an interest surcharge of 10 per cent to be levied on the person concerned?*
6. *If question 3 is answered in the negative, does Article 4, 6 or 7 of Directive 2004/38/EC apply in a situation where an unemployed person has a temporary stay in another EEA State? If Article 4, 6 or 7 applies and may be relied on as against the home State, the same questions as in questions 3 to 5 are put in as far as applicable.*

36 Reference is made to the Report for the Hearing for a fuller account of the legal framework, the facts, the procedure and the proposed answers submitted to the Court. Arguments of the parties are mentioned or discussed hereinafter only insofar as is necessary for the reasoning of the Court.

III Answer of the Court

Question 1

37 By Question 1, the National Insurance Court asks, in essence, whether a requirement that the unemployed person must stay in the competent State to be entitled to a cash benefit in the event of unemployment, in cases where the conditions of Articles 64, 65 or 65a of the Regulation are not fulfilled, is compatible with the Regulation.

38 It follows from well-established case law, as well as being mentioned in recitals 4 and 45 of the Regulation, that the purpose of that regulation is to coordinate EEA States' social security systems in order to guarantee that the right to free movement of persons can be exercised effectively. That regulation modernised and simplified the rules contained in Council Regulation (EEC) No 1408/71 (OJ English Special Edition 1971(II), p. 416), while retaining the same objective as the latter (compare the judgment in *Klein Schiphorst*, C-551/16, EU:C:2018:200, paragraph 31).

39 According to Article 29 EEA, the legal acts in the field of social security incorporated into Annex VI to the EEA Agreement are intended to provide freedom of movement for workers and self-employed persons, in particular, by securing the payment of benefits to persons resident in the territory of another EEA State. However, Article 29 EEA provides for coordination, rather than harmonisation, of domestic legislation in this area. Thus, EEA law does not detract from the power of the EEA States to organise their social security systems. In the absence of harmonisation at EEA level, it is for the legislature of each EEA State to determine the conditions on which social security benefits are granted. Nevertheless, when exercising that power, the EEA States must comply with EEA law (see Case E-2/18 *Concordia*, judgment of 14 May 2019, paragraph 43).

40 Under Article 7 of the Regulation, cash benefits payable under the legislation of one or more EEA States or under the Regulation shall not be subject to any reduction, amendment, suspension, withdrawal or confiscation on account of the fact that the beneficiary or the members of his/her family reside in an EEA State other than that in which the institution responsible for providing benefits is situated. A condition of presence could be equivalent in practice to a habitual residence clause, if, in particular, such condition requires long periods of presence in the EEA State concerned and/or if that condition must be met for as long as the benefit in question is paid. In such cases, a presence requirement can be assimilated to a residence clause within the meaning of Article 7 (compare the judgment in *Stewart*, C-503/09, EU:C:2011:500, paragraph 73). The Court notes that a presence

requirement is in fact significantly more restrictive than a residence requirement (see Case E-3/12 *Stig Arne Jonsson* [2013] EFTA Ct. Rep. 248, paragraphs 69 to 74). Article 7 provides that EEA States cannot make benefits conditional on residence. It follows that an EEA State cannot condition such benefits on continuous physical presence either (see Case E-8/20 *Criminal proceedings against N*, judgment of 5 May 2021, paragraph 139).

- 41 Chapter 6 of Title III of the Regulation contains special provisions for unemployment benefits. It follows from Article 63 of the Regulation that for the purposes of that chapter, Article 7 shall apply only in the cases provided for by Article 64, 65 or 65a. Accordingly, Article 63 derogates from the main rule of Article 7 and allows EEA States to impose residence rules, including presence requirements such as in the main proceedings, for entitlement to unemployment benefits in instances other than those provided for by Articles 64, 65 or 65a.
- 42 The Court notes that an interpretation to the effect that a requirement to be present in an EEA State does not fall within the scope of Article 7 would deprive this provision of its effectiveness. That Article 7 also prevents EEA States from making benefits conditional on physical presence is supported by the fact that, according to Article 63 of the Regulation, Article 7 applies to unemployment benefits only in the cases provided for by Articles 64, 65 and 65a. Thus, those Articles exhaustively regulate the three situations in which the competent EEA State is required to allow recipients of an unemployment benefit to reside or stay in the territory of another EEA State.
- 43 The Court adds that the Regulation confers on unemployed workers certain advantages, such as those laid down by Articles 64, 65 and 65a, which they would not otherwise enjoy, and which thus help to ensure the freedom of movement for workers. These advantages are the exception and may, therefore, be granted only under the strict conditions provided for in those articles (compare the judgments in *Gray*, C-62/91, EU:C:1992:177, paragraph 10, and *Testa and Others*, 41/79, 121/79 and 796/79, EU:C:1980:163, paragraph 15).
- 44 It should be recalled that Article 29 EEA does not preclude legal acts incorporated into the EEA Agreement from attaching conditions to the rights and advantages which it accords in order to ensure freedom of movement for workers or from determining the limits thereto (compare the judgments in *Testa and Others*, cited above, paragraph 14, and *Gray*, cited above, paragraph 11).
- 45 The specific rules limiting the export of unemployment benefits find their justification in the special nature of those benefits which occupy a special place within social security systems (compare the judgment in *De Cuyper*, C-406/04, EU:C:2006:491, paragraph 45).
- 46 Unemployment benefits cover the risk associated with the loss of income suffered by a worker following the loss of employment, even though the worker is still able to work (compare the judgment in *Pensionsversicherungsanstalt*, C-135/19, EU:C:2020:177, paragraphs 32 to 34, and case law cited). Thus, the purpose of unemployment benefits is

to provide financial support when income from employment is lost and to facilitate the swiftest possible re-entry to the labour market.

- 47 Article 64(1) of the Regulation entitles unemployed persons who go to an EEA State other than the competent State “in order to seek employment there” to retain their entitlement to unemployment benefit for a period of three months, which may be extended up to a period of a maximum of six months. The conditions set out in Article 64(1) must be construed as being exhaustive and the competent authorities of the EEA States are not entitled to impose additional conditions (compare the judgment in *Rydergård*, C-215/00, EU:C:2002:111, paragraph 19).
- 48 Based on a literal reading of Article 64(1), as submitted by the Norwegian Government and the Netherlands Government, the provision covers situations in which an unemployed person “goes to another” EEA State. As noted above, it is clear from the wording of the first limb of Article 64(1)(c) that the entitlement to unemployment benefits is guaranteed for a period of three months or, where relevant, if that period is extended by the competent institutions, up to a maximum of six months, for a wholly unemployed person who goes to another EEA State in order to seek work there, subject to strict procedural conditions. Thus, the provision, which ensures the right to retain benefits in another EEA State for a period of three months, should be understood as covering both residence and stay in another EEA State. It is not limited to unemployed persons transferring their habitual residence to another EEA State within the meaning of point (j) of Article 1 of the Regulation.
- 49 The same logic underpins Article 64(2) of the Regulation, which provides that if the unemployed person does not return to the competent State within three months, he shall lose all entitlement to benefits under the legislation of that State (compare the judgment in *Klein Schiphorst*, cited above, paragraph 53). Thus, Article 64 enables an unemployed worker to be exempt for a specific period, for the purpose of seeking employment in another EEA State, from the obligation imposed by national law to make himself available to the employment services of the competent State without thereby losing his entitlement to unemployment benefits as against that State (compare the judgment in *Testa and Others*, cited above, paragraph 4).
- 50 The Court notes that Article 64 of the Regulation does not simply seek to coordinate national social security legislation. It establishes an independent body of rules in favour of workers claiming the benefit thereof, which constitute an exception to national legal rules and which must be interpreted uniformly in all the EEA States irrespective of the rules laid down in national law regarding the continuance and loss of entitlement to benefits (compare the judgment in *Testa and Others*, cited above, paragraph 5).
- 51 As a result, and as the Norwegian and Netherlands Governments as well as the Commission submitted during the hearing, it is clear from a combined reading of Articles 7 and 63 as well as Article 64(1) of the Regulation that the right to retain unemployment benefits for a

wholly unemployed person who goes to another EEA State is guaranteed only for the purposes of seeking work there and under the conditions mentioned in Article 64(1) (compare the judgment in *Klein Schiphorst*, cited above, paragraph 49).

- 52 Lastly, the Court notes that both the *De Cuyper* judgment (cited above) and the *Petersen* judgment (C-228/07, EU:C:2008:494) concerned unemployment benefits with the special feature that the beneficiaries were not subject to the requirement to be available to work. As a result, Article 69 of Regulation (EEC) No 1408/71, the predecessor provision to Article 64 of the Regulation, was not applicable to the situation in those cases (compare the judgments in *De Cuyper*, cited above, paragraph 38, and *Petersen*, cited above, paragraphs 39 and 40). Thus, those cases should be distinguished from situations falling under Article 64 of the Regulation, such as those at issue in the main proceedings, in which the unemployment benefit is linked to the individual's obligation to be available with respect to filling positions on the labour market.
- 53 The Court notes that it is clear from the request and appears to be uncontested by the parties that O does not satisfy the conditions of Article 64 of the Regulation, as he was not seeking employment in another EEA State. In such circumstances, the competent State remains within the limits permitted by the Regulation to impose a requirement to stay in Norway.
- 54 The Court observes that the same line of reasoning applies to Article 5(b) of the Regulation, to which the first question refers. Article 5(b) codifies the general coordination principle of equal treatment of facts or events occurring in other EEA States. In that context, it should be noted that Article 5 applies only “[u]nless otherwise provided for by this Regulation”.
- 55 Chapter 6 of Title III of the Regulation contains a special provision for unemployment benefits and allows EEA States to impose residence rules. Therefore, Article 5(b) should not be interpreted as meaning that, in the context of unemployment benefits, stays in another EEA State are to be equated with stays in the competent State (compare the judgments in *Klein Schiphorst*, cited above, paragraph 48, and *Adanez-Vega*, C-372/02, EU:C:2004:705, paragraphs 55 to 58).
- 56 In the light of the foregoing, the answer to Question 1 must be that a requirement that the unemployed person must stay in the competent State to be entitled to a cash benefit in the event of unemployment in cases where the conditions of Articles 64, 65 or 65a are not fulfilled is compatible with the Regulation, including Article 5(b) thereof.

Questions 2 to 4 and 6

- 57 By Questions 2 to 4 and 6, the National Insurance Court asks, in essence, whether Articles 31 or 36 EEA and/or Directive 2004/38/EC of the European Parliament and the Council (OJ 2004 L 158, p. 77) apply in the case of temporary stays in another EEA State such as those described in the main proceedings.

- 58 Articles 64 to 65a exhaustively regulate the only three situations in which the competent EEA State is required to allow recipients of an unemployment allowance to retain the benefit when they reside or stay in the territory of another EEA State.
- 59 Article 64 of the Regulation goes beyond a simple measure coordinating national law on social security, since rights are created which EEA nationals would not otherwise have enjoyed. Under Article 64, the unemployed person is, subject to strict conditions and for a limited period of time, relieved of the duty to keep himself available to the employment services of the competent State. The provision thus establishes an independent body of rules in favour of workers claiming the benefit which constitute an exception to national legal rules, and which must be interpreted uniformly in all the EEA States. It should be recalled that Article 29 EEA does not prohibit the legislature from attaching conditions to the rights and advantages which it accords in order to ensure freedom of movement for workers or from determining the limits thereto (compare the judgments in *Testa and Others*, cited above, paragraphs 5 and 14, and *Gray*, cited above, paragraph 10).
- 60 Lastly, as regards the entitlement to unemployment benefits of workers seeking employment in an EEA State other than that in which they last worked or paid contributions, the legislature considered it necessary that such entitlement should be subject to conditions designed to encourage such persons to seek work in the EEA State in which they were last employed, to make that State bear the burden of providing the unemployment benefits, and, finally, to ensure that those benefits are granted only to those actually seeking employment (compare the judgment in *Gray*, cited above, paragraphs 12 and 13).
- 61 In the light of the foregoing, the answer to Questions 2 to 4 and 6 must be that outside the situations expressly mentioned in Articles 64, 65 and 65a of the Regulation, a condition to stay in the competent EEA State for entitlement to unemployment benefits does not fall to be assessed under Articles 31 and 36 of the EEA Agreement. According to the same considerations, the condition does not fall to be assessed in the light of Directive 2004/38.

Question 5

- 62 By Question 5, the National Insurance Court asks whether it is compatible with EEA law to require repayment and impose sanctions in the form of an interest surcharge of 10 per cent for a failure to comply with an obligation to inform the competent institution about a stay in another EEA State in circumstances such as those at issue in the main proceedings.
- 63 The Regulation is not intended to lay down the criteria creating the right to benefits. Each EEA State retains the power to determine in its domestic legislation the conditions for granting benefits under a social security system, albeit in compliance with EEA law (see Case E-2/18 *Concordia*, cited above, paragraph 43, and compare the judgment in *van Delft and Others*, C-345/09, EU:C:2010:610, paragraph 99).

- 64 In the absence of EEA legislation in this area, the EEA States retain the power to determine whether or not unlawfully acquired allowances and benefits should be repaid. Furthermore, it is up to each EEA State to choose the penalties which seem appropriate to them. They must, however, exercise that power in accordance with EEA law and its general principles. This includes the principle of equivalence, under which these rules must not be less favourable than those governing similar domestic actions, and the principle of effectiveness, under which these rules must not render practically impossible or excessively difficult the exercise of rights conferred by EEA law (see, for example, Case E-7/13 *Creditinfo Lánstraust* [2013] EFTA Ct. Rep. 970, paragraph 45).
- 65 Accordingly, EEA States retain the power to determine whether or not unlawfully acquired allowances and benefits should be repaid. They must, however, exercise that power in accordance with EEA law and its general principles, including the principles of equivalence and effectiveness.

IV Costs

- 66 The costs incurred by the Netherlands 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 the national court, 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 the Norwegian National Insurance Court hereby gives the following Advisory Opinion:

- 1. A requirement that the unemployed person must stay in the competent State to be entitled to a cash benefit in the event of unemployment in cases where the conditions of Articles 64, 65 or 65a are not fulfilled is compatible with Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, including Article 5(b) thereof.**
- 2. Outside the situations expressly mentioned in Articles 64, 65 and 65a of Regulation (EC) No 883/2004, a condition to stay in the competent EEA State for entitlement to unemployment benefits does not fall to be assessed under Articles 31 and 36 of the EEA Agreement and is not incompatible with 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.**
- 3. EEA States retain the power to determine whether or not unlawfully acquired allowances and benefits should be repaid. The EEA States must, however, exercise that power in accordance with EEA law and its general principles, including the principles of equivalence and effectiveness.**

Páll Hreinsson

Per Christiansen

Bernd Hammermann

Delivered in open court in Luxembourg on 30 June 2021.

Ólafur Jóhannes Einarsson
Registrar

Páll Hreinsson
President