



E-13/20-16

REPORT FOR THE HEARING

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

O

and

the Labour and Welfare Directorate,

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.

I Introduction

1. By letter of 9 September 2020, registered at the Court on 10 September 2020, the National Insurance Court (*Trygderetten*) requested an Advisory Opinion in the case pending before it between O and the Labour and Welfare Directorate (*Arbeids- og velferdsdirektoratet*).

2. The case before the National Insurance Court concerns the question of whether the Labour and Welfare Directorate can require O both to repay the unemployment benefits that were paid whilst he was staying in Germany and to pay an interest surcharge, on the grounds that he did not fulfil the condition of staying in Norway, which is laid down in

Section 4-2 of Norwegian Act No 19 of 28 February 1997 on National Insurance (*lov 28. februar 1997 nr. 19 om folketrygd*) (“the National Insurance Act”). O was sanctioned on the ground that he had been grossly negligent in failing to report his stays outside of Norway by a decision of NAV Appeals (*NAV Klageinstans*).

3. According to the National Insurance Court, the case raises questions of whether a condition to stay in Norway in order to receive unemployment benefits is compatible with EEA law.

II Legal background

EEA law

4. 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.

5. Article 31(1) EEA reads:

1. 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.

6. Article 36(1) EEA reads:

1. 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.

7. 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 (OJ 2004 L 158, p. 77), as corrected by OJ 2004 L 229, p. 35, OJ 2005 L 30, p. 27, and OJ 2005 L 197, p. 34, (“the Directive”) was incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 158/2007 of 7 December 2007 (OJ 2008 L 124, p. 20, and EEA Supplement 2008 No 26, p. 17), and is referred to at point 3 of Annex VIII and point 1 of Annex V.

8. Article 1 of Decision No 158/2007 reads:

Annex VIII to the Agreement shall be amended as follows:

‘ ...

The provisions of the Directive shall, for the purposes of the Agreement, be read with the following adaptations:

(a) The Directive shall apply, as appropriate, to the fields covered by this Annex.

(b) The Agreement applies to nationals of the Contracting Parties. However, members of their family within the meaning of the Directive possessing third country nationality shall derive certain rights according to the Directive.

(c) The words “Union citizen(s)” shall be replaced by the words “national(s) of EC Member States and EFTA States”.

9. Article 4(1) of the Directive, headed “Right of exit”, reads:

1. Without prejudice to the provisions on travel documents applicable to national border controls, all Union citizens with a valid identity card or passport and their family members who are not nationals of a Member State and who hold a valid passport shall have the right to leave the territory of a Member State to travel to another Member State.

10. Article 6 of the Directive, headed “Right of residence for up to three months”, reads:

1. Union citizens shall have the right of residence on the territory of another Member State for a period of up to three months without any conditions or any formalities other than the requirement to hold a valid identity card or passport.

2. The provisions of paragraph 1 shall also apply to family members in possession of a valid passport who are not nationals of a Member State, accompanying or joining the Union citizen.

11. Article 7(1)(b) of the Directive, headed “Right of residence for more than three months”, reads:

1. All Union citizens shall have the right of residence on the territory of another Member State for a period of longer than three months if they:

...

(b) have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State; or

...

12. 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 2005 L 200, p. 1, (“the Regulation”). 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 to the EEA Agreement.

13. 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;

...

14. 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;

...

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

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.

16. 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.

17. 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.

18. 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.

19. Article 65 of the Regulation, headed “Unemployed persons who resided in a Member State other than the competent State”, reads:

1. A person who is partially or intermittently unemployed and who, during his/her last activity as an employed or self-employed person, resided in a Member State other than the competent Member State shall make himself/herself available to his/her employer or to the employment services in the competent Member State. He/she shall receive benefits in accordance with the legislation of the competent Member State as if he/she were residing in that Member State. These benefits shall be provided by the institution of the competent Member State.

2. A wholly unemployed person who, during his/her last activity as an employed or self-employed person, resided in a Member State other than the competent Member State and who continues to reside in that Member State or returns to that Member State shall make himself/herself available to the employment services in the Member State of residence. Without prejudice to Article 64, a wholly unemployed person may, as a supplementary step, make himself/herself available to the employment services of the Member State in which he/she pursued his/her last activity as an employed or self-employed person.

An unemployed person, other than a frontier worker, who does not return to his/her Member State of residence, shall make himself/herself available to the employment services in the Member State to whose legislation he/she was last subject.

3. The unemployed person referred to in the first sentence of paragraph 2 shall register as a person seeking work with the competent employment services of the Member State in which he/she resides, shall be subject to the control procedure organised there and shall adhere to the conditions laid down under the legislation of that Member State. If he/she chooses also to register as a person seeking work

in the Member State in which he/she pursued his/her last activity as an employed or self-employed person, he/she shall comply with the obligations applicable in that State.

4. The implementation of the second sentence of paragraph 2 and of the second sentence of paragraph 3, as well as the arrangements for exchanges of information, cooperation and mutual assistance between the institutions and services of the Member State of residence and the Member State in which he/she pursued his/her last occupation, shall be laid down in the Implementing Regulation.

5.

(a) The unemployed person referred to in the first and second sentences of paragraph 2 shall receive benefits in accordance with the legislation of the Member State of residence as if he/she had been subject to that legislation during his/her last activity as an employed or self-employed person. Those benefits shall be provided by the institution of the place of residence.

(b) However, a worker other than a frontier worker who has been provided benefits at the expense of the competent institution of the Member State to whose legislation he/she was last subject shall firstly receive, on his/her return to the Member State of residence, benefits in accordance with Article 64, receipt of the benefits in accordance with (a) being suspended for the period during which he/she receives benefits under the legislation to which he/she was last subject.

6. The benefits provided by the institution of the place of residence under paragraph 5 shall continue to be at its own expense. However, subject to paragraph 7, the competent institution of the Member State to whose legislation he/she was last subject shall reimburse to the institution of the place of residence the full amount of the benefits provided by the latter institution during the first three months. The amount of the reimbursement during this period may not be higher than the amount payable, in the case of unemployment, under the legislation of the competent Member State. In the case referred to in paragraph 5(b), the period during which benefits are provided under Article 64 shall be deducted from the period referred to in the second sentence of this paragraph. The arrangements for reimbursement shall be laid down in the Implementing Regulation.

7. However, the period of reimbursement referred to in paragraph 6 shall be extended to five months when the person concerned has, during the preceding 24 months, completed periods of employment or self-employment of at least 12 months in the Member State to whose legislation he/she was last subject, where such periods would qualify for the purposes of establishing entitlement to unemployment benefits.

8. *For the purposes of paragraphs 6 and 7, two or more Member States, or their competent authorities, may provide for other methods of reimbursement or waive all reimbursement between the institutions falling under their jurisdiction.*

20. Article 65a of the Regulation as amended by Regulation (EU) No 465/2012 of the European Parliament and of the Council of 22 May 2012, headed “Special provisions for wholly unemployed self-employed frontier workers where no unemployment benefits system covering self-employed persons exists in the Member State of residence”, reads:

1. *By way of derogation from Article 65, a wholly unemployed person who, as a frontier worker, has most recently completed periods of insurance as a self-employed person or periods of self-employment recognised for the purposes of granting unemployment benefits in a Member State other than his/her Member State of residence and whose Member State of residence has submitted notification that there is no possibility for any category of self-employed persons to be covered by an unemployment benefits system of that Member State, shall register with and make himself/herself available to the employment services in the Member State in which he/she pursued his/her last activity as a self-employed person and, when he/she applies for benefits, shall continuously adhere to the conditions laid down under the legislation of the latter Member State. The wholly unemployed person may, as a supplementary step, make himself/herself available to the employment services of the Member State of residence.*

2. *Benefits shall be provided to the wholly unemployed person referred to in paragraph 1 by the Member State to whose legislation he/she was last subject in accordance with the legislation which that Member State applies.*

3. *If the wholly unemployed person referred to in paragraph 1 does not wish to become or remain available to the employment services of the Member State of last activity after having been registered there, and wishes to seek work in the Member State of residence, Article 64 shall apply mutatis mutandis, except Article 64(1)(a). The competent institution may extend the period referred to in the first sentence of Article 64(1)(c) up to the end of the period of entitlement to benefits.*

National law and practice

21. 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.

22. Section 4-3 of the National Insurance Act provides that the purpose of unemployment benefits is to provide partial coverage for a loss of income from employment in the event of unemployment. There are a number of cumulative 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.

23. 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.*

24. 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.

25. 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.*

26. 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.

27. The first and fourth paragraph of Section 22-15 of the National Insurance Act read:

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.

28. The first paragraph of Section 22-17a of the National Insurance Act 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.

29. 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.

30. 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.

31. 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 pursuant to paragraph 4 of the National Insurance Act Section 4-5

32. Section 4-1 of the Unemployment Benefits Regulation, headed “Active seeking of employment”, 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.

33. 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.

34. 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.

III Facts and procedure

35. In its request, the National Insurance Court describes the facts of the case as follows: 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 benefits in the event of unemployment.

36. From January 2013, O was registered at an address with his family in Norway. In January 2016, he registered as having moved to Germany.

37. Whilst he was receiving unemployment benefits, O had a number of stays at a flat he had at his disposal 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 (*Arbeids- og velferdsetaten*) (“NAV”) of the stays in Germany.

38. Otherwise O stayed in Norway.

39. 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.

40. O has a one-man firm (*enkeltmannsforetak*) that was registered in the Register of Legal Entities (*Enhetsregisteret*) in 2004. There were no operations in the undertaking before he became unemployed. There were operations in the undertaking in the weeks 46/2013, 06/2014, 08/2014, 34/2014, 36/2014 and 42/2014. He worked a total of 172.5 hours, which he reported to NAV on an ongoing basis. 157.5 hours of that work was performed while he stayed in Germany, whilst the rest of the work was performed in Norway. The undertaking provided services solely to Norwegian clients. O was deemed to be liable to pay tax in Norway because the operations were not run out of a permanent place of business in Germany. O states that he did not intend to run a self-employed operation from Germany over an extended period.

41. The stays in Germany were discovered when NAV carried out a check on whether O fulfilled the conditions for receiving unemployment benefits. On 28 August 2015 NAV adopted a decision to order recovery of the unemployment benefits paid out in the period from December 2012 until October 2014. O appealed against that decision.

42. NAV Appeals (*NAV Klageinstans*) ruled on the appeal on 8 June 2016. It held that O was resident in Norway and subject to Norwegian legislation pursuant to the rules laid down in Regulation (EC) No 883/2004 for the entire period relevant to the case. NAV Appeals 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.

43. 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.

44. O was subsequently convicted in criminal proceedings for having failed to state his stays abroad in reports to NAV.

45. Against this background, the National Insurance Court decided to stay the proceedings and refer 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.**

IV Written observations

46. Pursuant to Article 20 of the Statute of the Court and Article 97 of the Rules of Procedure, written observations have been received from:

- O, represented by Hanne Krogenæs and Helge Hjort, Advocates;
- the Labour and Welfare Directorate, represented by Simen Hammersvik and Torje Sunde, acting as Agents;
- the Government of the Netherlands, 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, members of its Legal Service, acting as Agents.

V Proposed answers submitted

O

47. O proposes that the Court answer the questions as follows:

Question 1:

Regulation 883/2004, including article 5 b, must be interpreted as precluding a requirement to stay in Norway in order to receive a benefit such as the unemployment benefit at issue in the proceedings pending before the national court.

Question 2:

Article 36 EEA applies to the case at issue in the proceedings pending before the national court.

Question 3:

Articles 28, 31 and 36 of the EEA Agreement must be interpreted to the effect that a requirement to stay in Norway imposed on recipients of unemployment benefits constitutes a restriction on the free movement.

Question 4:

The restriction cannot be justified on any of the grounds submitted.

Question 5:

Even if the requirement to stay in Norway was not precluded the repayment provision and the interest provision constitute restrictions on articles 28, 31 and 36 of the EEA Agreement and articles 4, 6 and 7 of Directive 2004/38 which are not justified. The requirement to stay in Norway, the repayment provision and the interest provision constitute a violation of fundamental EEA principles such as legal certainty, the freedom of movement, the protection of personal data and the principle of ne bis in idem.

Question 6:

Articles 4, 6 and 7 of Directive 2004/38 must be interpreted to the effect that a requirement to stay in Norway imposed on recipients of unemployment benefits constitutes a restriction on the free movement which is not justified.

The Labour and Welfare Directorate

48. The Labour and Welfare Directorate proposes that the Court answer the questions as follows:

Question 1:

Regulation (EC) No 883/2004, including Article 5(b), does not preclude a national rule according to which unemployment benefits are contingent on the presence of the unemployed person in the competent State in cases where Articles 64, 65 or 65a are not applicable.

Questions 2 and 3:

Article 36 EEA does not preclude a national rule according to which unemployment benefits are subject to the condition that the unemployed person stays in the competent state in cases where Articles 64, 65 or 65a are not applicable.

Question 4:

Article 31 of the EEA Agreement does not preclude a requirement to be present in the competent State in order to qualify for unemployment benefits, such as that applied in the case in the main proceedings, in cases where the requirements of Arts. 64-64a of Regulation (EC) No 883/2004 are not fulfilled.

Question 5:

Article 36 of the EEA Agreement does not preclude an enforcement clause, such as that applied in the case in the main proceedings, pursuant to which the EEA State can order recovery of unlawfully acquired unemployment benefits. Article 36 of the EEA Agreement does not preclude an enforcement clause, such as that applied in the case in the main proceedings, to impose interest surcharge of 10 percent in cases where the unemployed intentionally or with gross negligence have failed to comply with the requirements for obtaining unemployment benefits.

Question 6:

Article 4, 6 and 7 of Directive 2004/38/EC do not apply to a national rule according to which unemployment benefits are contingent on the presence of the unemployed person in the competent state in cases where Articles 64, 65 or 65a of Regulation 883/2004 are not applicable, and where the unemployed person is ordered recovery because he has taken up a temporary stay in another EEA State without complying therewith.

The Government of the Netherlands

49. The Government of the Netherlands proposes that the Court answer the questions as follows:

Question 1:

It is compatible with the provisions of Regulation 883/2004, including Article 5(b), for entitlement to unemployment benefits to be subject to a residence condition in cases where Articles 64, 65 or 65a are not applicable.

Question 2:

Article 36 of the EEA Agreement does not apply in the case of temporary stays in another EEA State as described in the case at hand.

Questions 3 and 4:

Articles 31 and 36 of the EEA Agreement are to be interpreted as not precluding the Member States from imposing a residence condition for entitlement to unemployment benefits in cases where Articles 64, 65 or 65a of Regulation 883/2004 do not apply.

Question 5:

In compliance with the principles of equivalence and effectiveness, an EEA State may order a person to repay a benefit that was received unlawfully under national law, and levy a 10% interest surcharge on the person concerned.

Question 6:

Articles 4, 6 and 7 of Directive 2004/38 do not preclude a residence condition for the entitlement to unemployment benefits in cases where Articles 64, 65 or 65a of Regulation 883/2004 do not apply.

ESA

50. ESA submits that the Court should answer the questions as follows:

Question 1:

Article 63 of Regulation 883/2004, read in the light of Article 7 of the same Regulation is to be interpreted to the effect that, if the national court were to come to the conclusion that the person concerned actually changed his residence, the competent state is entitled to withdraw unemployment benefits by virtue of Article 63 of Regulation 883/2004, unless one of the specific situations dealt with in Articles 64, 65 and 65a arose, which it is for the national court to verify.

Question 2:

A situation such as the one at issue in the main proceedings falls within the scope of application of the freedom to provide services and a requirement to stay within the competent State constitutes a restriction on that freedom.

Question 3:

A restriction on the ability of recipients of unemployment benefits to stay in another EEA State may be justified, as long as it is applied in a non-discriminatory manner, to the extent that it is necessary and proportionate in order to ensure that the person concerned remains available to the employment market and that proper monitoring can be carried out. It is for the national court to assess to what extent that is the case.

Question 4:

To the extent that the national legislation at issue falls to be justified by reference to the fundamental freedoms, the principle of equal treatment of facts enshrined in Article 5(b) of Regulation 883/2004 does not add anything to the legal assessment as, for the purposes of the assessment of the proportionality of the restrictions at issue, it in any event has to be examined whether the objectives of the legislation at issue can be equally well achieved in another EEA State.

Question 5:

Repayment of overpaid amounts as well as penalty interest at 10% do not appear so disproportionate as to become obstacles to the exercise of fundamental freedoms. They must be effected in compliance with the principle of legal certainty, which it is for the national court to verify.

Question 6:

The analysis under Articles 4 and 6 of Directive 2004/38 leads to the same conclusion as that regarding Article 36 EEA.

The Commission

51. The Commission proposes that the Court answer the questions as follows:

Question 1:

Article 63 of Regulation 883/2004 should be interpreted as not obliging a competent State to export unemployment benefits in a case where the beneficiary of those

benefits does not fall within one of the situations expressly governed by Articles 64, 65 or 65a of Regulation 883/2004.

Questions 2 to 5:

The absence of a right to export unemployment benefits outside the situations expressly mentioned in Articles 64, 65 and 65a of Regulation 883/2004 does not constitute an obstacle to the freedom of movement guaranteed by Articles 31 and 36 of the EEA Agreement.

Páll Hreinsson
Judge-Rapporteur