



E-15/20-17

REPORT FOR THE HEARING

in Case E-15/20

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 Borgarting Court of Appeal (*Borgarting lagmannsrett*), in criminal proceedings against

P,

concerning the interpretation of the Agreement on the European Economic Area, in particular Articles 3, 7, 28, 29 and 36 thereof, 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 16 October 2020, registered at the Court on 21 October 2020, Borgarting Court of Appeal requested an Advisory Opinion in the criminal proceedings pending before it between P and the Prosecuting Authority (*påtalemyndigheten*).

2. The case before the referring court concerns criminal proceedings against P, who has been indicted for aggravated fraud and providing a false statement to the Norwegian Labour and Welfare Administration (*Arbeids- og velferdsetaten*) (“NAV”) in connection with the receipt of unemployment benefits. Under Norwegian law, it is a general rule that the unemployed person must stay (*oppholde seg*) in Norway in order to receive unemployment benefits, to which there are certain exceptions that allow an unemployed person to export such cash benefits. In the main proceedings, it is undisputed that P stayed in other EEA States whilst receiving unemployment benefits, without at any time applying for the export of that benefit, and regularly failed to inform NAV that he was staying outside Norway. By judgment of 22 August 2019, Oslo District Court (*Oslo tingrett*) convicted P in accordance with his indictment and sentenced him to five months in prison. P has brought an appeal against that sentence.

3. According to the referring court, the main question in the national proceedings is whether a requirement to stay (*oppholde seg*) in Norway in order to receive unemployment benefits is compatible with EEA law.

II Legal background

EEA law

4. Article 3 of the Agreement on the European Economic Area (“the EEA Agreement” or “EEA”) reads:

The Contracting Parties shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Agreement.

They shall abstain from any measure which could jeopardize the attainment of the objectives of this Agreement.

Moreover, they shall facilitate cooperation within the framework of this Agreement.

5. Article 7 EEA reads:

Acts referred to or contained in the Annexes to this Agreement or in decisions of the EEA Joint Committee shall be binding upon the Contracting Parties and be, or be made, part of their internal legal order as follows:

(a) an act corresponding to an EEC regulation shall as such be made part of the internal legal order of the Contracting Parties;

(b) an act corresponding to an EEC directive shall leave to the authorities of the Contracting Parties the choice of form and method of implementation.

6. Article 28 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.

3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:

(a) to accept offers of employment actually made;

(b) to move freely within the territory of EC Member States and EFTA States for this purpose;

(c) to stay in the territory of an EC Member State or an EFTA State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;

(d) to remain in the territory of an EC Member State or an EFTA State after having been employed there.

4. The provisions of this Article shall not apply to employment in the public service.

5. Annex V contains specific provisions on the free movement of workers.

7. Article 29 EEA reads:

In order to provide freedom of movement for workers and self-employed persons, the Contracting Parties shall, in the field of social security, secure, as provided for in Annex VI, for workers and self-employed persons and their dependants, in particular:

(a) aggregation, for the purpose of acquiring and retaining the right to benefit and of calculating the amount of benefit, of all periods taken into account under the laws of the several countries;

(b) payment of benefits to persons resident in the territories of Contracting Parties.

8. 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.

9. 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, and OJ 2007 L 204, p. 30, and as amended by Regulation (EU) No 465/2012 of the European Parliament and of the Council of 22 May 2012 amending Regulation (EC) No 883/2004 on the coordination of social security systems and Regulation (EC) No 987/2009 laying down the procedure for implementing Regulation No 883/2004 (OJ 2012 L 149, p. 4), (“Regulation 883/2004”) 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.

10. Article 1 of Regulation 883/2004, 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;

...

11. Article 3(1) of Regulation 883/2004, headed “Matters covered”, reads, in extract:

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

...

(h) unemployment benefits;

...

12. Article 4 of Regulation 883/2004, headed “Equality of treatment”, reads:

Unless otherwise provided for by this Regulation, persons to whom this Regulation applies shall enjoy the same benefits and be subject to the same obligations under the legislation of any Member State as the nationals thereof.

13. Article 5 of Regulation 883/2004, 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:

(a) where, under the legislation of the competent Member State, the receipt of social security benefits and other income has certain legal effects, the relevant provisions of that legislation shall also apply to the receipt of equivalent benefits acquired under the legislation of another Member State or to income acquired in another Member State;

(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.

14. Article 6 of Regulation 883/2004, headed “Aggregation of periods”, reads:

Unless otherwise provided for by this Regulation, the competent institution of a Member State whose legislation makes:

— the acquisition, retention, duration or recovery of the right to benefits,

— the coverage by legislation,

or

— the access to or the exemption from compulsory, optional continued or voluntary insurance,

conditional upon the completion of periods of insurance, employment, self-employment or residence shall, to the extent necessary, take into account periods of insurance, employment, self-employment or residence completed under the legislation of any other Member State as though they were periods completed under the legislation which it applies.

15. Article 7 of Regulation 883/2004, 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.

16. Article 63 of Regulation 883/2004, 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.

17. Article 64 of Regulation 883/2004, headed “Unemployed persons going to another Member State”, reads, in extract:

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.

...

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.

...

18. Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems (OJ 2009 L 284, p. 1), as amended by Regulation (EU) No 465/2012 of the European Parliament and of the Council of 22 May

2012 amending Regulation (EC) No 883/2004 on the coordination of social security systems and Regulation (EC) No 987/2009 laying down the procedure for implementing Regulation No 883/2004 (OJ 2012 L 149, p. 4), (“Regulation 987/2009”) 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 2 of Annex VI (Social security) to the EEA Agreement.

19. Article 55 of Regulation 987/2009, headed “Conditions and restrictions on the retention of the entitlement to benefits for unemployed persons going to another Member State”, reads, in extract:

1. In order to be covered by Article 64 or Article 65a of the basic Regulation, the unemployed person going to another Member State shall inform the competent institution prior to his/her departure and request a document certifying that he/she retains his/her entitlement to benefits under the conditions laid down in Article 64(1)(b) of the basic Regulation.

That institution shall inform the person concerned of his obligations and shall provide the abovementioned document which shall include the following information:

(a) the date on which the unemployed person ceased to be available to the employment services of the competent State;

(b) the period granted in accordance with Article 64(1)(b) of the basic Regulation in order to register as a person seeking work in the Member State to which the unemployed person has gone;

(c) the maximum period during which the entitlement to benefits may be retained in accordance with Article 64(1)(c) of the basic Regulation;

(d) circumstances likely to affect the entitlement to benefits.

2. The unemployed person shall register as a person seeking work with the employment services of the Member State to which he goes in accordance with Article 64(1)(b) of the basic Regulation and shall provide the document referred to in paragraph 1 to the institution of that Member State. If he has informed the competent institution in accordance with paragraph 1 but fails to provide this document, the institution in the Member State to which the unemployed person has gone shall contact the competent institution in order to obtain the necessary information.

3. The employment services in the Member State to which the unemployed person has gone to seek employment shall inform the unemployed person of his obligations.

4. The institution in the Member State to which the unemployed person has gone shall immediately send a document to the competent institution containing the date on which the unemployed person registered with the employment services and his new address.

...

20. 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, (“Directive 2004/38”) 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), which entered into force on 7 December 2007, and is referred to at point 3 of Annex VIII (Right of establishment) and point 1 of Annex V (Free movement of workers) to the EEA Agreement.

21. Article 4(1) of Directive 2004/38, headed “Right of exit”, reads:

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.

22. Article 6 of Directive 2004/38, 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.

23. Article 7(3) of Directive 2004/38, headed “Right of residence for more than three months”, reads:

3. For the purposes of paragraph 1(a), a Union citizen who is no longer a worker or self-employed person shall retain the status of worker or self-employed person in the following circumstances:

(a) he/she is temporarily unable to work as the result of an illness or accident;

(b) he/she is in duly recorded involuntary unemployment after having been employed for more than one year and has registered as a job-seeker with the relevant employment office;

(c) he/she is in duly recorded involuntary unemployment after completing a fixed-term employment contract of less than a year or after having become involuntarily unemployed during the first twelve months and has registered as a job-seeker with the relevant employment office. In this case, the status of worker shall be retained for no less than six months;

(d) he/she embarks on vocational training. Unless he/she is involuntarily unemployed, the retention of the status of worker shall require the training to be related to the previous employment.

National law and practice

24. The Regulation on the Incorporation of the Social Security Regulations Forming Part of the EEA Agreement (*Forskrift om inkorporasjon av trygdeforordningene i EØS-avtalen*) incorporates Regulation 883/2004 and Regulation 987/2009 into Norwegian law.

25. Section 4-2 of the Act of 28 February 1997 on National Insurance (*lov 28. februar 1997 nr. 19 om folketrygd*) (“the National Insurance Act”) reads:¹

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.

26. The first paragraph of Section 4-5 of the National Insurance Act reads, in extract:

... A genuine job-seeker includes a person who is able to work and is willing to:

¹ All translations of national law are unofficial.

- (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.*

27. Section 4-8 of the National Insurance Act, which imposes a specific notification duty on the recipient of unemployment benefits, 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.

28. The first paragraph of Section 4-20 of the National Insurance Act 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.*

29. Section 4-21 of the National Insurance Act reads:

Entitlement to unemployment benefits shall lapse from the time the member no longer fulfils the conditions for being a genuine job-seeker (see Section 4-5) and shall resume only as from the time those conditions are once again fulfilled.

30. Section 21-3 of the National Insurance Act obliges a recipient of unemployment benefits from NAV to provide information. The recipient must provide information about all changes that may affect their entitlement to the benefits or for the amount of the benefit to be verified.

31. Circular R04-00 (*Rundskriv til ftrl kap 4: Dagpenger under arbeidsløshet*) was drawn up to accompany Chapter 4 of the National Insurance Act. As regards Section 4-2 of the National Insurance Act, Circular R04-00 states the following, in extract:

...

The rationale for the condition of staying in Norway is, inter alia, that the person is to be available for contact with NAV and be able to take up work quickly.

...

32. As regards the first paragraph of Section 4-8 of the National Insurance Act, Circular R04-00 states that:

The user can register through nav.no or attend in person at the NAV office. Persons who register through nav.no receive standard information about applying for unemployment benefits and sending employment status forms: for more detail, see under related information.

33. As regards the second paragraph of Section 4-8 of the National Insurance Act, Circular R04-00 also states that:

The unemployment benefits recipient may choose between two ways of sending in the notification form:

- *electronic notification form on nav.no;*
- *paper notification form sent by post.*

34. As regards the third paragraph of Section 4-8 of the National Insurance Act, Circular R04-00 further states that:

The NAV office may decide that reporting may also take place otherwise than and in addition to sending in a notification form. This may occur in cases where the NAV

office finds it appropriate to request, e.g., attendance at the NAV office, telephone inquiry, etc.

When the unemployment benefits recipient is summoned to the NAV office, that person is under an obligation to attend. Should the person fail to attend, entitlement to unemployment benefits shall lapse for a limited time.

35. Section 1-3 of Regulation No 890 of 16 September 1998 on Unemployment Benefits during Unemployment (*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.

36. Section 1-4 of the Unemployment Benefits Regulation provides that a member that 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 to stay in Norway for up to three days.

37. Section 1-5 of the Unemployment Benefits Regulation allows a person who has received unemployment benefits for more than 52 weeks to stay outside Norway in connection with holiday absence pursuant to the fourth paragraph of Section 4-5 of the National Insurance Act.

38. 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, 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.

39. 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.

40. 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 job-seeker 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 twelve 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 monitoring 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.

41. Section 221 of the Act of 20 May 2005 on the Penal Code (*lov 20. mai 2005 om straff*) (“the Penal Code”) reads, in extract:

A penalty of a fine or imprisonment for a term not exceeding two years shall be applied to any person who, in writing or orally, provides false information to:

...

(d) a public authority when the statement is intended to serve as evidence

...

42. Section 371 of the Penal Code reads, in extract:

A penalty of a fine or imprisonment for a term not exceeding two years shall be applied to any person who with intent to obtain an illicit gain for himself/herself or others

...

(b) makes use of false or incomplete information ... or otherwise illicitly affects the result of automated data processing, thereby causing someone a loss or risk of loss.

III Facts and procedure

43. P is a Norwegian national who was resident in Norway when he became unemployed in 2014. He subsequently registered with NAV as a jobseeker on 3 August 2014 and applied for unemployment benefits from NAV on 15 September 2014. In the application for unemployment benefits, P confirmed that he was familiar with information on the conditions for unemployment benefits available on NAV’s website and a brochure entitled “Unemployment benefits”, which included information on the main conditions for entitlement to unemployment benefits, the notification duty and the grounds for loss of the allowance.

44. On 9 October 2014, NAV adopted a decision to grant P unemployment benefits with effect from 16 September 2014. In that decision, it was explained to P that he had to inform NAV if he intended to take a holiday and that he also had to indicate any holiday absences on his notification form. It was further stated in that decision that:

Payment of unemployment benefits shall be made as directed by NAV provided that you comply with the notification duty as a job-seeker and the conditions of the law are fulfilled.

45. According to the request, P had checked the box for holiday or absence in some of the electronic notification forms covered by the indictment and NAV made deductions to the unemployment benefits accordingly. On other occasions, P did not notify having absences or stays in another EEA State, even though he actually did. At no time did P apply to NAV for a PD U2 certificate nor did P register as a job-seeker in the countries to which he travelled.

46. In the autumn of 2016, NAV discovered that P had stayed outside Norway on additional and lengthier occasions, in Denmark and Spain, beyond what had been stated on the notification forms P had submitted to NAV. Therefore, from 31 October 2016, NAV stopped payment of unemployment benefits to P and, subsequently, on 18 May 2017, adopted a recovery decision. An indictment was also later issued by the Norwegian Prosecuting Authority.

47. On 22 August 2019, Oslo District Court delivered its judgment convicting P of aggravated fraud and providing a false statement and sentenced P to five months in prison. The aggravated fraud involved NOK 320 426 in the period from 19 September 2014 to 13 October 2016. It was not disputed that P stayed abroad during much of the period from September 2014 to October 2016 and that he did not notify those stays abroad.

48. In its judgment, Oslo District Court observed that it was conceivable that P, with his background, had the best prospects of finding a new job abroad. Nevertheless, it considered that the decisive factor was that P could not be away on travel and, at the same time, receive social security benefits without notifying or applying for permission to do so from NAV. Oslo District Court took the view that P was aware of this and noted that he had received plenty of information about these requirements from NAV.

49. P brought an appeal against the judgment of Oslo District Court to Borgarting Court of Appeal, only in relation to sentencing. After it was discovered that NAV may have misapplied EEA law by reporting a number of fraud cases involving the payment of different cash benefits on the basis of false or incomplete information concerning stays abroad in the EEA, the Prosecuting Authority requested that the application of the law in relation to P's conviction also be reviewed.

50. Against this background, Borgarting Court of Appeal decided to stay the proceedings and refer the following questions to the Court:

1. Do Articles 3 and 7(a) of the EEA Agreement, read in conjunction with Regulation 883/2004, in particular Articles 4, 5 and 7, read in conjunction with Chapter 6, preclude a national scheme under which:

a) it is a condition for entitlement to unemployment benefits that the unemployed person stays ("oppholder seg") in Norway (see Section 4-2 of the National Insurance Act); and

- b) an exemption from the requirement to stay, including the provision in Article 64 of Regulation 883/2004, is provided for in the national Unemployment Benefits Regulation, which is also implemented in the Transposing Regulation?
2. Irrespective of the answer to question 1, is a scheme as described in question 1 a restriction under the EEA Agreement's rules on free movement, including Articles 28, 29 and 36?

If so, can such a restriction be justified by reference to the following grounds:

- i. that stays in the competent State are usually viewed as giving the unemployed person better incentive and opportunities for seeking and finding employment, including being able to start quickly in a possible job;
 - ii. that stays in the competent State are usually viewed as helping the unemployed person to be available for the employment services, and that presence in Norway makes it possible for the public administration to monitor whether the unemployed person fulfils the conditions for receiving the cash benefit paid in the event of unemployment – including that the unemployed person is in fact unemployed and does not have hidden sources of income, is a genuine job-seeker, is engaged in an active search for employment or participates in other activities aimed at finding employment;
 - iii. that stays in the competent State are usually viewed as giving the employment services better opportunities to assess whether the unemployed person is being given suitable follow-up; and
 - iv. that the national scheme allows for receiving unemployment benefits in another EEA State on the conditions provided for by Regulation 883/2004.
3. In so far as required by the answers to questions 1 and 2, equivalent questions are asked in relation to Directive 2004/38, including Articles 4, 6 and 7.
4. The accused has been indicted for having provided false information to the administrative body NAV regarding stays in another EEA State, thereby having misled NAV into paying unemployment benefits to which he was not entitled because the National Insurance Act lays down conditions requiring a stay (“opphold”) in Norway in order to receive unemployment benefits. Given

the Norwegian transposition of Regulation 883/2004 (see question 1), is the use of the provisions of the Criminal Code on fraud and providing a false statement in a case such as the present one in accordance with fundamental EEA law principles such as the principle of clarity and the principle of legal certainty?

- 5. In the light of the specific case such as the present one and the transposition by Norway of Regulation 883/2004 (see question 1), is the criminal law sanction in accordance with the principle of proportionality?**

IV Written observations

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

- P, represented by Henrik Boehlke and Dag Sørli Lund, advocates;
- the Oslo Public Prosecutions Office (*Oslo statsadvokatembeter*), represented by Henry John Mæland, Acting Director of Public Prosecutions;
- the Norwegian Government, represented by Simen Hammersvik, Torje Sunde, Kaja Moe Winther and Tone Hostvedt Aarthun, acting as Agents;
- the Netherlands Government, represented by Mielle Bulterman and Joost Hoogveld, acting as Agents;
- the EFTA Surveillance Authority (“ESA”), represented by Ewa Gromnicka, Erlend Møinichen Leonhardsen, Catherine Howdle and Carsten Zatschler, acting as Agents; and
- the European Commission (“the Commission”), represented by Denis Martin and Louise Grønfeldt, acting as Agents.

V Proposed answers submitted

P

52. P proposes that the questions be answered as follows:

Question 1:

Articles 3 and 7(a) of the EEA Agreement, cf. the Basic Regulation, specifically Articles 7 read in conjunction with 63 and 64, preclude national rules that makes

actual stay/physical presence in Norway a condition for the entitlement to unemployment benefits.

Question 2:

A scheme such as that described in question 1 constitutes a disproportional restriction on the right to free movement under Articles 28 and/or 36 of the EEA Agreement.

Question 3:

Articles 4 and 6 of Directive 2004/38/EU must be interpreted as precluding a requirement of stay in the competent State in order to be entitled to unemployment benefits.

Question 4:

Given the Norwegian incorporation of Regulation 883/2004, the use of the provisions of the Criminal Code on fraud and providing a false statement in the present case is not in accordance with fundamental principles of EEA law, such as the principle of clarity and legal certainty.

Question 5:

In light of the specific circumstances of the present case, including the incorporation of Regulation 883/2004, the use of criminal sanctions is not in accordance with the principle of proportionality.

The Oslo Public Prosecutions Office

53. The Oslo Public Prosecutions Office proposes that the questions be answered 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:

Articles 28, 29 and 36 of the EEA Agreement do 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 3:

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.

Question 4:

The Norwegian rules regulating the sanctions for failing to inform the Norwegian Labour and Welfare Directorate of stays abroad in circumstances where such information is decisive for the calculation and the entitlement of the unemployment benefit, do not infringe the principle of legal certainty.

Question 5:

A penalty of imprisonment for unlawfully obtaining an unemployment benefit by providing incorrect information or by failing to inform the competent institution of circumstances that are decisive for the right to the benefit, such conduct having been deemed intentional and entailing loss or risk of loss for the deceived party, and thus qualifying as intentional fraud under the criminal code in that State, does not go beyond what is strictly necessary for the objectives pursued by the penal code and the social security legislation or is so disproportionate to the gravity of the infringement that it becomes an obstacle to the rights to free movement enshrined in Articles 28, 29 and 36 of the EEA Agreement.

The Norwegian Government

54. The Norwegian Government proposes that the questions be answered as follows:

Question 1:

EEA law 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 Article 64, 65 or 65a of Regulation 883/2004 are not applicable.

Question 2:

Articles 28, 29 and 36 EEA do not preclude a national rule, according to which unemployment benefits are subject to the condition that the unemployed person must

stay in the competent State in cases where Articles 64, 65 or 65a of Regulation 883/2004 are not applicable.

Question 3:

Articles 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.

Questions 4 and 5:

It is consistent with fundamental EEA law principles to apply the provisions set out in the national Criminal Code on fraud and providing false statement in a case such as the case in the main proceedings.

The Netherlands Government

55. The Netherlands Government proposes that the questions be answered as follows:

Question 1:

It is not contrary to Regulation 883/2004 to have a general requirement to stay in Norway, combined with the exemptions as provided for by, inter alia, Article 64 of that Regulation.

Question 2:

A national scheme as referred to in the first question is compatible with Articles 28, 29 and 36 EEA.

Question 3:

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 and 65a of Regulation 883/2004 do not apply.

Question 4:

The Netherlands Government does not propose an answer to Question 4.

Question 5:

It is in accordance with the principle of proportionality to impose a criminal law sanction in a case such as the present one.

ESA

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

Question 1:

Articles 3 and 7 EEA and Regulation 883/2004 must be interpreted as neither precluding nor permitting the imposition on recipients of unemployment benefit of a general requirement to stay on national territory, the lawfulness of which rather falls to be assessed from the point of view of the fundamental freedoms.

Articles 3 and 7 EEA and the principle of legal certainty require EEA EFTA States when making acts corresponding to regulations part of their legal order to do so without alterations and to remove from the national legal order rules that inhibit the achievement of the aims of those regulations. It is incumbent on national courts, in application of the principle of conform interpretation to ensure the effectiveness of the rights granted on the basis of EEA law.

Question 2 and 3:

EEA law, and in particular Articles 28 and 36 EEA and Articles 4 and 6 of Directive 2004/38, must be interpreted as not precluding a restriction on the ability of recipients of unemployment benefits to stay in another EEA State, as long as it is applied in a non-discriminatory manner, and 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.

Questions 4 and 5:

A failure to comply with a procedural requirement cannot be held against persons where that procedural requirement is tainted with the unlawfulness of the substantive condition which it is designed to enforce. Therefore, it is only in circumstances where enforcement of a stay requirement would have complied with the requirements set out immediately above in the specific case of the individual concerned that a sanction for failure to comply with a notification obligation would be compatible with EEA law.

The principle that penalties must have a proper legal basis is a corollary of the principle of legal certainty, which constitutes a general principle of EEA law and requires that any legislation, in particular when it imposes or permits the imposition of sanctions, must be clear and precise so that the persons concerned may know without ambiguity what rights and obligations flow from it and may take steps accordingly.

The power of EEA States to impose penalties in fields governed by EEA law must be exercised with respect for the general principles of EEA law. Penalties must not go beyond what is strictly necessary, and any control procedures must not be conceived in such a way as to restrict freedom of movement or be accompanied by a sanction which is so disproportionate that it becomes an obstacle to the exercise of that freedom.

The Commission

57. The Commission proposes that the questions be answered as follows:

Question 1:

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 and 3:

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 the EEA Agreement.

Questions 4 and 5:

The EEA law does not prohibit national authorities from imposing criminal sanctions on persons who have obtained unemployment benefits by knowingly providing wrongful information. However, such sanctions must comply with EEA law principles such as the principles of equivalence, legal certainty and proportionality. It is for the national judge to assess whether those principles are complied with in the present case.

Páll Hreinsson
Judge-Rapporteur