



## JUDGMENT OF THE COURT

14 December 2004\*

*(Freedom of movement for workers - social security for migrant workers - Title II  
of Regulation 1408/71 - form E 101 - Article 3 EEA)*

In Case E-3/04,

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 Gulating lagmannsrett (Gulating Court of Appeal), Norway, in a case pending before it between

**Tsomakas Athanasios and Others with Odfjell ASA as an accessory intervener**

and

**The Norwegian State, represented by Rikstrygdeverket (The National Insurance Administration)**

on the interpretation of Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as amended (“Regulation 1408/71”) and as referred to in Annex VI, point 1 to the EEA Agreement,

THE COURT,

composed of: Carl Baudenbacher, President, Per Tresselt and Thorgeir Örlygsson (Judge-Rapporteur), Judges,

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\* Language of the Request: Norwegian.

Registrar: Henning Harborg,

having considered the written observations submitted on behalf of:

- Tsomakas Athanasios, Labropoulos V. Elias, Pastrikos Constantinos, Moystakas Antonios, Stiros Ilias, Papmarkos Konstantinos, Desypris Petros, Dellaportas Gerasimos, Koufogiannis Nikolas Sotirios, Markou Stavros Pantelis, Bourzikos Konstantinos, Karafillidis Grigorios, Spyratos Konstantinos, Skiadaressis Vassilis, Manasis Leonidas, Kourouklis Panagiotis, Vasilakis Georgios (the “Plaintiffs”), and Odfjell ASA, the accessory intervener in the proceedings before the national court (the “Accessory Intervener”), represented by Stephan L. Jervell, Advokat, Wiersholm, Mellbye & Bech Advokatfirma AS, Oslo, and Espen Ommedal, Advokat, Ernst & Young Tax, Bergen;
- the Norwegian State (the “Defendant”), represented by Ketil Bøe Moen, Advokat, Office of the Attorney General;
- The Government of the Republic of Iceland, represented by Finnur Thór Birgisson, Ministry of Foreign Affairs, acting as Agent;
- The Government of the Federal Republic of Germany, represented by Claus-Dieter Quassowski and Annette Tiemann, officials in the Federal Ministry of Finance, acting as Agents;
- the EFTA Surveillance Authority, represented by Michael Sánchez Rydelski, Deputy Director, Legal & Executive Affairs, and Arne Torsten Anderssen, Officer, Legal & Executive Affairs, acting as Agents;
- the Commission of the European Communities, represented by Nicola Yerrell and Denis Martin, Members of its Legal Service, acting as Agents;

having regard to the Report for the Hearing,

having heard oral argument of the Plaintiffs and the Accessory Intervener, represented by Stephan L. Jervell, the Defendant, represented by Ketil Bøe Moen, the EFTA Surveillance Authority, represented by Arne Torsten Anderssen and the Commission of the European Communities, represented by Nicola Yerrell at the hearing on 12 November 2004,

gives the following

## Judgment

### I Facts and procedure

- 1 By a reference dated 28 May 2004, registered at the Court on 4 June 2004, Gulating lagmannsrett referred 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, a question on the interpretation of Regulation 1408/71.
- 2 The question arose in the context of a dispute between the plaintiffs, who are Greek mariners, and Rikstrygdeverket (The National Insurance Administration) over a decision of Folketrygdekontoret for utenlandssaker (the National Office for Social Insurance Abroad, “FFU”) of 11 July 2000, denying their request for an exemption from Norwegian social security legislation on the basis of Article 14b(4) of Regulation 1408/71.
- 3 The Plaintiffs worked on board vessels owned by the Accessory Intervener for varying lengths of time between 1995 and 1999. All of the vessels were registered with the Norwegian International Ship Registry (“NIS”). According to documentation provided to the national court by the Accessory Intervener, the Plaintiffs are residing in Greece and have been employed and remunerated by Mare Maritime SA, which has its place of business in Greece.
- 4 Before issuing its decision, FFU, which is the competent institution in Norway for deciding whether Norway’s social security legislation applies pursuant to Regulation 1408/71, sent a request to the competent Greek institution to issue form E 101 for a group of Greek mariners working on board vessels registered in NIS. The competent Greek institution subsequently issued E 101 forms for most of the Greek mariners, but not for all of them, and not for any of the Plaintiffs.
- 5 In its decision, FFU found that it was for the Greek social security authorities to make a factual determination, and to provide confirmation that the conditions for the application of Article 14b(4) of Regulation 1408/71 were fulfilled. Such confirmation could be provided by issuing form E 101 or equivalent official statement from Greek social security authorities. The decision provides that in the absence of such documentation, Norwegian legislation is to apply pursuant to Article 13(2)(c) of Regulation 1408/71. Upon appeal, Trygderetten (The National Insurance Court) upheld FFU’s decision by a ruling on 11 April 2003.
- 6 The Plaintiffs brought an action before Gulating lagmannsrett, demanding that Trygderetten’s ruling be set aside, primarily on the grounds that the finding of a requirement for documentation from Greek social security authorities is contrary to Article 14b(4) of Regulation 1408/71. The Defendant argues in its reply that Trygderetten’s ruling was based upon a correct interpretation of EEA law, and requests a finding in favour of the Defendant.

- 7 The Gulating lagmannsrett decided to request an Advisory Opinion from the Court on the following question:

*Is it compatible with the choice of law rules contained in Title II of Regulation (EEC) No 1408/71, that the flag State proceeds from the premise that the State of residence must have issued a form E 101 or a statement containing information equivalent to that found in form E 101, for the legislation of the State of residence to apply in accordance with Article 14b(4), and that in the absence of such documentation, the legislation of the flag State shall apply in accordance with Article 13(2)(c)?*

## **II Legal background**

### *National law*

- 8 The basic principle of the Norwegian National Insurance Act of 28 February 1997 No 19 (lov av 28. februar 1997 nr. 19 om folketrygd), is that only those persons who are residing in Norway are compulsory members of the Norwegian social security scheme (folketrygden) cf. Section 2-1. However, the King is, pursuant to Section 1-3 of the Act, authorised to grant exemptions from its provisions on the basis of reciprocal agreements with other States, such as the EEA Agreement. Until 1 January 2001, the choice of law rules of Regulation 1408/71 were implemented in Norwegian law through Regulation No 384 of 25 April 1997 (forskrift av 25. april 1997 nr. 384). According to Section 1 of the Norwegian regulation, the rules of the National Insurance Act shall be derogated from insofar as is necessary in order to apply, inter alia, the choice of law rules contained in Regulation 1408/71.

### *EEA Law*

- 9 Article 3 of the EEA Agreement 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.*

- 10 Article 28(1) and (2) of the EEA Agreement read:

*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.*

11 Article 29 of the EEA Agreement 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.*

12 Regulation 1408/71 is referred to in point 1 of Annex VI to the EEA Agreement. It was amended and updated by Council Regulation (EC) No 118/97 (OJ 1997 L 28, p. 1), incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 66/98 of 4 July 1998. It has subsequently been amended several times. Regulation 1408/71, as amended by Council Regulation No 1399/1999 of 29 April 1999 (OJ 1999 L 164, p.1), incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 9/2000 of 28 January 2000, that entered into force the subsequent day, is the version relevant to this case.

13 According to Article 13(1) of Regulation 1408/71 persons to whom the Regulation applies shall be subject to the legislation of a single Member State only.

14 Article 13(2)(c) of Regulation 1408/71 reads:

*2. Subject to Articles 14 to 17:*

*(...)*

*(c) a person employed on board a vessel flying the flag of a Member State shall be subject to the legislation of the State;*

15 Article 14b(4) of Regulation 1408/71 reads:

*Article 13(2)(c) shall apply subject to the following exceptions and circumstances:*

*(...)*

*4. A person employed on board a vessel flying the flag of a Member State and remunerated for such employment by an undertaking or a person whose registered office or place of business is in the territory of another Member State*

*shall be subject to the legislation of the latter State if he is resident in the territory of that State; the undertaking or person paying the remuneration shall be considered as the employer for the purpose of the said legislation.*

- 16 Articles 80 and 81 of Regulation 1408/71 establish the Administrative Commission on Social Security for Migrant Workers (the “Administrative Commission”). Its duties include dealing with all administrative questions and questions of interpretation arising from the provisions of Regulation 1408/71.
- 17 In the EEA context, the rights and duties conferred upon the Administrative Commission are assumed by the EEA Joint Committee, cf. point II under the heading “Sectoral Adaptations” in Annex VI to the EEA Agreement.
- 18 Article 84 of Regulation 1408/71 contains rules on cooperation between competent authorities and institutions of the Member States within the field of application of the Regulation. Article 84(1) requires the competent authorities of the Member States to communicate to each other information regarding, inter alia, their implementing measures. Article 84(2) states that the authorities and institutions of the Member States shall lend their good offices and act as though implementing their own legislation. Article 84(3) states that the competent authorities and institutions may, for the purpose of implementing the Regulation, communicate directly with one another and with the persons concerned or their representatives.
- 19 Regulation (EEC) No 574/72 of 21 March 1972 laying down the procedure for implementing Regulation (EEC) No 1408/71, was amended and updated by Council Regulation (EC) No 118/97. The version relevant to the case at hand is the Regulation as it read after it was amended by Council Regulation (EC) No 1399/1999 and as referred to in point 2 of Annex VI to the EEA Agreement (“Regulation 574/72”). According to Article 2(1) of Regulation 574/72 models of certification and other documents necessary for the application of the Regulation and of the implementing Regulation shall be drafted by the Administrative Commission.
- 20 Article 11(1)(a) and (b) of Regulation 574/72 reads:

*The institutions designated by the competent authority of the Member State whose legislation is to remain applicable shall issue a certificate stating that an employed person shall remain subject to that legislation up to a specific date:*

*(a) at the request of the employed person or his employer in cases referred to in Articles 14 (1) and 14b (1) of the Regulation;*

*(b) in cases where Article 17 of the Regulation applies.*

- 21 Form E 101, drafted by the Administrative Commission by Decision No 164 of 27 November 1998 on the model forms necessary for the application of Regulation (EEC) No 1408/71 and Regulation (EEC) No 574/72 (OJ 1997 L 216, p. 85), as amended by Decision No 172 of 9 December 1998 (OJ 1999 L 143, p.

13), referred to in point 3.48 of Annex VI to the EEA Agreement, contains the following introduction:

“CERTIFICATE CONCERNING THE LEGISLATION APPLICABLE  
Regulation (EEC) No 1408/71: Article 13.2.d; Article 14.1.a; (...) Article 14b.1,  
2 and 4; (...) Article 17”

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

### **III Findings of the Court**

- 23 The question from the national court concerns the significance of form E 101 or an equivalent official statement for the application of Article 14b(4) of Regulation 1408/71, which contains conditions for exempting a person employed on board a vessel flying the flag of a Contracting Party from the social security legislation of the flag State. The national court asks, in essence, whether the flag State is entitled to refuse an application for such exemption solely on the ground that such official documentation is absent. That question concerns the role of the flag State in the assessment of conditions established in Article 14b(4); in particular, to what extent the flag State is obliged to take into account other evidence.
- 24 The Plaintiffs submit that by requiring the production of form E 101 or of an equivalent official statement, the Defendant imposes a condition for the application of Article 14b(4) not contained in the Regulation, and which, contrary to the aim of the choice of law rules, creates a risk of simultaneous application of the legislation of more than one Contracting Party. Such an additional requirement constitutes indirect discrimination on the basis of nationality and a restriction on the right to free movement of workers that cannot be justified. They stress that Title II of Regulation 1408/71 is only concerned with the question of which social security legislation applies. Therefore, it is of no importance for the application of Article 14b(4) whether the Plaintiffs fall completely outside the Greek social security system or whether they, as they argue, merely fall outside the mandatory social security system, but as pensioners may voluntarily subscribe to the social security system in Greece.
- 25 The Defendant shares the view of the Plaintiffs that Title II of Regulation 1408/71 is confined to choice of law rules, but contests the submission of the Plaintiffs that the Defendant’s interpretation of the Regulation entails a condition not contained therein. The Defendant submits that the Regulation is based on a principle of home State control and argues that the objectives of the Regulation, to avoid both positive and negative conflict of laws, can only be ensured if it is the competent institution of the State of residence that decides whether the

conditions of Article 14b(4) are fulfilled. Furthermore, the Defendant submits that where form E 101 has been issued, the evaluation made is binding on other States and refers in that regard to Cases C-178/97 *Barry Banks and Others v Théâtre Royal de la Monnaie* [2000] ECR I-2005, at paragraph 40; and C-202/97 *Fitzwilliam Executive Search v Bestuur van het Landelijk Instituut Sociale Verzekeringen* [2000] ECR I-883, at paragraph 53. In the view of the Defendant, the same consideration applies where the State of residence does not issue form E 101. The Defendant asserts that the social security authorities and the courts in Norway are not competent to overrule the competent Greek institution in this matter.

- 26 The EFTA Surveillance Authority and the Commission are of the opinion that the flag State cannot proceed from the premise that the State of residence must issue form E 101 or another equivalent official statement, but has to evaluate private documentation if presented. In support of this conclusion, they refer, inter alia, to the aim of Regulation 1408/71 (to facilitate the free movement of workers), to the nature and aim of the choice of law rules contained in the Regulation, and to the obligations of the Contracting Parties to cooperate when implementing the Regulation.
- 27 The starting point for the Court must be that Regulation 1408/71 provides for coordination and not harmonisation of social security legislations of the Contracting Parties. In order to facilitate the free movement of workers, Title II of Regulation 1408/71 contains provisions that constitute a complete and uniform system of choice of law rules. Those rules are intended to prevent the simultaneous application of more than one national system of social security legislation to persons covered by the Regulation, and to ensure that those persons are not left without social security cover because there is no legislation applicable to them (see also Case C-196/90 *Fonds voor Arbeidsongevallen v Madeleine De Paep* [1991] ECR I-4815, at paragraph 18).
- 28 The choice of law rules of Title II of Regulation 1408/71 are binding in the sense that a Contracting Party cannot decide the extent to which its own legislation or that of another State applies. In order to facilitate their implementation, Regulation 1408/71 and Regulation 574/72 establish a system of cooperation and reconciliation between the Contracting Parties. In the Community, a central body, the Administrative Commission, deals with administrative questions and questions of interpretation. In the EEA context, the rights and duties conferred upon the Administrative Commission are assumed by the EEA Joint Committee, cf. point II under the heading “Sectoral Adaptations” in Annex VI to the EEA Agreement.
- 29 The duty of the competent institutions of a Contracting Party to issue a certificate declaring that its legislation applies to a certain individual in a given situation, is an essential feature of the system. Pursuant to Regulation 574/72, the Administrative Commission has to draft model certificates to be used by the Contracting Parties, cf. Article 2. Form E 101 constitutes such a model certificate. Its aim is to facilitate the implementation of Regulation 1408/71, and



thereby the free movement of workers (see Case C-202/07 *Fitzwilliam*, at paragraph 48).

- 30 Article 3 EEA lays down the principle of sincere cooperation between the Contracting Parties. Article 84 of Regulation 1408/71 is a specification of this principle and imposes a duty on the issuing institution to carry out a proper factual assessment and consequently to guarantee the correctness of the information contained in form E 101 (see for comparison Case C-202/07 *Fitzwilliam*, at paragraph 51; and Case C-178/97 *Barry Banks*, at paragraph 38).
- 31 It follows from the principle of sincere cooperation and the aims of the choice of law rules contained in Title II of Regulation 1408/71, that once form E 101 has been issued, it is binding on other Contracting Parties in so far as it establishes a presumption that the individual in question falls under the social security legislation of the issuing State (see Case C-202/97 *Fitzwilliams*, at paragraphs 52 to 53; and Case C-178/97 *Barry Banks*, at paragraphs 39 to 40). The same applies with respect to equivalent official statements. If the competent institution of the flag State doubts the correctness of the issued form, the competent institution of the State of residence is obliged to reconsider whether the form was properly issued and, if appropriate withdraw it (see *Fitzwilliam*, at paragraph 56; and *Barry Banks*, at paragraph 43).
- 32 In a situation, such as the one at hand, where no form E 101 has been issued, the States concerned are similarly under an obligation to ensure the correct application of the choice of law rules contained in Title II of Regulation 1408/71. That follows from the principle of sincere cooperation which is laid down in Article 3 EEA. The flag State must assess whether the conditions of Article 14b(4) of Regulation 1408/71 are fulfilled, and for that purpose evaluate other evidence presented to it, including unofficial evidence. Any other solution would impair legal certainty and thereby undermine the aims of the choice of law rules in Regulation 1408/71 and restrain the free movement of workers.
- 33 This is further supported by the wording of Article 84(3) of Regulation 1408/71, which stipulates that authorities and institutions of the Contracting Parties may, for the purpose of implementing the Regulation, communicate directly with one another and with the persons concerned or their representatives. Form E 101 or an equivalent statement is therefore not a legal precondition to the application of the rule in Article 14b(4).
- 34 If the flag State is satisfied that the evidence made available to it allows the conclusion that the conditions of Article 14b(4) are fulfilled, its legislation will not be applicable, and the flag State should notify the identified State of residence. If, in that situation, the identified State of residence does not acknowledge that its legislation applies, the competent institutions of both States are bound to seek a settlement of the issue through all practicable channels, including, if necessary, referring of the matter to the EEA Joint Committee, cf. Article 111 EEA.

- 35 In light of the above, the answer to the question referred to the Court must be that it is not compatible with the choice of law rules contained in Title II of Regulation 1408/71, that a flag State proceeds from the premises that a State of residence must have issued a form E 101 or a statement containing equivalent information, for the legislation of the State of residence to apply in accordance with Article 14b(4), and that in the absence of such documentation, the legislation of the flag State shall apply in accordance with Article 13(2)(c).

#### IV Costs

- 36 The costs incurred by the EFTA Surveillance Authority, the Commission of the European Communities, the Republic of Iceland and the Federal Republic of Germany, which have submitted observations to the Court, are not recoverable. In so far as the parties to the main proceedings are concerned, these proceedings are a step in the proceedings pending before the national court. The decision on costs is therefore a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by Gulating lagmannsrett by a reference of 28 May 2004, hereby gives the following Advisory Opinion:

**It is not compatible with the choice of law rules contained in Title II of Regulation (EEC) 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as amended and as referred to in Annex VI, point 1 to the EEA Agreement, that a flag State proceeds from the premises that a State of residence must have issued a form E 101 or a statement containing equivalent information, for the legislation of the State of residence to apply in accordance with Article 14b(4), and that in the absence of such documentation, the legislation of the flag State shall apply in accordance with Article 13(2)(c).**

Carl Baudenbacher

Per Tresselt

Thorgeir Örlygsson

Delivered in open court in Luxembourg on 14 December 2004.

Henning Harborg  
Registrar

Carl Baudenbacher  
President