**REPORT FOR THE HEARING**
in Case E-3/12

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 from Borgarting lagmannsrett ("Court of Appeal") in a case between

**the Norwegian State, represented by the Ministry of Labour,**

and

**Stig Arne Jonsson**

concerning the rules on the free movement of workers within the EEA.

## I Facts and procedure

1. Stig Arne Jonsson ("the Defendant") is a Swedish national living in Sweden. From 1983 he has frequently worked in Norway, where he also held his last job, at the Norwegian company Leonhard Nilsen & Sønner AS on Svalbard, before he became unemployed in November 2008. In this job, Mr Jonsson stayed in Norway during work periods and normally travelled back home to Sweden during off-duty periods. After becoming unemployed, he returned to his home in Sweden and has not had any actual residence in Norway since.

2. Following the termination of his employment relationship, Mr Jonsson applied for unemployment benefits in Norway in January 2009 as a wholly unemployed person.

3. On 21 January 2009, the EEA Department of the Norwegian Labour and Welfare Administration ("NAV") rejected the claim for unemployment benefits on the grounds that the Defendant did not reside in Norway and, therefore, having regard to Article 71 of Council 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 (OJ, English Special Edition 1971 (II), p. 416, "the Social Security Regulation" or the "Regulation"), failed to meet the conditions for entitlement to unemployment benefits.

4. Mr Jonsson then filed an administrative appeal against the decision. However, by a decision of 22 May 2009, the appellate body upheld the rejection of his claim. While his appeal case was being processed, he also applied for unemployment benefits in Sweden and registered with the employment service there.

5. Mr Jonsson then appealed against the decision of the appellate body to the Norwegian National Insurance Court, which, in its decision of 1 June 2010, ruled in his favour. The National Insurance Court concluded that the requirement of residence in Norway could not be applied in the case of the Defendant because, in its view, that requirement was incompatible with Article 71 of the Social Security Regulation.

6. In line with the National Insurance Court's ruling, Mr Jonsson received unemployment benefits from Norway from 1 January 2009 until 12 December 2009.

7. Following the National Insurance Court's decision, the Norwegian authorities requested further information from Mr Jonsson. It then became apparent that he had registered with the employment service in Sweden in February 2009 and applied for unemployment benefits there as well. By a decision of the Swedish Construction Workers' Unemployment Insurance Fund of 31 March 2009, Mr Jonsson was granted unemployment benefits in Sweden starting on 2 March 2009. However, the benefit amount paid in Sweden was much lower than unemployment benefits from Norway would have been on account of the fact, inter alia, that Mr Jonsson had not been a member of the relevant unemployment insurance fund.

8. The Norwegian State subsequently brought an action before the Court of Appeal challenging the National Insurance Court's ruling in which it seeks to have the ruling of the National Insurance Court set aside. Mr Jonsson is seeking an order dismissing the State's action.

9. Having heard the parties' views on the substance of the questions, Borgarting lagmannsrett decided to request the Court's opinion on the following questions:

> **When national legislation requires, inter alia, actual stay in the State in order to be entitled to unemployment benefits, is it then compatible with Council Regulation (EEC) No 1408/71 Article 71(1)(b) to require continued stay in the competent State (the State of last employment) in order to be granted such benefits from this State, also in the case of a wholly unemployed person who, during his/her last employment, has stayed there as a "non-genuine" frontier worker?**
>
> **Is it relevant to the answer to this question whether:**

1. **the unemployed person lives in a country near the competent State (the State of last employment), so that it is possible in practice for that person to appear at the employment office in that State even if he/she does not stay there?**

2. **the unemployed person, after having returned to the State of residence, registers as a job seeker with the employment service and also applies for unemployment benefits in that State?**

## II Legal background

*EEA law*

10. Paragraph 1 of Protocol 40 to the EEA Agreement on Svalbard provides:

> *When ratifying the EEA Agreement, the Kingdom of Norway shall have the right to exempt the territory of Svalbard from the application of the Agreement.*

11. The Kingdom of Norway availed itself of this right.

12. Article 1(b) of Regulation No 1408/71, which under the EEA Agreement applied in the relevant period, provides:

> *"frontier worker" means any employed or self-employed person who pursues his occupation in the territory of a Member State and resides in the territory of another Member State to which he returns as a rule daily or at least once a week; however, a frontier worker who is posted elsewhere in the territory of the same or another Member State by the undertaking to which he is normally attached, or who engages in the provision of services elsewhere in the territory of the same or another Member State, shall retain the status of frontier worker for a period not exceeding four months, even if he is prevented, during that period, from returning daily or at least once a week to the place where he resides;*

13. Article 71(1) of Regulation No 1408/71 provides:

> *1. An unemployed person who was formerly employed and who, during his last employment, was residing in the territory of a Member State other than the competent State shall receive benefits in accordance with the following provisions:*
>
> *(a) (i) a frontier worker who is partially or intermittently unemployed in the undertaking which employs him, shall receive benefits in accordance with the provisions of the legislation of the competent State as if he were residing in the territory of that State; these benefits shall be provided by the competent institution;*

*(ii) a frontier worker who is wholly unemployed shall receive benefits in accordance with the provisions of the legislation of the Member State in whose territory he resides as though he had been subject to that legislation while last employed, these benefits shall be provided by the institution of the place of residence at its own expense;*

*(b) (i) an employed person, other than a .frontier worker, who is partially, intermittently or wholly unemployed and who remains available to his employer or to the employment services in the territory of the competent State shall receive benefits in accordance with the provisions of the legislation of that State as though he were residing in its territory; these benefits shall be provided by the competent institution;*

*(ii) an employed person, other than a frontier worker, who is wholly unemployed and who makes himself available for work to the employment services in the territory of the Member State in which he resides, or who returns to that territory, shall receive benefits in accordance with the legislation of that State as if he had last been employed there; the institution of the place of residence shall provide such benefits at its own expense. However, if such an employed person has become entitled to benefits at the expense of the competent institution of the Member State to whose legislation he was last subject, he shall receive benefits under the provisions of Article 69. Receipt of benefits under the legislation of the State in which he resides shall be suspended for any period during which the unemployed person may, under the provisions of Article 69, make a claim for benefits under the legislation to which he was last subject.*

14. Regulation No 1408/71 is accompanied by an implementing regulation, that is, Council Regulation (EEC) No 574/72 fixing the procedure for implementing Regulation (EEC) No 1408/71 (OJ, English Special Edition 1972 (I), p. 159, "Regulation No 574/72").

15. Article 84 of Regulation No 574/72 reads:

*1. In the cases referred to in Article 71(1)(a)(ii) and in the first sentence of Article 71(1)(b)(ii) of the Regulation, the institution of the place of residence shall be considered to be the competent institution, for the purposes of implementing the provisions of Article 80 of the implementing Regulation.*

*2. In order to claim benefits under the provisions of Article 71(1)(b)(ii) of the Regulation, an unemployed person who was formerly employed shall submit to the institution of his place of residence, in*

*addition to the certified statement provided for in Article 80 of the implementing Regulation, a certified statement from the institution of the Member State to whose legislation he was last subject, indicating that he has no right to benefits under Article 69 of the Regulation.*

*3. For the purposes of implementing the provisions of Article 71(2) of the Regulation, the institution of the place of residence shall ask the competent institution for any information relating to the entitlements, from the latter institution, of the unemployed person who was formerly an employed person.*

16. In relation to Norway, Regulation No 1408/71 was replaced from 1 June 2012 by 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 200, p. 1), as amended by Regulation (EC) No 988/2009 (OJ 2009 L 284, p. 43), Regulation (EU) No 1244/2010 (OJ 2010 L 338, p. 35) and Regulation (EU) No 465/2012 (OJ 2012 L 149, p. 4) ("Regulation No 883/2004").

*National law*

17. It is a general condition for entitlement to benefits pursuant to the Norwegian national insurance system that the claimant is a member of the Norwegian National Insurance Scheme. Membership is granted, inter alia, to individuals who reside or work lawfully in Norway, see Sections 2-1 and 2-2 of the Norwegian National Insurance Act (Act relating to National Insurance of 28 February 1997 No 19). For employment on Svalbard, a special provision is set out in Section 2-3. As a result of that provision, during his employment on Svalbard as an employee of a Norwegian company, the Defendant was a member of the National Insurance Scheme.

18. In addition, it is a condition for entitlement to unemployment benefit that the unemployed person resides in Norway. The provision reads as follows:

*Section 4-2. Residence in Norway*

*To be entitled to unemployment benefit, the member must reside in Norway.*

*The Ministry may issue regulations pertaining to exemption from the requirement for residence in Norway.*

19. This is a general requirement of actual residence in Norway that applies to both Norwegian and foreign nationals.

20. Section 4-5 first paragraph and Section 4-8 of the National Insurance Act read as follows:

*Section 4-5. Genuine job seekers*

*To be entitled to unemployment benefits, the member must be a genuine job seeker. By genuine job seeker is meant a person who is able to work, and willing to*

*a) take any type of employment that is paid in accordance with a collective wage agreement or common practice,*

*b) take employment anywhere in Norway,*

*c) take employment regardless of whether it is full-time or part-time,*

*d) to participate in labour market schemes*.

*Section 4-8. Duty to report and appear in person*

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

*The member must report every two weeks (the reporting period). The Norwegian Labour and Welfare Administration decides how such reporting shall take place.*

*…*

21. Article 4 of the Nordic Convention on Social Security of 18 August 2003 contains a specific clause on the application of the Social Security Regulation which reads as follows:

*Article 4 Extended application of the Regulation*

*Unless it otherwise follows from this Convention, the application of the Regulation and the Implementing Regulation shall be extended to include all persons covered by this Convention who reside in a Nordic country.*

22. The Defendant was subject to Norwegian national insurance law when he worked on Svalbard and resided in another Nordic country (Sweden). Consequently, pursuant to the Nordic Convention, the provisions of the Social Security Regulation are applicable to the situation that arose in this case.

## III Written observations

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

- the Norwegian State (“the Plaintiff”), represented by Ketil Bøe Moen, Advocate, Office of the Attorney General (Civil Affairs), acting as Agent;

- the Defendant, represented Lars Edvard Landsverk, Advocate at the law firm Ness Lundin, Oslo;

- the EFTA Surveillance Authority ("ESA"), represented by Xavier Lewis, Director, and Maria Moustakali, Temporary Officer, Department of Legal and Executive Affairs, acting as Agents;

- the European Commission ("the Commission"), represented by Julie Samnadda and Viktor Kreuschitz, members of its Legal Service, acting as Agents.

## IV The question

*The Plaintiff*

24. The Plaintiff submits that there is general requirement of actual stay in Norway that applies equally to both Norwegian and foreign nationals. It simply means that unemployment benefits are only awarded for the periods in which the unemployed person is actually present in Norway.

25. The Plaintiff states that this is not a requirement to have a registered address or habitual residence in Norway. For instance, a "non-genuine" frontier worker, such as the Defendant, may be entitled to unemployment benefits from Norway to the extent that he or she remains present in Norway after becoming unemployed, despite still residing (formally and habitually) in Sweden. In these circumstances, the Plaintiff argues that it would be more appropriate to translate the term "opphold i Norge" with "stay" or "actual stay" in Norway and not with "residence", the term chosen in the Court's translation of the request for an advisory opinion.[1]

26. In the Plaintiff's view, a requirement for actual stay in the State, such as the requirement established in Section 4-2 of the National Insurance Act, is compatible with Regulation No 1408/71, and may be applied to "non-genuine" frontier workers in the circumstances set out in the questions to Court. It submits that two main lines of reasoning lead to this conclusion.

27. First, according to the Plaintiff, "non-genuine" frontier workers have the choice to apply for unemployment benefits in the competent State (in this case the State of last employment) if they are available to the employment service in that State. The Plaintiff argues that such an application is to be treated "in accordance with the provisions of the legislation of that State", see Article 71(1)(b)(i) of the Regulation.

28. The Plaintiff submits that the obligation to stay in the State is a general rule of the Norwegian legislation. Neither the Regulation nor EEA law in general prohibits such a provision. Hence, it may also be applied to "non-genuine"

[1] The Norwegian Government points out that the term in Norwegian is "opphold i Norge".

frontier workers. In its view, that conclusion applies irrespective of the distance between the competent State and the State of residence.

29. Second, if the unemployed person chooses to travel to the State of residence and apply for (and receive) unemployment benefits in that State, the Plaintiff argues that such person has made a choice to receive benefits from the State of residence, and only from this State. In the Plaintiff's view, this follows from Article 71(1)(b)(ii) of Regulation No 1408/71, and is further confirmed by the more precise provision in Article 65 of Regulation No 883/2004 which has now replaced the Social Security Regulation applicable in this case.

30. The Plaintiff argues that these two lines of reasoning lead to the same conclusion where the State concerned, in this case Norway, requires as a condition of entitlement to unemployment benefits actual stay in the State and the facts are such as those in the case at hand. It points out, however, that the first line of reasoning applies irrespective of whether the unemployed person may be regarded as "available to the employment service" in the competent State. In contrast, the second line of reasoning applies irrespective of whether the competent State has made benefits dependant on stay in the State or not.

31. As regards its first line of reasoning, the Plaintiff submits that the Defendant, as an unemployed worker other than a frontier worker, has a choice between being subject to the legislation of the competent State and that of the State of residence. The choice is made by the unemployed person as a function of whether he makes himself available to the employment services in the State of employment, on the one hand, or whether he, on the other hand, makes himself available to the employment services in his State of residence or simply returns to that State, see Article 71(1)(b)(i) and (ii) of the Regulation. In both cases, he has to comply with the relevant national provisions governing entitlement to unemployment benefits.

32. According to the Plaintiff, Article 71(1)(b)(i) of the Regulation establishes the conditions under which an unemployed worker, other than a frontier worker, shall be subject to the legislation of the competent State, in this case the State of last employment. The conditions are (i) that the unemployed person is available to the employment services in this State and (ii) that the provisions of that State's legislation are satisfied.

33. As regards the condition of compliance with the legislation of the competent State, in the view of the Plaintiff, it follows directly from the wording of the provision that benefits can only be required "in accordance with the legislation of [the competent State]". In this connection, the Plaintiff points out that, under Section 4-2 of the National Insurance Act, stay or presence in Norway is a general requirement for the payment of unemployment benefits in Norway.

34. According to the Plaintiff, under the Norwegian legislation, this requirement applies to all unemployed workers. Consequently, this requirement is clearly a part of the "legislation of [the competent State]" within the meaning

of Article 71 of the Regulation and must therefore be satisfied before the Defendant is entitled to benefits from Norway.

35. To this end, the Plaintiff emphasises that the condition of a stay or presence in Norway is not the same as a residence requirement. It stresses, furthermore, that, as Regulation No 1408/71 aims at the coordination and not harmonisation of social security legislation, a substantially more precise provision of EEA law would be necessary before the competent State could be prevented from applying its general conditions governing entitlement to unemployment benefits.

36. Moreover, according to the Plaintiff, it follows from case law that, as a general rule, a residence requirement is compatible with the Regulation.[2] Consequently, in its view, if a residence requirement is, as a general rule, compatible with Regulation No 1408/71, the requirement of presence in the State must, as a general rule, also be compatible with the Regulation. The Plaintiff concedes that Article 71(1)(b)(i) of the Regulation presupposes that a "non-genuine" frontier worker may be subject to the legislation of the competent State without residence in that state. However, as it has already argued, that provision cannot preclude national provisions other than residence requirements such as the general condition of presence in the State at issue here.

37. The Plaintiff also submits that other parts of the EEA rules on unemployment benefits underscore the view that the competent State must be able to apply a general condition of stay in the country. In the Plaintiff's view, an opposite interpretation would imply a lack of coherence within the Chapter of the Regulation on unemployment benefits.

38. According to the Plaintiff, its interpretation creates, first, a better internal coherence between the position of "genuine" and "non-genuine" frontier workers under Article 71(1) of the Regulation. It contends that genuine frontier workers who are wholly unemployed do not have any choice under the scheme established by Article 71(1)(a), that is, they are subject to the legislation of the State of residence. This remains the case even if the frontier worker only fulfils the conditions for unemployment benefits in the State of last employment, because the State of residence has other and stricter conditions, or would have received considerably higher benefits had he been subject to the legislation of the State of last employment. According to case law, only in exceptional circumstances may genuine frontier workers remain under the jurisdiction of the State of last employment, that is, where they are regarded as "atypical" or "false" genuine frontier workers.

39. In contrast, according to the Plaintiff, pursuant to Article 71(1)(b) of the Regulation, only "non-genuine" frontier workers have a general choice concerning the State whose legislation governs their claim for unemployment benefits. This choice gives this group considerable flexibility, presumably because it is difficult to decide generally which State should have jurisdiction.

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[2] Reference is made to Case C-406/04 *De Cuyper* [2006] ECR I-6947, paragraph 37.

40. The Plaintiff contends that this flexibility ensures that such unemployed persons do not risk falling outside both States' systems. The rationale for that flexibility does not imply, however, that the non-genuine frontier worker is exempted from the general conditions governing entitlement to unemployment benefits in the State in which he chooses to make a claim. Indeed, the Plaintiff continues, it would create an unsubstantiated difference between the position of genuine and non-genuine frontier workers if the latter group could choose the State whose legislation they wished to satisfy – typically choosing the State with liberal conditions and high benefits – and at the same time stay in a different State – typically a State with lower cost levels.

41. Second, the Plaintiff argues that Article 71(1)(b)(ii) of the Regulation regulates the consequences if the unemployed worker "makes himself available for work to the employment services in the territory of the Member State in which he resides, *or who returns to that territory*" (emphasis added by the Plaintiff). In its view, this provision appears to presuppose that the unemployed person is no longer subject to the legislation of the State of competence if he no longer stays there. Consequently, it would imply a lack of coherence were the competent State not entitled to apply a condition of stay in the State when that is a general condition applicable under its legislation.

42. Third, the Plaintiff contends that also Article 69 of the Regulation, on the export of unemployment benefit, appears to rest on the premise that actual stay in the State of competence constitutes the basic principle and that particular legal requirements must be satisfied in order to deviate from this principle. Article 69 regulates the situation in which an unemployed person satisfies the conditions for unemployment benefits in one State and goes to another State in search of employment. It allows the person to leave the State without losing the benefits, but only under strict conditions. For instance, the person must actively seek employment in the State to which he goes, and may export benefits in this way only once during a period of benefit entitlement and only for a maximum of three months. In the Plaintiff's view, the fact that unemployment benefit is the only kind of benefit with a provision for export, and the strict conditions for such export of rights to another State appears to suggest that normally the recipient of unemployment benefits must seek employment and be present in the competent State. Were States to be precluded from applying a general condition requiring an actual stay on the national territory, the limitations set out in Article 69 would be of limited relevance, as in those circumstances an unemployed person could in any event receive unemployment benefits without being present in the competent State.

43. In the Plaintiff's view, there is no case law that leads to the conclusion that the condition requiring the unemployed person to stay in the country is incompatible with the Regulation. In this regard, the Plaintiff contests the

relevance of the judgments in *Miethe* and *Naruschawicus*, to which the Defendant referred in the proceedings before the national court.[3]

44. As regards the issue of justification, the Plaintiff stresses that the provision on stay in Norway applies generally, without any kind of discrimination. However, were the Court to find elements of indirect discrimination, in the Plaintiff's view, this is, in any event, objectively justified due, in particular, to control considerations. Case law has established that in certain matters outside the scope of Article 71 of the Regulation a residence requirement is justified as suitable and necessary in ensuring an effective control of the conditions laid down in national legislation.[4] In the view of the Plaintiff, the same must apply to situations falling within the scope of the said provision.

45. In addition to its first line of argument, namely, that, pursuant to Article 71(1)(b)(i) of the Regulation, a person may be subject to a national condition requiring stay or presence in the State of last employment, the Plaintiff also submits that, pursuant to Article 71(1)(b)(ii), the competent State may decline an application for unemployment benefits when the non-genuine frontier worker has chosen to return to the State of residence and apply for (and receive) unemployment benefits in that State.

46. According to the Plaintiff, it follows directly from the wording of Article 71(1)(b)(ii) of the Regulation that an unemployed worker shall receive benefits from the State of residence as if the last employment had taken place there, provided that the unemployed person either "makes himself available to the employment services" in the State of residence or "returns to that territory". It argues that the latter alternative necessarily presupposes that the unemployed worker changes his actual stay or presence from the competent State to the State of residence.

47. According to the Plaintiff, the provision thus sets up two alternatives, both of which imply that the person concerned is subject to the legislation of the State of residence. In its view, the unemployed person shall be subject to the legislation of the State of residence where that person either has made himself available to the employment services in the State of residence or has returned to that State.

48. The Plaintiff submits that under those circumstances the worker cannot choose to be subject to the legislation of the competent State. Instead, he has chosen to be subject to the legislation of the State of residence. In the view of the Plaintiff, this does not preclude the possibility, however, that the unemployed worker may also seek jobs in the State of last employment by being available to the employment services in that State. It entails simply that it is the State of residence that is responsible for unemployment benefits. In this connection, the Plaintiff notes that, in determining whether the conditions for benefits are

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[3] Reference is made to Case 1/85 *Miethe* [1986] ECR 1837, paragraphs 6 and 11, and Case C-308/94 *Naruschawicus* [1996] ECR I-207, paragraphs 3, 4, and 26.

[4] Reference is made to *De Cuyper*, cited above, paragraphs 45 to 47.

satisfied and in calculating benefits, the State of residence is obliged to include periods of employment in the other State.

49. The Plaintiff submits that its interpretation results in a clear and practical solution. Conversely, if, after having returned to his State of residence, an unemployed person could still elect to be subject to the legislation of the State of last employment, difficult cross-border cases would immediately arise.

50. The Norwegian Government proposes that the first question be answered as follows:

> *When national legislation requires actual stay in the state as a general condition to be entitled to unemployment benefits, it is compatible with Article 71(1)(b) of Council Regulation (EEC) No 1408/71 for the competent state (the state of last employment) to apply this condition also to a wholly unemployed worker that is not a frontier worker (a "non-genuine" frontier worker). The conclusion is the same irrespective of the distance between the competent state and the state of residence.*
>
> *The competent state is also entitled to refuse unemployment benefits for a "non-genuine" frontier worker who has registered as a job seeker also with the employment service in the state of residence and applied for unemployment benefits in that state as well.*

*The Defendant*

51. The Defendant contends that, for Article 71 of the Social Security Regulation to apply, it suffices that he "resided" in Sweden while he was working on Svalbard. In his assessment, the parties agree that this condition is met. Furthermore, the Defendant points out that for the whole period he was working in Norway his family remained in Sweden. Although he has worked in Norway for several years, he has returned home whenever this has been practically possible. His place of residence in Sweden has been his base and the centre for his interests.

52. According to the Defendant, it is also common ground that he does not come within the scope of the term "frontier worker". Consequently, as a "non-genuine" frontier worker, he is subject to the provisions of Article 71(1)(b) of the Regulation, which, in subparagraphs (i) and (ii), sets out two different rules for persons who are wholly unemployed, not frontier workers and who, during their last employment, resided in a Member State other than the competent State.

53. The Defendant submits that the question of whether he is entitled to unemployment benefit from the NAV must be decided on the basis of Article 71(1)(b)(i) of the Regulation, which exhaustively regulates when an unemployed worker is entitled to benefits from the competent State. In his view, what is decisive under that provision is whether the worker remains available to the employer or the employment service. As long as this is the case, so the Defendant argues, where to submit a claim for unemployment benefit remains a

matter of choice for the worker. It is only when the unemployed person ceases to "remain available" that the alternative rule in Article 71(1)(b)(ii) applies to the exclusion of the rule in Article 71(1)(b)(i).

54. In response to the argument of the Norwegian State that an unemployed person who returns to his State of residence is entitled to unemployment benefit from that State alone, which, in his view, is mainly based on a purely linguistic understanding of Article 71(1)(b)(ii) of the Regulation, the Defendant submits that such an interpretation would considerably narrow the scope of the rule in Article 71(1)(b)(i), as it would entail that the rule only applies as long as the unemployed person physically stays in the competent State.

55. Since the unemployed person has his residence in another State, in the Defendant's view, it would be normal in this situation to return to the State of residence. Consequently, so he argues, this must be understood as an assumption which underpins the structure of the provision. If, however, a return to the State of residence entails not only that the rule in Article 71(1)(b)(ii) of the Regulation applies but, at the same time, excludes the application of the alternative rule in Article 71(1)(b)(i), the latter provision has, in fact, very limited application. In the Defendant's view, the relationship between the two alternatives does not support an interpretation of that kind.

56. Based on the above arguments, the Defendant submits that, when viewed in isolation, the wording of Article 71(1)(b) of the Regulation supports the interpretation that an unemployed person has a choice as regards the State where he is entitled to claim unemployment benefit.

57. The Defendant contends that general purposive and consequential considerations suggest that the assessment for benefit entitlement has to be based on Article 71(1)(b)(i) of the Regulation. In this regard, the Defendant refers to the background to the Social Security Regulation and the specific principles on which the rules are based, and the fact that the opposite solution would be contrary to the consistency and coherence of the set of rules. In his view, the rationale underlying the assessment whether an unemployed person should be treated as a non-genuine frontier worker is the presumption that such a person has the greatest chance of finding new employment in the competent State. Therefore, it would hardly be expedient and would come into conflict with the considerations underlying these rules, if the unemployed person was obliged to make himself available to the employment services in his State of residence.

58. The Defendant contends that his situation is a very good illustration of this point. He has had considerable work assignments in Norway since the 1980s, and it has been appropriate for him to seek employment there. Were he now to be required to apply for unemployment benefit in Sweden, his opportunities for finding new employment would be drastically reduced.

59. The Defendant rejects the submission of the Norwegian State to the effect that the rules of Regulation No 883/2004 (the new Social Security Regulation) warrant an interpretation of Regulation No 1408/71 which differs from what the Defendant has submitted above. In his view, there is, in effect, no difference as to the legal rule prescribed by the two texts. Alternatively, should the Court find that the two texts differ, the Defendant submits that this constitutes a change in the law that cannot have any bearing on the interpretation of Article 71 of Regulation No 1408/71 for the purposes of this case.

60. In the Defendant's view, in the same way as is provided for in Article 71 of Regulation No 1408/71, Article 65 of Regulation No 883/2004 also sets out two different rules for unemployed persons who, during their last employment, resided in a Member State other than the competent State, without falling under the definition of a frontier worker. The system established in Article 65(2) of Regulation No 883/2004 is thus the same as that set out in Article 71(1)(b) of Regulation No 1408/71. However, in his view, there are also differences. Article 71(1)(b) of Regulation No 1408/71 regulates from which Member State the non-genuine frontier worker shall receive unemployment benefit, while the rules in Article 65(2) of Regulation No 883/2004 regulate where the unemployed person shall make himself available to the employment services. In practice, the Defendant continues, the difference is not so great, since Article 65 of Regulation No 883/2004 thereby also regulates which State is to pay unemployment benefits. Such benefits shall be paid by the Member State in which the unemployed person makes himself available to the employment services.

61. According to the Defendant, it is in relation to the act which distinguishes the first and second subparagraphs of Article 65(2) of Regulation No 883/2004 that a difference might be inferred in comparison to the scheme established by Article 71(1)(b) of Regulation No 1408/71. In his view, the wording of Article 65(2) of Regulation No 883/2004 could be understood to mean that it is decisive whether or not the unemployed person returns to his State of residence. This would entail that, as a result of returning to his home, the unemployed person must make himself available to the employment services in his State of residence. For the unemployed person, this interpretation would mean that the element of choice is whether he returns to his State of residence or remains in the State of employment. Through making this choice, the person in question would decide also from which State he is to receive unemployment benefit.

62. However, the Defendant rejects such an interpretation. In his view, the social security administrations of the Member States will not know whether the unemployed person has chosen to return before reporting to the employment service. Consequently, the decisive factor is not whether the unemployed person has returned, but whether he makes himself available to the employment services in the State of employment or the State of residence. Based on this understanding

of Article 65 of Regulation No 883/2004, there is no real difference between that provision and Article 71 of Regulation No 1408/71.[5]

63. According to the Defendant, the question to be determined in the main proceedings is whether, for the purposes of Article 71(1)(b)(i) of the Regulation, the Defendant remains available to the NAV when he resides/stays in Sweden. In his view, Article 71(1)(b)(i) does not specify what is required to remain available to the employment services in the territory of the competent State. He contends, however, that the wording of the provision offers some guidance. The Defendant has made himself available to NAV and, on that basis, pursuant to the provision in question, he shall receive unemployment benefit "as though he were residing" in Norway.

64. In the Defendant's view, it follows from this phrase that, pursuant to the rules, it is acceptable for the unemployed person to reside in a State other than the competent State. As a consequence, this must be understood to mean that, in order to remain available to the employment services in the competent State, one does not have to reside in that State. In the Defendant's view, the wording indicates that it is also not necessary to stay in the competent State. Where, pursuant to Article 71(1)(b)(i) of the Regulation, it is acceptable for an unemployed person to reside in a State other than the competent State, this implies, at the same time, that that is where he habitually stays when not working, see Article 1(h) of the Regulation. In this case, it must also be acceptable that he actually stays there without this infringing the requirement to remain available to the employer or the employment services of the competent State.[6]

65. The Defendant submits that this interpretation does not conflict with purposive or consequential considerations. He argues that the purpose of the Regulation is mainly to limit the scope of national social security rules insofar as they are in conflict with the free movement of workers. Thus, national rules requiring an unemployed person to stay permanently in the competent State would, in effect, prevent the cross-border element on which the right to freedom of movement for workers is based. In his view, it follows from case law that an unemployed person must subject himself to the national authorities' control measures only in so far as this does not require a change of residence.

66. The Defendant rejects the view of the Norwegian State that this interpretation conflicts with general control considerations. He contends that the employment services in the competent State will have adequate and real possibilities of exercising control in relation to the unemployed person even if he lives in another State. It is quite possible, for example, to submit the employment status registration card electronically. Moreover, in light of the actual control

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[5] Reference is made to R. Cornelissen (2007), "The new EU coordination system for workers who become unemployed", *European Journal of Social Security*, Vol. 9, p. 187, at p. 214.

[6] In support of this argument, reference is made to *Naruschawicus*, cited above, paragraphs 25 to 27.

procedures used in Norway, this consideration must be assumed to be of limited significance.

67. In the view of the Defendant, a residence requirement such as that established in Section 4-2 of the National Insurance Act is precluded by Article 71 of the Social Security Regulation.[7] Instead, what can be required is that he registers with NAV and complies with NAV's control procedures. None the less, it is clear that the competent State's control requirement cannot extend so far as to require the unemployed person to change his place of residence. Consequently, it may be concluded that the Defendant is permitted to reside and stay in Sweden. In order to achieve this, the Defendant asserts, the requirements of the National Insurance Act must be interpreted in line with the Social Security Regulation, see Section 1-3 of the National Insurance Act and the Regulation concerning incorporation of the Social Security Regulation into the EEA Agreement, pursuant to which the rules of the Social Security Regulation take precedence over the National Insurance Act.

68. As for the relevance of the fact that the unemployed person lives in a country near the competent State, so that it is possible in practice for that person to appear at the employment office in that State, even if he or she does not reside there, the Defendant cannot see that the interpretation of Article 71 of the Regulation should, in principle, be influenced by where the unemployed person lives.

69. According to the Defendant, it is conceivable that the opportunity to find work in the competent State may be greater for unemployed persons living in Member States near to the competent State than for unemployed persons living in Member States far away. This may influence the outcome in specific cases. However, these are considerations that relate to the application of Article 71 of the Regulation to a specific case and cannot influence how Article 71 should be understood in general.

70. In relation to the possible significance of the fact that the unemployed person, after having returned to the State of residence, registers as a job seeker with the employment service and also applies for unemployment benefits in that State, the Defendant submits that the fact that an unemployed person submits a claim for unemployment benefit in his State of residence after having had his application rejected by the employment services in the competent State cannot have any bearing on the interpretation of Article 71 of the Regulation.

71. The Defendant argues that the reason for his application was the fact that he needed support for subsistence as he had not received unemployment benefit from Norway and that this clearly cannot have a bearing on the assessment whether he should have received benefits from Norway.

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[7] Reference is made to *Naruschawicus*, cited above.

72. In conclusion, the Defendant submits that the Court should give the following answer to the question submitted:

> *1. In relation to non-genuine frontier workers, it is incompatible with Article 71(1)(b) of Council Regulation (EEC) No 1408/71 to impose a national requirement for actual stay in the competent State in order to be entitled to unemployment benefit.*
>
> *2. Whether the unemployed person lives close enough to the employment services of the competent State to be able to attend in person when required has no bearing on the interpretation of Article 71(1)(b).*
>
> *3. Whether a person has been granted unemployment benefit from the State of residence has no bearing on the interpretation of Article 71(1)(b) provided that he first applied for unemployment benefit in the competent State.*

*The EFTA Surveillance Authority*

73. According to ESA, it is undisputed in the main proceedings that Mr Jonsson was a "non-genuine" frontier worker, who after the termination of his employment relationship became wholly unemployed. Therefore, his case falls within the scope of Article 71(1)(b) of the Regulation and is to be decided either in accordance with subparagraph (i) or (ii) of that provision, depending on his choice as an unemployed person.

74. ESA argues that the choice the wholly unemployed person is entitled to and needs to make under Article 71(1)(b) of the Regulation is either to remain available to his employer or to the employment services in the territory of the competent State, and thus fall under subparagraph (i), or make himself available for work to the employment services in the territory of the EEA State where he resides, or return to this territory, and thus fall under the scope of subparagraph (ii).

75. In this regard, ESA submits that it has long been recognised that the rationale behind the rules of Article 71(1)(b) of the Regulation is to ensure that a migrant worker receives unemployment benefits in the conditions most favourable to the search for new employment.[8] Their objective is to offer a choice to the worker, who is in the best position to know what the possibilities of finding new employment are. Recitals 24 and 25 in the preamble to Regulation No 1408/71 point to the importance of securing mobility of labour under improved conditions and of facilitating the search for employment in the various

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[8] Reference is made to Case 39/76 *Mouthaan* [1976] ECR 1901, paragraph 13; Case 227/81 *Aubin* [1982] ECR 1991, paragraph 12; *Miethe*, cited above, paragraph 16; Case 236/87 *Bergemann* [1988] ECR 5125, paragraph 18; Case C-454/93 *Van Gestel* [1995] ECR I-1707, paragraph 20; and Case C-444/98 *De Laat* [2001] ECR I-2229, paragraph 32.

EEA States by granting to the unemployed worker the benefits provided for by the legislation of the EEA State to which he was last subject.

76. ESA argues that the benefit is not merely pecuniary but includes the assistance in finding new employment which the employment services provide for workers who have made themselves available to them.[9] However, the worker may not aggregate the unemployment benefits from both States or, if he has made himself available only to the employment office in the territory of the EEA State where he resides, claim unemployment benefits from the State in which he was last employed.[10]

77. In ESA's view, the referring court in essence asks whether the EEA State of last employment, that is Norway in the present case, may require continued stay in its territory from the wholly unemployed person in order to consider that the person is making himself available to the employment services of that State.

78. In ESA's view, it follows from the wording of Article 71(1)(b)(i) of the Regulation and case law that residence cannot constitute a condition in order to satisfy the criterion of making oneself "available". According to established case law, the State of residence refers to the EEA State in which the person concerned habitually resides and where the habitual centre of their interests is to be found.[11]

79. According to ESA, the professional and personal situation of a wholly unemployed person has frequently been held to be a relevant factor in assessing where he has his residence in order to determine whether the person may fall under the exception of Article 71(1)(b)(ii) of the Regulation and not the general rule of Article 67 of the Regulation. However, this search for connecting factors indicating the EEA State of residence never compromises the choice that the wholly unemployed person has under Article 71(1)(b) of the Regulation and which is indisputable once it is established that the wholly unemployed person was previously a non-genuine frontier worker.[12]

80. ESA rejects the view of the Norwegian State to the effect that a person who returns to his State of residence and who no longer resides in the State of last employment (the competent State) has chosen, for the purposes of Article 71(1)(b) of the Regulation, to be subject to the rules in his State of residence. In this regard, ESA submits that the phrase "who returns to that territory" has been held merely to imply that the concept of residence does not necessarily exclude

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[9] Reference is made to *Miethe*, cited above, paragraph 16.

[10] Reference is made to *Aubin*, cited above, paragraph 19, and *Van Gestel*, cited above, paragraph 23.

[11] Reference is made to *Naruschawicus*, paragraphs 24 and 27.

[12] Reference is made to Case C-102/91 *Knoch* [1992] ECR I-4341, paragraph 14, Case C-90/97 *Swaddling* [1999] ECR I-1075, paragraph 30, and Case 76/76 *Di Paolo* [1977] ECR 315, paragraph 21. In addition, reference is made also to *Van Gestel*, paragraph 23; *Bergemann*, paragraph 21; *Miethe*, paragraph 18; *Naruschawicus*, paragraph 28; and *Aubin*, paragraph 19, all cited above.

non-habitual residence in another Member State. Consequently, in its view, the Norwegian Government can derive no comfort from that phrase.

81. As for the requirement of physical presence/continued stay in the State of last employment in order to make oneself available and the compatibility of that requirement with Article 71(1)(b) of Regulation No 1408/71, ESA submits that such a requirement actually constitutes an even more onerous requirement than the requirement of residence which has been found incompatible with EEA rules by the Court of Justice of the European Union ("the ECJ").

82. ESA submits that, if continued stay were required, the choice of the wholly unemployed person set out in Article 71(1)(b) of the Regulation would be seriously compromised and rendered nugatory from a practical point of view.

83. First, so ESA contends, it would be restrictive, discriminatory and disproportionate to require a person seeking to make use of the possibilities available in the internal EEA labour market either to move his residence to the EEA State of employment or to remain in the territory of that State after the termination of his employment relationship in order to be entitled to receive unemployment benefits from the latter State.

84. Second, ESA stresses that a requirement of continued stay would not take into account the personal situation and the actual intentions of the wholly unemployed person. In certain cases, leaving the territory of the State of last employment might indicate the interruption of any link to that State and a choice to become re-established in another State. In other cases, however, a wholly unemployed person might leave the territory of the State of last employment for several reasons (for example the cost of living there might be extremely high for an unemployed person or the unemployed person might have personal links in another State) in order to return once he finds employment.

85. Third, ESA asserts that the requirement of continuous physical presence in the territory of the State of last employment constitutes a restrictive condition as it does not reflect the rationale of Article 71(1)(b)(i) of the Regulation. In its view, the phrase "remain available to his employer or to the employment services in the territory of the competent State" does not aim to exclude all possibility for a wholly unemployed person to seek job opportunities in other EEA States during the period that he receives benefits from the State of last employment, taking advantage of the possibilities offered by the internal labour market.

86. Although the requirement for a continuous physical presence in the territory of the State of last employment is precluded by Article 71(1)(b)(i) of the Regulation, ESA submits that the requirement to report periodically to the competent authorities in that State may in principle be compatible with that provision, depending on the circumstances of the case. However, the reporting requirement should not render it unduly difficult in practice or practically impossible for a claimant to seek employment opportunities in any other EEA

State. Indeed, Section 4-8 of the Norwegian National Insurance Act requires the claimant to report in principle every two weeks. Such a requirement falls short, ESA submits, of a requirement for continuous physical presence in Norway.

87. Finally, ESA submits that the control considerations relevant in Case C-406/04 *De Cuyper* cannot be of any assistance to Norway's arguments in the present case as that case concerned a different category of migrant workers, who do not fall under Article 71 of Regulation No 1408/71.

88. In ESA's view, the non-genuine frontier worker who becomes unemployed cannot be deprived, therefore, of his choice pursuant to Article 71(1)(b) of the Regulation. He will decide which country offers the most favourable financial or non-financial conditions for him for the period he remains unemployed with a view to finding new employment. Furthermore, given that the choice is a benefit accorded to the wholly unemployed person, the fact that he qualifies for one of the options under Article 71(1)(b) does not disqualify him from pursuing another.

89. As has already been stated, ESA's view is that a requirement for residence or continued stay in Norway as a condition for receipt of unemployment benefits is incompatible with Article 71(1)(b) of the Regulation and, consequently, any other requirement imposed by national law which amounts to and is more onerous than a residence requirement must also be incompatible with that provision.

90. In ESA's view, it is, in principle, possible, pursuant to Article 71(1)(b)(i) of the Regulation, for an EEA State to lay down a requirement to report periodically to the competent authorities in the State of last employment. That reporting obligation should not, however, in the circumstances of a given case, amount to an obligation equivalent to a requirement of permanent residence or stay. In particular, the reporting requirement should not render it practically impossible or unduly difficult for the claimant to seek employment opportunities in any other EEA State, whether close or distant.

91. Thus, in ESA's view, it is generally irrelevant whether the claimant lives in an EEA State that is close or distant to the State of last employment. Nevertheless, there may be circumstances that arise in a particular case which indicate that is practically impossible for the claimant to reside in the EEA State of his choice and to comply with the reporting requirements in Norway. In such circumstances, ESA argues that it is for the national court to determine whether the Defendant complied with or has the practical possibility to comply with the other conditions set by the Norwegian legislation in order to determine whether he is entitled to receive the benefit.

92. ESA submits that in the assessment of a new claim for benefits in Norway it would be inappropriate to hold it against Mr Jonsson that he was granted unemployment benefits in Sweden after he had been initially refused such

benefits in Norway. In ESA's view, Mr Jonsson clearly claimed benefits in Sweden because he had been denied them in Norway and was in need of means of subsistence.

93. In this regard, ESA observes that Article 71(1)(b)(ii) of the Regulation provides for the suspension of the benefits a wholly unemployed person receives from the State of residence when he has become entitled to benefits at the expense of the competent institution of the Member State to whose legislation he was last subject. Therefore, that provision makes clear that it is not the benefits from the State of last employment that must be suspended and, moreover, that those benefits take priority over the benefits received from the State of residence.

94. In ESA's view, it is also clear from that provision that a person is entitled to unemployment benefits in the State of last employment even where he has received unemployment benefits under the legislation of the State of residence. This is also in line with the principle that it is the State of last employment that is the competent State for unemployed workers and Article 71 of the Regulation introduces a derogation from this principle only in so far as the unemployed worker claims unemployment benefits in the State of residence pursuant to Article 71(1)(a)(ii) or Article 71(1)(b)(ii) of Regulation No 1408/71.

95. ESA submits further that account must be taken of the fact that an unemployed person might have limited knowledge of social security law while at the same time being in need of means of subsistence. It reiterates, however, that an unemployed person may not aggregate the unemployment benefits of two different States, that is, Norway and Sweden in the present case.

96. ESA submits that the question should be answered as follows:

1. *It is incompatible with Article 71(1)(b) of Council 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 to require continued stay or residence in the competent State (the State of last employment) in order to grant the unemployment benefit in the case of a wholly unemployed person who, during his last employment, has stayed there as a "non-genuine" frontier worker;*

2. *(i) The EEA State of last employment (the competent State) is not precluded by Article 71(1)(b)(i) of Regulation (EEC) No 1408/71 from requiring the unemployed person to report periodically to the competent authorities there so that the claimant is available to the employment services in that State provided that those reporting requirements do not render it practically impossible or unduly difficult to seek employment opportunities in another EEA State. It is for the referring court to assess, in the light of all of the circumstances of the case, whether the complainant can in practice*

*comply with the reporting requirements laid down by the EEA State of last employment.*

*(ii) A wholly unemployed person, other than a frontier worker, who registers as a job seeker with the employment service and applies for unemployment benefits in the State of residence, remains entitled to claim unemployment benefits pursuant to Article 71(1)(b)(i) of Regulation (EEC) No 1408/71 in the State of last employment (the competent EEA State) after registering with the employment service there. The receipt of benefits under the legislation of the State of residence is suspended for any period during which the unemployed person receives unemployment benefits from the competent EEA State.*

*The European Commission*

97. In the Commission's view, it is uncontested that Mr Jonsson fell within the scope of Article 71 of Regulation No 1408/71. Having returned less frequently than once per week to his country of residence, Mr Jonsson was an employed person, other than a frontier worker, within the meaning of Article 71(1)(b) of the Regulation.

98. As regards the application of Article 71(1)(b) of the Regulation, the Commission submits that, according to case law, the decisive element in applying Article 71 of the Regulation, as a whole, is the residence of the person concerned in a Member State other than the State to whose legislation he was subject during his last employment.[13] In the Commission's view, the concept of "the Member State in which he resides" within the meaning of Article 71 must be limited to the State where the worker, although employed in another Member State, continues to habitually reside and where the habitual centre of his interests is also situated.[14]

99. The Commission submits that Article 71 of Regulation No 1408/71 seeks to ensure that the migrant worker receives unemployment benefits under the most favourable conditions for seeking new employment.[15] It argues that an employed person other than a frontier worker who, during his last employment, resided in a Member State other than the competent State has, in the event of becoming unemployed, a choice under Article 71(1)(b) of the Regulation between the State of residence and the State of last employment as regards the payment of benefits.

100. In the Commission's view, this category of migrant workers was given the choice to request unemployment benefits in the State of last activity given the

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[13] Reference is made to *Di Paolo*, cited above, paragraph 11.

[14] Ibid., paragraph 12. Reference is also made to *Knoch*, cited above, paragraphs 21 to 23.

[15] Reference is made to *Mouthaan*, paragraph 13; *Aubin*, paragraph 12; *Miethe*, paragraphs 15 to 19; and *De Laat*, paragraphs 32 and 36, all cited above.

possibility that their links to that State are stronger such as to give them a better chance of finding new employment in that State and to allow them the opportunity as job-seekers of having regular face to face contact with the competent institution.

101. Thus, according to the Commission, Article 71(1)(b) of the Regulation allows wholly unemployed persons who resided outside the competent Member State during their last employment and who were not frontier workers either to claim unemployment benefits in the competent Member State as though they were residing in its territory, or to claim unemployment benefits in the State of residence as if they had last been employed there.

102. According to the Commission, this choice is exercised by the wholly unemployed person who makes himself available to the employment services of the country where the benefits are claimed. The provision in question requires the competent State to create a legal fiction of residence and to provide unemployment benefits to such person in accordance with its legislation as if he resided on its territory. If, on the other hand, the person claims benefits in the State of residence, the latter is required to create a legal fiction of previous employment and provide unemployment benefits in accordance with its legislation as though the person had last been employed there.

103. The Commission rejects the submission of the Norwegian State to the effect that it is compatible with Article 71 of the Regulation to require residence in the competent State for wholly unemployed persons who worked in Norway, but who were resident in another Member State, and, moreover, that a person who returned to the State of residence and who no longer resides in the competent State has thus chosen, for the purposes of Article 71(1)(b) of the Regulation, to be subject to the rules in his State of residence.

104. In contrast, the Commission submits that the phrase "who returns to that territory" merely implies that the concept of residence does not necessarily exclude non-habitual residence in another Member State.[16] Moreover, it contends that Article 71(1)(b) of the Regulation neither requires a continuous stay in the competent State nor it does imply that a person has resided or must reside there in order to claim unemployment benefits, since such an interpretation would contradict the purpose and the wording of the Article.

105. In the Commission's view, it follows clearly from the very existence of Article 71(1)(b) of the Regulation, as interpreted by the ECJ, that the law coordinating social security systems is based on the premise that it is possible to be available to the employment services in the territory of a Member State, and, by extension, to satisfy the obligations laid down in the legislation of that Member State, without being resident in that Member State. Consequently, in so far as it remains possible to be available to the employment services in the

[16] Reference is made to *Di Paolo*, cited above, paragraph 21.

competent Member State and to satisfy the obligations laid down in the legislation of that Member State, the latter cannot refuse to grant unemployment benefits in accordance with Article 71(1)(b) of the Regulation to the entitled person on account of his lack of residence in its territory.[17]

106. The Commission also rejects the submission of the Norwegian Government to the effect that Regulation No 883/2004 has introduced changes with regard to the purpose and interpretation of this provision.

107. The Commission contests the conclusions drawn by the Norwegian Government from *De Cuyper*[18] to the effect that considerations of control serve to underline that an unemployed person should not be able to claim benefits in his former State of employment without actually residing there.

108. The Commission argues that *De Cuyper* concerned a different category of migrant workers who did not fall within the scope of Article 71 of the Regulation. The Commission points out that, in paragraph 38 of the judgment, the ECJ emphasises that the Regulation provides for two situations in which the competent Member State is required to allow recipients of an unemployment allowance to reside in the territory of another Member State while retaining their benefit entitlement. Article 71 of the Regulation relating to unemployed persons who, during their last employment, were residing in the territory of a Member State other than the competent State is explicitly mentioned as one of the two situations.

109. Therefore, in the Commission's view, the judgment cannot be interpreted, as the Norwegian Government suggests, as establishing that an unemployed person falling within the scope of Article 71(1)(b) of the Regulation should not be able to claim benefits in his former State of employment without actually residing there. On the contrary, according to the Commission, it follows clearly from *Naruschawicus* that for persons falling within the scope of Article 71(1)(b) of the Regulation the grant of unemployment benefits cannot be subject to a residence condition.

110. Moreover, the Commission adds that having regard to the aim pursued by the fundamental freedoms established under Union law and EEA law it is neither justified nor proportionate to require a person falling within the scope of Article 71(1)(b) of the Regulation to remain continuously present in the territory of that Member State. This would go beyond what is necessary to ensure compliance with obligations on job-seekers and would effectively prevent the person concerned from returning, on a regular basis, to his State of residence. In its view, the Norwegian State has not provided any justification for requiring the continuous presence of Mr Jonsson in Norway in order to comply with the

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[17] Reference is made to *Naruschawicus*, cited above, paragraphs 24 to 27, in particular paragraph 26.

[18] Reference is made to *De Cuyper*, cited above, paragraphs 45 to 47.

obligations on job-seekers and the monitoring measures which are in place there.

111. As regards the question of the national court whether it has any relevance if the unemployed person lives in a country near the competent State, so that is possible in practice for that person to appear at the employment office in that State even if he/she does not stay there, the Commission submits that neither the place of residence nor the actual distance between the States concerned should be relevant for the unemployed person's entitlement, as long as the person complies with the statutory conditions for the grant of unemployment benefits in the competent State.

112. As to the question of the national court whether it is relevant in answering the first question if the person registered as a job seeker and applied for unemployment benefits in the State of residence after returning there, the Commission maintains its view that the fact that a person has applied for benefits in his State of residence has no impact on the interpretation of Article 71(1)(b) of the Regulation.

113. The Commission stresses the fact that Mr Jonsson only applied for and was granted unemployment benefits in the State of residence after his claim for unemployment benefits was refused in Norway on the grounds that he was not resident there.

114. Contrary to the arguments of the Norwegian State, the Commission submits that it cannot be assumed that, in requesting unemployment benefits in his State of residence following the refusal in the competent State, Mr Jonsson exercised his choice under Article 71(1)(b) of the Regulation, since this step was necessary in order to obtain some means of subsistence. Therefore, this request cannot be considered an application under Article 71(1)(b) of the Regulation.

115. Moreover, according to the Commission, Mr Jonsson was entitled to claim unemployment benefits in Norway when he made himself available to the employment services there. This entitlement which is provided for in Union law and applicable in the EEA is not invalidated in circumstances where the application for benefits was rejected unlawfully by the competent Member State. In the Commission's view, where a worker makes a claim for benefits in the State of residence following a rejection of his claim for benefits in the competent Member State on the basis of a residence condition contrary to EEA law, it would clearly contradict the *effet utile* of the social security coordination rules to prohibit that worker from exercising his entitlement under Article 71(1)(b) of the Regulation.

116. Furthermore, the Commission rejects the argument of the Norwegian State to the effect that a wholly unemployed person, other than frontier worker, who registers with the employment services in his State of residence can no longer claim benefits under the legislation of the competent State. In this

regard, the Commission submits, first, that no other provision of the Regulation lays down conditions limiting the application of Article 71(1)(b)(i) of the Regulation. Second, it submits that such an interpretation would conflict with the aim pursued by that provision, which is to optimise a worker's chances of resuming employment. In the Commission's view, that aim would not be attained if the person concerned were deprived of their entitlement to benefits under the legislation of one State as a result of having opted initially for benefits in another.

117. On the other hand, the Commission points out that a worker can neither aggregate the amounts of unemployment benefits from the two States, nor, if he is available solely to the employment services in the territory of the State of residence, claim unemployment benefits from the State of last employment.[19] In this regard, the Commission submits that entitlement to unemployment benefits presumes that the unemployed person is available to the employment office where he is registered.[20]

118. Pursuant to Article 71(1)(b)(ii) of the Regulation, where a wholly unemployed person receives benefits in accordance with the legislation of the State of residence and has become entitled to benefits at the expense of the competent institution of the Member State to whose legislation he was last subject, the receipt of benefits under the legislation of the State of residence shall be suspended. In the Commission's view, this provision confirms that a person may remain entitled to unemployment benefits in the competent State even where he has received unemployment benefits under the legislation of the State of residence. The provision of unemployment benefits by the competent State takes priority, as the receipt of benefits under the legislation of the State of residence is suspended. This is also in line with the principle that the competent State for unemployed workers is the State of last employment and Article 71 of Regulation No 1408/71 introduces a derogation from this principle only in so far as the unemployed worker claims unemployment benefits in the State of residence.

119. With regard to the argument of the Norwegian State that the legislation of only one State shall apply to a certain type of benefit, the Commission underlines the fact that it is not at all unknown to the Union's social security coordination rules that a person becomes entitled to a certain type of benefit under the legislation of different States. However, the coordination rules prevent these benefits overlapping. The application of Article 71(1)(b) of the Regulation does not lead to the aggregation of unemployment benefits from two States, as the payment of the benefits in the State of residence shall be suspended for any period during which the unemployed person receives unemployment benefits

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19 Reference is made to *Aubin*, cited above, paragraph 19.

20 Case 20/75 *d'Amico* [1975] ECR 891, paragraph 4.

from the competent State, in order to prevent the overlapping of the two entitlements.

120. The Commission submits that the question should be answered as follows:

> *Article 71(1)(b) 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 precludes a competent Member State (the State of last employment) within the meaning of that provision from applying in its national law a requirement of residence or continued stay in the competent Member State in order to grant unemployment benefits to a wholly unemployed person other than a frontier worker.*
>
> *It is not relevant to the entitlement to claim unemployment benefits pursuant to Article 71(1)(b)(i) of Regulation (EEC) No 1408/71 in the competent Member State (the State of last employment) that the unemployed person lives in a country near the competent State, so that it is possible in practice for that person to appear at the employment office in that State even if he/she does not stay there.*
>
> *A wholly unemployed person, other than a frontier worker, who registers as a job seeker with the employment service and applies for unemployment benefits in the State of residence, remains entitled to claim unemployment benefits pursuant to Article 71(1)(b)(i) of Regulation (EEC) No 1408/71 in the competent Member State (the State of last employment) after registering with the employment services there. The receipt of benefits under the legislation of the State of residence is suspended for any period during which the unemployed person receives unemployment benefits from the competent Member State.*

Páll Hreinsson
Judge-Rapporteur