Trygderetten

The Registry
EFTA Court
1, rue du Fort Thüngen
L-1499 Luxembourg
Luxembourg

REQUEST FOR AN ADVISORY OPINION IN APPEAL CASE NO 21/1525

Parties

Appellant: A

Counsel: Advokat Olav Lægreid
Advokatfirmaet Advisio AS
P.O. Box 6755 St. Olavs plass
0130 Oslo

Respondent: Labour and Welfare Directorate (*Arbeids- og velferdsdirektoratet*)
Legal Section (*Rettsseksjonen*)
P.O. Box 354
8601 Mo i Rana

Counsel: Advokat Ida Thue
Office of the Attorney General (Civil Affairs) (*Regjeringsadvokaten*)
P.O. Box 8012 Dep.
0030 Oslo

Introduction

1) The National Insurance Court (*Trygderetten*) hereby requests an Advisory Opinion from the EFTA Court in Appeal Case No 21/1525, *A* v *Arbeids- og velferdsdirektoratet*, see Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (SCA).

2) The case concerns a claim for invalidity benefits. A has periods of insurance from Ireland in addition to Norway, but is not entitled to benefits in Ireland. The

Norwegian Labour and Welfare Administration (NAV) has calculated the invalidity benefit according to the partial pension principle (*pro rata*) in Article 52(1)(b) of Regulation (EC) No 883/2004. The question is whether A is entitled to be paid the difference between the *pro rata* benefit and the minimum annual benefit in the second paragraph of Section 12-13 of the Norwegian National Insurance Act (*folketrygdloven*). The answer to that question depends in particular on whether the minimum benefit in the second paragraph of Section 12-13 of the National Insurance Act constitutes a minimum benefit within the meaning of Article 58 of Regulation (EC) No 883/2004.

Background

3) A is a Norwegian national, born in 1966 and resident in Norway. In May 2018 he submitted a claim for invalidity benefits to NAV. It followed from the medical certificate accompanying the claim for invalidity benefits that he suffered from a serious long-term mental illness. In point 4 of the claim form, A checked the box indicating that he had resided in Ireland from May 2006 until February 2014. The claim for invalidity benefits was granted by decision of 25 January 2019, with a degree of invalidity of 80 per cent. The onset of invalidity – that is to say, the time when the earning capacity was permanently reduced by at least half – was set to April 2014.

4) According to information provided by Irish social security authorities, A has not been a member of the Irish national insurance scheme since December 2012. He thus did not fulfil the principal requirement under the first paragraph of Section 12-2 of five years' prior membership before the onset of invalidity, see the aggregation principle in Article 6 of Regulation (EC) No 883/2004. However, the NAV Employment and Benefits Office (*NAV Arbeid og ytelser*) found that the exception in the third paragraph of Section 12-2 of the National Insurance Act applied, since A was a member of the national insurance scheme at the time of the onset of invalidity and had acquired entitlement to at least half of the full minimum invalidity benefit. The invalidity benefit was calculated according to the rules in the National Insurance Act, since that gave the highest benefit, see Article 52(3) of Regulation (EC) No 883/2004.

5) A lodged an appeal against that decision, arguing that the degree of invalidity should be set to 100 per cent. It was correct that he ran a small computer service business, but A argued that it was almost as a hobby and that his ability to work was highly unpredictable. The income from the business varied and had declined in recent years. Nevertheless, in an appeal decision of 15 November 2019, NAV Appeals (*NAV Klageinstans*) upheld the original decision.

6) That decision was appealed to the National Insurance Court on 25 November 2019. Before the National Insurance Court, A has maintained that the degree of invalidity should be set to 100 per cent. He has also argued – and this is the reason why the National Insurance Court has found it necessary to make a reference to the EFTA Court – that he is entitled to be paid a guarantee supplement/additional benefit pursuant to Article 58 of Regulation (EC) No 883/2004, since the total of A's *pro*

rata benefits is lower than the minimum benefit under the second paragraph of Section 12-13 of the National Insurance Act.

7) A also applied for invalidity benefits in Ireland. By decision of 21 August 2019, his claim was however rejected by the Irish social security authorities. The rejection stated inter alia: "Your application has been disallowed as you do not satisfy the conditions for receipt of Invalidity Pension. Having examined all of the documents provided in support of your claim it has been decided that you are not permanently incapable of work. According to information supplied, you are currently self-employed as Computer Engineer". A thus receives only a *pro rata* benefit from Norway.

8) By decision of 10 August 2020, NAV Appeals referred the part of the case relating to prior membership back to the NAV Employment and Benefits Office for a reassessment.

9) On 19 August 2020, the NAV Employment and Benefits Office adopted a new decision in which the calculation of the invalidity benefit was amended so that A received a higher invalidity benefit. In the decision it was held that the appellant satisfied the condition for the exception in letter b of the second paragraph of Section 12-2 of the National Insurance Act (instead of the exception in the third paragraph, which had been held previously). The condition was satisfied through aggregation of Norwegian and Irish periods of insurance.

10) Since A satisfied the condition in letter b of the second paragraph of Section 12-2 of the National Insurance Act through aggregation of periods of insurance, the Norwegian invalidity benefit was calculated on a *pro rata* basis pursuant to Article 52(1)(b) of Regulation (EC) No 883/2004 and the Norwegian Regulation on calculation of invalidity benefits under the EEA Agreement (*forskrift 12. februar 2015 nr. 130 om beregning av uføretrygd etter EØS-avtalen*).

11) This was done, first, by calculating a theoretical amount equal to the benefit to which A would have been entitled had all periods of insurance been completed in Norway. Next, an actual amount was determined for the *pro rata* benefit based on the theoretical amount, on the basis of the ratio between the completed periods of insurance in Norway before the incident (the onset of invalidity) and the combined completed periods of insurance in Norway and Ireland before the incident.

12) Since A had low income in the last five calendar years preceding the onset of invalidity, the theoretical amount was calculated on the basis of the minimum benefit in the second paragraph of Section 12-13 of the National Insurance Act. Furthermore, A's total periods of insurance in Norway and Ireland, including future periods of insurance, were set to a maximum of 40 years. As stated above, the degree of invalidity was 80 per cent. Based on the basic amount, [which is the base amount for which Norwegian social security calculates benefits (*grunnbeløpet*)], as of 1 May 2022 – which is NOK 111 477 – this gave the following calculation:

Theoretical amount: [NOK] 111 477 x 2.48 x 40/40 x 80% = [NOK] 221 170

13) The actual amount was calculated as follows, based on 283 months of periods of insurance in Norway before the onset of invalidity and 59 months in Ireland:

Actual amount: [NOK] 221 170 x 283/342 = [NOK] 183 015 ([NOK] 15 251 per month).

14) By comparison, the current minimum annual benefit for single persons is 2.48 x [NOK] 111 477 = [NOK] 276 463 based on 40 years of periods of insurance. When adjusted for 80 per cent degree of invalidity, this gives [NOK] 221 170. Thus, what A claims in this case is to have the annual invalidity benefit adjusted from [NOK] 183 015 to [NOK] 221 170. The legal basis relied on for the claim is Article 58 of Regulation (EC) No 883/2004.

National law

15) Chapter 12 of the National Insurance Act is entitled Invalidity benefits (*Uføretrygd*). The chapter is placed in Part IV of the National Insurance Act: Benefits in the event of illness, etc. (*Ytelser ved sykdom m.m.*).

16) Section 12-1 of the National Insurance Act provides that "[t]he purpose of invalidity benefits is to ensure income for persons who have had their earning capacity permanently reduced due to illness, injury or defect".

17) Section 12-1 a. of the National Insurance Act was added on 25 November 2022 and reads:

> "**Section 12-1 a.** ***The relationship to provisions on international coordination of social security systems***
>
> Invalidity benefits are a benefit in the event of invalidity under the social security regulation. Provisions in this chapter shall be disapplied to the extent necessary in respect of relevant provisions in the Main Part of the EEA Agreement, the social security regulation, the implementing regulation and bi- and multilateral social security agreements, see Sections 1-3 a and 1-3 b.
>
> The Ministry may, by regulation, issue provisions supplementing or facilitating compliance with provisions on benefits in the event of invalidity in the social security regulation and the implementing regulation."

18) Section 12-2 of the National Insurance Act reads:

> "**Section 12-2.** ***Prior membership***
>
> It is a condition for entitlement to invalidity benefits that the person concerned has been a member in the national insurance scheme for the five years preceding the onset of invalidity, see Section 12-8. In the assessment of whether the condition is fulfilled, no account shall be taken of periods spent serving with international organisations or bodies of which the Norwegian State is a member, to which it makes financial contributions or to which it is responsible for contributing to staffing.

> The condition of five years of prior membership in the first paragraph shall not apply to a person who has been a member in the insurance scheme for at least one year immediately before he or she submits a claim for invalidity benefits, if
>
> a. the person concerned became disabled before turning 26 years of age and at that time was a member in the national insurance scheme, or
> b. the person concerned, after turning 16 years, has been a member in the national insurance scheme except for a maximum of five years.
>
> The condition in the first paragraph shall not apply if the person concerned was a member in the national insurance scheme at the time of the onset of invalidity and the invalidity benefit in the event of a 100 per cent degree of invalidity:
>
> a. calculated on the basis under the first paragraph of Section 12-11 will at least correspond to half of the high rate under the third sentence of the second paragraph of Section 12-13, or
> b. calculated on the basis of periods of insurance will at least correspond to half of the minimum benefit under the second paragraph of Section 12-13.
>
> Future periods of insurance shall not be included, see the fifth paragraph of Section 12-12."

19) As stated above, A is considered to fall within the exception in letter b of the second paragraph of Section 12-2, through aggregation with Irish periods of insurance. He has not been without a membership in the national insurance scheme – by which is meant the Norwegian *and* Irish social security schemes – for more than five years.

20) The first paragraph of Section 12-3 of the National Insurance Act further provides that a condition for entitlement to invalidity benefits is that the person concerned is still a member in the national insurance scheme. Under Section 2-1 of the National Insurance Act, persons who are *resident* in Norway are compulsorily members in the national insurance scheme (domicile principle). Section 2-2 of the National Insurance Act further provides that a person who is not a member in the national insurance scheme under Section 2-1 (that is to say, as a resident) is nevertheless a compulsorily member in the national insurance scheme if the person concerned is a worker in Norway. The first paragraph of Section 12-3 of the National Insurance Act does not prevent invalidity benefits from being exported to other EEA States, see Article 7 of Regulation (EC) No 883/2004. An exception applies for the so-called youth invalidity supplement, see the third paragraph of Section 12-13 of the National Insurance Act, which is regarded as a non-exportable hybrid benefit under Article 70 of the regulation.

21) Under Section 12-4 of the National Insurance Act, it is a condition for entitlement to invalidity benefits that the person be between 18 and 67 years of age. Invalidity

benefits are intended to compensate for lost or reduced earning capacity and is accordingly only relevant for persons of working age. Once the member turns 67 years of age, the old-age pension becomes the relevant benefit.

22) Section 12-8 of the National Insurance Act defines the onset of invalidity as the time at which the earning capacity was permanently reduced by at least half. As stated above, in the present case the onset of invalidity was set to April 2014.

23) Sections 12-9 and 12-10 of the National Insurance Act contain detailed rules on the determination of the degree of invalidity. According to Section 12-9, an income before and after invalidity shall be determined. The income before invalidity is set to the person's normal annual income from full-time employment before the onset of invalidity, but shall be no lower than 3.5 times the basic amount for single persons, see the first and second paragraphs of Section 12-9. The income after invalidity is set to the income the member is presumed to be able to earn by utilising his or her remaining earning capacity, see the third paragraph of Section 12-9. In cases where the member actually has maintained a level of income after invalidity, that income will, in practice, be used as a basis. When the income before and after invalidity are set pursuant to Section 12-9, the degree of invalidity follows directly from a comparison between the two levels of income. The invalidity is graded in steps of five percentage points. NAV has a statutory obligation always to assess whether the degree of invalidity is to be set lower than 100 per cent, see the last sentence of the first paragraph of Section 12-10. In the case before the National Insurance Court, A had limited employment activity before the onset of invalidity and the income before invalidity was accordingly set to the minimum level of 3.5 times the basic amount, see letter b of the second paragraph of Section 12-9. Based on inter alia income information from the Norwegian Tax Administration (*Skatteetaten*), NAV set A's earning capacity after invalidity at NOK 60 000. On that basis, the degree of invalidity was set to 80 per cent.

24) The first paragraph of Section 12-11 of the National Insurance Act lays down the main rule for the calculation of the invalidity benefit:

> "**Section 12-11.** ***Basis for calculation of invalidity benefits***
>
> Invalidity benefits shall be calculated on the basis of pension-generating income, see Section 3-15, during the five last calendar years preceding the onset of invalidity, see Section 12-8. The average income during the three best income years shall be used as a basis."

Prior to the invalidity reform in 2015, the invalidity *pension* – now invalidity *benefits* – was calculated in accordance with the system for the old-age pension, with the basic pension and additional pension, along with possible specific supplements. All years with income higher than the basic amount (up to a maximum of 40 years) were relevant for the calculation of the additional pension. The amendments as from 1 January 2015 entailed a shift towards developing an "income replacement model", see Narvland (ed.), the National Insurance Act with annotations (*Folketrygdloven med kommentarer*) (3rd edition, Oslo 2019), page 608. In the preparatory works, the Ministry stated that it was "more correct, as a matter of principle, that the invalidity benefit aims to substitute the employment

income that has been lost, rather than reflect an assumed overall lifetime income as per the model of the old-age pension", see Prop. 130 L (2010-2011) page 87.

25) Section 12-12 of the National Insurance Act contains provisions on periods of insurance and reads:

> "**Section 12-12.** ***Periods of insurance***
>
> Periods of insurance are a factor used in the calculation of invalidity benefits, see the fourth paragraph of Section 12-13.
>
> The period of insurance is the period of time from 1 January 1967 in which a person has been a member in the national insurance scheme with entitlement to benefits under Chapters 12, 16, 17, 19 and 20. The period of insurance shall be calculated from the time the person turns 16 years of age up to and including the year in which he or she turns 66 years of age. The time before 1 January 1967 shall also be counted as a period of insurance if the person concerned would then have fulfilled the conditions for insurance coverage as referred to in the first sentence.
>
> A period of insurance shall also include a future period of insurance from the onset of invalidity (see Section 12-8) up to and including the year in which the person concerned turns 66 years of age. If less than 4/5 of the time between when the person turns 16 years of age and the onset of invalidity (acquisition period) can count as a period of insurance, the future period of insurance shall amount to 40 years, with a deduction of 4/5 of the acquisition period.
>
> When the condition on prior membership is fulfilled under the second paragraph of Section 12-2, a future period of insurance shall be counted at the earliest from the time when the person concerned was last a member in the national insurance scheme. The time up to that point in time shall be counted as an acquisition period.
>
> A future period of insurance shall not be included in the calculation when an invalidity benefit is granted under the third paragraph of Section 12-2.
>
> If the period of insurance is set under the second sentence of the third paragraph, it shall be set again when a new onset of invalidity is set with a higher degree of invalidity under the second paragraph of Section 12-8.
>
> When the total period of insurance amounts to at least five years, it shall be rounded off to the nearest full year."

26) The period of insurance for the purposes of the National Insurance Act is defined in the second paragraph of Section 12-12 as the period of time as from 1 January 1967 in which a person has been a member in the national insurance scheme with entitlement to benefits under Chapters 12, 16, 17, 19 and 20.

27) As stated above, under Sections 2-1 and 2-2 of the National Insurance Act, it is possible to be a member in the national insurance scheme either on the basis of being resident in Norway or being a worker in Norway. Thus, under Norwegian law, a period of insurance can be acquired on the basis of a period of residence or periods of employment or a combination of the two. Both those who are members on the basis of being resident in Norway and those who are members on the basis of working in Norway will satisfy the condition in the second paragraph of Section 12-12 on entitlement to benefits under Chapters 12, 16, 17, 19 and 20. In A's case, it is clear that the period of insurance falls under those chapters.

28) Invalidity benefits are thus adjusted for periods of insurance, see the fourth paragraph of Section 12-13. The full period of insurance is 40 years. If only actual periods of insurance until the onset of invalidity were to be included, the invalidity benefit could become very low. Therefore, as a rule, future periods of insurance from the onset of invalidity up to and including the year in which the person concerned turns 66 years of age are also included in the calculation, so that the total period of insurance becomes the sum of actual and future periods of insurance. The future period of insurance is limited for a person who has not been a member in the national insurance scheme for a fifth or more of what is referred to as the acquisition period, that is to say, the time from when the person turned 16 years of age and up to the onset of invalidity, see the second sentence of the third paragraph of Section 12-12.

29) In the fourth paragraph of Section 12-12 it is assumed that when the condition on prior membership is fulfilled under the exception in the second paragraph of Section 12-2, future periods of insurance are included in the calculation. The fifth paragraph of Section 12-12 provides that when invalidity benefits are granted under the third paragraph of Section 12-2, future periods of insurance are *not* included in the calculation. The same rule follows from the third paragraph of Section 12-2 in fine. This explains why the result was more favourable for A when NAV applied the exception in the second paragraph of Section 12-2.

30) Section 12-13 of the National Insurance Act, particularly the second paragraph, is the key provision in the present case. The entire provision reads:

> "**Section 12-13.** ***Amount of invalidity benefits***
>
> Invalidity benefits shall be paid at a rate of 66 per cent of the basis under Section 12-11.
>
> The minimum annual benefit is 2.28 times the basic amount (ordinary rate) for persons who reside together with a spouse (see Section 1-5) or with a cohabitant in a cohabitation arrangement that has existed for at least 12 of the last 18 months. The minimum annual benefit is nevertheless 2.33 times the basic amount if the person concerned receives an invalidity benefit which is a recalculated invalidity pension. For others, the minimum annual benefit is 2.48 times the basic amount (high rate).
>
> For a member who became disabled prior to turning 26 years of age due to serious and permanent illness, injury or defect which is clearly documented,

> the minimum benefits as referred to in the second paragraph are 2.66 and 2.91 times the basic amount, respectively. This applies even though a member has been more than 50 per cent occupationally active after turning 26 years of age, if it is clearly documented that the conditions in the first sentence were fulfilled before the person turned 26 years of age and the claim is submitted before the person turns 36 years of age. The provision in the first sentence also applies when invalidity benefits are granted again after the benefit is lost due to income-testing under Section 12-14. The minimum benefit under the present paragraph shall be paid at the earliest from and including the month in which the member turns 20 years of age.
>
> When the period of insurance under Section 12-12 is under 40 years, the invalidity benefit shall be reduced accordingly.
>
> If the degree of invalidity under Section 12-10 is lower than 100 per cent, the invalidity benefit shall be fixed as a proportionate share of the amount under the first to fourth paragraphs."

31) The second paragraph lays down rules on the minimum annual benefit. The Court reproduces here a passage from the general motives set out in the preparatory works, see Prop. 130 L (2010-2011) page 96:

> "The benefits in the national insurance scheme shall both ensure everyone a minimum income (basic insurance) and ensure that one can maintain the accustomed standard of living (standard insurance). The basic insurance is provided through the minimum benefits/minimum pension."

In the specific motives set out in the preparatory works it is emphasised that the minimum benefit shall ensure a higher invalidity benefit for persons who have a low basis of calculation under Section 12-11, see Prop. 130 L (2010-2011) page 206.

32) As stated above, A had a modest income in the five calendar years preceding the onset of invalidity and the theoretical amount was therefore calculated on the basis of the minimum benefits under the second paragraph of Section 12-13. For A the high rate, that is to say, 2.48 times the basic amount, is applied.

33) Another key provision is the fourth paragraph of Section 12-13, which provides that when the period of insurance under Section 12-12 is less than 40 years, the invalidity benefit is reduced accordingly. This means that the income-based invalidity benefit in the first paragraph of Section 12-13 and the minimum benefits in the second paragraph of Section 12-13 are not fixed amounts, but are paid in different amounts depending on how many years of insurance period the person concerned has. The Court reproduces here a passage from the general motives set out in the preparatory works, see Prop. 130 L (2010-2011) page 105:

> "Just as today, it could be perceived as unreasonable if someone who has little connection to Norway were to receive an equally high invalidity benefit as someone who has resided in Norway their whole life. Persons who have resided outside Norway may also have acquired entitlement to invalidity benefits abroad (…) Reductions in invalidity benefits for persons who have

little connection to Norway could therefore contribute to the legitimacy of the invalidity scheme."

34) From the time when the EEA Agreement entered into force for Norway on 1 January 1994 and until 2013, Norway granted a guarantee supplement under the regulation, on the basis of a guarantee level corresponding to the minimum pension as though all acquisition periods in the EEA were acquisition periods in Norway, see point 2 of the Declaration from Norway concerning Article 5 of Regulation (EEC) No 1408/71, published in the EEA Supplement to the Official Journal of the European Union, dated 15 May 2003. The supplement thus ensured a benefit corresponding to the minimum annual benefit in the event of invalidity, calculated as though the total period of insurance in all EEA States was acquired in Norway, see the reply of the Minister of Labour and Social Affairs of 2 March 2020 to a written question of 26 February 2020 from Member of Parliament Lerbrekk. In Chapter 3.8 of NAV's Circular R45-00 the following is stated about the change of practice in 2013 and the relationship between the minimum benefits in the second paragraph of Section 12-13 (and minimum old-age pension level in Section 19-8) and Article 58 of Regulation (EC) No 883/2004:

"**3.8 Guarantee supplement when the total pension is lower than the minimum pension in the country where the pensioner is residing**

The provision is found in Article 58 of Regulation 883/2004. It shall no longer be applied by Norway.

NAV has previously applied that provision in such a way that a guarantee supplement to pension from the national insurance scheme was paid to persons residing in Norway and having pension from Norway and another EEA State. The guarantee consisted in ensuring a total benefit corresponding to a minimum pension from the national insurance scheme or minimum pension level for old-age pension when turning 67 years of age, calculated according to a total period of insurance in EEA States which paid a pension. The guarantee supplement to flexible old-age pension was paid at the earliest once the person drew a full old-age pension upon turning 67 years of age. A deduction was made from the minimum pension level when the person turned 67 years of age if the person concerned had drawn an old-age pension before turning 67 years of age.

The Ministry of Labour and Social Affairs examined the question of whether Norway shall once again pay a guarantee supplement, and concluded that Norway shall not pay such a supplement. Accordingly, a guarantee supplement shall no longer be paid by Norway. The decisions on guarantee supplement are regarded as being invalid decisions under letter (c) of the first paragraph of Section 35 of the Public Administration Act (*forvaltningsloven*), and all guarantee supplements currently being paid shall lapse by 1 September 2014.

In a letter of 25 June 2013 to the Labour and Welfare Directorate, the Ministry wrote inter alia the following:

> ‘Following a re-examination of the matter, it seems clear that Norway has at no time been under any obligation to pay the guarantee supplements in question. Although the previous Norwegian interpretation of the relevant provisions in the regulation entails that the guarantee supplements functions as a logical supplement to the other pension rules in the EEA, our interpretation of the provisions has nevertheless not been correct. The schemes referred to in the provisions of the regulation are schemes under which there is payment of a supplement to benefits fixed under the usual rules on periods of insurance and income-based pensions when those benefits do not reach a determined minimum level. The National Insurance Act contains no such rules. Supplementary benefits for elderly persons with brief periods of residence may in and of themselves be considered to be such a scheme, but that benefit scheme has its own place in the EEA system.
>
> The previous interpretation of the articles on guarantee supplement meant that the guarantee level was set to a minimum pension, calculated according to the rules for the theoretical amount for the EEA calculation of pensions. Case law from the European Court of Justice (“ECJ”) shows, however, that the provisions on guarantee supplement do not concern such a scheme. This is particularly clear from the judgment in Case C-22/81.’”

35) Both the National Insurance Court and the Court of Appeal (*lagmannsretten*) have previously upheld the change of practice. In its judgment in LH-2016-120882 delivered on 27 March 2017, Hålogaland Court of Appeal (*Hålogaland lagmannsrett*) stated, referring to the ECJ’s judgments in Cases 64/77 *Torri* and 22/81 *Browning*:

> “Thus the prerequisite for granting a guarantee supplement is that national legislation provides for payment of a guaranteed minimum amount in those cases where a general pension calculation does not result in a benefit that makes a reasonable standard of living possible. The objective seems to correspond to the Norwegian scheme providing for social security benefits.
>
> The Court of Appeal agrees with the State on the point that the National Insurance Act does not provide a legal basis for a guaranteed minimum amount irrespective of acquisition period (…) That Norway, in the 2003 declaration in relation to Article 5 of Regulation 1408/71, stated that those provisions represent a minimum benefit as referred to in Article 50, is probably based on the administration’s misinterpretation of that article and shall be of no significance with regard to what in reality may be inferred from the provisions of the National Insurance Act.”

The Court of Appeal’s judgment was appealed to the Supreme Court of Norway (*Høyesterett*), but leave to appeal was not granted, see HR-2017-1539-U.

36) Regulation No 130 of 12 February 2015 on calculation of invalidity benefits under the EEA Agreement contains detailed provisions on the calculation of invalidity benefits from the national insurance scheme under Article 52(1)(b) of Regulation

(EC) No 883/2004. Section 2 of that regulation contains rules on the determination of the basis for the calculation of invalidity benefits and, in particular, how the basis is to be determined in cases where the person has had employment income both in Norway and in another EEA State in the five years preceding the onset of invalidity. Sections 3, 4 and 5 of that regulation read:

> "**Section 3.** ***Minimum annual benefit***
>
> Invalidity benefits shall be paid at a rate of 66 per cent of the basis under Section 2. The minimum annual benefit follows from Section 12-13 of the National Insurance Act.
>
> The invalidity benefit shall be reduced under Section 4 and Section 5.
>
> **Section 4.** ***Theoretical amount***
>
> The theoretical amount for the invalidity benefit in the event of full invalidity shall be equal to 66 per cent of the basis for the invalidity benefit, see Section 2, multiplied by a fraction where the theoretical period of insurance is the numerator and 40 is the denominator.
>
> If the person concerned is entitled to a minimum annual benefit under the second and third paragraphs of Section 12-13 of the National Insurance Act, the theoretical amount for the invalidity benefit in the event of full invalidity shall be equal to the minimum annual benefit, multiplied by a fraction where the theoretical period of insurance is the numerator and 40 is the denominator.
>
> Theoretical period of insurance refers to the period of insurance determined under Section 12-12 of the National Insurance Act, but nevertheless in such a way that insured periods in other EEA States are equated with periods of insurance under the second paragraph of Section 12-12 of the National Insurance Act.
>
> **Section 5.** ***Actual amount***
>
> The actual amount of the invalidity benefit is determined by the theoretical amount under Section 4 being multiplied by a fraction in which periods of insurance in Norway prior to the onset of invalidity determined in the number of months are the numerator, and the total of the periods of insurance in Norway and insured periods in other EEA States prior to the onset of invalidity determined in the number of months are the denominator.
>
> The period of insurance is limited to periods of time that can count as periods of insurance under the second paragraph of Section 12-12 of the National Insurance Act. The period of insurance may not amount to more than 480 months as numerator or denominator.
>
> If the degree of invalidity is lower than 100 per cent, the invalidity benefit shall be fixed as a proportionate share of the amount under the first paragraph."

37) Chapter 23 of the National Insurance Act provides that the financing of the national insurance scheme is to be based primarily on three sources: 1) contributions by the members in the national insurance scheme in the form of social security contributions which is levied on the basis of wages, self-employment income and pensions, 2) employers' contributions paid by employers on the basis of paid benefits subject to withholding tax, and 3) contributions from the State. There is no direct connection between revenue and expenditure in the national insurance scheme. The difference between revenue and expenditure in the national insurance scheme is covered through the determination of the annual State contribution to the national insurance scheme, see Narvland (ed.), *the National Insurance Act with annotations* (*Folketrygdloven med kommentarer*) (3rd edition, Oslo 2019), page 1180.

38) The provisions in the Main Part of the EEA Agreement apply as Norwegian law and, in the event of conflict, prevail over the provisions of the National Insurance Act, see Sections 1 and 2 of the EEA Act (*EØS-loven*) and Section 1-3 of the National Insurance Act. Following the legislative amendment that entered into force on 25 November 2022, Regulation (EC) No 883/2004 and Regulation (EC) No 987/2009 also now apply as Norwegian primary law and take precedence over the provisions of the National Insurance Act, see Section 1-3 a of the National Insurance Act. Those regulations were previously implemented at the level of domestic secondary regulations, but they still took precedence over the provisions of the National Insurance Act, so that the legislative amendment is not intended to entail any substantive change to the previously-existing situation.

The reason for the request

39) The fact that invalidity benefits are calculated on the basis of periods of insurance, see above, means that it is type B legislation under the Regulation (EC) No 883/2004 system, see Article 44(1). The detailed provisions in Chapter 5 of the regulation on pensions therefore apply accordingly for invalidity benefits, see Article 46.

40) Article 58 is the continuation of Article 50 of Regulation (EEC) No 1408/71. Article 50 had a somewhat different wording, but the National Insurance Court proceeds on the assumption that the substantive content of Article 58 is the same as the previous Article 50. Article 58 reads:

Article 58

Award of a supplement

> 1. A recipient of benefits to whom this chapter applies may not, in the Member State of residence and under whose legislation a benefit is payable to him, be provided with a benefit which is less than the minimum benefit fixed by that legislation for a period of insurance or residence equal to all the periods taken into account for the payment in accordance with this Chapter.

> 2. The competent institution of that Member State shall pay him throughout the period of his residence in its territory a supplement equal to the difference between the total of the benefits due under this Chapter and the amount of the minimum benefit.

41) There are three key judgments from the ECJ concerning the interpretation of the former Article 50. All of those cases concerned old-age pension.

42) Case 64-77 *Torri* concerned an Italian national resident in Belgium who had worked for 19 years in Italy and 25 years in Belgium when he applied for old-age pension in Belgium. The pension from Belgium was calculated on the basis of a 25-year acquisition period. The Belgian legislation contained no provisions on any such minimum benefit as referred to in Article 50. It provided that the pension was to be calculated on the basis of the worker's period of employment and the gross remuneration he had earned during that period. Torri submitted that in cases where there is no minimum benefit of a fixed amount in Belgian legislation, the minimum benefit under Article 50 must be equal to the theoretical Belgian pension amount calculated in accordance with the previous Article 46(2) of the regulation, that is to say, the pension amount that he would have been entitled to, if all periods of insurance had been completed in Belgium (paragraph 4). He accordingly claimed to be paid the difference between the total benefits from Belgium and Italy and the amount he would have received if he had had his entire acquisition period in Belgium. The ECJ held that Article 50 did not provide a basis for a guarantee supplement in a case such as that one and stated in paragraph 13 that Article 50 is applicable only in cases in which provision is made for a minimum pension in the legislation of the Member State in whose territory the worker resides.

43) Case 22/81 *Browning* concerned an Irish national resident in the United Kingdom who was paid an old-age pension from both Ireland and the United Kingdom. The UK authorities had initially granted him a guarantee supplement under Article 50 corresponding to the difference between the total benefits from Ireland and the United Kingdom, and the theoretical amount to which he would have been entitled had all periods of insurance been completed in the United Kingdom. The decision to grant a guarantee supplement under Article 50 was however reversed, which is what gave rise to the dispute. The UK legislation made no reference to the concept of minimum pension. A description of the UK rules on old-age pension is given on page 3373 of the Advocate General's Opinion. The question from the UK Court was whether the basic amount for the old-age pension, with the conditions laid down in the legislation, constituted a minimum benefit within the meaning of Article 50 and, if so, what a UK minimum benefit comprised. The ECJ answered the first question in the negative and stated inter alia the following in paragraph 13:

> "(…) what is meant is a minimum resulting from a specific guarantee laid down under national legislation and not the minimum benefits which may result from the normal operation of the rules concerning the determination of rights to retirement pension on the basis of the insurance periods which have been completed and the contributions which have been paid."

As a result of the answer to the UK Court's first question, it was not necessary for the ECJ to answer the second question about what a UK minimum benefit might comprise.

44) Case C-189/16 *Zaniewicz-Dybeck* concerned a Polish national resident in Sweden. After having worked in Poland for 19 years, she had resided in Sweden for 24 years and worked for 23 of these years. The dispute concerned the calculation of her old-age pension in Sweden. In paragraph 9 of the judgment it is stated that the Swedish retirement pension is made up of three components: graduated pension, supplementary pension and guaranteed pension. Whilst the first two are based on the income of the person concerned, "the guaranteed pension, the purpose of which is to provide basic protection for persons with little or no income, is a tax-funded residence-based benefit", see paragraph 11. Although the questions from the national court focused more on the specific calculation, the ECJ considered whether the guaranteed pension was a minimum benefit within the meaning of Article 50. In paragraphs 44-46 the following was stated on that point:

> "In the present case, it should be noted that, at the hearing, the Swedish Government itself recognised that the purpose of the guaranteed pension is to provide those in receipt of such a pension with a reasonable standard of living by guaranteeing them a minimum income in excess of the amount they would receive if they drew only an income-based retirement pension, where that amount is too small or even nil. The guaranteed pension therefore constitutes the basic form of cover under the Swedish state retirement pension system.
>
> In that regard, the Court held, in paragraph 15 of the judgment of 17 December 1981, Browning (22/81, EU:C:1981:316), that there is a 'minimum benefit' within the meaning of Article 50 of Regulation No 1408/71 where the legislation of the Member State of residence includes a specific guarantee the object of which is to ensure for recipients of social security benefits a minimum income which is in excess of the amount of benefit which they may claim solely on the basis of their periods of insurance and their contributions.
>
> It is therefore clear that, in view of its purpose, as described in paragraph 44 above, the guaranteed pension at issue in the main proceedings constitutes a minimum benefit that falls within Article 50 of Regulation No 1408/71."

The National Insurance Court has noted in particular that the fact that the Swedish guarantee pension, like the minimum annual benefit provided for in the second paragraph of Section 12-13 of the National Insurance Act, was reduced where the period of insurance was less than 40 years, see paragraph 23 of the judgment, does not seem to have prevented it from being regarded as a minimum benefit within the meaning of Article 50.

45) In the abovementioned judgment from the Court of Appeal, LH-2016-120882, it is stated that "[i]t is clear from paragraphs 10-15 in that judgment [Browning] that Article 50 only provides a basis for a guarantee supplement where national legislation contains *an expressly guaranteed minimum amount to be paid* in those cases where calculation of benefits on the basis of acquisition period and income

does not make a reasonable standard of living possible in the country of residence" (emphasis added).

46) The Court is uncertain as to whether that viewpoint may be upheld in the light of Case C-189/16 *Zaniewicz-Dybeck*. The question may also be asked whether the Court of Appeal is basing itself on a correct interpretation of Case 22/81 *Browning*. As observed by the Advocate General in his Opinion, entitlement to the basic amount of the UK old-age pension was conditional on and varied according to the yearly average contribution. If that average did not exceed a minimum threshold, there was no right to an old-age pension at all. The UK Court had inter alia referred questions on whether the minimum benefit in Article 50 was simply the lowest amount that could be paid through application of the ordinary rules. Both the Advocate General and the ECJ expressly rejected such an interpretation, see paragraph 13 of the judgment, reproduced above. In his Opinion, the Advocate General further wrote on pages 3377-3378:

> "The fact that a minimum benefit is one fixed by the national legislation 'for a period of insurance or residence' seems clearly to recognize that the minimum may be made dependent on the completion of a qualifying period and that the amount may vary for different qualifying periods.
>
> (…)
>
> If an amount is fixed in respect of a period of insurance without it being necessary to satisfy other conditions than the completion of the period of insurance, then it is a minimum benefit within the meaning of the article. The 'limited object' of Article 50 is to enable the person, who cannot satisfy the qualifying factors to achieve a higher pension under the preceding articles of the regulation, to obtain in the country in which he resides the minimum fixed in respect of all the periods of insurance referred to. The minimum benefit may not necessarily be expressed in the legislation as a specific sum of money. It may be a sum which is capable of calculation by reference to a formula. It must, however, not be conditional other than in the way which I have indicated."

The National Insurance Court is uncertain as to the implications of those statements for the present case, and whether the ECJ had a different view than the Advocate General.

47) Another question is whether the fact that the calculation of the minimum annual benefit under the second paragraph of Section 12-13 of the National Insurance Act – in a case such as the present one – seems to coincide with the manner in which the theoretical amount is calculated under Article 52(1)(b) of Regulation (EC) No 883/2004 precludes it from constituting a minimum benefit within the meaning of the regulation.

48) The Norwegian legislation contains provisions on a minimum annual benefit in the event of invalidity in the second paragraph of Section 12-13 of the National Insurance Act, expressed in specific amounts, depending on the person's civil status. The question in the case is what significance it has that the benefit is proportionally reduced in the event of a period of insurance shorter than 40 years.

The period of insurance is in reality the only variable factor that affects the amount of the benefit. Does the provision providing for a reduction mean that the benefit is not a minimum benefit as referred to in Article 58? The matter is of great importance beyond just the present case. The relevant case law from the ECJ – as reproduced above – does not explicitly address the crux of the present case. In the light of the foregoing, the Court finds it necessary to request an Advisory Opinion from the EFTA Court before delivering an order in the case, see Article 34 SCA.

The parties' submissions

49) **The appellant**, A, has submitted:

50) The principal question in the case is whether the "minimum annual benefit" under the second paragraph of Section 12-13 of the National Insurance Act ("minimum annual benefit") constitutes a "minimum benefit" under Article 58(1) of the regulation. A is familiar with the ECJ's judgments in 64/77 *Torri*, 22/81 *Browning* and C-189/16 *Zaniewicz-Dybeck*.

51) If there is a "minimum benefit" under Article 58(1), it does not matter where in the EEA the period of insurance is completed. In that case, A is entitled to compensation for the difference between the minimum benefit and the benefit owed to him by virtue of a *pro rata* calculation under Article 52(1)(b), in accordance with Article 58(2).

52) In order for there to be a "minimum benefit" under Article 58(1), none of the three judgments from the ECJ leave any doubt that there is a "minimum benefit" when the objective of the relevant national rule or benefit is to ensure the recipient a financial minimum standard.

53) The objective of the "minimum annual benefit" is to ensure persons with a permanent invalidity a financial minimum standard. This has been clear under Norwegian law ever since the first legislative provisions on minimum pension were enacted in 1969. The objective has been reiterated a number of times in connection with legislative reforms. By way of example, the National Insurance Court has referred to Prop. 130 L (2010-2011) page 96.

54) The State nevertheless contends that the rules on the "minimum annual benefit" do not have the objective of ensuring a financial minimum standard and argues that the basis for reduction on grounds of periods of insurance outside Norway supports this position. The State's interpretation of the legislation in the present case has no support in Norwegian law, Norwegian preparatory works or established legal methodology in Norwegian law.

55) Within the EEA legal framework, the State's line of reasoning becomes circular. The reduction of the benefit paid to A is the result of the application of Article 52, the adverse consequences of which Article 58 is intended to safeguard against.

56) A submits that Article 58(1) of the regulation must be construed as an exception to the other calculation rules in Chapter 5. A *pro rata* calculation under Article 52, just

like calculations in accordance with other rules in Chapter 5, will in such cases only have the status of a nominal calculation for the purpose of determining whether Article 58(1) may be applicable. Article 58 must, therefore, be seen as a safety valve that serves to prevent the calculation rules in the regulation from distorting its objective.

57) For persons who have their entire period of insurance in Norway, the minimum benefits will ensure them a financial minimum standard. That group will receive a minimum benefit as a result of a lack of financial earning in the form of employment income. The State's position in the case seems solely to be aimed at negatively affecting persons who exercise their right of free movement within the EEA.

58) The second paragraph of Section 12-13 of the National Insurance Act provides for an annual minimum amount, that is to say, a factor multiplied under the national insurance scheme by the basic amount (*grunnbeløpet*), which is adjusted annually, so as to calculate a minimum amount. The factor depends solely on the civil status of the applicant. Only two rates are currently applied, 2.28 times the basic amount for persons living in a relationship and 2.48 times the basic amount for single persons.

59) Norwegian legislation confers authority to make reductions under the fourth paragraph of Section 12-13 of the National Insurance Act. In practice, the competent institution in Norway uses Article 52(1)(b) of the regulation to make that reduction on a *pro rata* basis when the period of insurance outside Norway was acquired in another EEA State. Hence the fourth paragraph of Section 12-13 of the National Insurance Act is of no practical import next to Article 52(1)(b) when all periods of insurance are completed in EEA States.

60) Under Norwegian law, the theoretical amount under Article 52(1)(b) can be anything between maximum benefit and the "minimum annual benefit". This is due to the fact that the maximum period of insurance is 40 years, whilst the economical acquisition period is five years. The three best of those five income years are used as the basis for the calculation. Hence it is incorrect that the theoretical amount under Article 52(1)(b) will always be equal to the "minimum annual benefit".

61) A person with a high income in the last three years prior to the onset of invalidity, but with periods of insurance outside Norway prior to this, can end up with a calculation that is lower than the "minimum annual benefit" due to the period of insurance factor, that is to say, a calculation of a *pro rata* benefit under Article 52(1)(b) in which the actual amount turns out to be lower than the "minimum annual benefit".

62) For that reason, that person will under the Norwegian rules be eligible for the "minimum annual benefit", even though the financial earnings in Norway in three of the last five years will have been high. This is the core of Article 58.

63) The key feature of the "minimum annual benefit" is that it becomes relevant when the benefit calculated on the basis of earnings and periods of insurance will be lower than that minimum level. It is of no significance for the legal characterisation

of the "minimum annual benefit" under Article 58 that the theoretical amount under Article 52(1)(b) in some cases will be equal to the "minimum annual benefit", and in other cases not.

64) Periods of insurance under the national insurance scheme are calculated on the basis of periods of residency or periods of employment, without any financial component as a basis for determining the length of the period of insurance. Consequently, under Norwegian law there is no connection between period of insurance and payments to the State treasury. Since the different taxes and contributions are of no significance to the calculation of benefits, the national insurance scheme is, in practical terms, fully financed by taxes.

65) The Norwegian scheme reflects a welfare model that is highly similar throughout the Nordic countries. It is not correct, as the State contends, that the Swedish system that was in place when the judgment in Case C-189/16 *Zaniewicz-Dybeck* was delivered, was different from the Norwegian system on any practically relevant points. *Torri* and *Browning* concern rights in countries that had no specific benefits that were defined as minimum benefits, in contrast to Norway and Sweden.

66) **The respondent**, the Labour and Welfare Directorate, has submitted:

67) The regulation's rules on coordination of benefits in the event of invalidity are based on a *pro rata* principle. For persons who have low earnings in the States to which they have had a connection, this may lead to low benefits. This is a consequence of the fact that the social security regulation aims solely to coordinate benefits from several States and shall not lead to a harmonised level of benefits.

68) *Browning* is the key judgment for the interpretation of the concept of minimum benefit under Article 58 of the social security regulation. *Zaniewicz-Dybeck* refers to *Browning* and adds nothing new on the interpretation of Article 58. The ECJ merely elaborated on Sweden's statements at the hearing concerning the guaranteed pension as a minimum benefit, and thus did not carry out any independent assessment of the benefit in the light of the conditions set out in *Browning*.

69) It follows from *Browning* paragraph 15 that there is a minimum benefit only where the legislation of the country of residence contains an express guarantee that has as objective to ensure the recipients of social security benefits a minimum income that exceeds the amount they can claim solely on the basis of their periods of insurance and contributions.

70) Article 58 of the regulation does not confer entitlement to a minimum benefit from States that do not have such a guarantee in their national law. Such an interpretation of Article 58 is incompatible with both *Torri* and *Browning*.

71) Norwegian law does not contain any such express guarantee of a minimum benefit – only usual rules on acquisition based on periods of insurance and income.

72) The minimum annual benefit in the second paragraph of Section 12-13 is earned on the basis of periods of insurance and has 40 different levels, depending on how much has been acquired. Most of the levels are clearly not high enough to cover a

minimum subsistence income. Only the amounts paid in the event of full acquisition (40 years' period of insurance), 2.28 G and 2.48 G respectively, are intended to ensure a reasonable standard of living, see paragraph 5 of *Torri*. This shows clearly that the second paragraph of Section 12-13 is part of the usual social security system, with benefits based on acquisition, and does not provide for an express guaranteed income that comes in addition to the usual benefits.

73) Just as in *Browning*, the Norwegian rules on invalidity benefits are made up of two different components. One is income-based: the so-called "graduated benefit" as referred to in *Browning*, and the invalidity benefit under the first paragraph of Section 12-13 of the National Insurance Act, see Section 12-11. The second component is not income-based: it is "the basic pension" in *Browning*, and the minimum annual benefit in Section 12-13 of the National Insurance Act.

74) The only difference between "the basic pension" at issue in *Browning* and the minimum annual benefit under the second paragraph of Section 12-13 is that the former varied according to both the period of insurance and the number of contribution payments, whilst the latter varied only according to the period of insurance.

75) The social security regulation shall only coordinate the States' rules on social security, not harmonise them, see recital 4 of the social security regulation. States, therefore, stand as a starting point free to determine the conditions for social security. They decide whether benefits shall depend on, for example, periods of residency, periods of employment, periods of insurance, payment of contributions, income – or a combination of such variables.

76) Norway has an invalidity benefit where one component is based on income and period of insurance (first paragraph of Section 12-13), and one component is solely based on acquired period of insurance (second paragraph of Section 12-13). That Norway has opted to let the minimum annual benefit be contingent solely on the acquired period of insurance, without other variables, can obviously not by itself lead to the benefit being "transformed" into a minimum benefit under Article 58. That would be incompatible with *Browning* paragraph 13, that states that a minimum benefit under Article 58 is something else than the minimum amount obtained when the ordinary rules on determining entitlement to pension are applied on the basis of period of insurance and paid contributions. Period of insurance is here referred to specifically as a component of the "ordinary" pension rules.

77) It is not correct that the minimum annual benefit in the second paragraph of Section 12-13 is reduced on the basis of periods of insurance from other EEA States, as A claims. The benefit is calculated solely on the basis of periods acquired under Norwegian law. No reduction is made for persons who also have periods of insurance under Article 1(t) of the regulation from other EEA States. It is a different matter that Norwegian authorities thereafter also apply Article 52(1) on *pro rata* calculation to such cases, which they are obliged to do under the regulation.

78) The Advocate General in *Browning* suggested that a benefit could be a minimum benefit if it conferred entitlement to a given amount and it was not necessary to fulfil other conditions than completion of a given period of insurance (see page

3377). There is however no trace of such an interpretation in the judgment. The ECJ was clear on the point that it is only when national law contains an express guarantee in addition to the usual rules on social security benefits that Article 58 applies.

79) A's submissions are based on the position that the second paragraph of Section 12-13 is both part of the usual rules on invalidity benefits which is to be calculated *pro rata* under Article 52 and an express guarantee under Article 58. This is logically impossible. One and the same national benefit cannot simultaneously be part of the usual social security rules and an express guarantee. This shows clearly that the second paragraph of Section 12-13 cannot be a minimum benefit under Article 58.

80) If the minimum annual benefit in the second paragraph of Section 12-13 is considered to be a minimum benefit under Article 58 of the regulation, A will also receive an amount equal to the theoretical amount under Article 52(1)(b). In both *Torri* and *Browning*, the ECJ stated that a minimum benefit under Article 58 is different from the theoretical amount.

81) The rules on the minimum annual benefit in the second paragraph of Section 12-13 in any event differ from the Swedish rules in *Zaniewicz-Dybeck*. The Norwegian benefit is not acquired solely through periods of residence, but also through periods of employment and it is not financed solely through tax, but through a combination of contributions from the members, employers and the State.

Question

Is there a minimum benefit within the meaning of Article 58 of Regulation (EC) No 883/2004 where the national legislation contains provisions on a minimum annual benefit in the event of invalidity, but at the same time provides that that benefit is to be proportionally reduced when the person has a shorter period of insurance than the full period of insurance, which is 40 years?

Oslo, 16 May 2023

Leif Erlend Johannessen
Member of the National Insurance Court