E-8/20-19

REPORT FOR THE HEARING

in Case E-8/20

REQUEST to the Court under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice by the Supreme Court of Norway (*Norges Høyesterett*) in criminal proceedings against

N

concerning the interpretation of the Agreement on the European Economic Area, in particular Articles 28 and 36 thereof, Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community, Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems and Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.

I Introduction

1. By letter of 30 June 2020, registered at the Court on 2 July 2020, the Supreme Court of Norway (*Norges Høyesterett*) requested an Advisory Opinion in the case pending before it between N and the Prosecuting Authority (*Påtalemyndigheten*).

2. The case before the referring court concerns the question whether N can be subject to criminal penalties for grossly negligent aggravated fraud on the grounds that he received a work assessment allowance (*arbeidsavklaringspenger*) under Chapter 11 of Act of 28 February 1997 No 19 on National Insurance (*lov 28. februar 1997 nr. 19 om folketrygd*) ("the National Insurance Act") without notifying a number of stays in Italy during the period for which he received the allowance. N was sentenced to 75 days in prison for the conduct in question by judgment of the Supreme Court of Norway of 15 March 2017. Following a petition by N and the Prosecuting Authority, the Criminal Cases Review

Commission (*Gjenopptakelseskommisjonen*) decided on 19 March 2020 that the case should be reopened. Accordingly, the Supreme Court of Norway will now re-hear the appeal.

3. According to the referring court, the main question in the national proceedings is whether a requirement to stay in Norway in order to receive a work assessment allowance is compatible with EEA law.

II Legal background

EEA law

4. Article 28(1) and (2) of the Agreement on the European Economic Area ("the EEA Agreement" or "EEA") reads:

> *1. Freedom of movement for workers shall be secured among EC Member States and EFTA States.*
>
> *2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of EC Member States and EFTA States as regards employment, remuneration and other conditions of work and employment.*

5. Article 31(1) EEA reads:

> *1. Within the framework of the provisions of this Agreement, there shall be no restrictions on the freedom of establishment of nationals of an EC Member State or an EFTA State in the territory of any other of these States. This shall also apply to the setting up of agencies, branches or subsidiaries by nationals of any EC Member State or EFTA State established in the territory of any of these States.*
>
> *Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of Article 34, second paragraph, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of Chapter 4.*

6. Article 36(1) EEA reads:

> *1. Within the framework of the provisions of this Agreement, there shall be no restrictions on freedom to provide services within the territory of the Contracting Parties in respect of nationals of EC Member States and EFTA States who are established in an EC Member State or an EFTA State other than that of the person for whom the services are intended.*

7. Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community (OJ, English Special Edition 1971(II), p. 416) ("Regulation No 1408/71"). Regulation No 1408/71 was incorporated into Annex VI to the EEA Agreement by virtue of the entry into force of the EEA Agreement.

8. Article 1 of Regulation No 1408/71, headed "Definitions", reads, in extract:

For the purpose of this Regulation:

...

(h) 'residence' means habitual residence;

(i) 'stay' means temporary residence;

...

9. Article 4(1) of Regulation No 1408/71, headed "Matters covered", reads:

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

(a) sickness and maternity benefits;

(b) invalidity benefits, including those intended for the maintenance or improvement of earning capacity;

(c) old-age benefits;

(d) survivors' benefits;

(e) benefits in respect of accidents at work and occupational diseases;

(f) death grants;

(g) unemployment benefits;

(h) family benefits.

10. Article 19(1) of Regulation No 1408/71, headed "Residence in a Member State other than the competent State – General rules", reads:

1. A worker residing in the territory of a Member State other than the competent State, who satisfies the conditions of the legislation of the competent State for

entitlement to benefits, taking account where appropriate of the provisions of Article 18, shall receive in the State in which he is resident:

(a) benefits in kind provided on behalf of the competent institution by the institution of the place of residence in accordance with the legislation administered by that institution as though he were insured with it;

(b) cash benefits provided by the competent institution in accordance with the legislation which it administers. However, by agreement between the competent institution and the institution of the place of residence, such benefits may be provided by the latter institution on behalf of the former, in accordance with the legislation of the competent State.

11. Article 22(1) and (2) of Regulation No 1408/71, headed "Stay outside the competent State - Return to or transfer of residence to another Member State during sickness or maternity - Need to go to another Member State in order to receive appropriate treatment", reads:

1. A worker who satisfies the conditions of the legislation of the competent State for entitlement to benefits, taking account where appropriate of the provisions of Article 18, and:

(a) whose condition necessitates immediate benefits during a stay in the territory of another Member State, or

(b) who, having become entitled to benefits chargeable to the competent institution, is authorised by that institution to return to the territory of the Member State where he resides, or to transfer his residence to the territory of another Member State, or

(c) who is authorised by the competent institution to go to the territory of another Member State to receive there the treatment appropriate to his condition, shall be entitled:

(i) to benefits in kind provided on behalf of the competent institution by the institution of the place of stay or residence in accordance with the legislation which it administers, as though he were insured with it; the length of the period during which benefits are provided shall be governed however by the legislation of the competent State;

(ii) to cash benefits provided by the competent institution in accordance with the legislation which it administers. However, by agreement between the competent institution and the institution of the place of stay or residence, such benefits may be provided by the latter

institution on behalf of the former, in accordance with the legislation of the competent State.

2. The authorisation required under paragraph 1 (b) may be refused only if it is established that movement of the person concerned would be prejudicial to his state of health or the receipt of medical treatment.

The authorisation required under paragraph 1 (c) may not be refused where the treatment in question cannot be provided for the person concerned within the territory of the Member State in which he resides.

12. Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 77), as corrected by OJ 2004 L 229, p. 35, OJ 2005 L 30, p. 27, and OJ 2005 L 197, p. 34, ("Directive 2004/38/EC") was incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 158/2007 of 7 December 2007 (OJ 2008 L 124, p. 20; and EEA Supplement 2008 No 26, p. 17), and is referred to at point 3 of Annex VIII and point 1 of Annex V to the EEA Agreement.

13. Article 4(1) of Directive 2004/38/EC, headed "Right of exit", reads:

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

14. Article 6 of Directive 2004/38/EC, headed "Right of residence for up to three months", reads:

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

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

15. Article 7(1)(b) of Directive 2004/38/EC, headed "Right of residence for more than three months", reads:

> *1. All Union citizens shall have the right of residence on the territory of another Member State for a period of longer than three months if they:*
>
> *...*
>
> *(b) have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State; or*
>
> *...*

16. Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (OJ 2004 L 166, p. 1), as corrected by OJ 2004 L 200, p. 1, and OJ 2007 L 204, p. 30, ("Regulation No 883/2004") was incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 76/2011 of 1 July 2011 (OJ 2011 L 262, p. 33; and EEA Supplement 2011 No 54, p. 46), which entered into force on 1 June 2012, and is referred to at point 1 of Annex VI to the EEA Agreement.

17. Article 1 of Regulation No 883/2004, headed "Definitions", reads, in extract:

> *For the purposes of this Regulation:*
>
> *...*
>
> *(j) 'residence' means the place where a person habitually resides;*
>
> *(k) 'stay' means temporary residence;*
>
> *...*

18. Article 2 of Regulation No 883/2004, headed "Persons covered", reads:

> *1. This Regulation shall apply to nationals of a Member State, stateless persons and refugees residing in a Member State who are or have been subject to the legislation of one or more Member States, as well as to the members of their families and to their survivors.*
>
> *2. It shall also apply to the survivors of persons who have been subject to the legislation of one or more Member States, irrespective of the nationality of such*

persons, where their survivors are nationals of a Member State or stateless persons or refugees residing in one of the Member States.

19. Article 3 of Regulation No 883/2004, headed “Matters covered”, reads, in extract:

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

(a) sickness benefits;

...

2. Unless otherwise provided for in Annex XI, this Regulation shall apply to general and special social security schemes, whether contributory or non-contributory, and to schemes relating to the obligations of an employer or shipowner.

3. This Regulation shall also apply to the special non-contributory cash benefits covered by Article 70.

4. The provisions of Title III of this Regulation shall not, however, affect the legislative provisions of any Member State concerning a shipowner's obligations.

20. Article 21 of Regulation No 883/2004, headed “Cash benefits”, reads:

1. An insured person and members of his family residing or staying in a Member State other than the competent Member State shall be entitled to cash benefits provided by the competent institution in accordance with the legislation it applies. By agreement between the competent institution and the institution of the place of residence or stay, such benefits may, however, be provided by the institution of the place of residence or stay at the expense of the competent institution in accordance with the legislation of the competent Member State.

2. The competent institution of a Member State whose legislation stipulates that the calculation of cash benefits shall be based on average income or on an average contribution basis shall determine such average income or average contribution basis exclusively by reference to the incomes confirmed as having been paid, or contribution bases applied, during the periods completed under the said legislation.

3. The competent institution of a Member State whose legislation provides that the calculation of cash benefits shall be based on standard income shall take into account exclusively the standard income or, where appropriate, the average of standard incomes for the periods completed under the said legislation.

4. Paragraphs 2 and 3 shall apply mutatis mutandis to cases where the legislation applied by the competent institution lays down a specific reference period which corresponds in the case in question either wholly or partly to the periods which the person concerned has completed under the legislation of one or more other Member States.

National law and practice

21. During the period relevant to the case, 19 May 2010 to 31 October 2012, the first paragraph of Section 11-1 of Act of 28 February 1997 on National Insurance (*lov 28. februar 1997 om folketrygd*) ("the National Insurance Act") read:

The purpose of the work assessment allowance is to ensure income for members whilst they receive active treatment, participate in work-oriented measures or are being followed up in another way with a view to obtaining or retaining employment.

22. During the period relevant to the case, 19 May 2010 to 31 October 2012, Section 11-5 of the National Insurance Act, headed "Reduced fitness for work", read:

It is a condition for entitlement to benefits under this Chapter that the member, due to sickness, injury or impairment, has suffered a reduction in their fitness for work to such an extent that the person concerned is prevented from retaining or obtaining gainful employment.

When the determination is being made as to whether the fitness for work is reduced to the extent that the person concerned is prevented from retaining or obtaining gainful employment, regard shall be had inter alia to health, age, fitness, education, professional background, interests, wishes, opportunities for returning to the current employer, employment opportunities at the place of residence and employment opportunities at other places where it is reasonable for the person concerned to accept employment.

23. During the period relevant to the case, 19 May 2010 to 31 October 2012, Section 11-6 of the National Insurance Act, headed "Need for assistance in obtaining or retaining employment", read:

It is a condition for entitlement to benefits under this Chapter that the member

(a) has a need for active treatment, or

(b) has a need for work-oriented measures, or

(c) after having tried measures under (a) or (b), still be considered to have a certain prospect of integrating into the labour market, and be followed up by the Labour and Welfare Administration (NAV) in order once again to be able to obtain or retain employment within his or her capabilities.

24. During the period relevant to the case, 19 May 2010 to 31 October 2012, Section 11-8 of the National Insurance Act, headed "Activity with a view to integrating into the labour market", read:

> *It is a condition for entitlement to benefits under this Chapter that the member contribute actively to the process of integrating into the labour market. The requirements for individual activity are to be adapted to the individual's function level and be determined at the time the benefit is granted.*

25. During the period relevant to the case, 19 May 2010 to 31 October 2012, Section 11-3 of the National Insurance Act, headed "Stay in Norway", read:

> *It is a condition for entitlement to benefits under this Chapter that the member stay in Norway.*
>
> *Benefits may nevertheless be granted to a member who, pursuant to their activity plan, see Section 14 a of the Labour and Welfare Administration Act (arbeids- og velferdsforvaltningsloven), receives medical treatment or participates in a work-oriented measure abroad.*
>
> *A member may also receive benefits under this Chapter for a limited period during a stay abroad if it can be demonstrated that the stay abroad is compatible with the completion of the planned activity and does not impede follow-up and control by the Labour and Welfare Administration.*

26. During the period relevant to the case, 19 May 2010 to 31 October 2012, the first and second paragraphs of Section 11-7 of the National Insurance Act, headed "Notification Duty", read:

> *In order to be entitled to benefits under this Chapter, the member must report to the Labour and Welfare Administration every fourteenth day (notification period) and provide information of importance for entitlement to the benefits. Notification shall be given using a notification form, by attending in person or in some other manner as determined by the Labour and Welfare Administration.*
>
> *If the member, without reasonable grounds, fails to report on the scheduled day, entitlement to the benefits under this Chapter shall cease as from the day on which the member ought to have reported and until such time as the member reports once again. If the member has had a reasonable ground for failing to report, the benefits shall be paid with retroactive effect.*

27. From 28 February 2011, part 11.3.2 of Circular R40-00 (*Rundskriv til EØS-avtalens trygdedel*), which was later replaced by Circular R45-00 *(Rundskriv til EØS-avtalens bestemmelser om trygd*) from 28 February 2012, read:

> *Resident in Norway and stay in other EEA country*
>
> *The Regulation's rules on this are applicable only to a move to another EEA country or in respect of members resident in another EEA country.*
>
> *For workers or self-employed persons who are resident in Norway and are members of the social security scheme, the National Insurance Act's general rules on work assessment allowance during stays abroad also apply to stays in another EEA country, see the second and third paragraphs of Section 11-3 of the National Insurance Act. Accordingly, the Regulation's rules on the possibility of retaining entitlement to cash benefits in the event of sickness during a stay outside Norway as the competent country are not applicable.*

28. Circular R11-00 (*Rundskriv til ftrl kap. 11 – Arbeidsavklaringspenger*), was drawn up to accompany Chapter 11 of the National Insurance Act. In the version in force from 1 March 2010, the following, inter alia, was stated as regards Section 11-3 of the National Insurance Act:

> *In order for the entitlement to work assessment allowance and additional benefits, there is a requirement to stay in Norway. The background for that provision is the need to be able to follow up on users in relation to correct benefits and work-oriented activities and to be able to know at all times whether the conditions for entitlement to the benefit are satisfied.*
>
> *The work assessment allowance is regarded as a cash benefit during sickness under EEA Regulation No 1408/71.*
>
> *Reference is made to the EEA Agreement's part on social security and accompanying circulars, and social security agreements Norway has with other countries and separate specific circulars. In the event of conflict between the Norwegian rules and the provisions in social security agreements, including the EEA Agreement, the agreement's rules take precedence, see Section 1-3 of the National Insurance Act.*
>
> *…*
>
> ***The third paragraph of Section 11-3 – Exemption for stay abroad not pursuant to the activity plan***

As a rule, it is not permitted to stay abroad and at the same time receive work assessment allowance and additional benefits. If the user is staying abroad and is thus not available for NAV, the benefit will lapse during that period.

The third paragraph of Section 11-3 allows for benefits to be granted exceptionally also for a limited period during a stay abroad, such as in the event of temporary breaks between measures or during waiting periods for treatment/measures.

Benefits should usually not be paid for longer than the period of a normal holiday trip. 'Normal holiday trip' means a period of up to four weeks. This presupposes, however, that it can be demonstrated that the stay abroad is compatible with the completion of the planned activity and does not impede follow-up and control by NAV. The key factor in that context is that the stay abroad does not negatively impact the preparation and implementation of the activity plan.

Users must apply in advance for authorisation to keep receiving benefits during a temporary stay abroad. Users are to be given proper, repeated information to the effect that he or she must stay in Norway in order to be entitled to benefits under Chapter 11 and that he or she must notify NAV if they travel abroad.

29. The following was added to Circular R11-00 from 6 June 2012:

Users must apply to the NAV office for prior authorisation before they may bring the work assessment allowance with them during a temporary stay in other countries. Form 11-03.07 should be used in so far as not precluded on time-related grounds. If NAV does not have any relevant activities to offer during the time period, it is not to be counted as a period of absence, see Sections 11-8 and 11-9.

If the NAV office approves the application, authorisation may be given verbally and recorded in Arena. Consequences for follow-up must be considered, including submission of the notification form. The user must be informed about means of submission (notification form) and consequences of tardy submission of forms. If the NAV office does not approve the application, the user is to be provided with a written letter of refusal in which the reasons are stated and information is given about the general right of appeal: Section 29 of the Public Administration Act (forvaltningsloven). If the user decides to travel abroad despite the fact that NAV has not approved the application, stopping the work assessment allowance must be considered, see Sections 11-8 and/or 11-9.

30. During the period relevant to the case, 19 May 2010 to 31 October 2012, Section 270 of the General Civil Penal Code of 22 May 1902 No 10 (*Almindelig borgerlig Straffelov 22. mai 1902 nr. 10*) ("the Penal Code") read, in extract:

Any person who, for the purpose of obtaining for himself or another an unlawful gain,

...

2. by the use of incorrect or incomplete information, ... or otherwise unlawfully influences the result of automatic data processing, and thereby causes loss or a risk of loss to any person, is guilty of fraud.

The penalty for fraud is fines or imprisonment for a term not exceeding three years.
...

31. During the period relevant to the case, 19 May 2010 to 31 October 2012, Section 271 of the Penal Code, read, in extract:

The penalty for gross fraud is imprisonment for a term not exceeding six years. Fines may be imposed in addition to a sentence of imprisonment. ...

...

32. During the period relevant to the case, 19 May 2010 to 31 October 2012, Section 271a of the Penal Code, read:

Any person who by gross negligence commits fraud as described in Section 270 or Section 271 shall be liable to fines or imprisonment for a term not exceeding two years.

III Facts and procedure

33. On 18 February 2016, after being reported by the Norwegian Labour and Welfare Administration (*Arbeids- og velferdsetaten*) ("NAV"), N was indicted for intentional aggravated social security fraud under Section 271 of the Penal Code.

34. The basis for the indictment was that, in the period from 19 May 2010 to 31 October 2012, N was considered to have misled NAV employees to make total payments to him in the amount of NOK 309 458 in work assessment allowance, in that he failed to inform NAV that, during that time, he had stayed abroad during certain periods without approval by NAV and was thus not entitled to a work assessment allowance, which gave rise to loss or a risk of loss for NAV. During the proceedings before the Nedre Telemark District Court (*Nedre Telemark tingrett*) ("the District Court"), the Prosecuting Authority amended its submissions to grossly negligent aggravated fraud.

35. On 4 March 2016, the District Court delivered its verdict of grossly negligent aggravated fraud and sentenced N to 75 days in prison. The District Court based the

conviction on the fact that, in November 2008, N was granted a rehabilitation allowance. In the decision, he was informed that he "*must report to NAV locally*" if he "*travels outside Norway (applies to sickness benefit and rehabilitation allowance)*". The same information was given each time N was granted a rehabilitation allowance for a new period.

36. According to the request, the reason why N was granted a rehabilitation allowance was poor health, combined with N having become redundant at his former place of employment. From 1 March 2010, N's rehabilitation allowance was replaced with a work assessment allowance due to legislative amendments.

37. In a decision of 26 July 2010 granting a work assessment allowance, N was informed that "*you must notify your NAV office if you ... plan to travel or move outside Norway*". The same information was given each time N was granted a work assessment allowance until N was granted an invalidity pension from 1 November 2012.

38. Through acquaintances, N and his spouse were offered the use of a house in Italy and, in the following years, they had a total of 14 three and four-week stays in Italy.

39. N applied for an exemption from the requirement to stay in Norway for two of those stays. N neither applied for authorisation nor gave notification in respect of the other stays. Before the District Court, N testified that he worked from Italy when his health permitted. The District Court did not find that testimony credible and it was not relied upon. The District Court did, however, find that it had not been proven that N had deliberately and for gainful purposes failed to inform NAV that during certain periods he had stayed abroad, but that N had acted in gross negligence. The District Court held that:

> *It is a condition for entitlement to a work assessment allowance that the person concerned stays in Norway, see Section 11-3 of the National Insurance Act. NAV can grant exemptions from that requirement for a limited period if the stay abroad is compatible with the implementation of the activity plan. The Court does not consider that the accused was in good faith when he had stays abroad without notifying his absence or applying for an exemption from the requirement of stay.*

40. The District Court further stated that, even if N's testimony were to be accepted, he would have to be convicted due to the requirement to stay in Norway, of which he was aware.

41. N appealed the judgment of the District Court and, by judgment of 12 December 2016, Agder Court of Appeal (*Agder lagmannsrett*) sentenced N to 45 hours of community service, to be carried out within 90 days and, in the alternative, a prison sentence of 45 days. In its sentencing, the Agder Court of Appeal emphasised that N could have obtained authorisation for stays abroad if he had applied, and that it was therefore a genuine possibility that the potential loss associated with N's actions was significantly lower than the amount stated in the indictment.

42. The Prosecuting Authority appealed the judgment of the Agder Court of Appeal to the Supreme Court of Norway which, by judgment of 15 March 2017, upheld the District Court's judgment.

43. In the autumn of 2019, NAV became uncertain as to whether its prevailing practice might be contrary to Article 21 of Regulation No 883/2004. NAV modified its practice in the autumn of 2019 in accordance with the interpretation that the term "stays" *("oppholder seg"*) includes all temporary stays that do not amount to establishing residence. NAV did not consider, however, that its earlier practice had been contrary to Regulation No 1408/71.

44. Prior to N being reported to the police, NAV had adopted a decision to recover NOK 345 119 from N. The recovery decision was partly reversed by decision of 19 December 2019. The part of the decision that was maintained amounts to NOK 199 370 and relates to the period before 1 June 2012.

45. On 19 March 2020, following petitions from both N and the Prosecuting Authority to have the criminal case reopened, the Criminal Cases Review Commission decided that the case should be reopened.

46. Against this background, the Supreme Court of Norway decided to stay the proceedings and refer the following questions to the Court:

Questions about the state of the law before 1 June 2012

1. **Is the term "sickness benefits" in Article 4(1)(a) of Regulation No 1408/71 to be interpreted as encompassing a benefit such as the work assessment allowance (*arbeidsavklaringspenger*)?**

2. **Is Article 22 of Regulation No 1408/71, or possibly Article 19, to be interpreted as conferring entitlement to receive cash benefits only when residing (*bosetting*) in an EEA State other than the competent State, or are shorter stays (*opphold*) such as in the present case also included?**

3. **If shorter stays such as in the present case are also included, is Article 22 of Regulation No 1408/71 and its reference to authorisation from the competent institution, or possibly Article 19, to be interpreted as meaning that the competent State may make a person's entitlement to be able to bring their work assessment allowance along subject to the condition that that person must have applied for and obtained authorisation to stay (*oppholde seg*) in another EEA State?**

4. **Should Regulation No 1408/71 be found not to confer entitlement to bring work assessment allowance along during a stay in another EEA State, or possibly not without authorisation from the competent institution pursuant to national**

rules, must it also be determined whether the national rules come within the scope of other EEA rules?

5. **Do Articles 28 or 36 of the EEA Agreement apply in a situation where a national of an EEA State has a shorter leisure stay in another EEA State?**

6. **If that question is answered in the affirmative, is it a restriction on free movement under Article 28 of the EEA Agreement or Article 36 that national law lays down the following conditions:**

    - **(i) that the benefit may be given only for a limited period of time which, according to administrative circulars, may not usually exceed four weeks per year; and**
    - **(ii) that the stay abroad is compatible with the performance of defined activity obligations and does not impede follow-up and control by the competent institution, and**
    - **(iii) that the person concerned must apply for and obtain authorisation from the competent institution (and compliance with the notification duty is controlled through the use of a notification form)?**

7. **If the condition in (i) constitutes a restriction, can the condition be justified as a general safeguarding of the considerations underlying condition (ii), that is to say, ensuring performance of defined activity obligations and also follow-up and control?**

8. **If condition (i) cannot be justified and conditions (ii) and (iii) constitute a restriction, can conditions (ii) and (iii) be justified on the basis of the same considerations?**

9. **If conditions (ii) and (iii) can be justified, is it compatible with Articles 28 and 36 of the EEA Agreement for a person who has failed to apply for and obtain authorisation to bring benefits along to another EEA State and who provides the competent institution with incorrect information about the place of stay (*oppholdssted*) to be ordered to repay the benefit which was thus unlawfully acquired under national law?**

10. **If that question is answered in the affirmative, is it compatible with Articles 28 and 36 of the EEA Agreement for the person concerned potentially to be subject to criminal sanctions for having provided incorrect information and thus having misled the competent institution into making unfounded payments?**

11. **If question 5 is answered in the negative, do Articles 4 or 6 of Directive 2004/38**

apply in a situation where a national of an EEA State has a shorter leisure stay in another EEA State? In so far as Article 6 applies, does that provision impose obligations on the home State? If Articles 4 or 6 is applicable and may be relied on as against the home State, the same question as questions 6 to 10 are asked in so far as they fit.

Questions about the state of the law after 1 June 2012

12. **Is the term "sickness benefits" in Article 3(1)(a) of Regulation No 883/2004 to be interpreted as encompassing a benefit such as a work assessment allowance?**

13. **Is the term "staying" in Article 21(1) of Regulation No 883/2004, which is defined as "temporary residence" in Article 1(k), to be interpreted as encompassing each and every short-term stay in another EEA State not constituting residence, including stays such as in the present case?**

14. **If that question is answered in the affirmative, is Article 21 of Regulation No 883/2004 to be interpreted as only covering situations where the medical diagnosis is given during the stay in the other EEA State, or also situations where – as in the present case – the diagnosis is recognised by the competent institution before departure?**

15. **If Article 21 is applicable in a situation such as that in the present case, is that provision, including the condition "in accordance with the legislation it applies", to be interpreted as meaning that the competent EEA State may maintain the following conditions:**

    - **(i) that the benefit may be given only for a limited period of time which, according to administrative circulars, may not usually exceed four weeks per year; and**
    - **(ii) that the stay abroad is compatible with the performance of defined activity obligations and does not impede follow-up and control by the competent institution, and**
    - **(iii) that the person concerned must apply for and obtain authorisation from the competent institution (and compliance with the notification duty is controlled through the use of a notification form)?**

16. **If Article 21 precludes condition (i), but not (ii) and (iii), do (ii) and (iii) come within the scope of other EEA rules (see question 4 et seq.)?**

IV Written observations

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

- N, represented by John Christian Elden and Anders Brosveet, Advocates;

- the Norwegian Government, represented by Pål Wennerås, Lisa-Mari Moen Jünge, Kaja Moe Winther and Tone Hostvedt Aarthun, acting as Agents;

- the EFTA Surveillance Authority ("ESA"), represented by Erlend Møinichen Leonhardsen, Ewa Gromnicka, Catherine Howdle and Carsten Zatschler, acting as Agents; and

- the European Commission ("the Commission"), represented by Denis Martin and Bernd-Roland Killmann, acting as Agents.

V Proposed answers submitted

N

48. N proposes that the questions be answered as follows:

Question 1:

Work assessment allowance is a cash benefit during sickness and, for that reason, was regulated by Regulation No 1408/71

Question 2:

Articles 22 and/or 19 of Regulation No 1408/71 encompasses short-term stays in other EEA states. Regulation No 1408/71 therefore precludes a refusal or reduction of work assessment allowance solely on the ground that a person was staying in an EEA State other than the competent State.

Question 3:

Regulation No 1408/71 allowed for an authorization scheme, but the authorization could only be refused if the movement of the person would be prejudicial to his state of health or receipt of medical treatment.

Question 4:

If Regulation No 1408/71 does not confer entitlement to bring work assessment allowance along during a stay in another EEA State, or not without authorization from the competent institution, it must be determined whether the national rules come within the scope of other EEA law.

Question 5:

Article 28 of the EEA Agreement applies in a situation where a national of an EEA State has a shorter leisure stay in another EEA State.

Article 36 of the EEA Agreement applies in a situation where a national of an EEA State has a shorter leisure stay in another EEA State.

Question 6:

It is a restriction on free movement under Article 28 and Article 36 of the EEA Agreement that national law lays down the conditions (i) and (iii). Condition (ii) may constitute a restriction depending on the obligations in the individual case.

Question 7:

The condition that stay abroad must not exceed four weeks per year cannot be justified as a general safeguarding of ensuring performance of defined activity obligations, follow-up and control.

Question 8:

The considerations that condition (iii) are meant to realize can be met with less intrusive measures, and the condition therefore not be justified.

For condition (ii) to be justified, every specific activity obligation must serve a purpose that is recognized by EEA law and the obligation must be suitable and proportionate. The obligation must also pass a balancing test.

Question 9:

A person who has failed to apply for prior authorization or who provides the competent institution with incorrect information about the place of stay, may not be ordered to repay the benefit.

Question 10:

A person who has failed to apply for prior authorization or who provides the competent institution with incorrect information about the place of stay, may not be subject to criminal sanctions.

Question 11:

Articles 4 or 6 of Directive 2004/38 applies in a situation where a national of an EEA State has a shorter leisure stay in another EEA State. Articles 4 or 6 may be relied on as against the home State.

It a restriction on free movement under Articles 4 and 6 of Directive 2004/38 that national law lays down the listed conditions. These conditions must satisfy the requirements of EEA law. Therefore, it is contrary to Directive 2004/38Norwegian law to refuse work assessment allowance solely on the grounds that the recipient is staying in another EEA state.

The conditions (i), (ii) and (iii) constitutes restrictions that cannot be justified

Question 12:

Work assessment allowance is a cash benefit during sickness and, for that reason, is regulated by Regulation No 883/2004.

Question 13:

Article 21(1) of Regulation No 883/2004 is to be interpreted as encompassing each and every short-term stay in another EEA State not constituting residence, including stays such as in the present case. Article 21(1) therefore precludes a refusal or reduction of work assessment allowance on the ground that the recipient is present (residence and stay) in another EEA State.

Question 14:

Article 21(1) of Regulation No 883/2004 is to be interpreted as covering both situations where the medical diagnosis is given during the stay in the other EEA State, and – as in the present case – the diagnosis is recognized by the competent institution before departure.

Question 15:

Article 21 of Regulation No 883/2004 does not confer authority to attach conditions,

including a requirement of prior authorization, to the receipt of work assessment allowance in the event of stays in other EEA States. On the contrary, this runs counter to the wording and purpose of Article 21 of Regulation No 883/2004 and the provision thus positively precludes conditions (iii).

Also conditions (i) and (ii) are contrary to the rights given in Regulation No 833/2004 and can therefore not be maintained. In the alternative, condition (i) is not suitable and does not pass the balancing test, and condition (ii), to be justified, every specific activity obligation must serve a purpose that is recognized by EEA law and the obligation must be suitable and proportionate. The specific obligation must also pass a balancing test.

Question 16:

Condition (ii) and (iii) is a restriction on free movement under Article 28 and 36 of the EEA and Article 4 and 6 of Directive 2004/38. Condition (iii) cannot be justified. Condition (ii), to be justified, every specific activity obligation must serve a purpose that is recognized by EEA law and the obligation must be suitable and proportionate. The obligation must also pass a balancing test.

In the alternative, if the conditions can be justified, a person who has failed to apply for prior authorization and who has failed to notify their place of temporary residence may nevertheless not be ordered to repay the benefit as unlawfully acquired under national law or be subject to criminal sanctions.

The Norwegian Government

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

Question 1:

A benefit such as the work assessment allowance is a sickness benefit for the purposes of Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, in the version amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996, as amended by Council Regulation (EC) No 307/1999 of 8 February 1999.

Question 2:

Article 22 of Regulation No 1408/71 confers entitlement to cash benefits, in a situation as that at issue in the main proceedings and subject to the other conditions applicable, where the worker or self-employed person has transferred his residence

to the territory to another EEA State, and therefore does not cover stays such as that at issue in the main proceedings. The same applies to Article 19 of Regulation No 1408/71.

Question 3:

In the light of the preceding answer, it is not necessary to answer the third question referred.

In the alternative: Article 22(1)(b) and Article 22(2) of Regulation No 1408/71 means that a person retains the right to receive the benefits referred to in Article 22(1)(b) after transferring his residence to an EEA State other than the competent state, provided that he has obtained authorisation for that purpose and fulfils the other conditions therein.

Question 4:

The finding that a national measure may be consistent with Regulation No 1408/71 does not necessarily have the effect of removing that measure from the scope of the provisions in the main part of the EEA Agreement.

Questions 5 and 6:

Article 28 EEA does not apply in a situation such as that at issue in the main proceedings.

Persons established in a Member State who travel to another Member State as tourists must be regarded as recipients of services and thus fall within the scope of application of Article 36 EEA. However, conditions for entitlement to a work assessment allowance, such as those at issue in the main proceedings, do not affect the persons' right to travel freely as a tourist and to receive services for the purposes of Article 36 EEA.

Questions 7 and 8:

In the light of the preceding answer, it is not necessary to answer the seventh and eight question referred.

In the alternative: National legislation such as that at issue in the main proceedings may be justified for reasons of general interests such as integration of excluded persons from the labour market and promotion of a high level of employment, monitoring compliance, prevention of abuse, the risk of seriously undermining the financial balance of the social security system and ensuring rules which are easily managed and supervised.

The national legislation must also be suitable to attain their objectives and do not go beyond what is necessary in order to attain them. The latter condition requires that the objectives may not be achieved in an equally effective manner by measures that are less restrictive of free movement.

Question 9:

In the event that the two conditions to which the ninth question refers are justified and proportionate, which is a matter for the national court to ascertain in light of the answer given to the seventh and eight question above, an administrative measure ordering repayment of a benefit such as the work assessment allowance, which has been obtained in the absence of an authorisation required by national law and thus rendering the national authorities unable to verify in advance whether the stay at issue was compatible with inter alia the requirement that the stay abroad is compatible with scheduled activity, follow-up and control, does not go beyond what is necessary to attain the rules pursued.

Question 10:

Subject to the same caveat as given above, a criminal penalty for obtaining a benefit such as the work assessment allowance without authorisation required by national law and by providing incorrect information to the competent institution, such conduct having been deemed grossly negligent and entailing risk of loss for the deceived party, thus qualifying as grossly negligent fraud under the criminal code in that State, does not in of itself go beyond what is strictly necessary for the objectives pursued or is so disproportionate to the gravity of the infringement that it becomes an obstacle to the freedom enshrined in Article 36 EEA, should that provision be deemed applicable. The concrete assessment is in any event a matter for the national court to determine.

Question 11:

National measures such as those at issue in the main proceedings do not infringe the right to leave the territory of that State for the purposes of Article 4 of Directive 2004/38. Article 6 of Directive 2004/38 gives an EEA national a right of residence for three months on the territory of another EEA State and therefore does not impose obligations on the EEA State of which that national is a citizen.

Question 12:

A benefit such as the work assessment allowance is a sickness benefit for the purposes of Regulation No 883/2004.

Question 13:

Stays such as those at issue in the main proceedings are stays within the meaning of Article 21(1) of Regulation No 883/2004, as each of those constitutes a temporary residence for the purposes of Article 1(k) of Regulation No 883/2004.

Question 14:

Article 21 of Regulation No 883/2004 covers both situations where the medical diagnosis is given during a stay in an EEA State other than the competent State and where that diagnosis is given in the competent State prior to departure.

Question 15:

By making an insured person entitled to cash benefits provided by the competent institution in accordance with the legislation it applies, Article 21 of Regulation No 883/2004 reflects that Article 48 TFEU does not provide for the harmonisation of the social security legislation of the EU and EEA States, but only for their coordination. It is thus for the legislation of each EEA State to determine the conditions for granting social security benefits. National conditions must not, however, render Article 21 of Regulation No 883/2004 devoid of purpose. A condition that precludes stays in another EEA State beyond four weeks is therefore not compatible with Article 21 of Regulation No 883/2004. In addition, when EEA States determine the conditions for granting social security benefits, the EEA State must comply with EEA law. Consequently, the referring court must assess those conditions in light of the answers given above to questions 5 to 8.

Question 16:

The finding that a national measure may be consistent with Regulation No 883/2004 does not necessarily have the effect of removing that measure from the scope of the provisions in the main part of the EEA Agreement.

ESA

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

1. Regulation 1408/71 must be interpreted as not precluding a requirement to stay in the competent State in order to receive a benefit such as the work assessment allowance at issue in the proceedings pending before the national court. Such a requirement must however comply with other applicable provisions of EEA law.

2. Article 36 EEA and/or 28 EEA must be interpreted to the effect that conditions imposed on recipients of a sickness benefit within the meaning of Article 4(1)(a) of Regulation 1408/71 entailing:

(i) that the benefit recipient may stay abroad only for a limited period of time which may not usually exceed four weeks per year; and

(ii) that the stay abroad is compatible with the performance of defined activity obligations and does not impede follow-up and control by the competent institution; and

(iii) that the person concerned must apply for and obtain authorisation from the competent institution, compliance being controlled through the use of a notification form;

constitute restrictions on the free movement of those recipients which do not appear to be justified.

As regards the failure to seek an authorisation as foreseen in condition (iii), a failure to comply with an obligation to seek an official authorisation, or with a notification requirement, cannot be held against persons where the conditions on which such an authorisation would be granted were in themselves contrary to EEA law.

3. Articles 4 and 6 of Directive 2004/38 must be interpreted as precluding a requirement to stay in the competent State in order to receive a benefit such as the work assessment allowance in issue in the proceedings pending before the national court.

4. Article 21 of Regulation 883/2004 must be interpreted as precluding a requirement to stay in the competent State in order to receive a benefit such as the work assessment allowance in issue in the proceedings pending before the national court.

The Commission

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

The concept of "sickness benefits" in Article 4(1)(a) of Regulation 1408/71 and in Article 3(1)(a) of Regulation 883/2004 is to be interpreted as encompassing the Norwegian work assessment allowance, the objective of which is to allows its recipients to have an income in periods during which they are ill or injured and need assistance from the Norwegian Labour and Welfare Administration to return to work.

Article 22(1)(b) of Regulation 1408/71 is to be interpreted as preventing a competent State from making retention of entitlement to a benefit such as that at issue in the main proceedings subject to an authorization during stays in another EEA State where the refusal of such an entitlement is not based on the objective factor that the movement of the person concerned would be prejudicial to his state of health or the receipt of medical treatment

The concept of "stay" in Article 21(1) of Regulation 883/2004 is to be interpreted as encompassing all short stays in other EEA States, whatever their purposes. That provision precludes EEA States from subjecting the retention of the right to cash benefits during those short stays in other EEA States to a permission or an authorization.

Páll Hreinsson
Judge-Rapporteur