



## JUDGMENT OF THE COURT

30 June 2021\*

*(Social security – Regulation (EC) No 883/2004 – Articles 7, 63 and 64 – Unemployment benefits – Requirement to stay in the competent EEA State – Unemployed person going to another EEA State)*

In Case E-15/20,

REQUEST to the Court under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice by Borgarting Court of Appeal (*Borgarting lagmannsrett*), in criminal proceedings against

**P,**

concerning the interpretation of the Agreement on the European Economic Area, in particular Articles 3, 7, 28, 29 and 36 thereof, Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, and Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States,

THE COURT,

composed of: Páll Hreinsson, President (Judge-Rapporteur), Per Christiansen and Bernd Hammermann, Judges,

Registrar: Ólafur Jóhannes Einarsson,

having considered the written observations submitted on behalf of:

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\* Language of the request: Norwegian. Translations of national provisions are unofficial and based on those contained in the documents of the case.

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

having regard to the Report for the Hearing,

having heard the oral arguments of P, represented by Henrik Boehlke and Dag Sørli Lund; Oslo Public Prosecution Office, represented by Henry John Mæland; the Norwegian Government, represented by Simen Hammersvik, Torje Sunde, Kaja Moe Winther and Tone Hostvedt Aarthun; the Netherlands Government, represented by Mielle Bulterman and Joost Hoogveld; ESA, represented by Carsten Zatschler, Ewa Gromnicka and Erlend Møinichen Leonhardsen; and the Commission, represented by Denis Martin and Louise Grønfeldt, at the remote hearing on 23 March 2021,

gives the following

## **Judgment**

### **I Legal background**

*EEA law*

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

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

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

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

2 Article 7 EEA reads:

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

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

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

3 Article 28 EEA reads:

*1. Freedom of movement for workers shall be secured among EC Member States and EFTA States.*

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

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

*(a) to accept offers of employment actually made;*

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

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

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

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

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

4 Article 29 EEA reads:

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

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

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

5 Article 36(1) EEA reads:

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

6 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, (“the Regulation”) was incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 76/2011 of 1 July 2011 (OJ 2011 L 262, p. 33; and EEA Supplement 2011 No 54, p. 46), which entered into force on 1 June 2012, and is referred to at point 1 of Annex VI (Social security) to the EEA Agreement.

7 Article 1 of the Regulation, 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;*

...

8 Article 3 of the Regulation, headed “Matters covered”, reads, in extract:

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

...

(h) *unemployment benefits;*

...

9 Article 7 of the Regulation, headed “Waiving of residence rules”, reads:

*Unless otherwise provided for by this Regulation, cash benefits payable under the legislation of one or more Member States or under this Regulation shall not be subject to any reduction, amendment, suspension, withdrawal or confiscation on account of the fact that the beneficiary or the members of his/her family reside in a Member State other than that in which the institution responsible for providing benefits is situated.*

10 Article 63 of the Regulation, headed “Special provisions for the waiving of residence rules”, reads:

*For the purpose of this Chapter, Article 7 shall apply only in the cases provided for by Articles 64, 65 and 65a and within the limits prescribed therein.*

11 Article 64 of the Regulation, headed “Unemployed persons going to another Member State”, reads:

*1. A wholly unemployed person who satisfies the conditions of the legislation of the competent Member State for entitlement to benefits, and who goes to another Member State in order to seek work there, shall retain his/her entitlement to unemployment benefits in cash under the following conditions and within the following limits:*

*(a) before his/her departure, the unemployed person must have been registered as a person seeking work and have remained available to the employment services of the competent Member State for at least four weeks after becoming unemployed. However, the competent services or institutions may authorise his/her departure before such time has expired;*

*(b) the unemployed person must register as a person seeking work with the employment services of the Member State to which he/she has gone, be subject to the control procedure organised there and adhere to the conditions laid down under the legislation of that Member State. This condition shall be considered satisfied for the period before registration if the person concerned registers within seven days of the date on which he/she ceased to be available to the employment services of the Member State which he/she*

*left. In exceptional cases, the competent services or institutions may extend this period;*

*(c) entitlement to benefits shall be retained for a period of three months from the date when the unemployed person ceased to be available to the employment services of the Member State which he/she left, provided that the total duration for which the benefits are provided does not exceed the total duration of the period of his/her entitlement to benefits under the legislation of that Member State; the competent services or institutions may extend the period of three months up to a maximum of six months;*

*(d) the benefits shall be provided by the competent institution in accordance with the legislation it applies and at its own expense.*

*2. If the person concerned returns to the competent Member State on or before the expiry of the period during which he/she is entitled to benefits under paragraph 1(c), he/she shall continue to be entitled to benefits under the legislation of that Member State. He/she shall lose all entitlement to benefits under the legislation of the competent Member State if he/she does not return there on or before the expiry of the said period, unless the provisions of that legislation are more favourable. In exceptional cases the competent services or institutions may allow the person concerned to return at a later date without loss of his/her entitlement.*

*3. Unless the legislation of the competent Member State is more favourable, between two periods of employment the maximum total period for which entitlement to benefits shall be retained under paragraph 1 shall be three months; the competent services or institutions may extend that period up to a maximum of six months.*

*4. The arrangements for exchanges of information, cooperation and mutual assistance between the institutions and services of the competent Member State and the Member State to which the person goes in order to seek work shall be laid down in the Implementing Regulation.*

#### *National law and practice*

12 Section 4-2 of the National Insurance Act, headed “Stay in Norway”, reads:

*In order to be entitled to unemployment benefits, the member must stay in Norway.*

*The Ministry may issue regulations providing for exemptions from the requirement to stay in Norway.*

13 Section 4-3 of the National Insurance Act gives right to partial coverage for a loss of income from employment in the event of unemployment. There are conditions for the

benefit. The person concerned must have lost income from employment as a worker due to unemployment and the usual working time must be reduced by at least 50 per cent.

- 14 The first paragraph of Section 4-5 of the National Insurance Act, headed “Genuine job-seekers”, reads:

*In order to be entitled to unemployment benefits, the member must be a genuine jobseeker. A genuine job-seeker includes a person who is able to work and is willing to:*

- (a) accept any employment that is paid in accordance with a collective wage agreement or customary practice;*
- (b) accept employment anywhere in Norway;*
- (c) accept employment irrespective of whether it is full-time or part-time;*
- (d) participate in labour market measures.*

- 15 Section 4-8 of the National Insurance Act, headed “Obligation to register and report and obligation to attend”, reads:

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

*The member must report in every 14 days (the reporting period). The Labour and Welfare Administration shall determine how the reporting is to take place.*

*The Labour and Welfare Administration may decide that the member is to attend on days other than the scheduled reporting days.*

*If the member, without reasonable cause, fails to report in on the scheduled day, entitlement to unemployment benefits shall be lost as from the day on which the member ought to have reported in until such time as he or she reports in once again.*

- 16 The first paragraph of Section 4-20 of the National Insurance Act, headed “Temporary loss of unemployment benefits”, reads:

*Entitlement to unemployment benefits shall be lost for a limited time if the member, without reasonable cause, refuses to:*

- (a) accept an offer of employment that is paid in accordance with a collective wage agreement or customary practice;*
- (b) accept an offer of employment anywhere in Norway;*

*(c) accept an offer of employment irrespective of whether it is full-time or part-time;*

*(d) participate in labour market measures;*

*(e) attend meetings with the Labour and Welfare Administration when called upon to do so, or fail to attend after being called into such a meeting.*

17 Section 4-21 of the National Insurance Act provides that entitlement to unemployment benefits lapses when the member does not fulfil the condition of being a genuine job-seeker.

18 Section 21-3 of the National Insurance Act obliges a recipient of unemployment benefits from the Norwegian Labour and Welfare Administration (“NAV”) to provide information. The recipient must provide information about all changes that may affect their entitlement to the benefits or for the amount of the benefit to be verified.

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

...

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

...

20 As regards the first paragraph of Section 4-8 of the National Insurance Act, Circular R04-00 states, in extract:

...

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

...

21 As regards the second paragraph of Section 4-8 of the National Insurance Act, Circular R04-00 also states, in extract:

...

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

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

...

- 22 As regards the third paragraph of Section 4-8 of the National Insurance Act, Circular R04-00 further states, in extract:

...

*The NAV office may decide that reporting may also take place otherwise than and in addition to sending in a notification form. This may occur in cases where the NAV office finds it appropriate to request, e.g., attendance at the NAV office, telephone inquiry, etc.*

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

...

- 23 Section 1-3 of Norwegian Regulation No 890 of 16 September 1998 on Unemployment Benefits (*Forskrift om dagpenger under arbeidsløshet*) (“the Unemployment Benefits Regulation”) provides that a person who receives unemployment benefits while establishing their own business may apply for an exemption from the requirement to stay in Norway if the stay outside Norway is an integral part of the process of establishing the business.

- 24 Section 1-4 of the Unemployment Benefits Regulation reads:

*A member who is attending a job interview in another EEA country may, upon application, be exempted from the requirement in the National Insurance Act Section 4-2 on residence in Norway for up to three days.*

- 25 Section 1-5 of the Unemployment Benefits Regulation reads:

*A member who has received unemployment benefits for more than 52 weeks may stay outside Norway in connection with holiday absence pursuant to the fourth paragraph of the National Insurance Act Section 4-5.*

26 Section 4-1 of the Unemployment Benefits Regulation reads:

*A member who receives unemployment benefits must engage actively in seeking employment or in other activity with a view to obtaining employment, in order for that person to be deemed to be a genuine job-seeker pursuant to the first paragraph of Section 4-5 of the National Insurance Act.*

*The Labour and Welfare Administration and the member shall agree on which specific activities the member is to complete. If no agreement is reached as to activity or where otherwise deemed appropriate, the Labour and Welfare Administration may order the member to complete a specified activity.*

*The Labour and Welfare Administration may require the member to document the completed activity.*

27 The first paragraph of Section 13-4 of the Unemployment Benefits Regulation reads:

*There shall be exemptions from the requirement in Section 4-2 of the National Insurance Act on stays in Norway for members who:*

*a. have availed themselves of the opportunity to export unemployment benefits, see Section 13-9;*

*b. are frontier workers who are partially unemployed or laid off from employment in Norway; or*

*c. are partially or intermittently unemployed and during their last employment were resident in another EEA country or Switzerland, and are not considered to be frontier workers, who work several consecutive days in a week and then are off for several days in a row (in a recurring rotation or rotation scheme), and who travel home to their country of residence during free periods.*

28 Section 13-9 of the Unemployment Benefits Regulation reads:

*Wholly unemployed recipients of unemployment benefits who are seeking employment in other EEA countries or Switzerland may retain Norwegian unemployment benefits for up to three months, provided that, after they become unemployed, they have been registered with the Labour and Welfare Administration as a genuine person seeking work for at least four weeks prior to departure, with entitlement to unemployment benefits under Chapter 4 of the National Insurance Act.*

*The requirement of being a genuine job-seeker must have been fulfilled for at least four of the last 12 weeks prior to departure. Exemptions to the four-week requirement may be granted where the unemployed person is to follow their spouse or common-law partner to another EEA country where that person has accepted employment.*

*In order to be entitled to unemployment benefits for the entire three-month period, the member must register as a job-seeker for the employment services in that country to which he or she travels and be subject to the prevailing control and follow-up routines there. Registration must take place within seven days after departure from Norway. In exceptional cases, the Labour and Welfare Directorate may grant an extension to the seven-day time-limit.*

*The possibility of seeking employment with unemployment benefits in other EEA countries or Switzerland shall be limited to a three-month period per benefits period.*

*A person who returns to Norway before or upon expiry of the three-month period may continue with payment of unemployment benefits from Norway if the other conditions for entitlement to unemployment benefits are fulfilled.*

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

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

...

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

...

- 30 Section 371 of the Penal Code reads, in extract:

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

...

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

## II Facts and procedure

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

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

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

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

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

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

36 In its judgment, Oslo District Court observed that it was conceivable that P, with his background, had better prospects of finding a new job abroad. Nevertheless, it considered that the decisive factor was that P could not be away on travel and, at the same time, receive social security benefits without notifying or applying for permission to do so from NAV.

Oslo District Court took the view that P was aware of this and noted that he had received information about these requirements from NAV.

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

38 Against this background, Borgarting Court of Appeal decided to stay the proceedings and make a reference to the Court. The request, dated 16 October 2020, was registered at the Court on 21 October 2020. Borgarting Court of Appeal has referred the following questions to the Court:

1. *Do Articles 3 and 7(a) of the EEA Agreement, read in conjunction with Regulation 883/2004, in particular Articles 4, 5 and 7, read in conjunction with Chapter 6, preclude a national scheme under which:*
  - a. *it is a condition for entitlement to unemployment benefits that the unemployed person stays ("oppholder seg") in Norway (see Section 4-2 of the National Insurance Act); and*
  - b. *an exemption from the requirement to stay, including the provision in Article 64 of Regulation 883/2004, is provided for in the national Unemployment Benefits Regulation, which is also implemented in the Transposing Regulation?*
2. *Irrespective of the answer to question 1, is a scheme as described in question 1 a restriction under the EEA Agreement's rules on free movement, including Articles 28, 29 and 36?*

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

- i. *that stays in the competent State are usually viewed as giving the unemployed person better incentive and opportunities for seeking and finding employment, including being able to start quickly in a possible job;*
- ii. *that stays in the competent State are usually viewed as helping the unemployed person to be available for the employment services, and that presence in Norway makes it possible for the public administration to monitor whether the unemployed person fulfils the conditions for receiving the cash benefit paid in the event of unemployment – including that the*

*unemployed person is in fact unemployed and does not have hidden sources of income, is a genuine job-seeker, is engaged in an active search for employment or participates in other activities aimed at finding employment;*

*iii. that stays in the competent State are usually viewed as giving the employment services better opportunities to assess whether the unemployed person is being given suitable follow-up; and*

*iv. that the national scheme allows for receiving unemployment benefits in another EEA State on the conditions provided for by Regulation 883/2004.*

*3. In so far as required by the answers to questions 1 and 2, equivalent questions are asked in relation to Directive 2004/38, including Articles 4, 6 and 7.*

*4. The accused has been indicted for having provided false information to the administrative body NAV regarding stays in another EEA State, thereby having misled NAV into paying unemployment benefits to which he was not entitled because the National Insurance Act lays down conditions requiring a stay (“opphold”) in Norway in order to receive unemployment benefits. Given the Norwegian transposition of Regulation 883/2004 (see question 1), is the use of the provisions of the Criminal Code on fraud and providing a false statement in a case such as the present one in accordance with fundamental EEA law principles such as the principle of clarity and the principle of legal certainty?*

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

39 Reference is made to the Report for the Hearing for a fuller account of the legal framework, the facts, the procedure and the proposed answers submitted to the Court. Arguments of the parties are mentioned or discussed hereinafter only insofar as is necessary for the reasoning of the Court.

### **III Answer of the Court**

#### *Preliminary observations*

40 The Court notes that, except for Questions 4 and 5, the questions referred essentially correspond to the questions answered by the Court in Case E-13/20 *O v the Norwegian Government* (judgment of 30 June 2021). Accordingly, a general reference is made to Case E-13/20, which is applied and adjusted for the purposes of the present case.

*Question 1*

- 41 By Question 1, the referring court asks in essence whether a requirement that the unemployed person must stay in the competent State to be entitled to a cash benefit in the event of unemployment is compatible with the Regulation. It also asks whether the manner in which the Regulation has been implemented is consistent with the implementation obligations under Article 7(a) of the EEA Agreement, read in conjunction with Article 3 thereof.
- 42 As regards the second part of that question, it must be borne in mind that, under the procedure laid down in Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, the Court has no jurisdiction to interpret national law, that being exclusively for the referring court (see Case E-11/12 *Koch and Others* [2013] EFTA Ct. Rep. 272, paragraph 60).
- 43 However, the Court does have jurisdiction to supply the national court with guidance on the interpretation of EEA law so as to enable that court to determine whether such implementation obligations have been respected, in order that it can decide the case before it (see *Koch and Others*, cited above, paragraph 61, and case law cited).
- 44 Under Article 7 EEA, the EFTA States are obliged to implement all acts referred to in the Annexes to the EEA Agreement, as amended by decisions of the EEA Joint Committee. According to its wording, Article 7(a) requires the EFTA States to implement acts corresponding to regulations “as such” (see, inter alia, Case E-15/14 *ESA v Iceland*, [2015] EFTA Ct. Rep. 40, paragraph 32). Thus, when implementing such acts, the provision leaves the EFTA States with no discretion to amend or alter an act corresponding to a regulation when making it part of their national law.
- 45 However, the Court notes that, if necessary, the EFTA States may lay down national provisions supplementing acts corresponding to regulations, for example in order to ensure their effectiveness. That is for example the case with legislative provisions governing criminal liability for breaches of the act corresponding to a regulation.
- 46 The first part of the first question concerns whether rules such as those at issue in the main proceedings, which provide that a recipient of unemployment benefits must stay in Norway in order to receive said benefit, are in line with the Regulation. In this regard, the Court notes that in *O v the Norwegian Government*, cited above, the Court held that it follows from well-established case law, as well as being mentioned in recitals 4 and 45 of the Regulation, that the purpose of that regulation is to coordinate EEA States’ social security systems in order to guarantee that the right to free movement of persons can be exercised effectively. Further, according to Article 29 EEA, the legal acts in the field of social security incorporated into Annex VI to the EEA Agreement are intended to provide freedom of movement for workers and self-employed persons, in particular, by securing the payment of benefits to persons resident in the territory of another EEA State. However,

Article 29 EEA provides for coordination, rather than harmonisation, of domestic legislation in this area. Thus, EEA law does not detract from the power of the EEA States to organise their social security systems. In the absence of harmonisation at EEA level, it is for the legislature of each EEA State to determine the conditions on which social security benefits are granted. Nevertheless, when exercising that power, the EEA States must comply with EEA law (see *O v the Norwegian Government*, cited above, paragraphs 38 and 39).

- 47 The Court observed that, under Article 7 of the Regulation, cash benefits payable under the legislation of one or more EEA States or under the regulation shall not be subject to any reduction, amendment, suspension, withdrawal or confiscation on account of the fact that the beneficiary or the members of his/her family reside in an EEA State other than that in which the institution responsible for providing benefits is situated. The Court found that since a presence requirement is in fact significantly more restrictive than a residence requirement, it follows that an EEA State cannot condition such benefits on continuous physical presence either (see *O v the Norwegian Government*, cited above, paragraph 40).
- 48 However, the Court also found that Chapter 6 of Title III of the Regulation contains special provisions for unemployment benefits and that Article 63 of the Regulation derogates from the main rule of Article 7. Article 63 allows EEA States to impose residence rules, including presence requirements such as in the main proceedings, for entitlement to unemployment benefits in other instances than those provided for by Articles 64, 65 or 65a. The Court found that those Articles exhaustively regulate the three situations in which the competent EEA State is required to allow recipients of an unemployment benefit to reside or stay in the territory of another EEA State (see *O v the Norwegian Government*, cited above, paragraphs 41 and 42).
- 49 Accordingly, it is clear from a combined reading of Articles 7 and 63 as well as Article 64(1) of the Regulation that the right to retain unemployment benefits for a wholly unemployed person who goes to another EEA State is guaranteed only for the purposes of seeking work there and, under the conditions mentioned in Article 64 (see *O v the Norwegian Government*, cited above, paragraph 51).
- 50 The Court notes that it is clear from the request and appears to be uncontested by the parties that P does not satisfy the conditions of Article 64 of the Regulation, as he never registered as a job seeker in the EEA States to which he travelled. In such circumstances, the competent State remains within the limits permitted by the Regulation to impose a requirement to stay in Norway.
- 51 In the light of the foregoing, the answer to Question 1 must be that a requirement that the unemployed person must stay in the competent State, in cases where the conditions of Articles 64, 65 or 65a are not fulfilled, is compatible with the Regulation.

*Questions 2 and 3*

- 52 By Questions 2 and 3, the referring court asks in essence whether a requirement that the unemployed person must stay in the competent State, such as is described in the main proceedings, is compatible with Articles 28, 29 and 36 EEA and/or Directive 2004/38 of the European Parliament and of the Council (OJ 2004 L 158, p. 77).
- 53 As the Court held in *O v the Norwegian Government*, Articles 64 to 65a exhaustively regulate the only three situations in which the competent EEA State is required to allow recipients of an unemployment allowance to retain the benefit when they reside or stay in the territory of another EEA State (see *O v the Norwegian Government*, cited above, paragraph 58). In that judgment, the Court found that, under Article 64, the unemployed person is, subject to strict conditions and for a limited period of time, relieved of the duty to make himself available to the employment services of the competent State. The provision thus establishes an independent body of rules in favour of workers claiming the benefit which constitute an exception to national legal rules, and which must be interpreted uniformly in all the EEA States. It should be recalled that Article 29 EEA does not prohibit the legislature from attaching conditions to the rights and advantages which it accords in order to ensure freedom of movement for workers or from determining the limits thereto (see *O v the Norwegian Government*, cited above, paragraph 59).
- 54 In the light of the foregoing, the answer to Questions 2 and 3 must be that outside the situations expressly mentioned in Articles 64, 65 and 65a of the Regulation, a condition to stay in the competent EEA State for entitlement to unemployment benefits does not fall to be assessed under Articles 28, 29 and 36 of the EEA Agreement. According to the same considerations, the condition does not fall to be assessed in the light of Directive 2004/38.

*Questions 4 and 5*

- 55 By Questions 4 and 5, the referring court asks in essence whether it is compatible with EEA law to impose criminal law sanctions for having knowingly provided false information to the competent institution regarding circumstances that are decisive for the right to benefits, in a situation such as that at issue in the main proceedings.
- 56 As the Court held in *O v the Norwegian Government*, cited above, the Regulation is not intended to lay down the criteria creating the right to benefits. Each EEA State retains the power to determine in its domestic legislation the conditions for granting benefits under a social security system, albeit in compliance with EEA law. In the absence of EEA legislation in this area, the EEA States may choose the penalties which seem appropriate to them. They must, however, exercise that power in accordance with EEA law and its general principles. This includes the principle of equivalence, under which these rules must not be less favourable than those governing similar domestic actions, and the principle of effectiveness, under which these rules must not render practically impossible or

excessively difficult the exercise of rights conferred by EEA law (see *O v the Norwegian Government*, cited above, paragraph 64).

- 57 Furthermore, domestic sanctions must not go beyond what is necessary and must not be so disproportionate to the gravity of the infringement that they become an obstacle to the freedoms enshrined in the EEA Agreement (compare the judgments in *Skani and Chryssanthakopoulos*, C-193/94, EU:C:1996:70, paragraph 36, and *Ntionik and Pikoulas*, C-430/05, EU:C:2007:410, paragraph 54).
- 58 In order to assess whether a penalty is consistent with the principle of proportionality, account must be taken, inter alia, of the nature and the degree of seriousness of the infringement which the penalty is intended to sanction and of the means of establishing the amount of the criminal sanction (compare the judgment in *Global Starnet*, C-322/16, EU:C:2017:985, paragraph 61 and case law cited). Moreover, the principle of legal certainty requires, in matters governed by EEA law, that the legislation of the EFTA States be sufficiently precise and clear and its application foreseeable by those subject to it (see Case E-15/12 *Jan Anfinn Wahl* [2013] EFTA Ct. Rep. 534, paragraph 52).
- 59 It is, however, for the national court to determine, in the light of the foregoing considerations, whether the penalties provided for by the applicable national legislation are in accordance with EEA law.
- 60 Accordingly, EEA States retain the power to determine whether criminal sanctions may be imposed for obtaining unemployment benefits by knowingly providing wrongful information. They must, however, exercise that power in accordance with EEA law and its general principles, including the principle of proportionality.

#### **IV Costs**

- 61 The costs incurred by the Norwegian Government, the Netherlands Government, ESA and the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are a step in the proceedings pending before the national court, any decision on costs for the parties to those proceedings is a matter for that court.

On those grounds,

THE COURT

in answer to the questions referred to it by Borgarting Court of Appeal hereby gives the following Advisory Opinion:

- 1. A requirement that the unemployed person must stay in the competent State to be entitled to a cash benefit in the event of unemployment in cases where the conditions of Articles 64, 65 or 65a are not fulfilled is compatible with Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems.**
- 2. Outside the situations expressly mentioned in Articles 64, 65 and 65a of Regulation (EC) No 883/2004, a condition to stay in the competent EEA State for entitlement to unemployment benefits does not fall to be assessed under Articles 28, 29 and 36 of the EEA Agreement and is not incompatible with 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.**
- 3. EEA States retain the power to determine whether criminal sanctions may be imposed for obtaining unemployment benefits by knowingly providing wrongful information. EEA States must, however, exercise that power in accordance with EEA law and its general principles, including the principle of proportionality.**

Páll Hreinsson

Per Christiansen

Bernd Hammermann

Delivered in open court in Luxembourg on 30 June 2021.

Ólafur Jóhannes Einarsson  
Registrar

Páll Hreinsson  
President