



ATTORNEY GENERAL FOR CIVIL AFFAIRS

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To the EFTA Court

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OSLO, 21 August 2023

**Written Observations  
by the Norwegian Government, represented by  
the Labour and Welfare Directorate (Arbeids- og  
velferdsdirektoratet)**

represented by Ida Thue, advocate at the Office of the Attorney General for Civil Affairs,  
submitted pursuant to Article 90(1) of the Rules of Procedure of the EFTA Court, in

**Case E-3/23 A v Arbeids- og velferdsdirektoratet**

concerning a request for a preliminary ruling from Trygderetten (The Norwegian National  
Insurance Court)

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## 1 INTRODUCTION

- (1) The National Insurance Court has, by application dated 16 May 2023, requested the EFTA Court to give an advisory opinion on a question regarding a claim for invalidity benefit (*uføretrygd*). The question reads, as translated by the EFTA Court:

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

- (2) The question has arisen in a case between the appellant A (hereinafter 'the appellant') and the Norwegian Labour and Welfare Directorate (hereinafter 'NAV' or 'the Government') pending before the National Insurance Court (hereinafter 'the referring court').

## 2 BACKGROUND

- (3) The basic facts of the case, as set out in the order of reference, are as follows:
- (4) The appellant is a Norwegian national who has periods of insurance both from Ireland and Norway, but who is not entitled to an invalidity benefit in Ireland.
- (5) By decision of 19 August 2020, the NAV Employment and Benefits Office (*NAV Arbeid og ytelser*) granted A an invalidity benefit based on the provisions on minimum annual benefits in the second paragraph of Section 12-13 of the Norwegian National Insurance Act and the provisions in Article 52(1)(b) of Regulation 883/2004 on *pro rata* calculation of benefits, cf. Article 46(1). The actual amount, cf. Article 52(1)(b)(ii), was calculated based on 283 months of insurance in Norway and 59 months in Ireland.
- (6) The appellant submits that the provisions on the minimum annual benefit in the second paragraph of Section 12-13 of the National Insurance Act constitute a minimum benefit within the meaning of Article 58 of the Regulation. On that basis, A claims that he is entitled to the full minimum amount in the second paragraph of Section 12-13 (2.48 times the basic amount) without any reduction based on a *pro rata* calculation, cf. Article 52(1)(b).
- (7) The Norwegian Government considers that the provisions on the minimum annual benefit in the second paragraph of Section 12-13 of the National Insurance Act are part of the normal rules on invalidity benefits based on income and acquired insurance periods, and therefore cannot be regarded as "a specific guarantee the object of which is to ensure for recipients of social security benefits a minimum income which is in excess of the amount of benefit which they may claim solely on the basis of their periods of insurance and their contributions", cf. the judgment in case 22/81 *Browning*.

**3 NATIONAL LAW**

- (8) The order for reference paras. 15–33 contain the relevant provisions on invalidity benefit in Chapter 12 of the National Insurance Act. The Government will therefore only provide a brief summary of the Norwegian rules on invalidity benefits.
- (9) An insured person between 18 and 67, whose income capacity is permanently reduced by at least 50 per cent due to illness, injury or defect, is entitled to an invalidity benefit. As a main rule, it is required that the person has been insured for at least five years immediately prior to the contingency (qualification period), cf. Section 12-2 of the National Insurance Act.
- (10) Periods of insurance are a factor used in the calculation of invalidity benefits, cf. the first paragraph of Section 12-12 of the National Insurance Act. This is as a main rule the period in which a person has been a member in the national insurance scheme with entitlement to benefits under Chapters 12, 16, 17, 19 and 20. The period of insurance shall be calculated from the time the person turns 16 years of age up to and including the year in which he or she turns 66 years of age, cf. the second paragraph of Section 12-12.
- (11) Persons residing in Norway are compulsory members of the National Insurance Scheme, cf. the first paragraph of Section 2-1 National Insurance Act. A person who is not a member of the National Insurance Scheme in accordance with § 2-1 (that is, as resident in Norway), is a compulsory member of the National Insurance Scheme if he or she is employed in Norway, see the first paragraph of Section 2-2 of the National Insurance Act. Periods of insurance under the Norwegian National Insurance Act are consequently earned through residence or employment in Norway (or, for many members, through both residence and employment in Norway).
- (12) The invalidity benefit is calculated on the basis of the average pensionable income of the best three of the previous five years before the onset of disability, but income exceeding six times the basic amount (NOK 697 434) is not taken into account, cf. the first and fifth paragraph of Section 12-11. The disability benefit rate is 66 per cent of the calculation basis, cf. the first paragraph of Section 12-13. If the person's insurance periods amount to less than 40 years, the benefit is proportionally reduced, cf. the fourth paragraph of Section 12-13.
- (13) The second paragraph of Section 12-13 of the National Insurance Act contains provisions on minimum annual invalidity benefits. The yearly minimum amount depends on whether the insured person has a spouse or cohabitant. Furthermore, the amount varies according to the length of the person's insurance periods. The benefit is proportionally reduced if the total of the person's insurance periods is less than 40 years (the fourth paragraph of Section 12-13).
- (14) In practice, this means that the "minimum" annual invalidity benefit in the second paragraph of Section 12-13 is in fact not an absolute minimum, but instead a benefit with 40 different levels depending on the person's insurance time. A person without a spouse or a cohabitant will for example be entitled to one of the following 40 different "minimum" annual amounts:

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Years of insurance	Yearly amount (NOK)	Yearly amount (EUR)
1	7354	640
2	14709	1280
3	22063	1920
4	29418	2560
5	36772	3200
6	44127	3840
7	51481	4479
8	58836	5119
9	66190	5759
10	73544	6399
11	80899	7039
12	88253	7679
13	95608	8319
14	102962	8959
15	110317	9599
16	117671	10239
17	125025	10879
18	132380	11519
19	139734	12158
20	147089	12798
21	154443	13438
22	161798	14078
23	169152	14718
24	176507	15358
25	183861	15998
26	191215	16638
27	198570	17278
28	205924	17918
29	213279	18558
30	220633	19198
31	227988	19837
32	235342	20477
33	242697	21117
34	250051	21757
35	257405	22397
36	264760	23037
37	272114	23677
38	279469	24317
39	286823	24957
40	294178	25597

- (15) It is not correct that the minimum annual benefit in Section 12-13 is reduced on the basis of periods of insurance from other EEA States, as A claims. The benefit is calculated solely on the basis of periods acquired under Norwegian law. No reduction is made for persons who also have periods of insurance under Article 1(t) of the regulation from other EEA States. It is a different matter that Norwegian authorities thereafter apply Article 52(1) of the Regulation (the *pro rata* provisions) to such cases, which they are obliged to do under the Regulation.
- (16) The financing of the insurance scheme in the Norwegian National Insurance Act is based on three sources: 1) social security contributions by the members of the scheme, calculated on the basis of wages, self-employment income and pensions, 2) employers' contributions and 3) State contributions, cf. Chapter 23 of the National Insurance Act.
- (17) The income-based invalidity benefit (the first paragraph of Section 12-13), and the minimum annual amounts (the second paragraph of Section 12-13) are financed in the same way.
- (18) Finally, mention should be made of the Supplementary Allowance Act of 29 April 2005 (*Lov om supplerande stønad til personer med kort butid i Noreg*). The supplementary allowance scheme is a separate scheme that is intended to be a supplement to the old-age pension and the invalidity benefit under the National Insurance Act. It targets persons who do not receive a full minimum old age pension/minimum annual invalidity benefit because they have earned less than 40 years of insurance time.
- (19) Only refugees can receive a supplementary allowance to an invalidity benefit. The second paragraph of Section 5 of the Act gives the refugee right to an amount corresponding to the full minimum annual amount under the second paragraph of Section 12-13 of the National Insurance Act. This means that the amount is not proportionally reduced in accordance with the fourth paragraph of Section 12-13 of the National Insurance Act.
- (20) The supplementary allowance is subject to a strict means test and is reduced if the person or his/her spouse or cohabitant has other income. It is granted without any conditions of qualifying periods or completed periods of insurance. The supplementary allowance scheme is fully financed over the central government budget and is listed in Annex X to Regulation 833/2004 as a special non-contributory cash-benefit, cf. Article 70.

## **4 LEGAL ASSESSMENT**

### **4.1 General remarks – the aim and nature of Regulation No 883/2004**

- (21) Regulation No 883/2004 only draws up a system of coordination and does not harmonise the social security legislation of the EEA States, cf. the preamble paras. 1, 4 and 5.
- (22) The ECJ described the consequences of coordination in case 41/84 *Pinna* (para. 20):

*"... it must be observed that Article 51 of the Treaty provides for the coordination, not the harmonization, of the legislation of the Member States. As a result, Article 51 leaves in being differences between the Member States' social security systems ... It*

*follows that substantive and procedural differences between the social security systems of individual Member States ... are unaffected by Article 51 of the Treaty."*

- (23) The EEA States are therefore free to determine the substantive conditions for social security benefits. They can, for example, choose whether the right to an invalidity benefit shall be determined based on criteria relating to periods of residency/employment/insurance, or payment of contributions, or income – or a combination of several such factors.
- (24) The fact that the regulation only draws up a system of coordination also explains why the ECJ in *Torri* and *Browning* insisted that the minimum benefit provision (now Article 58) only was applicable in cases in which provision was made in the legislation of the Member State for such a benefit. A different interpretation would have had the effect of harmonising the social security legislation of the Member States by introducing substantive rules on a new minimum benefit.

#### **4.2 Coordination of invalidity benefits: the *pro rata* principle**

- (25) It seems undisputed that the provisions on invalidity benefits in Chapter 12 of the National Insurance Act are 'type B legislation', cf. Article 44(1) of the Regulation, and that Chapter 5 of Title III on old-age and survivors' pensions apply to coordination of such benefits, cf. Article 46(1).
- (26) The principle of coordination of long-term benefits (old-age pension, survivors' benefit and invalidity benefit) is different from short-term benefits (unemployment benefits and sickness benefits). The latter benefits are calculated as one single benefit, based on the social security legislation of one Member State only. Long-term benefits are based on a *pro rata* principle, where several partial benefits are calculated, based on the periods of insurance completed in different States. The State that is responsible for the application must collect information on the right to benefits earned in other Member States, cf. Article 50.
- (27) Article 52(1)(b) contains detailed rules on the calculation of the *pro rata* benefit. The first step is calculating a theoretical amount. This is the benefit which the person could claim if all the periods of insurance and/or residence completed in other States had been completed in the State responsible for the application. The second step is calculating the actual amount of the *pro rata* benefit by applying to the theoretical amount the ratio between the duration of the periods completed before the materialisation of the risk in the competent Member State and the total duration of such periods under the legislation of all Member States.
- (28) For persons who have low earnings and/or a low number of insurance periods in the States to which they have had a connection, this may lead to low invalidity benefits. This is only a consequence of the *pro rata* principle and the fact that the Regulation's objective is solely to coordinate benefits from several States and shall not lead to a harmonised level of benefits.
- (29) The *pro rata* principle entails that Article 6 on the aggregation of periods is not applicable to the calculation of long-term benefits covered by Chapter 5 of Title III of the Regulation. The essence of the *pro rata* principle is that several partial benefits are calculated based only on

the periods of insurance completed in each individual State. Aggregation of periods from other Member States would be contrary to this principle of coordination.

#### 4.3 Award of a supplement under Article 58

(30) Article 58(1) states that a recipient of benefits may not, in a Member State of residence and under whose legislation a benefit is payable to him/her, be provided with a benefit which is less than the minimum benefit fixed by that legislation for a period of insurance or residence equal to all the periods taken into account in accordance with Chapter 5 of Title III.

(31) The Government shares the view of the referring court that Article 58 is the continuation of Article 50 of Regulation No 1408/71, and that the substantive content of Article 58 is the same as the previous Article 50.

(32) It is apparent from the wording of Article 58(1) that the right to award of a supplement only applies if the competent State has chosen to introduce rules on a minimum benefit in their national social security law, cf. "minimum benefit fixed by that legislation".

(33) This interpretation was confirmed by the ECJ in case 64/77 *Torri* (operative part):

*"Article 50 of Regulation (EEC) No 1408/71 of the Council is applicable only in cases in which provision is made in the legislation of the Member State in whose territory the worker resides for a minimum pension."*

(34) It was later repeated by the ECJ in case 22/81 *Browning* (operative part):

*"Article 50 of Regulation No 1408/71 is to be interpreted as meaning that a "minimum benefit" exists only where the legislation of the State of residence includes a specific guarantee the object of which is to ensure for recipients of social security benefits' a minimum income which is in excess of the amount of benefit which they may claim solely on the basis of their periods of insurance and their contributions."*

(35) Consequently, Article 58 of the regulation does not confer entitlement to a minimum benefit from States that do not have such a guarantee in their national social security legislation. Such an interpretation of Article 58 would be incompatible with both *Torri* and *Browning*.

(36) It follows from *Browning* that a "minimum benefit" only exists if national law has a "specific guarantee" that shall ensure a minimum income in excess of the amount of benefit which a person may claim solely on the basis of the person's periods of insurance and contributions.

(37) *Browning* concerned a claim for old-age pension under the English National Insurance Act from a person who had been a member of the social security systems both in England and Ireland.

(38) The English National Insurance Act provided for a "graduated benefit", based on previous income ("a rudimentary earnings-related scheme"), as well as a "flat-rate" pension, cf. page 3361 of the judgment.

- (39) The level of the flat-rate benefit was dependent upon the relation between the number of contributions paid and the length of insurance (page 3361).
- (40) A person was entitled to the flat-rate pension if he was over pensionable age, was retired from regular employment and satisfied the contribution requirements (page 3373 of the opinion of the Advocate General). The last condition had two limbs: the claimant must have paid a minimum of 156 weekly contributions, and the yearly average of contributions must be at least 50 weekly contributions (page 3373). If the yearly average was less than 50, the person was entitled to a pension at a reduced rate, but if it was below 13, there was no right to a pension. Between 13 and 49 the yearly average was divided into bands, and the level of the reduced flat-rate pension depended on the band into which the person's average contribution fell. The lowest level was that for a yearly average of 13 to 17 contributions (page 3373–3374).
- (41) The total of the average contributions paid by the claimant in *Browning* under English and Irish law produced a yearly average of just over 50. The average based on contributions under the English scheme amounted to a yearly average of 38.
- (42) The question raised by the referring court in *Browning* was whether a benefit such as the flat-rate pension must be regarded as a "minimum benefit" within the meaning of Article 50 of Regulation No 1408/71, and – if that question was answered in the affirmative – if the minimum benefit was: 1) the smallest amount of benefit payable (e.g. for a contribution average of 13); 2) the amount that would be payable taking into account all of the insurance periods completed in all Member States (e.g. just over 50); or 3) some other amount.
- (43) The ECJ found that a benefit such as the English "flat-rate" pension could not be regarded as a minimum benefit within the meaning of Article 50.
- (44) The ECJ stated that provisions on minimum benefits in Member States where the existence of such benefits was not contested, were designed "to guarantee to recipients of retirement pensions a minimum income in excess of the amount to which they would normally be entitled on the basis of the periods of insurance completed by them and the contributions which they have paid. The purpose of such provisions is, in general, to provide the recipients with a guaranteed minimum income" (para. 11).
- (45) The ECJ emphasised that the award of a "supplement" under Article 50 meant "an additional payment in excess of the minimum payable in application of the normal rules". A minimum benefit within the meaning of Article 50 must be understood as "a minimum resulting from a specific guarantee laid down under national legislation and not the minimum benefits which may result from the normal operation of the rules concerning the determination of rights to retirement pension on the basis of the insurance periods which have been completed and the contributions which have been paid" (para. 13).
- (46) Consequently, the English provisions on the "flat-rate" pension were considered a part of the normal rules on retirement pensions. It was of no relevance that the "flat-rate" pension was



calculated on a flat-rate basis (with several levels), or that the English system of retirement benefits also consisted of an income-based benefit (the “graduated benefit”).

- (47) The Government submits that Section 12-13 of the National Insurance Act does not contain any specific guarantee for a minimum benefit within the meaning Article 58 – only normal rules on invalidity benefits based on acquired periods of insurance and income.
- (48) Both the amount of the income-based component and the amount of the minimum benefit-component of the Norwegian invalidity benefit varies according to the claimant’s acquired insurance time, cf. the fourth paragraph of Section 12-13 of the National Insurance Act, and are financed in the same way (social security contributions from the members, contributions from the employers, and contributions from the State).
- (49) The Government considers that both the income-based component and the minimum benefit-component of the invalidity benefit under Section 12-13 of the National Insurance Act are integrated and indissociable parts of the ordinary rules of invalidity benefits under Norwegian law, where benefits are calculated based on income and earned insurance time.
- (50) The minimum annual benefit in Section 12-13 provides for 40 different possible levels, depending on the claimant’s insurance time. Only the amounts paid in the event of full acquisition (40 years), are intended to ensure a reasonable standard of living. Most of the levels are not high enough to cover a minimum subsistence income.
- (51) There are several similarities between the English provisions on old-age pension in *Browning* and the provisions on invalidity benefit in Section 12-13 of the National Insurance Act.
- (52) Just as in *Browning*, the Norwegian rules on invalidity benefits have two components. The first component is income-based: “graduated benefit” in *Browning* (page 3361), and the invalidity benefit under the first paragraph of Section 12-13 of the National Insurance Act. The second component is not income-based. This is “the basic pension” in *Browning*, and the minimum annual benefit in Section 12-13 of the National Insurance Act.
- (53) The only difference between the “flat-rate” pension in *Browning* and the minimum annual benefit in Section 12-13 of the National Insurance Act is that the former varied according to both the period of insurance and the number of contribution payments, whilst the latter varies only according to the period of insurance.
- (54) As shown above, Regulation No 883/2004 shall only coordinate the States’ social security systems, not harmonise them. Consequently, the EEA States are free to determine the conditions for social security. They can decide whether a benefit shall depend on periods of insurance/ employment/residence, contributions, income, or a combination of such factors.
- (55) The Norwegian legislator has chosen a system for invalidity benefits where one component is based on income and periods of insurance (the first paragraph of Section 12-13), and the other component is based solely on acquired period of insurance (the second paragraph of Section 12-13). The fact that Norway has opted to let the second component be contingent solely on the acquired period of insurance, cannot lead to the benefit being “transformed”

into a minimum benefit under Article 58. Such an interpretation would make it impossible for a national legislator to opt for periods on insurance as sole requirement for acquiring long-term social security benefits, since it would have the effect of replacing the ordinary provisions on coordination of long-term benefits in Chapter 5 of Regulation No 883/2004 (*pro rata*) with the rules on the minimum benefit in Article 58. The national legislator's choice of criteria for national social security benefits would accordingly be restricted – contrary to the principle that Regulation No 883/2004 “leaves in being differences between the Member States' social security systems” and that “substantive and procedural differences between the social security systems... are unaffected” (*Pinna* para. 20)

- (56) Such an interpretation would also be incompatible with *Browning* para. 13, where the ECJ stated that a minimum benefit is something else than the minimum amount obtained when the ordinary rules on determining entitlement to pension are applied on the basis of periods of insurance and paid contributions. In this judgment, the ECJ specifically referred to periods of insurance as a component of the “normal” rules on retirement pensions.
- (57) The Advocate General in *Browning* suggested that a benefit could be a minimum benefit if it conferred entitlement to a given amount and it was not necessary to fulfil other conditions than completion of a given period of insurance (see page 3377). There is, however, no trace of such an interpretation in the judgment itself. The ECJ was clear on the point that it is only when national law has a specific guarantee in addition to the normal rules on social security benefits that Article 58 applies. This must be understood as a rejection of the interpretation proposed by the Advocate General.
- (58) An interpretation to the effect that a benefit with 40 levels (most of which are not sufficient to cover a minimum subsistence income) could be a “minimum benefit” within the meaning of Article 58, would in any event be contrary to the very essence of the concept of a national minimum benefit in Regulation No 883/2004.
- (59) The objective of the national benefits referred to in Article 58 is to provide “a guaranteed minimum income” (see *Browning* para. 11) or “a reasonable standard of living” (see *Torri* para. 5 and *Browning* para. 12). That is not the case where a benefit contains 40 different levels and most levels are not sufficient to cover basic subsistence needs.
- (60) It is instructive to compare the minimum annual amount in Section 12-13 of the National Insurance Act with the supplementary allowance (*supplerande stønad*) referred to above in Chapter 3. Under the Supplementary Allowance Act, a person is granted a supplementary allowance that is equal to the full minimum annual amount in Section 12-13 of the National Insurance Act, in other words, corresponding to the maximum 40 years of insurance time.
- (61) The supplementary allowance is granted without any requirements of qualifying periods or completed periods of insurance. Consequently, in contrast to the minimum annual benefit in Section 12-13 of the National Insurance Act, the supplementary allowance constitutes a genuine guarantee, capable of securing a reasonable standard of living.

- (62) The Norwegian legislator has chosen to reserve the special guarantee of the supplementary allowance for refugees who are entitled to an invalidity benefit.
- (63) The allowance is fully financed over the central government budget and is listed in Annex X to Regulation 833/2004 as a special non-contributory cash-benefit, see. Article 70(3). It is not a minimum benefit within the meaning of Article 58.
- (64) Based on the above, the Government respectfully argues that the Norwegian legislator has not enacted any provisions on a “minimum benefit” within the meaning of Article 58 of the Regulation.
- (65) A’s submissions are based on the position that the second paragraph of Section 12-13 is both part of the normal rules on invalidity benefits, which is to be calculated *pro rata* under Article 52, and an express guarantee under Article 58. This is logically impossible. One and the same national benefit cannot simultaneously be part of the normal social security rules and constitute an express guarantee.
- (66) If the minimum annual benefit in Section 12-13 is considered a minimum benefit under Article 58, A will receive an amount equal to the theoretical amount under Article 52(1)(b). In both *Torri* and *Browning*, the ECJ stated that a minimum benefit under Article 58 is different from the theoretical amount.
- (67) *Browning* is the leading case on the minimum benefit under Article 58. The recent judgment of the CJEU in case C-189/16 *Zaniewicz-Dybeck* refers to the interpretation of Article 58 that was established in *Browning* and adds nothing new (para. 45). The request for a preliminary ruling turned on questions concerning Article 46 and 47 of Regulation No 883/2004 and did not include any questions on Article 58. The ECJ merely referred to Sweden’s statements at the hearing, describing the Swedish guaranteed pension as a minimum benefit, and did not carry out any independent assessment of that benefit in the light of the conditions that are set out in *Browning*.
- (68) In any event, the rules on the minimum annual benefit in the second paragraph of Section 12-13 of the National Insurance Act differ from the Swedish rules in *Zaniewicz-Dybeck*. As noted above in Chapter 3, the Norwegian benefit is not acquired solely through periods of residence, but also through periods of employment and it is not financed solely through tax, but through a combination of contributions from the members, employers and the State.

## 5 ANSWER TO THE QUESTION

Based on the foregoing, the Norwegian Government respectfully submits that the question posed by the referring court should be answered as follows:

*National provisions such as Section 12-13 of the National Insurance Act, providing for a minimum annual benefit consisting of 40 possible different levels depending on the person’s insurance time, is not a minimum benefit within the meaning of Article 58 of Regulation (EC) No 883/2004 “*

ATTORNEY GENERAL FOR CIVIL AFFAIRS

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Oslo, 21/08/2023

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