



JUDGMENT OF THE COURT

20 March 2013*

(Regulation (EEC) No 1408/71 – Social security for migrant workers – Unemployment benefits – Residence in the territory of another EEA State – Condition of actual presence in the State of last employment for entitlement to unemployment benefits)

In Case E-3/12,

REQUEST to the Court under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice by Borgarting lagmannsrett (“Court of Appeal”), in the case of

the Norwegian State, represented by the Ministry of Labour,

and

Stig Arne Jonsson

concerning the rules on free movement of workers within the European Economic Area,

THE COURT,

composed of: Per Christiansen, Acting President, and Páll Hreinsson (Judge-Rapporteur) and Martin Ospelt (ad hoc), Judges,

Registrar: Gunnar Selvik,

having considered the written observations submitted on behalf of:

- the Norwegian State (“the plaintiff”), represented by Ketil Bøe Moen, Advocate, Office of the Attorney General (Civil Affairs), acting as Agent;
- Mr Stig Arne Jonsson (“the defendant”), represented by Lars Edvard Landsverk, advokat;

* Language of the request: Norwegian.

- the EFTA Surveillance Authority (“ESA”), represented by Xavier Lewis, Director, and Maria Moustakali, Temporary Officer, Department of Legal and Executive Affairs, acting as Agents;
- the European Commission (“the Commission”), represented by Julie Samnadda and Viktor Kreuzschitz, members of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

having heard oral argument of the plaintiff, represented by Ketil Bøe Moen; the defendant, represented by Lars Edvard Landsverk; ESA, represented by Maria Moustakali and Xavier Lewis; and the Commission, represented by Julie Samnadda and Viktor Kreuzschitz, at the hearing on 11 January 2013,

gives the following

Judgment

I Introduction

- 1 Mr Jonsson is a Swedish national living in Sweden. From 1983 he has frequently worked in Norway, where he also held his last job, for a Norwegian company on Svalbard, before he became unemployed in November 2008. During his last employment, Mr Jonsson stayed in Norway during work periods and normally travelled back home to Sweden during off-duty periods. After becoming unemployed, he returned to his home in Sweden where he currently resides.
- 2 Following the termination of his employment relationship, Mr Jonsson applied for unemployment benefits in Norway as a wholly unemployed person. His application was rejected. The case before the national court concerns the legality of that rejection.

II Legal background

EEA law

- 3 Paragraph 1 of Protocol 40 to the EEA Agreement on Svalbard provides:

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

- 4 The Kingdom of Norway availed itself of this right.
- 5 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 (OJ, English Special Edition 1971 (II), p. 416) (“Regulation No 1408/71” or “the Regulation”) is referred to at point 1 of Annex

VI to the EEA Agreement. Unless otherwise indicated, the following provisions are quoted with the wording applicable, subject to Protocol 1 of the EEA Agreement and the adaptations contained in Annex VI, at the time when the facts giving rise to the main proceedings took place.

- 6 Article 1(b) of the Regulation, which under the EEA Agreement applied in the relevant period, provides:

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

- 7 Article 1(h) of the Regulation provides:

“residence” means habitual residence;

- 8 Article 13(2)(a) of the Regulation provides:

a person employed in the territory of one Member State shall be subject to the legislation of that State even if he resides in the territory of another Member State or if the registered office or place of business of the undertaking or individual employing him is situated in the territory of another Member State;

- 9 Article 71(1) of the Regulation provides:

An unemployed person who was formerly employed and who, during his last employment, was residing in the territory of a Member State other than the competent State shall receive benefits in accordance with the following provisions:

- (a) (i) *a frontier worker who is partially or intermittently unemployed in the undertaking which employs him, shall receive benefits in accordance with the provisions of the legislation of the competent State as if he were residing in the territory of that State; these benefits shall be provided by the competent institution;*
- (ii) *a frontier worker who is wholly unemployed shall receive benefits in accordance with the provisions of the legislation of the Member State in whose territory he resides as though he had been subject to that legislation while last employed, these benefits shall be*

provided by the institution of the place of residence at its own expense;

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

10 Regulation No 1408/71 is accompanied by an implementing regulation, that is, Council Regulation (EEC) No 574/72 of 21 March 1972 laying down the procedure for implementing Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to their families moving within the Community (OJ, English Special Edition 1972 (I), p. 159) (“Regulation No 574/72”). Regulation No 574/72 is referred to at point 2 of Annex VI to the EEA Agreement. Unless otherwise indicated, the following provisions are quoted with the wording applicable, subject to Protocol 1 of the EEA Agreement and the adaptations contained in Annex VI, at the time when the facts giving rise to the main proceedings took place.

11 Article 84 of Regulation No 574/72 reads:

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

2. *In order to claim benefits under the provisions of Article 71(1)(b)(ii) of the Regulation, an unemployed person who was formerly employed shall submit to the institution of his place of residence, in addition to the certified statement provided for in Article 80 of the implementing Regulation, a certified statement*

from the institution of the Member State to whose legislation he was last subject, indicating that he has no right to benefits under Article 69 of the Regulation.

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

- 12 By Decision No 76/2011 of the EEA Joint Committee of 1 July 2011, Regulation No 1408/71 was replaced by Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, (OJ 2004 L 200, p. 1), as amended by Regulation (EC) No 988/2009 (OJ 2009 L 284, p. 43), Regulation (EU) No 1244/2010 (OJ 2010 L 338, p. 35) and Regulation (EU) No 465/2012 (OJ 2012 L 149, p. 4) (“Regulation No 883/2004”). The Decision entered into force on the day following the last notification to the EEA Joint Committee pursuant to Article 103(1) of the Agreement. That day was 1 June 2012.

National law

- 13 Under Sections 2-1 and 2-2 of the Norwegian National Insurance Act (Act relating to National Insurance of 28 February 1997 No 19) it is a general condition for entitlement to benefits pursuant to the Norwegian national insurance system that the claimant is a member of the Norwegian National Insurance Scheme. According to these provisions, membership is granted, inter alia, to individuals who reside or work lawfully in Norway.
- 14 For employment on Svalbard, a special provision is set out in Section 2-3 of the National Insurance Act. As a result of that provision, during his employment on Svalbard as an employee of a Norwegian company, the defendant was a member of the National Insurance Scheme.
- 15 In addition, it is a condition for entitlement to unemployment benefit that the unemployed person stays in Norway. The provision reads as follows:

Section 4-2. Stay in Norway

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

The Ministry may issue regulations pertaining to exemption from the requirement to stay in Norway.

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

Section 4-5. Genuine job seekers

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

- a) take any type of employment that is paid in accordance with a collective wage agreement or common practice,*
- b) take employment anywhere in Norway,*
- c) take employment regardless of whether it is full-time or part-time,*
- d) to participate in labour market schemes.*

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

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

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

...

Nordic Convention on Social Security

- 17 Article 4 of the Nordic Convention on Social Security of 18 August 2003 reads:

Article 4 Extended application of the Regulation

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

- 18 As noted above, the EEA Agreement is not applicable on Svalbard. However, Article 4 of the Nordic Convention on Social Security of 18 August 2003 (“the Convention”) contains a specific clause pursuant to which Regulation No 1408/71 shall apply to persons covered by the Convention who reside in a Nordic country. As the defendant was a member of the Norwegian National Insurance Scheme during his employment on Svalbard, he was covered by the Convention. He was also resident in a Nordic country. Accordingly, by virtue of the Convention, the Regulation thus applies to the circumstances of the present case.

III Facts and procedure

- 19 On 21 January 2009, the EEA Department of the Norwegian Labour and Welfare Administration (“NAV”) rejected Mr Jonsson’s claim for unemployment benefits on the grounds that he was not staying in Norway and, therefore, having regard to Article 71 of Regulation No 1408/71 and the Norwegian National Insurance Act Section 4-2, failed to meet the conditions for entitlement to unemployment benefits.
- 20 Mr Jonsson then filed an administrative appeal against the decision of NAV. By a decision of 22 May 2009, the appellate body upheld the rejection of his claim.
- 21 While his appeal case was being processed, Mr Jonsson registered with the employment service in Sweden in February 2009 and applied for unemployment benefits there.
- 22 By decision of 31 March 2009 of the Swedish Construction Workers’ Unemployment Insurance Fund, Mr Jonsson was granted unemployment benefits in Sweden starting on 2 March 2009. The benefit amount paid in Sweden was lower than unemployment benefits under Norwegian rules would have been on account of the fact, inter alia, that Mr Jonsson had not been a member of the relevant unemployment insurance fund in Sweden.
- 23 Mr Jonsson appealed against the decision of the appellate body to the Norwegian National Insurance Court, which, in its decision of 1 June 2010, ruled in his favour. The National Insurance Court concluded that the requirement of actual stay in Norway could not be applied in Mr Jonsson’s case. It held that the requirement was incompatible with Article 71 of the Regulation.
- 24 In line with the National Insurance Court’s ruling, Mr Jonsson received unemployment benefits from Norway from 1 January 2009 until 12 December 2009.
- 25 The Norwegian State subsequently brought an action before Borgarting lagmannsrett challenging the National Insurance Court’s ruling in which it seeks to have that ruling set aside. Mr Jonsson is seeking an order dismissing the State’s action.
- 26 Having heard the parties’ views on the substance of the questions, Borgarting lagmannsrett decided to request the Court’s opinion on the following questions:

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

Is it relevant to the answer to this question whether:

1. *the unemployed person lives in a country near the competent State (the State of last employment), so that it is possible in practice for that person to appear at the employment office in that State even if he/she does not stay there?*
2. *the unemployed person, after having returned to the State of residence, registers as a job seeker with the employment service and also applies for unemployment benefits in that State?*

27 Reference is made to the Report for the Hearing for a fuller account of the legal framework, the facts, the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only insofar as is necessary for the reasoning of the Court.

IV The question

Observations submitted to the Court

- 28 It is common ground between the parties that Mr Jonsson is subject to the provisions of Article 71(1)(b) of the Regulation. It sets out two different rules for the category of unemployed persons who are wholly unemployed, not frontier workers, and who, during their last employment, resided in an EEA State other than the State of last employment (hereinafter also “the competent State”).
- 29 The parties disagree on the interpretation of this Article, in particular whether it precludes the possibility that national law may require an unemployed worker to stay in the State of last employment for entitlement to unemployment benefits.
- 30 The Norwegian State submits that there is a general requirement of actual stay in national law which applies equally to both Norwegian nationals and nationals of other EEA States. It argues that the concept of stay under the National Insurance Act differs from the concept of residence as defined in Article 1(h) of the Regulation in the sense that it refers to physical presence in the territory of Norway, whereas the concept of residence refers to a person’s habitual centre of interests, that is, where he normally lives and where he has his family.
- 31 According to the Norwegian State, this requirement implies that unemployment benefits are awarded only for the periods in which the unemployed person is actually present in Norway irrespective of his place of residence. It argues that the requirement established in Section 4-2 of the National Insurance Act is compatible with the Regulation and that it may be applied to “non-genuine” frontier workers in the circumstances set out in the questions to Court. In its view, that conclusion applies irrespective of the distance between the competent State and the State of residence.

- 32 The Norwegian State contends that Article 71(1)(b)(i) of the Regulation establishes the conditions under which an unemployed worker, other than a frontier worker, shall be subject to the legislation of the competent State. The conditions are (i) that the unemployed person is available to the employment services in this State and (ii) that the provisions of that State's legislation are satisfied.
- 33 As regards the latter condition, the Norwegian State points out that, under Section 4-2 of the National Insurance Act, stay or presence in Norway is a general requirement for payment of unemployment benefits in Norway. This requirement applies to all unemployed workers and clearly belongs to the "legislation of [the competent State]" within the meaning of Article 71 of the Regulation. This requirement must therefore be satisfied before the defendant is entitled to benefits from Norway.
- 34 The Norwegian State also argues that, by applying for and receiving unemployment benefits in Sweden, Mr Jonsson has exercised his choice pursuant to Article 71(1)(b) of the Regulation to receive benefits from Sweden as his State of residence, and only from there.
- 35 The Norwegian State submits that such an unemployed person exercises his choice by either making himself available to the employment services in the State of employment or simply returning to his State of residence. In each case, the relevant national provisions governing entitlement to unemployment benefits have to be satisfied. It argues that this follows from Article 71(1)(b)(ii) of the Regulation and is further confirmed by the more precise provision in Article 65 of Regulation No 883/2004 which has now replaced the Regulation applicable in this case.
- 36 The defendant, ESA and the Commission disagree with the contention of the Norwegian State that it is compatible with Article 71 of the Regulation to require stay in the State of last employment for wholly unemployed persons who worked in Norway, but who were resident in another EEA State. They also contest its submission that a person who returns to the State of residence has thus chosen, for the purposes of Article 71(1)(b) of the Regulation, to be subject to the rules of his State of residence.
- 37 According to the defendant, ESA and the Commission, for the purposes of Article 71(1)(b) of the Regulation, the choice available to the wholly unemployed person is exercised by making oneself available to the employment services in the territory where the benefits are claimed. The provision in question requires the competent State to create a legal fiction of residence and to provide unemployment benefits to such person in accordance with its legislation as if he resided on its territory. If, on the other hand, the person claims benefits in the State of residence, the latter is required to create a legal fiction of previous employment and provide unemployment benefits in accordance with its legislation as though the person had last been employed there.
- 38 In the view of the defendant, a requirement for actual stay in Norway such as that established in Section 4-2 of the National Insurance Act is precluded by Article 71 of Regulation No 1408/71. Although the defendant can be required to register with the Labour and Welfare Administration and comply with its control procedures, it is clear

that Norway's control requirement cannot extend so far as to require the unemployed person to change his place of residence. Consequently, in the defendant's view, it may be concluded that he is permitted to reside and stay in Sweden.

- 39 The defendant submits that, in order to achieve this, the requirements of the National Insurance Act must be interpreted in line with the Regulation, and relies in this respect on Section 1-3 of the National Insurance Act and the Regulation concerning the incorporation of Regulation No 1408/71 into the EEA Agreement, pursuant to which the rules of the Regulation take precedence over the National Insurance Act.
- 40 As regards the condition for stay or presence in Norway, ESA submits that such a requirement constitutes an even more onerous requirement than a requirement of residence which has already been found incompatible with EEA rules by the Court of Justice of the European Union. ESA argues that if a requirement of continued stay were allowed, the choice of the wholly unemployed person set out in Article 71(1)(b) of the Regulation would be seriously compromised and rendered nugatory from a practical point of view.
- 41 First, ESA contends, it would be restrictive, discriminatory and disproportionate to require a person seeking to make use of the possibilities available within the internal EEA labour market either to move his residence to the EEA State of employment or to remain in the territory of that State after the termination of his employment relationship in order to be entitled to receive unemployment benefits from the latter State. Second, a requirement of continued stay does not take into account the personal situation and the actual intentions of the wholly unemployed person.
- 42 ESA asserts further that the requirement of continuous physical presence in the territory of the State of last employment constitutes a restrictive condition as it fails to reflect the rationale of Article 71(1)(b)(i) of the Regulation. In its view, the phrase "remains available to his employer or to the employment services in the territory of the competent State" does not aim to preclude all possibility for a wholly unemployed person to seek job opportunities in other EEA States during the period that he receives benefits from the State of last employment, taking advantage of the possibilities offered by the internal labour market.
- 43 The Commission submits that the fundamental freedoms established under EEA law render it neither justified nor proportionate to require a person falling within the scope of Article 71(1)(b) of the Regulation to remain continuously present in the territory of that EEA State. This would go beyond what is necessary to ensure compliance with obligations on job seekers and would effectively prevent the person concerned from returning, on a regular basis, to his State of residence. In its view, the Norwegian State has not provided any justification for requiring the continuous presence of Mr Jonsson in Norway in order to comply with the obligations on job seekers and the monitoring measures which are in place there.
- 44 With regard to the national court's first variation on the main question, ESA and the Commission submit that neither the place of residence nor the actual distance between

the States concerned should be relevant for the unemployed person's entitlement, as long as the person complies with the statutory conditions for the grant of unemployment benefits in the competent State.

- 45 As regards the national court's second variation on the main question, the defendant, ESA and the Commission all stress the fact that Mr Jonsson only applied for and was granted unemployment benefits in the State of residence after his claim for unemployment benefits was refused in Norway on the grounds that he was not resident there. Contrary to the arguments advanced by the Norwegian State, the defendant and the Commission submit that it cannot be assumed that, in seeking unemployment benefits in his State of residence following the refusal in the competent State, Mr Jonsson exercised his choice under Article 71(1)(b) of the Regulation. In their view, this step was necessary in order to obtain some means of subsistence. Therefore, this claim cannot be considered an application for unemployment benefits for the purposes of Article 71(1)(b) of the Regulation.
- 46 Moreover, according to the Commission, Mr Jonsson was entitled to claim unemployment benefits in Norway when he made himself available to the employment services there. This entitlement which is provided for in EEA law is not invalidated in circumstances in which the application for benefits was unlawfully rejected by the competent EEA State, that is, the State of last employment. In the Commission's view, where a worker makes a claim for benefits in the State of residence following a rejection of his claim for benefits in the competent EEA State on the basis of a requirement contrary to EEA law, it would clearly contradict the *effet utile* of the social security coordination rules to prohibit that worker from exercising his entitlement under Article 71(1)(b) of the Regulation.
- 47 Furthermore, the Commission rejects the argument of the Norwegian State to the effect that a wholly unemployed person, other than frontier worker, who registers with the employment services in his State of residence can no longer claim benefits under the legislation of the competent State. It asserts that no provision of the Regulation lays down conditions limiting the application of Article 71(1)(b)(i) of the Regulation. Moreover, the interpretation favoured by the Norwegian State would conflict with the aim of that provision, which is to optimise a worker's chances of resuming employment. In the Commission's view, such aim would not be attained if the persons concerned were deprived of their entitlement to benefits under the legislation of one State as a result of having opted initially for benefits in another.
- 48 However, the Commission underlines the fact that a worker can neither aggregate the amounts of unemployment benefits from the two States, nor, if he is available solely to the employment services in the territory of the State of residence, claim unemployment benefits from the State of last employment. In this regard, the Commission submits that entitlement to unemployment benefits presupposes that the unemployed person is available to the employment office where he is registered.
- 49 ESA and the Commission submit that, pursuant to Article 71(1)(b)(ii) of the Regulation, where a wholly unemployed person receives benefits in accordance with

the legislation of the State of residence and has become entitled to benefits at the expense of the competent institution of the EEA State to whose legislation he was last subject, receipt of benefits under the legislation of the State of residence shall be suspended. In the view of ESA and the Commission, this provision confirms that a person may remain entitled to unemployment benefits in the competent State even where he has received unemployment benefits under the legislation of the State of residence. They point out that provision of unemployment benefits by the competent State takes priority, as receipt of benefits under the legislation of the State of residence is suspended. This reflects the principle that the competent State for unemployed workers is the State of last employment and that Article 71 of the Regulation introduces a derogation from that principle only in so far as the unemployed worker claims unemployment benefits in the State of residence.

Findings of the Court

- 50 By its question, the national court essentially asks whether it is compatible with Article 71(1)(b) of Regulation No 1408/71 for the national legislation of the State of last employment to require “continued stay” as phrased by the referring court, or “actual stay” as phrased by the Norwegian State, that is, actual presence in that State from a worker subject to the scheme of Article 71(1)(b) in order to be entitled to unemployment benefits.
- 51 In addition, the national court asks whether it is relevant to the answer to this question, that the unemployed person lives in a country near the State of last employment, even if he does not stay there, and, whether it is relevant that the unemployed person, after having returned to the State of residence, registers as a job seeker with the employment service in the State of residence and also applies for unemployment benefits in that State.
- 52 In the case pending before the national court, it is not disputed that Mr Jonsson had his last employment in Norway prior to becoming unemployed and that he resided in Sweden during the period of his last employment. Consequently, he comes within the scope of Article 71(1)(b) of the Regulation. Moreover, it is common ground between the parties to the main proceedings that the Regulation is applicable to the defendant’s situation.
- 53 According to its preamble, the Regulation was adopted to further the free movement of workers, as laid down in Article 28 EEA. It provides for a system of coordination of social security legislation and is intended to ensure equal treatment under the various legislations. The overall goal is to prevent migrant workers from being deterred from exercising their right to freedom of movement under the EEA Agreement.
- 54 To that end, the Regulation establishes, in Title II, a complete and uniform system of choice of law rules. Those rules are intended to prevent the simultaneous application of more than one national social security system to persons covered by the Regulation, and to ensure that those persons are not left without social security because there is no

legislation applicable to them (see Case E-3/05 *ESA v Norway* [2006] EFTA Ct. Rep. 102, paragraph 46).

- 55 It follows from settled case law that the Regulation provides for coordination of the applicable national law and not harmonisation of the social security legislations of the EEA States (see Case E-3/04 *Tsomakas and Others* [2004] EFTA Ct. Rep. 95, paragraph 27). The Regulation 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 thus for each EEA State to determine in national legislation the conditions on which social security benefits are granted. However, in such circumstances the EEA States must nevertheless comply with EEA law, in particular the freedom to provide services and the freedom of movement for workers, when exercising that power (see, Joined Cases E-11/07 and E-1/08 *Rindal and Slinning* [2008] EFTA Ct. Rep. 322, paragraph 43, and for comparison, Cases C-385/99 *Müller-Fauré and van Riet* [2003] ECR I-4509, paragraph 100, and C-347/10 *Salemink*, judgment of 17 January 2012, not yet reported, paragraphs 38 and 39).
- 56 In this sense, the Regulation is similar to other instruments of secondary legislation seeking to coordinate rather than to harmonise national law, such as Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services (OJ 1997 L 18, p. 1). This directive lays down in its Article 3(1) an exhaustive list of terms and conditions of employment that host EEA States in national law must require undertakings established in other EEA States to observe when they post workers to their territory. However, the directive does not harmonise the material content of those terms and conditions. Their content may thus be freely defined by the EEA States, in compliance with the EEA Agreement, in particular the freedom to provide services, and the general principles of EEA law (see Cases E-2/11 *STX Norway and Others*, judgment of 23 January 2012, not yet reported, paragraphs 27 to 31, and E-12/10 *ESA v Iceland* [2011] EFTA Ct. Rep. 117, paragraphs 40 and 45, and, by comparison, Cases C-341/05 *Laval un Partneri* [2007] ECR I-11767, paragraph 60, and C-490/04 *Commission v Germany* [2007] ECR I-6095, paragraph 19; see also Catherine Barnard, *EU Employment Law*, fourth edition, Oxford 2012, pp. 226 and 227).
- 57 This situation is different from situations where technical and regulatory issues are exhaustively harmonised in secondary law. One such example is the case for the collection of waste oil, which until recently was regulated by Council Directive 75/439/EEC of 16 June 1975 on the disposal of waste oils (OJ 1975 L 194, p. 23). Where a question has been regulated in a harmonised manner at EEA level by a directive, any national measure relating thereto must be assessed in the light of the provisions of the directive and not of primary EEA law (see Case E-9/11 *ESA v Norway*, judgment of 16 July 2012, not yet reported, paragraph 72, and for comparison, Case C-37/92 *Vanacker* [1993] ECR I-4947, paragraph 9).
- 58 Where the national legislation of the host State defines restrictive terms and conditions of employment that undertakings established in other EEA States must observe when they post workers to their territory, such restrictions may be justified where it meets

overriding requirements relating to the public interest, including the social protection of workers (see *STX and Others*, cited above, paragraph 80). However, the fact that the legal basis for Directive 96/71 is Article 56 of the Treaty on the Functioning of the European Union (“TFEU”), which is equivalent to Article 36 EEA, entails that Directive 96/71 primarily intends to protect the free movement of services rather than the protection of workers. Nevertheless, this freedom must not be abused in order to manifestly circumvent the protection of workers, *inter alia* through social dumping, while measures intended to address such abuse must be justified and proportionate (see Case E-15/11 *Arcade Drilling*, judgment of 3 October 2012, not yet reported, paragraph 88; and for comparison, Case C-577/10 *Commission v Belgium*, judgment of 19 December 2012, not yet reported, paragraph 45).

- 59 Even though coordination directives in the field of labour law contain certain aspects which must be made part of the national legal order (see, by comparison, Case C-341/02 *Commission v Germany* [2005] ECR I-2733), the EEA rules relating to labour law are also characterised by leaving a margin of appreciation to the EEA States and the social partners in their application. This may go beyond the mere liberty to choose the form and method of implementation under Article 7(b) EEA. This is particularly true in the case of directives incorporating in EEA law the framework agreements agreed by the European Social Partners including its Norwegian members, such as Council Directive 99/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP (OJ 1999 L 175, p. 143).
- 60 Nevertheless, it is important, in order to render the EEA Agreement effective, that EEA States apply the margin of appreciation mentioned in paragraph 59 above in respect *inter alia* of the right of EEA workers to move freely and the economic operators to exercise their freedom to provide services, as the case may be. It is equally important that such questions are referred to the Court under the procedure provided for in Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority if the legal situation lacks clarity (Case E-18/11 *Irish Bank*, judgment of 28 September 2012, not yet reported, paragraphs 57 and 58). Thereby unnecessary mistakes in the interpretation and application of EEA law are avoided and the coherence and reciprocity in relation to rights of EEA citizens, including EFTA nationals, in the EU are ensured (see, in this respect, *Irish Bank*, cited above, paragraph 122, and Case E-14/11 *DB Schenker and Others*, judgment of 21 December 2012, not yet reported, paragraph 118).
- 61 Returning to the Regulation, the Court recalls that Article 13(2)(a) in Title II of the Regulation lays down the general rule that a worker employed in the territory of one EEA State shall be subject to the legislation of that State even if he resides in the territory of another EEA State. This applies also with regard to unemployment benefits. That arrangement stems from the objective of the Regulation, set out in recital 9 of its preamble, to guarantee all workers who are EEA nationals, and who move within the EEA, equal treatment under the various national legislations and the enjoyment of social security benefits irrespective of the place of their employment or of their residence (see Case E-3/05 *ESA v Norway*, cited above, paragraph 47).

- 62 However, Article 71(1)(b) of the Regulation lays down specific provisions for unemployed persons other than frontier workers who, during their last employment, resided in an EEA State other than that in which they had been employed.
- 63 These provisions are intended to guarantee that migrant workers receive unemployment benefit under the most favourable conditions for seeking new employment (see, to that effect, Case 227/81 *Aubin* [1982] ECR 1991, paragraph 19, and Case C-102/91 *Knoch* [1992] ECR I-4341 paragraph 14). Thus, by virtue of Article 71(1)(b) of the Regulation, workers other than frontier workers who are wholly unemployed are entitled to make a choice between the benefits offered by the EEA State in which they were last employed (see Article 71(1)(b)(i) of the Regulation) and those offered by the EEA State in which they reside (see Article 71(1)(b)(ii) of the Regulation). They exercise that choice by making themselves available either to the relevant employment services in the State of last employment or the State of residence, as the case may be (see, for comparison, Case 1/85 *Miethé* [1986] ECR 1837, paragraph 9).
- 64 The Norwegian State has argued that it follows from the wording of Article 71(1)(b)(ii) of the Regulation that a choice to be subject to the legislation of the State of residence, and only this State, is made simply by returning to that State. However, it follows from case law that the phrase “who returns to that territory” in Article 71(1)(b)(ii) merely implies that the concept of residence does not necessarily exclude non-habitual residence in another EEA State (see, for comparison, Case 76/76 *Di Paolo* [1977] ECR 315, paragraph 21). Thus, in order to be subject to the legislation of the State of residence, the unemployed person must make himself available to the employment services in that State.
- 65 Article 71(1)(b)(ii) of the Regulation provides that an employed person, other than a frontier worker, who is wholly unemployed and who makes himself available for work to the employment services in the territory of the Member State in which he resides, or who returns to that territory, shall receive benefits in accordance with the legislation of that State as if he had last been employed there. This choice – being an exception for wholly unemployed persons from the main rule of Article 71(1)(b)(i) of the Regulation – enables such persons to be accorded the best conditions for finding new employment in the State of residence. It is true that Article 71(1)(b)(ii) thus allows wholly unemployed persons to receive unemployment benefits from an EEA State in which they had not paid contributions during their last employment. However, that is a consequence intended by the legislature, meant to ensure that unemployed persons were given the best chance of finding new employment (see, for comparison, Case C-454/93 *van Gestel* [1995] ECR I-1707, paragraphs 22 and 26).
- 66 The sole purpose of Article 71(1)(b) of the Regulation is to determine the national legislation applicable to persons who have worked in an EEA State, without being frontier workers, and become unemployed. As such, and as noted in paragraph 55 above, the provision is not intended to lay down the conditions creating the right or the obligation to become affiliated to a social security scheme or to a particular branch

under such a scheme. It is for the legislation of each EEA State to lay down those conditions.

- 67 However, as set out in paragraph 55 above, although EEA States retain the power to organise the conditions of affiliation to their social security schemes, they must none the less, when exercising that power, comply with EEA law. In particular, those conditions may not have the effect of excluding from the scope of the legislation at issue persons to whom that legislation applies pursuant to the Regulation (see, to that effect, Case C-2/89 *Kits van Heijningen* [1990] ECR I-1755, paragraph 20, and *Salemink*, cited above, paragraph 40).
- 68 Article 71(1)(b)(i) of the Regulation expressly provides that a person who is partially, intermittently or wholly unemployed and who remains available to the employment services in the territory of the State of his last employment shall receive benefits in accordance with the provisions of the legislation of that State as though he were residing in its territory. Accordingly, since it is a precondition for the application of that provision that the unemployed person resides in the territory of an EEA State other than the State of last employment, the legislation of the latter State cannot have the direct or indirect effect of requiring the person concerned to reside in that State as a precondition for benefits (see, for comparison, Case C-308/94 *Naruschawicus* [1996] ECR I-207, paragraphs 25 and 26, and, with regard to the general provision in Article 13(2)(a) of the Regulation, *Kits van Heijningen*, cited above, paragraph 21).
- 69 Information submitted to the Court makes it clear that the condition of stay under Section 4-2 of the National Insurance Act amounts to a condition of actual presence for any entitlement to the payment of unemployment benefits in Norway. Even though this condition will often overlap with being resident in the country, residents going abroad will also be disqualified for unemployment benefits during periods they are not present on Norwegian territory. Therefore, the condition of stay is not necessarily synonymous with the meaning of the term “residing” for the purposes of subparagraph (i) of Article 71(1)(b) of the Regulation or the term “resides” for the purposes of subparagraph (ii) of the same provision.
- 70 None the less, according to case law, a person remains available to the employment services in the territory of the State of last employment within the meaning of Article 71(1)(b)(i) of the Regulation if he registers with those services as a person seeking employment and undergoes the checks by the competent services of that State (see, to that effect, *Naruschawicus*, cited above, paragraph 27 and case law cited). It must therefore be held that Article 71(1)(b)(i) precludes a condition as to availability laid down in the legislation of the EEA State of last employment which entails that an unemployed worker residing in another EEA State must be physically present in the competent State.
- 71 The Norwegian State submits that the condition of actual stay under Section 4-2 of the National Insurance Act applies irrespective of whether the unemployed person is “available to the employment service” in the competent State. The condition is a

substantive and general one and must be fulfilled in order to receive unemployment benefits in Norway.

- 72 However, it is incompatible with Article 71(1)(b) of the Regulation for the national legislation of the State of last employment to impose on unemployed persons other than frontier workers a requirement of actual presence in that State for entitlement to unemployment benefits. The choice of the unemployed person pursuant to Article 71(1)(b) of the Regulation is intended to facilitate that migrant workers receive unemployment benefit under the most favourable conditions for seeking new employment. With a requirement of actual presence that choice is seriously compromised and rendered nugatory, as it will deter the person concerned from returning to his State of residence. Moreover, such a requirement would make it unduly difficult for an unemployed person to seek employment opportunities in another EEA State. In this context, a requirement of actual presence for entitlement to unemployment benefits is in fact more onerous than a residence requirement.
- 73 Furthermore, the general aim of the Regulation to contribute to the establishment of the greatest possible freedom of movement for migrant workers would not be attained if, as a consequence of the exercise of their right to freedom of movement, workers were to lose the social security advantages guaranteed them by the legislation of one EEA State, especially where those advantages represent a counterpart of contributions paid (see, to that effect, for example, Case 284/84 *Spruyt* [1986] ECR 685, paragraphs 18 and 19).
- 74 Finally, legislation such as that at issue in the main proceedings, which makes acquisition of the right to unemployment benefits subject to actual presence is likely, by its very nature, to operate to a particular disadvantage for unemployed workers residing outside the territory of Norway.
- 75 In light of this and having regard to the first variation on the main question of the national court, it cannot be of relevance to the answer to the main question whether the unemployed person lives in a country near the State of last employment, so that it is possible in practice for that person to appear at the employment office in that State even if he does not stay there. Such an interpretation is not supported by the provisions of the Regulation. Moreover, it could affect the predictability and effectiveness of the application of the coordination rules of the Regulation negatively and disproportionately.
- 76 With regard to the second variation on the main question, the Norwegian State argues that, by applying for unemployment benefits in Sweden in February 2009, after his application for unemployment benefits in Norway was turned down in January 2009, the defendant in the main proceedings effectively has opted to be subject to the system of unemployment benefits in Sweden, as the EEA State in which he resides.
- 77 The Court notes that it appears from the case file that the aim of the benefit at issue in the main proceedings is essentially to replace the remuneration lost by reason of unemployment and thereby provide for the maintenance of the unemployed person.

- 78 Therefore, the interpretation advocated by the Norwegian State cannot be maintained. Such an interpretation would effectively entail that an applicant who, following a rejection of his application for unemployment benefits in the State of last employment, has been forced to seek unemployment benefits in his State of residence in order to secure a means of subsistence, would have no choice as to where he seeks his unemployment benefits.
- 79 The Norwegian State's interpretation would also run contrary to the aim of Article 71(1)(b) of the Regulation, which is, as the Court has observed in paragraph 63 above, to guarantee unemployment benefits to migrant workers under the most favourable conditions for seeking new employment, and to enable the workers to make a choice in that respect. That aim would not be attained if, after having had an application for unemployment benefits in the EEA State of last employment turned down, the person concerned were deprived of all right to benefits in the same State solely as a result of subsequently applying for unemployment in the State of residence. Indeed, the first application for unemployment benefits made by an applicant, such as the defendant in the main proceedings, may be generally presumed to constitute his choice as to where to receive those benefits pursuant to Article 71(1)(b) of the Regulation.
- 80 Moreover, pursuant to Article 71(1)(b)(ii) of the Regulation, where a wholly unemployed person receives benefits in accordance with the legislation of the State of residence and has become entitled to benefits at the expense of the competent State, receipt of benefits under the legislation of the State of residence shall be suspended (see also in this respect Article 69 of the Regulation). This provision thus presupposes that a person may remain entitled to unemployment benefits in the competent State even where he has received unemployment benefits under the legislation of the State of residence.
- 81 It must be underlined, however, that an unemployed person can neither aggregate the amounts of unemployment benefits from the two States, nor, if he is available solely to the employment services in the territory of the State of residence, claim unemployment benefits from the State of last employment (compare *Aubin*, paragraph 19, and *van Gestel*, paragraph 23, both cited above).
- 82 Therefore, the answer to the question of Borgarting lagmannsrett must be that Article 71(1)(b)(i) of Regulation No 1408/71 precludes a provision of national law pursuant to which entitlement to payment of unemployment benefits is conditional on actual presence in the EEA State concerned. Such a provision may not be relied upon against the persons referred to in Article 71(1)(b)(i) of that regulation. It is not relevant for the answer to this question whether the unemployed person lives in a country near the State of last employment. Moreover, in circumstances such as those of the defendant in the main proceedings, it is of no consequence for the application of Article 71(1)(b)(i) that an unemployed person registers as a job seeker and applies for unemployment benefits in his State of residence.

V Costs

- 83 The costs incurred by ESA and the European Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are a step in the proceedings pending before the Borgarting lagmannsrett, 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 question referred to it by Borgarting lagmannsrett hereby gives the following Advisory Opinion:

- 1. Article 71(1)(b)(i) of Regulation No 1408/71 precludes a provision of national law pursuant to which entitlement to payment of unemployment benefits is conditional on actual presence in the EEA State concerned. Such a provision may not be relied upon against the persons referred to in Article 71(1)(b)(i) of that regulation.**
 - a. It is not relevant for the answer to this question whether the unemployed person lives in a country near the State of last employment.**
 - b. Moreover, in circumstances such as those of the defendant in the main proceedings, it is of no consequence for the application of Article 71(1)(b)(i) that an unemployed person registers as a job seeker and applies for unemployment benefits in his State of residence.**

Per Christiansen

Páll Hreinsson

Martin Ospelt

Delivered in open court in Luxembourg on 20 March 2013.

Gunnar Selvik
Registrar

Per Christiansen
Acting President