SUPREME COURT OF NORWAY

J U D G M E N T

given on 2 July 2021 by a grand chamber of the Supreme Court composed of

Justice Hilde Indreberg
Justice Bergljot Webster
Justice Wilhelm Matheson
Justice Aage Thor Falkanger
Justice Ragnhild Noer
Justice Henrik Bull
Justice Ingvald Falch
Justice Espen Bergh
Justice Cecilie Østensen Berglund
Justice Borgar Høgetveit Berg
Justice Kine Steinsvik

HR-2021-1453-S, (case no. 20-046393STR-HRET)

The Public Prosecution Authority	(Counsel Henry John Mæland)
v.	
A	(Counsel Anders Morten Brosveet Counsel John Christian Elden)

Attending:
The State represented by
the Ministry of Labour and Social Affairs (The Office of the Attorney General represented by Counsel Pål Wennerås)

(1) Justice **Steinsvik:**

Issues and background

(2) The case concerns a reopened criminal case on social security fraud, where the defendant was convicted of having withheld information about staying in Italy without NAV's approval during periods of receiving received a work assessment allowance (*arbeidsavklaringspenger*).

(3) The question is whether the conviction was incorrect because the requirement of stay in Norway in the National Insurance Act was contrary to EEA rules.

The criminal case against A

(4) On 18 February 2016, A was indicted for aggravated fraud, see section 271 cf. section 270 subsection 1 (1) of the Penal Code 1902.

(5) The basis for the indictment was that, from 19 May 2010 to 31 October 2012, A had misled employees in the Norwegian Labour and Welfare Service – NAV – to make payments to him in the amount of NOK 309 458 in work assessment allowance, by withholding information that he had stayed abroad without NAV's approval. This meant, according to the indictment, that A was not entitled to such a benefit and therefore had caused a financial loss or a risk of financial loss for the State.

(6) In November 2008, A was granted a rehabilitation allowance due to poor health and redundancy at his workplace. By a legal amendment that entered into force on 1 March 2010, the system with rehabilitation money was replaced by work assessment allowance. A started received this benefit instead until granted an invalidity pension from 1 November 2012.

(7) During the period concerned in the indictment, the District Court assumed that A had had a total of 14 stays in Italy, most of them with a duration of three or four weeks.

(8) A had been informed of the requirement of stay in Norway as a condition for receiving work assessment allowance. He was also aware that he had to report all travels abroad, alternatively apply for approval if he wanted to retain the work assessment allowance during temporary stays abroad. For two of the stays in Italy, A applied for NAV's approval. Both applications were granted. For the remaining 12 stays, A neither applied for approval nor notified NAV.

(9) As part of NAV's follow-up, A completed a work fitness program involving the sale of advertisements, a concept that he himself had developed. A entered the hours worked on notification forms to NAV. He also entered some hours worked during one of his stays in Italy.

(10) During the main proceedings in the District Court, the prosecutor requested that A be convicted of grossly negligent aggravated fraud, and by Nedre Telemark District Court's judgment of 4 March 2016, A was convicted of violation of section 271 a of the Penal Code 1902, see section 270 subsection 1 (1) cf. section 271 to 75 days of imprisonment. The District Court found it proven that A had acted grossly negligently on the following basis:

> "It is a condition for entitlement to a work assessment allowance that the person concerned stays in Norway, see section 11-3 of the National Insurance Act. NAV can

> grant exemptions from that requirement for a limited period if the stay abroad is compatible with the implementation of the activity plan. The Court does not consider that the accused was in good faith when he had stays abroad without notifying his absence or applying for an exemption from the requirement of stay."

(11) A appealed the judgment, challenging the sentence only. By Agder Court of Appeal's judgment of 12 December 2016, A was sentenced to 45 hours of community service to be carried out within 90 days and, in the alternative, a prison sentence of 45 days. The Court of Appeal emphasised that A could have obtained authorisation for stays abroad if he had applied, and that the "genuine potential of financial loss" for the State would have been smaller if the applications had been granted.

(12) The Public Prosecution Authority appealed the sentence to the Supreme Court, and leave to appeal was granted. In the Supreme Court, the main issue was whether it was correct to reduce the sentence to community sentence on the grounds that A could have obtained authorisation to stay abroad if he had applied. The defence counsel's pleading from the first proceedings have been presented in connection with the Supreme Court's hearing now. Arguing in favour of the Court of Appeal's sentence, the defence counsel referred mainly to sources of law on the interpretation of the National Insurance Act. However, he also mentioned the possible significance of EEA law, referring to Agder Court of Appeal's judgment in LA-2014-141843 dealing with the requirement of stay for cross-border workers as a condition for entitlement to daily unemployment benefits, and to the application of Regulation 1408/71.

(13) The Supreme Court delivered its judgment on 15 March 2017, HR-2017-560-A. The judgment built on the importance of not accentuating hypothetical, alternative courses of action in the sentencing process, as the Court of Appeal had done. The District Court's sentence of 75 days of imprisonment was upheld.

(14) *The application of the law in the determination of guilt*, more specifically whether the requirement of stay in section 11-3 of the National Insurance Act might be contrary to EEA rules, which would imply that A could not be convicted of social security fraud, was not at issue during the criminal proceedings, neither the Supreme Court nor in the lower instances.

(15) A served the sentence imposed during the period 5 January to 21 March 2018.

The change of NAV's practice with regard to the requirement of stay in connection with travel within the EEA

(16) Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, hereafter referred to as Regulation 883/2004 or the Social Security Regulation from 2004, was incorporated into the EEA Agreement with effect from 1 June 2012. It replaced the former Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community with later amendments, hereafter referred to as Regulation 1408/71 or the Social Security Regulation from 1971. This Regulation was implemented in Norwegian law upon the entry into force of the EEA Agreement on 1 January 1994.

(17) As I will return to, the requirement of stay as a condition for entitlement to a work assessment allowance under section 11-3 of the National Insurance Act was maintained when the Social Security Regulation from 2004 became effective in Norway from 1 June 2012.

(18) Between June 2017 and the summer of 2018, the National Insurance Appeals Council issued several rulings setting aside NAV's decision to withdraw or demand repayment of benefits in connection with temporary stays in other EEA countries. The reason given was either that NAV had not assessed the situation in the light of Article 21 of Regulation 883/2004, or that NAV had interpreted the Regulation incorrectly, see for instance the rulings in TRR-2016-2497 and TRR-2017-1058 with further references. Article 21 regulates the right to cash benefits for an insured person in an EEA State "residing or staying" in another EEA State. NAV did not change its practice despite the rulings from the National Insurance Appeals Council. The rulings were also not appealed to the Court of Appeal under section 26 of National Insurance Appeals Council Act.

(19) After the National Insurance Appeals Council's announcement during the hearing of another appeal in November 2018 that it was considering referring the question of interpretation of Article 21 to the EFTA Court, NAV conferred with the Directorate of Labour and Welfare, which in turn conferred with the Ministry of Labour and Social Affairs. In the autumn of 2009, NAV modified its practice in accordance with the interpretation that Article 21 of Regulation 883/2004 gave a right to benefits also during temporary stays in other EEA States.

(20) On 8 November 2019, the Government appointed an investigative committee headed by Professor Finn Arnesen – the Arnesen committee – to undertake an external review of the application Regulation 883/2004. As part of its mandate, the committee was also to assess whether the practice before 2012 had to be scrutinised.

(21) The Arnesen committee issued on 4 March 2020 a partial report on the legal issues linked to the requirement of stay and travel within the EEA. The committee then submitted, on 4 August 2020, Norwegian Official Report 2020: 9 The blind spot – Investigation of the misapplication of the National Insurance Act's requirement of stay in connection with travel within the EEA.

(22) In its partial report, the Arnesen committee found unanimously that since 1 June 2012, it had been contrary to EEA rules to refuse benefits such as work assessment allowance solely on the grounds that the insured person is in another EEA State. A majority also argued that the practice prior to 2012 also had to be scrutinised. A minority found that it, from 1 January 1994, had been contrary to rules on free movement of services in the EEA Agreement to refuse this type of benefits solely because the recipient is in another EEA State. The other committee members did not consider this issue. A majority agreed that the practice had been incompatible with EEA law since 1994, see Norwegian Official Report 2020: 9 page 47. At the same time, the committee stressed that clarifying the issues relating to EEA law was a task for the courts.

(23) As a result of NAV's modified practice, a review was initiated in the autumn of 2019 of administrative cases where insured persons had been ordered to repay benefits due to stays in other EEA States after 1 June 2012. The Director of Public Prosecutions started the work assessing possible reopening of criminal cases where recipients of various benefits during the same period might have been wrongfully convicted.

The petitions for reopening of the criminal case against A and the following proceedings

(24) In a letter of 27 November 2019, A was informed that NAV had re-examined the former decision on erroneous payments and recovery, and that the decision had been reversed for the period after 1 June 2012. A was also informed that the period before 1 June 2012 might be considered later, but that the status of the law had not yet been clarified. NAV also notified the relevant police district of the administrative re-examination of the case.

(25) On 19 March 2020, following the petitions from both A and the Public Prosecution Authority, the Criminal Cases Review Commission decided that the case should be reopened.

(26) The justice in charge of the preparatory phase in the Supreme Court, who assumed that the application of the law would be reviewed beyond the scope of the appeal, decided to request an advisory opinion from the EFTA Court. In the request, prepared based on a joint proposal from the prosecutor and the defence counsel, 16 questions were referred regarding the application of the EEA law versus the requirement of stay in section 11-3 of the National Insurance Act. The questions cover the periods both before and after 1 June 2012.

(27) The EFTA Court delivered its advisory opinion on 5 May 2021, see Case E-8/20, where A is referred to as N. The EFTA Court's opinion was issued after two rounds of written submissions as well as an oral hearing where the parties in the criminal case – the Norwegian State, the EU Commission and ESA – expressed their views. In brief, the EFTA Court expresses that both Article 36 of the EEA Agreement and Article 21 of the Social Security Regulation from 2004 rule out that the right to retain benefits while staying in another EEA is limited to four weeks per year and requires prior authorisation. I will return to the significance of the advisory opinion, the EFTA Court's reasoning and which conclusions that may be drawn.

(28) Pursuant to section 5 subsection 4, cf. section 6 subsection 2 first sentence of the Courts of Justice Act, it was decided on 11 May 2021 to have the case heard by a grand chamber of the Supreme Court. The composition of the grand chamber is determined by drawing of lots among the justices who have not been disqualified for possible bias, see the Supreme Court's rules of procedure of 12 December 2007 in accordance with section 8 of the Courts of Justice Act. Among others, the justices who participated in the former hearing of A's case, including the Chief Justice, were disqualified by decision of 18 May 2021.

(29) By the Supreme Court's Appeals Selection Committee's decision of 25 May 2012, the State represented by the Ministry of Labour and Social Affairs was given permission to appear in the case in accordance with Act section 30-13 subsection 1 of the Dispute Act. The State's submissions during the proceedings were limited to the significance of the EFTA Court's advisory opinion for the rules in the National Insurance Act regarding the duty of activity for the person receiving a work assessment allowance.

(30) The case in the Supreme Court has been heard by video link, see section 3 of temporary Act of 26 May 2020 no. 47 on adjustments to the procedural set of rules as a result of the Covid-10 outbreak etc.

The parties' contentions

(31) Both the Public Prosecution Authority and the defence counsel have asked for A's acquittal.

(32) *The Public Prosecution Authority*:

(33) A was convicted of having stayed in Italy while receiving a work assessment allowance without notifying NAV or applying for authorisation.

(34) In line with the EFTA Court's advisory opinion, it must be assumed that depriving A of the work assessment allowance during his stays in Italy was contrary to EEA rules. NAV's reporting to the police and the subsequent conviction, were based on the starting point that a person having been temporarily present in another EEA State was not entitled to benefits. This perception of the law was not correct.

(35) For the part of the indictment covering the period after 1 June 2012, this followed from Article 21 of Regulation 883/2004.

(36) A's case was not covered by the previous Regulation 1408/71. However, the requirement of stay in Norway was an unlawful restriction contrary to the provision on free movement of services in Article 36 of the main part of the EEA Agreement, which is decisive for the period before 1 June 2012.

(37) A was entitled under EEA law to retain his work assessment allowance while staying in Italy, and he has thus not obtained any "unlawful gain", which is a condition for criminal liability under section 270 subsection 1 (1) of the Penal Code 1902.

(38) The conviction of A was thus based on an error in law in the determination of guilt, and the Supreme Court must, beyond the scope of the appeal, acquit the defendant.

(39) Because the basis for the indictment in this case was that A had stays abroad without notifying NAV or applying for an exemption from the requirement, it was – irrespective of EEA law – correct to apply section 270 subsection 1 (1) of the Penal Code 1902. The judgment can therefore not be set aside on the grounds that A should have been convicted under section 270 subsection 1 (2).

(40) *The defence counsel*:

(41) The Supreme Court must review the District Court's application of the law beyond the scope of the appeal. The due process considerations behind section 342 subsection 2 (1) of the Criminal Procedure Act entails a duty to review the application of the law when its correctness is questioned in the issue of guilt, although the appeal is limited to other issues.

(42) A must be acquitted because the "unlawful gain" requirement in section 270 subsection 1 of the Penal Code 1902 is not met. The term refers to rules of civil law – in this case the social security rules – and the fact that A was entitled to a work assessment allowance under EEA law precludes criminal liability.

(43) Work assessment allowance is a sickness benefit and is thus regulated by Regulation 883/2004 and the former Regulation 1408/71.

(44) Since the EEA Agreement entered into force on 1 January 1994, it has been contrary to Article 36 to refuse work assessment allowance to persons that are not financially active, soley on the grounds that they are in another EEA state. Section 11-3 of the National Insurance Act impose restrictions on the free movement that cannot be justified under EEA law. Moreover, A performed work during one of his stays in Italy, and is thus also covered by Article 28 of the EEA Agreement on the free movement of employees when it comes to this particular stay.

(45) The District Court has convicted A of grossly negligent aggravated fraud, see section 271 a of the Penal Code 1902, cf. section 270 subsection 1 (1) cf. section 271. Since the notifications from A were processed electronically, the conditions for criminal liability in section 270 subsection 1 (1) are not fulfilled. The electronic notification forms did not inquire about possible stays abroad, which means that section 270 subsection 1 (2) on data fraud is also not applicable. This error in law suggests under any circumstances that the judgment must be set aside.

(46) *The State represented by the Ministry of Labour and Social Affairs* has been permitted to participate in the case in accordance with section 30-13 subsection 1 of the Dispute Act, and contends:

(47) Section 11-3 subsection 3 of the National Insurance Act on the exemption from the requirement of stay contains a time limit condition, a requirement that a stay abroad is compatible with the activity plan and follow-up, as well as an authorisation requirement.

(48) The EFTA Court has not assessed the activity plan requirement separately from the authorisation requirement. The advisory opinion cannot be read to imply that the EFTA Court finds that a requirement of an activity plan, as a condition for entitlement to work assessment allowance, is generally incompatible with EEA rules. The substantive conditions for entitlement to the benefit may be set by Norway on a national level as a competent State. EEA rules only prevent further conditions or special conditions for stays abroad, including rejection of work assessment allowance for the sole reason that the recipient is staying in another EEA State.

My opinion

The issues raised and the further discussion

(49) Section 270 subsection 1 of the Penal Code 1902 sets as a condition for criminal liability that the perpetrator must have obtained for himself or another person an “unlawful gain”. For there to be social security fraud, A must therefore have received benefits from NAV to which he was not entitled.

(50) A’s entitlement to work assessment allowance during his stays in Italy, depends on whether the requirement of stay in section 11-3 of the National Insurance Act and the practising thereof was compatible with EEA rules.

(51) The stays abroad on which the indictment was based extended from May 2010 to October 2012, and thus include the periods both before and after the current Social Security Regulation – Regulation 883/2004 – was incorporated into the EEA Agreement.

(52) In the following, I will first present my view on the status of the law after 1 June 2012. Article 21 of Regulation 883/2004 is crucial in this regard.

(53) Next, I will discuss the status of the law before 1 June 2012. The key issue here is whether the requirement of stay was contrary to the former the Social Security Regulation – Regulation 1408/71 – or to the rules on free movement of services in the Article 36 of the EEA Agreement.

(54) Before I turn to EEA law issues, I will discuss the Supreme Court's jurisdiction in the case and the significance of the EFTA Court's advisory opinion. I will also provide an overview of the rules in the National Insurance Act relating to work assessment allowance to the extent they are significant to my assessment of EEA law.

The Supreme Court's jurisdiction to examine issues beyond the scope of appeal under section 342 subsection 1 of the Criminal Procedure Act

(55) The question of guilt in the case was finally decided by the District Court's judgment. A's appeal to the Court of Appeal challenged the sentence, and so did the Public Prosecution Authority's later appeal to the Supreme Court.

(56) It follows from section 342 subsection 1 of the Criminal Procedure Act that the appellate court, when it is not to examine the assessment of evidence in the determination of guilt, is bound by the grounds staetd in the appeal. However, subsection 2 contains important exceptions, and subsection 2 (1) sets out that regardless of the ground of appeal, the court may "examine the issue whether the criminal legislation has been correctly applied."

(57) Issues beyond the scope of the appeal may be examined upon the court's own initiative, or may be raised by the parties before or during the proceedings. The fact that the Court of Appeal did not consider the application of the law does not prevent the Supreme Court from doing so, see the ruling in Rt-2003-179 paragraph 6, which has been followed up by a number of later rulings.

(58) According to the wording in section 342 subsection 2 (1) the court "may" examine the application of the law regardless of the grounds stated in the appeal. The Act therefore allows for discretion, which means that the Supreme Court as a starting point does not have a duty to examine the application of the law beyond the scope of the appeal. A relevant example is the ruling in HR-2020-2136-A paragraph 52, stating that there was no sufficient reason to examine possible time-bar of a minor offence in an extensive case involving internet child abuse. The requirement of an individual assessment is based among other things on the appeal system in section 323 of the Criminal Procedure Act. In Rt-2011-514 paragraph 29, it is stated that the individual assessment under section 342 subsection 1 "at least cannot be less strict than during an ordinary appeal hearing under section 323".

(59) The possibility to examine issues beyond the scope of the appeal is justified by the interest of reaching a substantively correct result. Therefore, depending on the specifics of the case, the basic due process guarantees that are to be ensured through the appeal system may force the appellate court to examine the application of the criminal legislation. A good example are cases where the court doubts whether the conditions for criminal liability are met. In such situations, the issue must be examined to avoid incorrect convictions.

(60) The case at hand is thus illustrative. If the Court of Appeal or the Supreme Court had become aware that the requirement of stay in section 11-3 of the National Insurance Act might be contrary to EEA rules, and that staying abroad could not lead to conviction of social security fraud, the issue would have had to be examined, regardless of the ground of appeal.

(61) This is also supported in EEA law itself. In the area of civil law, the Court of Justice of the European Union (CJEU) has stated several times that where national courts *can* go beyond the scope of the parties' contentions, they are also *obliged* to do so, to the extent the application of EU rules is at issue. Similarly, I must be so that where the appellate court in criminal cases *can* review the application of the law beyond the scope of the appeal, it is also *obliged* to do so, if there is doubt whether it will be contrary to EEA law to apply punishment.

(62) Against this background, the Supreme Court must now consider whether A's conviction was based on an error in law. It is without relevance that the Public Prosecution Authority originally only appealed the sentence.

The significance of the EFTA Court's advisory opinion

(63) When a Norwegian court is to consider the interpretation of a provision in the EEA Agreement, it may refer the issue to the EFTA Court, see section 51a of the Courts of Justice Act. In such cases, the EFTA Court "shall have jurisdiction to give advisory opinions on the interpretation of the EEA Agreement", see Article 34 subsection 1 of the Agreement between EFTA States on the Establishment of a Surveillance Authority and a Court of Justice.

(64) The EFTA Court's opinions are not formally binding. The national court must therefore independently decide on the interpretation and application of EEA law in the individual case. However, when interpreting EEA law, the national court must "attach considerable importance to the opinions of the EFTA Court concerning the interpretation of EEA law" see the Supreme Court judgment HR-2016-2554-P *Holship* paragraph 77. The following is specified in the same paragraph:

> "In their interpretation of EEA law, however, national courts shall attach considerable importance to the opinions of the EFTA Court concerning the interpretation of EEA law. The purpose of the EFTA Court is, according to the preamble of the Surveillance and Court Agreement, among other things, to "arrive at and maintain a uniform interpretation and application of the EEA Agreement and those provisions of the Community legislation which are substantially reproduced in that Agreement and to arrive at an equal treatment of individuals and economic operators as regards the four freedoms and the conditions of competition". The EFTA state's courts must therefore normally apply the EFTA Court's interpretation of EEA law, and cannot disregard an advisory opinion by the EFTA Court unless "special circumstances" so indicate, cf. Rt. 2013, p. 258, paragraphs 93–94, with reference to the plenary judgment of Rt. 2000, pp. 1811–1820. In order for the EFTA Court to fulfil its intended purpose, the court's interpretation of EEA law cannot normally be disregarded unless there are weighty and compelling reasons for doing so."

(65) In other words, the EFTA Court's interpretation of EEA law may not be challenged without "weighty and compelling reasons". With regard to the further distribution of jurisdiction between the EFTA Court and the national court, the following is set out in paragraph 78:

> "The EFTA Court has jurisdiction to give advisory opinions on the interpretation of EEA law, cf. Article 34, paragraph 1, of the Surveillance and Court Agreement. The assessment of evidence falls under the jurisdiction of the courts of each EFTA State. The

> same normally applies to the application of the law to the facts, but there is no clear distinction here. How far the EFTA Court will go in describing EEA law in minute detail, will, among other things, depend on the questions posed by the EFTA State's court and the level of detail included in the request."

(66) Many EEA rules are by nature approximate or appear as general principles. For instance, when interpreting and applying the basic freedoms in the main part of the EEA Agreement, one must assess whether the restrictions are suitable, necessary and proportionate. The EFTA Court's task is thus to give specifying guidelines for the application of the EEA rule, and to clarify which aspects should be emphasised. The findings of fact and the individual decision whether a national provision or regulation is compatible with EEA law, are assigned to the national court. To the extent the EFTA Court has carried out more specific assessments, for instance based on the questions referred by the national court, this may be of help to the national court. However, such statements considered in isolation carry less weight than direct statements from the Court regarding the interpretation of EEA law. This follows already from the fact that the EFTA Court, in interpretation cases referred by national courts, considers neither the facts of the case nor the content of the national legislation.

The National Insurance Act's rules on work assessment allowance

The background to the set of rules

(67) Work assessment allowance was introduced in the National Insurance Act as a new benefit by Act of 19 December 2008 no. 106, in force from 1 March 2010. It then replaced various types of medical and vocational rehabilitation programs and invalidity benefits of limited duration see Proposition to the Odelsting No. 4 (2008–2009) page 8.

(68) The amendment was part of a follow-up of the NAV reform from 2006, which involved a reorganisation of the labour and welfare administration, see the Proposition page 10. The objective of the reform was that the new administration, over time, would contribute to a more uniform and coordinated alternative for people that for various reasons have problems integrating into the employment market.

(69) To adjust the tools to the new welfare administration, Report No. 9 (2006–2007) to the Storting, gave an overall assessment of relevant tools for the new Norwegian Labour and Welfare Organisation – NAV. The main purpose was to "outline strategies and measures aimed at improved inclusion in working life for persons of working age who have problems gaining a foothold in the labour market, or who are in risk of dropping out of the labour market." In order to reach this target, one of the proposals was to establish a "more systematic process for coordination between the user and the organisation (assessments of need and working capacity) as well as the establishment of a simplified and more vocational, temporary income security scheme".

(70) The Report presented a number of guidelines for the new temporary income security scheme. I mention in particular that the target group was to be the same as for the replaced benefit that also covered temporary loss of income in connection with health issues. Furthermore, there was to be "a clear connection between the benefit and individually adjusted activity plans with the objective of returning to work" with the establishment of "several genuine follow-up and stop points on the way", see the quote in the Proposition page 10.

(71) The guidelines in the Report to the Storting were complied with through the Proposition. The purpose of the work assessment allowance was to ensure income for members while they receive active treatment, participate in work-orientated measures, or are being followed up in another way with a view to obtaining or retaining employment, see section 11-1 of the National Insurance Act.

The conditions for entitlement to work assessment allowance during the indictment period

(72) The rules on work assessment allowance have been altered several times after they entered into force. In the following, I will account for the rules as they read during the period comprised by the indictment against A. However, the conditions for entitlement to work assessment allowance correspond by far to those currently applicable.

(73) The two basic input conditions for earning the right to work assessment allowance were presented in section 11-5 on reduced fitness for work and section 11-6 on the need for assistance in obtaining or retaining employment. Section 11-5 of the National Insurance Act read as follows:

> "Section 11-5. Reduced fitness for work
>
> It is a condition for entitlement to benefits under this Chapter that the member, due to sickness, injury or impairment, has suffered a reduction in his or her fitness for work to such an extent that the person concerned is prevented from retaining or obtaining gainful employment.
>
> When the determination is being made as to whether the fitness for work is reduced to the extent that the person concerned is prevented from retaining or obtaining gainful employment, regard shall be had inter alia to health, age, fitness, education, professional background, interests, wishes, opportunities for returning to the current employer, employment opportunities at the place of residence and employment opportunities at other places where it is reasonable for the person concerned to accept employment."

(74) The condition of a need for assistance in obtaining or retaining employment followed from section 11-6, which provided that the member had to have "a need for active treatment" or for "work-oriented measures" to be entitled to benefits. In addition, there were requirements relating to age and prior membership, which are not relevant to the case at hand.

(75) During the benefits period, it was a condition for entitlement that "the member contribute actively to the process of integrating into the labour market", see section 11-8. As opposed to the member's duty of activity, NAV had a duty to provide regular follow-up under section 11-11.

(76) The provision on follow-up by NAV must be read in light of the provision implemented simultaneously as a new section 14a of the Labour and Welfare Administration Act. This implemented, on specific terms, a right to a written fitness for work assessment for members that need assistance in obtaining work. It followed from section 14a subsection 3 first sentence that members who had a documented need of assistance "have a right to participate in the preparation of a specific plan for how to obtain work (activity plan)". According to subsection 4, NAV was responsible for "carrying out the assessment and for preparing the activity plans".

(77) The control of the member's fulfilment of the conditions for entitlement to the benefit was maintained through the duty of notification every fourteenth day by use of a notification form, attendance in person or in some other manner, see section 11-7.

(78) Apart from this, section 21-3 of the National Insurance Act on the members' general duty of notification, which among other things states that "any person receiving a benefit, have a duty to notify the organisation of any changes in his or her situation that may be decisive for his or her entitlement to the benefit."

(79) A complied with the duty of notification by using notification forms, which were issued electronically by NAV. Moreover, documentation has been presented for the activity plans that had been prepared during the period covered by the indictment.

The requirement of stay in Norway – section 11-3 of the National Insurance Act

(80) In addition to the input conditions and the rules on follow-up and control, section 11-3 of the National Insurance Act contained a requirement of stay in Norway in order to be entitled to work assessment allowance. During the relevant period, the provision read as follows:

> "Section 11-3. Stay in Norway
>
> It is a condition for the entitlement to work assessment allowance that the member stays in Norway.
>
> Work assessment allowance can nevertheless be given to a member who is receiving medical treatment or participates in a work-oriented measure abroad, in accordance with the activity plan, see section 14a of the Labour and Welfare Administration Act.
>
> A member can also receive work assessment allowance while staying abroad for up to four weeks per calendar year. It is a prerequisite that the stay abroad is compatible with the implementation of the stipulated activity and does not impede the follow-up and control by the Labour and Welfare Administration."

(81) In the current section 11-3, the requirement of stay is upheld. In subsection 3, it is now specified that the benefit can be paid during a stay abroad "for up to four weeks per calendar year", if it can be demonstrated that the stay is compatible with the completion of the planned activity etc.

(82) NAV drew up Circular R 11-00 to accompany Chapter 11 of the National Insurance Act. In the version applicable from 1 March 2010, the following was stated in the initial comments to section 11-3:

> "For the entitlement to work assessment allowance and additional benefits, there is a requirement to stay in Norway. The background for that provision is the need to be able to follow up on users in relation to correct benefits and work-oriented activities and to be able to know at all times whether the conditions for entitlement to the benefit are satisfied.
>
> The work assessment allowance is regarded as a cash benefit during sickness under
>
> EEA Regulation No 1408/71.

> Reference is made to the EEA Agreement's part on social security and accompanying circulars, and social security agreements Norway has with other countries and separate specific circulars. In the event of conflict between the Norwegian rules and the provisions in social security agreements, including the EEA Agreement, the agreement's rules take precedence, see Section 1-3 of the National Insurance Act."

(83) Next, the Circular discusses the exceptions in section 11-3 subsections 2 and 3. As regards stays abroad that are not in compliance with the activity plan, the following was set out:

> "As a rule, it is not permitted to stay abroad and at the same time receive work assessment allowance and additional benefits. If the user is staying abroad and is thus not available for NAV, the benefit will lapse during that period.
>
> The third paragraph of Section 11-3 allows for benefits to be granted exceptionally also for a limited period during a stay abroad, such as in the event of temporary breaks between measures or during waiting periods for treatment/measures.
>
> Benefits should usually not be paid for longer than the period of a normal holiday trip. 'Normal holiday trip' means a period of up to four weeks. This presupposes, however, that it can be demonstrated that the stay abroad is compatible with the completion of the planned activity and does not impede follow-up and control by NAV. The key factor in that context is that the stay abroad does not negatively impact the preparation and implementation of the activity plan.
>
> Users must apply in advance for authorisation to keep receiving benefits during a temporary stay abroad. Users are to be given proper, repeated information to the effect that he or she must stay in Norway in order to be entitled to benefits under Chapter 11 and that he or she must notify NAV if they travel abroad."

(84) The Circular was changed with effect from 1 June 2012. In the introduction to section 11-3, the following was added:

> "In the cases where a user moves to another EEA country, the person may still be considered to be covered by Norwegian legislation (member of the National Insurance) under the EEA rules. Work assessment allowance may therefore on certain terms be exported to another EEA country. The condition is that the person was in employment and a member of the National Insurance at the time his or her fitness for work was reduced by at least fifty percent (the time of calculation)."

(85) In addition to the Circular I have now presented, others had been issued regarding the EEA Agreement's social security part, more specifically Circular 40-00, which was replaced by Circular 45-00 from 28 February 2012.

(86) It is set out in part 11.3.2 of Circular 40-00 that NAV interpreted Circular 1408/71 to mean that the rules gave a right on certain conditions to retain the work assessment allowance when *moving* to another EEA State, but not in connection with temporary *stays*. This interpretation was not changed in the new circular, Circular 45-00, issued in connection with the implementation of Regulation No. 883/2004.

(87) For members of the National Insurance residing in Norway, it was therefore assumed that temporary stays in another EEA State were exhaustively regulated in section 11-3 subsections 2 and 3 of the National Insurance Act. These rules demanded presence in Norway, with two exceptions: stays abroad in accordance with the activity plan under subsection 1 and stays abroad upon application and permission, and then for a limited period, in practice within the

scopes of a normal holiday trip. Temporary stays beyond the activity plan needed approval in advance, and it had to be demonstrated that the stay was compatible with the completion of the activity plan, and that it did not prevent NAV's follow-up and control, see subsection 3.

The EEA issues – legal starting points

(88) The main part of the EEA Agreement was incorporated into Norwegian law by the adoption of the EEA Act of 27 November 1992, and has status as formal Norwegian law according to section 1. Section 2 first sentence of the EEA Act sets out that EEA rules that are implemented in Norwegian law take precedence over other provision regulating the same issues in the event of conflict. This entails that Article 36 of the EEA Agreement takes precedence over section 11-3 of the National Insurance Act in the event of conflict.

(89) According to section 1-3 of the National Insurance Act, the King in Council may enter into mutual agreements with other countries on rights and duties under the Act, including making exemptions from certain provisions. Regulation 883/2004 was implemented in Norwegian law through Regulations of 22 June 2012 No. 585 on the Incorporation of Social Security Benefits in the EEA Agreement. It has status as subordinate legislation. In section 1 subsection 3, it is set out that provisions in the National Insurance Act shall "be deviated from to the extent it is necessary under the provisions" in the Regulation. Regulation 1408/71 was implemented in the same manner effective from the entry into force of the EEA Agreement. This means that the Regulations, too, take precedence over section 11-3 in the event of conflict.

(90) According to Article 29 of the EEA Agreement, legal acts in the field of security are intended to provide freedom of movement for workers, self-employed persons and their dependants. Among other things, the provision imposes the Contracting Parties to aggregate all periods taken into account under the laws of the several countries for retaining the right to benefits and of calculating them, and to ensure payment thereof irrespective of in which EEA State the member is residing, as provided for in the Agreement's Annex VI. Social Security Regulations are included in this Annex VI to the EEA Agreement.

(91) In paragraphs 46 and 47 of the EFTA Court's advisory opinion, it is stressed that the Regulations must be interpreted in light of the overall objective of Article 29, which – within the scope of the EEA Agreement – is to "contribute to the establishment of the greatest possible freedom of movement".

(92) Both the former and the current Social Security Regulation control the relationship between the social security systems of the EEA States. The purpose is to regulate which State's social security system is applicable, and to ensure that the entitlement to benefits is not lost for persons exercising their right to free movement within the EEA.

(93) The Regulations do not harmonise with the EEA States' social security systems with regard to either appliance considerations, membership or conditions for receiving various benefits. The EEA States are therefore, as a starting point, free to establish and structure respective national social security systems. Yet, the Regulations do contain rules of significance for the possibility to export benefits to another EEA State. The framework for the national insurance law is also set by other EEA law. Although the area of social security is not harmonised, the EEA States must respect the Regulations and other rules of EEA law.

(94) The social security coordination rules in Regulation 883/2004 build on several basic principles, among which *equality of treatment* expressed in Article 4 is key. This provision is a result of the basic prohibition against discrimination in Article 4 of the EEA Agreement. Article 4 of the Regulation sets out that unless otherwise stated therein, "persons to whom this Regulation applies shall enjoy the same benefits and be subject to the same obligations under the legislation of any Member State as the nationals thereof". The principle of *exportability* is also crucial, see for instance Article 7 of the Regulation, stating that "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".

The status of the law after 1 June 2012 – Regulation 883/2004

Introduction

(95) As mentioned, the Regulation from 1971 was replaced by Regulation 883/2004, which covers the coordination of social security systems in general. The group of persons covered is extended to comprise all EEA citizens, not only persons who are or have been financially active as employees or as self-employed, see Article 2. As I will return to, this was different in the Regulation from 1971.

(96) Regulation 883/2004 is therefore the natural starting point in the assessment of the possibility under applicable law to receive work assessment allowance during temporary stays in other EEA countries.

Article 21 – issues

(97) Regulation 883/2004 Article 21 (1) first sentence reads:

> "Article 21 Cash benefits
>
> 1. An insured person and members of his/her family residing or staying in a Member State other than the competent Member State shall be entitled to cash benefits provided by the competent institution in accordance with the legislation it applies."

(98) The questions referred by the Supreme Court to the EFTA Court on the possibility to receive work assessment allowance during a stay in another EEA state under this provision, can be divided into three categories:

(99) First, whether work assessment allowance is a sickness benefit, see Regulation 883/2004 Article 3 (1) (a). This is a precondition for the application of Article 21.

(100) Second, whether the term "is staying in a different member state" covers any short-term stay that does not imply moving of residence, and that case independent of whether the medical diagnosis is made in the residence state before departure.

(101) Third, whether the conditions for entitlement to work assessment allowance in section 11-3 subsection 1, cf. subsection 3, of the National Insurance Act are compatible with Article 21. The reason for the question is that although the provision gives the member a right to cash benefits, this shall take place "in accordance with the legislation" applied by the competent institution. In this case, the "competent institution" is NAV. The question in the request is specific as to whether Article 21 can be interpreted to mean that the following conditions in section 11-3 of the National Insurance Act can be maintained:

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

(102) Before I discuss these issues and the EFTA Court's advisory opinion, I reiterate that the grounds for A's conviction was that he, during periods of receiving work assessment allowance, was staying in Italy without having notified NAV or applied for authorisation. A was not convicted because his stays abroad were incompatible with the completion of the planned activities or because he prevented NAV's follow-up and control.

Is work assessment allowance a sickness benefit?

(103) Regulation 883/2004 Section III contains special provisions on various types of benefits and is divided into nine chapters, regulating various benefit categories according to cause. Article 21 is included in Chapter 1 in Section III, which applies to "sickness benefits", as well as benefits in connection with maternity and childbirth. Invalidity and unemployment benefits are regulated in Chapters 4 and 6.

(104) In other words, in order for Article 21 to apply, work assessment allowance must fall under the term "sickness benefits" within the meaning of Article 3 (1) (a). Article 1 of the Regulation in itself does not define this term.

(105) The Regulation distinguishes between cash benefits and benefits in kind. This distinction raises no issues, since work assessment allowance is a financial compensation for the loss of income in the form of regular payments to the member.

(106) There is also no doubt that work assessment allowance is a *social security benefit*. The key indicator of whether a benefit as such falls under the scope of the Regulation, is its purposes and the conditions on which it is granted, see the EFTA Court's advisory opinion paragraph 50. In Paragraph 51, this is specified such that a benefit "may be regarded as a social security benefit in so far as it is granted, without any individual and discretionary assessment of personal needs, to recipients on the basis of a legally defined position and provided that it relates to one of the risks expressly listed in Article 4(1) of Regulation 1408/71". Article 4 (1) in Regulation 1408/71 is found in Article 3 (1) in Regulation 883/2004.

(107) The EFTA Court has concluded that work assessment allowance is a sickness benefit under both the current and the former Regulation. When further classifying the sickness benefit, the

Court stresses the basis for granting it, or *the risk* covered by each benefit, see in particular the statement in paragraph 52.

(108) Although the classification of the benefit must be made in accordance with EEA law, and the national classification is therefore not decisive, I note that when work assessment allowance was introduced in the National Insurance Act, the Ministry assumed that "work assessment allowance will be considered a sickness benefit pursuant to the EEA Regulation 1408/71", see Proposition to the Odelsting No. 4 (2008–2009) page 18. Norway has also, at least in recent years, issued declarations in accordance with Regulation 883/2004 Article 9 that work assessment allowance is considered a sickness benefit pursuant to Article 3 (1) (a).

(109) In line with the EFTA Court's interpretation, it must be concluded that the Norwegian work assessment allowance is a sickness benefit. The decisive factor is that the basic input condition for work assessment allowance in section 11-5 of the National Insurance Act is that the member "due to sickness, injury or impairment, has suffered a reduction in their fitness for work to such an extent that the person concerned is prevented from retaining or obtaining gainful employment". This means that the benefit is to compensate the loss of income due to sickness.

(110) Admittedly, it follows from section 11-5 subsection 1 that the assessment of whether the fitness for work is reduced requires a broader assessment, and the system is employment-related in the way that the overall objective is to reintegrate the member into employment. Nevertheless, the benefit is still a temporary source of income for members of the National Insurance whose fitness for work is reduced due to sickness. It is not a permanent invalidity benefit, nor does it have the character of an unemployment benefit, as long as the reason for the loss of income is reduced fitness for work.

(111) The classification of "sickness benefits" in Regulation 1408/71 was not changed upon the adoption of Regulation 883/2004. It must therefore be assumed that work assessment allowance is a sickness benefit, according to both the former and the current Regulation. The benefit thus falls under the scope of Article 21 of Regulation 883/2004.

The area of application of Article 21 – are temporary stays in another EEA State covered?

(112) Article 10 of Regulation 1408/71 – which applied until 2012 – contained a provision on lifting of the residence requirement for specific benefits, establishing that these could not be subject to any "reduction, modification, suspension, withdrawal or confiscation by reason of the fact that the recipient resides in the territory of a Member State". Sickness benefits, and consequently work assessment allowance, were not on the list of benefits covered by Article 10 of the 1971 Regulation.

(113) In Regulation 883/2004, the provision is maintained in Article 7. However, the area of application is extended to include all "cash benefits payable under the legislation of one or more Member States or under this Regulation". The provision therefore also covers work assessment allowance as a sickness cash benefit.

(114) Article 7 of Regulation 883/2004 therefore constitutes a prohibition against reducing a member's benefit because he or she is residing in another EEA State. However, neither Article 7 nor Article 10 of the former Regulation regulates the situation where the recipient of a cash benefit *is staying* in another EEA State, without residing there.

(115) However, for cash benefits, it follows from the wording of Article 21 that this provision covers cases where the member of the National Insurance is "residing or staying" in a Member State other than the competent Member State. The insured person shall be "entitled to cash benefits" provided by the competent institution – here NAV – in accordance with the legislation it applies, also if the person is staying abroad.

(116) In Article 1 (j), the Regulation defines "residence" as the "place where a person habitually resides". The term "stay" in Article 1 (k) defined as "temporary residence".

(117) In its advisory opinion, the EFTA Court clarified the interpretation of Article 21 on this point. In paragraph 133, it is stated that the terms "residing" and "staying" in Article 21, when juxtaposed with the definitions in Article 1, must be interpreted as "covering a short-term stay in another EEA State", and that stay "encompasses both a short-term stay as well as a visit of longer duration". In support of its conclusion, the EFTA Court has, in addition to the wording, referred to CJEU judgment 5 June 2014 in Case C-255/13 *I* paragraph 50. This judgment dealt with the issue of how long a stay can be before the member must be regarded as having been resident, see paragraph 53. The EFTA Court also refers to the various language versions of the definitions in Article 1. The Court's conclusion is that "the term 'staying' in Article 21(1) of Regulation 883/2004 must be interpreted as encompassing short-term stays in another EEA State not constituting "residence" within the meaning of point (j) of Article 1 of that regulation, such as those at issue in the main proceedings", see paragraph 134.

(118) I also mention that the Arnesen committee found that the terms "residence" and "stay" in aggregate must encompass all forms of presence in another EEA State, and that "stay" therefore also encompasses very short-term stays, see Norwegian Official Report 2020: 9 appendix 2 page 306–307.

(119) In paragraph 136, the EFTA Court also states that there is no basis for limiting the applicability of Article 21 to situations where the medical diagnosis is given during a stay in an EEA State other than the competent EEA State, and that nothing suggests that the provision should not be interpreted in line with its clear wording.

(120) Against this background, the area of application of Article 21 of Regulation 883/2004 must be deemed to cover situations where a member is either residing or staying in another Member State, and that the terms in aggregate encompass any presence in another EEA State. The entitlement to cash benefits under Article 21 applies irrespective of whether the sickness is established in the competent State or in the state where the person is residing or staying.

(121) A's stay in Italy thus fell under the area of application of Article 21 (1).

The possibility to make conditions for entitlement to sick benefits when travelling in the EEA

(122) I have so far concluded that Article 21 of Regulation 883/2004 covers work assessment allowance under Chapter 11 of the National Insurance Act, as this is a cash benefit payable during sickness. Furthermore, I have concluded that the area of application of Article 21 covers any presence in another EEA State.

(123) The next question is the further implication of Article 21 when setting out that "the insured person shall be entitled to cash benefits provided by the competent institution in accordance with the legislation it applies".

(124) The overall question is whether Article 21 restricts the Member States' possibility to make conditions for entitlement to cash benefits during sickness. More specifically, the question is whether the conditions in section 11-3 subsection 1 and 3 of the National Insurance Act in whole or in part must be set aside as incompatible with EEA law.

(125) The wording in Article 21 in itself does not give a clear answer to these questions. The Regulation's starting point is, as mentioned, that it does not harmonise the social security systems of the Member States. The respective Member States are therefore, as a starting point, free to determine the conditions for entitlement to benefits. At the same time, it is clear that the Regulation's overall purpose of coordinating social security systems to ensure free movement, might be undermined if the provision is to be interpreted as an unconditional reference to each Member State's internal social security legislation. At least this is the case if the provision is to be interpreted to allow for conditions that are incompatible with other EEA law, including those on the freedom of movement. The purposes of the rules on social security coordination therefore clearly favour such an interpretation of Article 21. The starting point in the Regulation itself is also that provisions derogating from the principle of the exportability of social security benefits must be interpreted strictly, see item 37 of the Preamble.

(126) On this point, the EFTA Court has concluded that Article 21 (1) must be interpreted to rule out the conditions in section 11-3 of the National Insurance Act.

(127) Before I turn to the individual parts of the EFTA Court's advisory opinion, I note that the Arnesen committee in its partial report "Social security, requirement of stay and travel within the EEA" takes the following general approach, see Norwegian Official Report 2020: 9 appendix 2 page 296:

> "Although the Regulations in principle give the Member States freedom to design their respective social security systems, the systems must all the same be within the scope of what EEA law permits. This implies among other things that national social security rules must meet the requirements contained in the general rules on free movement of persons, goods, services and capital. In addition, the national social security systems must meet the Regulations' requirements relating to the significance of stays in other EEA States."

(128) The committee's conclusion regarding the interpretation of Article 21 and the possibility to make conditions for entitlement to cash benefits that limit the possibility to retain such benefits during a stay in another EEA State, is summarised as follows in Norwegian Official Report 2020: 9 page 46:

> "As the committee further describes in item 4.2.3 of its partial report, the wording may be interpreted in two ways. If one emphasises the provision's reference to national legislation (the 'entitlement to cash benefits from the competent institution *in accordance with the legislation it applies*'), Article 21 becomes merely a reference provision. If taking the phrase *'shall be entitled to cash benefits*' as a starting point, it is natural also to read a right into the provision. In the light of the case law of the CJEU and the consideration of obtaining homogeneity between EEA law and EU law, the committee stated in its partial report that the provision should be interpreted as a rights provision.
>
> However, the committee did not find support in interpreting the provision to prevent any condition that could make it more difficult to travel abroad. Such conditions must meet the requirements in EU and EEA law for obstructing free movement of persons. What Article 21 prevents, is NAV's refusal to pay cash benefits during sickness with the sole justification that the member is staying in an EEA country other than Norway."

(129) The EFTA Court's interpretation of Article 21 and the possibility to make conditions are set out in paragraph 138 et seq.

(130) As concerns the requirement of *stay in Norway* in section 11-3 subsection 1, cf. subsection 3, of the National Insurance Act, according to which the benefit may only be given for a limited period – in practice four weeks – during stays abroad, the EFTA Court takes as its starting point Article 7 of the Regulation regarding lifting of the residence requirement, and states the following in paragraph 139:

> "A condition of presence could be equivalent, in practice, to a habitual residence clause, if, in particular, such condition requires long periods of presence in the EEA State concerned and/or if that condition must be met for as long as the benefit in question is paid. In such cases, a presence requirement can be assimilated to a residence clause within the meaning of Article 7 of Regulation 883/2004 (compare the judgment in *Stewart* [CJEU judgment 21 July 2011 in Case C-503/09], cited above, paragraph 73). The Court notes that, in circumstances such as those of the main proceedings, a presence requirement, which excludes entitlement to sickness benefits during short-stays abroad, is in fact significantly more restrictive than a residence requirement (see Stig *Arne Jonsson* [the EFTA Court's judgment 20 March 2012, Case E-3/12], cited above, paragraphs 69 to 74). Article 7 provides that EEA States cannot make benefits conditional on residence. It follows that an EEA State cannot condition such benefits on continuous physical presence either."

(131) In other words, the EFTA Court concludes that a condition of continuous physical presence in the EEA State concerned, and a limited possibility to make exceptions, in practice equals a residence requirement. Such a condition for entitlement to cash benefits is thus contrary to Article 7.

(132) The EFTA Court goes on in paragraph 144 by stating that making a cash benefit conditional on physical presence in the competent State is contrary to Article 21. In paragraph 143, this is justified as follows:

> "However, Article 21 of Regulation 883/2004 does not provide a basis for derogating from the right to retain social security benefits when going to another EEA State as expressed in that provision. Thus, provided that the criteria for entitlement in national law are fulfilled, Article 21(1), including its wording "in accordance with the legislation it applies", cannot be interpreted as permitting an EEA State to impose any further conditions, such as requiring an insured person to be physically present on its territory. An interpretation permitting the entitlement conferred by Article 21(1) to be defeated by a requirement as to physical presence on an EEA State's territory would render that provision devoid of purpose (compare the judgment in *Tolley* [CJEU judgment 1 February 2017, Case C-430/15], cited above, paragraph 88)."

(133) The way I read these two paragraphs, the EFTA Court interprets Article 21 to imply that if the member fulfils the applicable conditions for entitlement to cash benefits under the competent State's internal legislation, no "*further conditions*" may be imposed for entitlement to payment because member is residing or staying in another EEA State.

(134) Neither party has objected to the EFTA Court's interpretation on this point, nor do I find any reason to derogate from this. A requirement of stay in Norway to be entitled to the benefit will undermine the coordination rules' basic objective of facilitating free movement.

(135) Based on the EFTA Court's interpretation of Articles 7 and 21, it must be assumed that the requirement of stay in Norway, with a possible exception of up to four weeks a year, is contrary to Regulation 883/2004, which is also the view expressed by the EFTA Court in paragraph 145. Then, it is not necessary to consider whether the requirement of stay in section 11-3 subsection 1 of the National Insurance Act may also be incompatible with other rules of EEA law.

(136) As concerns questions linked to the *other conditions in section 11-3 subsection 3*, it follows from the EFTA Court's conclusion in item 7 of the final statements. The EFTA Court interprets Article 21 as precluding conditions such as:

> "(ii) that it must demonstrated that the stay abroad is compatible with the activity obligations and does not impede follow-up and control; and
>
> (iii) that the person concerned must obtain authorisation and comply with the notification duty through the use of a notification form."

(137) The reasons for this conclusion are provided in paragraphs 146 to 148. Here, the EFTA Court sees the requirement of demonstrating that the stay abroad is compatible with the planned activity and the authorisation requirement as a whole, and as a requirement of *prior authorisation.*

(138) In paragraph 146, the EFTA Court points out that the way the conditions in section 11-3 subsection 3 are formulated, they in effect "constitute a requirement to be physically present in Norway, which can be lifted following approval by the competent institution of an application by the insured person". In paragraph 147, the EFTA Court states that Article 21 must be interpreted as "precluding a prior authorisation requirement" and that "any other interpretation would disregard the unconditional entitlement" contained in the provision. Finally, the EFTA Court points out that the wording of the former Article 22 (1) of Regulation 1408/71 provided for the possibility to retain the sickness benefits in the case of transfer of residence, but that this is changed in the new Regulation.

(139) As I understand the EFTA Court, Article 21 precludes a condition of prior authorisation requirement as that in section 11-3 subsection 3 of the National Insurance Act. The prior authorisation requirement for a member of the National Insurance residing or staying in another EEA State, implies that "further conditions" are made, or special conditions connected to the right to retain cash benefits while staying in another EEA state, contrary to the starting point for the interpretation clarified by the EFTA Court in paragraph 143.

Summary – the status of the law after 1 June 2012

(140) Against this background, the conclusion must be that Article 21, cf. Article 7, of Regulation 883/2004 implies that a member of the National Insurance cannot be denied work assessment allowance for the sole reason that he or she is residing or staying in another EEA state. The requirement of stay in Norway in section 11-3 of the National Insurance Act subsection 1 is therefore contrary to Article 21, cf. Article 7, of Regulation 883/2004.

(141) Article 21 further precludes a condition of prior authorisation as in section 11-3 subsection 3 to retain work assessment allowance during stays abroad.

(142) It has been questioned whether the EFTA Court's advisory opinion must be understood to imply that Article 21 also precludes the *activity obligation as a substantive condition* for entitlement to work assessment allowance. Here, the EFTA Court refers to the condition in section 11-8 the National Insurance Act, currently section 11-7, stating that the member must actively contribute in the process of finding employment.

(143) I cannot see that the EFTA Court's interpretation of Article 21 addresses this issue. First, the Court takes as its starting point that the Regulation does not harmonise the conditions for retaining benefits. Furthermore, the EFTA Court argues in paragraph 46 that the Regulation does not permit *further* conditions for stays abroad, compared with the conditions applicable to members of the National Insurance residing and staying in the competent State. The activity obligation, which applies generally and independent of where the member is residing or staying, is thus permitted.

(144) Whether the Regulation also prescribes which activity obligations may be imposed in the individual social security case, i.e. how the activity obligation in section 11-8 should be practiced when the member wishes to stay abroad, is not relevant to the case at hand.

The status of the law before 1 June 2012

Issues

(145) For the period before 1 June 2012, the requirement of stay in Norway in section 11-3 of the National Insurance Act raises several other EEA law issues.

(146) Until the incorporation of Regulation 883/2004 into the EEA Agreement, Regulation 1408/71 applied, and I will first consider the area of application of the latter, more specifically Articles 19 and 22.

(147) If this Regulation did not give a right to retain the work assessment allowance during stays abroad, it is all the same a question whether the rules on free movement in the main part of the EEA Agreement are significant for the requirement of stay in section 11-3 of the National Insurance Act. Here, the rules on free movement for services in Article 36 of the EEA Agreement are key.

The further application of Articles 19 and 22 of Regulation 1408/71

(148) Also in the light of the rules in Regulation 1408/71, it must be assumed that work assessment allowance is a sickness benefit. It is therefore the rules in Chapter 1 Section III of this Regulation that determine possible entitlement to a work assessment allowance during temporary stays in other EEA countries.

(149) According to Article 19 (1) (b) of Regulation 1408/71, a worker or a self-employed person "residing in the territory of a Member State other than the competent State" is entitled to cash benefits "in accordance with the legislation of the competent State".

(150) When interpreting this provision in paragraphs 63 and 64, the EFTA Court has attached decisive importance to the wording, and concludes that Article 19 "relates only to situations in which an insured person who applies to the competent institution of an EEA State for a sickness benefit resides in another EEA State on the date of his application". The EFTA Court

refers to CJEU judgment in *Tolley*, where the same interpretation forms the basis for paragraphs 71 to 73.

(151) Article 22 regulates various aspects of a member's stay outside the competent State. The relevant part of the provision is Article 22 (1) (b), which gives entitlement to benefits to a worker or a self-employed person "who, having become entitled to benefits chargeable to the competent institution, is authorised by that institution to return to the territory of the Member State where he resides, or to transfer his residence to the territory of another Member State".

(152) According to its wording, this provision does also not encompass more short-term stays. The EFTA Court states in paragraph 67 that a member spending short-term stays in another in another member state, "does not belong to the categories of persons targeted by point (b) of Articles 22(1) of Regulation 1408/71, which is limited to the retention of sickness benefits in case of transferring "residence" to another EEA state". At this point, too, the EFTA Court refers to CJEU judgment in *Tolley*, paragraph 74.

(153) Based on the wording in Articles 19 and 22 and the EFTA Court's firm conclusion regarding the interpretation of these provisions, it must be assumed that A's temporary stay in Italy while retaining work assessment allowance from NAV is not covered by Articles 19 and 22 of Regulation 1408/71.

The Social Security Regulations versus the freedom of movement in the main part of the EEA Agreement

(154) I have already pointed out that EEA rules other than the rules on social security coordination in the Regulations will restrict domestic social security legislation, and that this is the case despite the absence of harmonisation of social security systems at EEA level.

(155) It is clear that the rules on the freedom of movement as background rules of law are crucial in the interpretation of the individual provisions in the Regulations. Also, there can be no doubt that the rules on free movement may function as *independent legal bases* with the possible consequence that conditions in social security legislation that are contrary to the basic freedoms in the main part of the EEA Agreement must be set aside, see section 2 of the Norwegian EEA Act.

(156) In elaboration of its conclusion that Regulation 1408/71 does not cover to A's situation, the EFTA Court states the following on the application of the rules on free movement, see paragraph 68:

> "This interpretation of Regulation 1408/71 must be understood without prejudice to the solution which flows from the potential applicability of provisions of the main part of the EEA Agreement (compare the judgment in von Chamier-Glisczinski [CJEU judgment 16 July 2009, Case C-208/07], cited above, paragraph 66). The finding that a national measure does not fall within the scope of a provision of a legal act incorporated into the EEA Agreement, in this case point (b) of Article 22(1), does not have the effect of removing that measure from the scope of the main part of the EEA Agreement or another legal act incorporated into the EEA Agreement (compare the judgment in Elchinov [CJEU judgment 5 October 2010], C-173/09, EU:C:2010:581, paragraph 38 and case law cited). It follows that the non-applicability, as the case may be, of Articles 19 or 22 to a situation such as that at issue in the main proceedings does not of itself prevent the person concerned from claiming, pursuant to the main part of the EEA Agreement or another

> legal act incorporated into the EEA Agreement, the retention of a sickness benefit in cash during short-term stays in another EEA State."

(157) There are also a number of rulings from the CJEU demonstrating this connection between the Regulations and the basic freedoms. I refer judgment of 18 July 2006 in Case C-406/04 *De Cuyper*, which concerned the possibility under Regulation 1408/71 to export unemployment benefits to another Member State. The CJEU established that De Cuyper not was in a situation where the Regulation's provisions on the exportability of the benefit was applicable, see paragraph 38. It then discussed whether a residence requirement under Belgian legislation was compatible with the treaty provision on freedoms conferred on citizens of the Union, see paragraph 39. The same undoubtedly applies to the traditional rules on free movement. Incidentally, I refer to the Social Security Coordination Committee's review of the application of Social Security Regulations and the main rules on free movement in Norwegian Official Report 2021: 8 item 2.4.

Was the requirement of stay in section 11-3 of the National Insurance Act contrary to the freedom of movement in the EEA Agreement?

(158) The EFTA Court has received the question whether the entitlement to sickness benefits during temporary stays in another EEA State is covered by Article 28 or Article 36 of the EEA Agreement. The background to the question relating to Article 28, which concerns free movement of employees, is that A during one of his stays in Italy entered 66 hours of work on notification forms to NAV. However, the parties agree that the key issue is the application of Article 36 of the EEA Agreement on the freedom to provide services, which I will discuss next.

(159) The services rules do not constitute the central framework of the rules on social security coordination. The main purpose of the rules in the Regulations on social security coordination is to secure free movement of persons in the EEA, and not free provision of services, see Article 29 of the EEA Agreement. This is also set out in the Preamble to Regulation 883/2004, item 1.

(160) Article 36 of the EEA Agreement 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."

(161) As it appears, any restriction on the freedom to provide services is as a starting point prohibited. A was not a service provider during his stays in Italy. However, it follows from case law from the CJEU and the EFTA Court that Article 36 and the corresponding provision in Article 56 of the Treaty on the Functioning of the European Union (TFEU) also has a passive side – a right for recipients of services to receive the services in another EEA State without being obstructed by restrictions. I refer to CJEU judgment of 31 January 1984 in joint Cases 286/82 and 86/83 *Luisi and Carbone.* Here, the Court found that the home state restrictions in Italian law regarding the possibility to bring currency abroad constituted a restriction according to the rules on services. Paragraph 16 sets out:

> "It follows that the freedom to provide services includes the freedom, for the recipients of services, to go to another Member State in order to receive a service there, without being

> obstructed by restrictions, even in relation to payments and that tourists, persons receiving medical treatment and persons travelling for the purpose of education or business are to be regarded as recipients of services."

(162) The EFTA Court applies the same interpretation with reference to additional case law, and clarifies that the cause of the stay is not decisive for the interpretation, see the statement paragraph 77:

> "In the case of a person who is prevented from working, as in the case of recipients of a benefit such as that at issue, numerous explanations may explain their choosing to stay in another EEA State. However, in such circumstances, it can be assumed that such an individual will receive services in the EEA State in which he stays."

(163) In other words, the Court relies on the presumption that a person who travels to another EEA State without exercising the rules on the freedom of movement for employees and self-employed persons, will receive services, and at this is sufficient to be covered by Article 36 of the EEA Agreement.

(164) The interpretation prescribed by the EFTA Court entails a wider application of the rules on the freedom to provide services. However, it corresponds to the interpretation applied by the majority of the Arnesen committee, see Norwegian Official Report 2020: 9 page 47 et seq. Like the EFTA Court, the committee's majority also bases its findings on CJEU judgment of 20 April 2020 in Case C-897/19 PPU *criminal case against I.N.,* where extradition to Russia of an Icelandic citizen on holiday in Croatia was covered by Article 36 of the EEA Agreement. In that case, as pointed out by the committee, there was also no direct link between the relevant restriction and I.N.'s financial activities as a tourist. However, the restriction had direct consequences for the possibility to exercise the right to receive benefits. The Arnesen committee's majority concluded as follows on page 48:

> "The committee's majority, its head Arnesen and members Strandbakken, Wærnes and Jendal, thus find that it can be characterised as generally accepted law that the rules on free movement of services are applicable where the recipient of services travels to the service provider and receives the service(s) there. The majority finds no support in case law or any written EU or EEA rule to conclude that the fact that the relevant restriction is the loss of entitlement to cash benefits during sickness, implies that the rules on services are nonetheless not applicable."

(165) I cannot see that there is a basis for derogating from the EFTA Court's interpretation on this point, and conclude that A, during his temporary stays in Italy, was covered by Article 36 of the EEA Agreement in the capacity of a recipient of services.

(166) In my view, it is therefore automatically clear that the requirement of stay as described in section 11-3 subsection 1, cf. subsection 3, of the National Insurance Act, constituted a *restriction* on the right to receive services in another EEA State.

(167) For there to be a restriction, it is sufficient that the requirements of stay and prior authorisation "prohibit, impede or render less attractive the exercise of the free movement of services", see the EFTA Court's advisory opinion paragraph 79 with a further reference to case law.

(168) The requirement of stay in Norway entailed in practice that A would have to give up his benefit if he wanted to exercise his freedom to receive services in Italy beyond a limited period. In my view, this rendered at least the exercise of the freedom to provide services less

interesting. The prior authorisation requirement in section 11-3 subsection 3 constituted a restriction also in itself. A prior authorisation requirement constitutes, as argued by the EFTA Court, an additional burden for individuals choosing to stay in another EEA State compared to those staying in Norway, see paragraph 86.

(169) The decisive issue is consequently whether the requirements of stay and prior authorisation in section 11-3 subsection 1, cf. subsection 3, can *be justified*. From a legal perspective, it depends on whether the restrictions justified by overriding reasons in the public opinion are appropriate to securing the attainment of the legitimate objective pursued, and proportionate having regard to that objective. I refer to the EFTA Court's advisory opinion paragraph 91 and HR-2016-2554-P *Holship* paragraph 97. The State carries the burden of proof and must demonstrate specifically that the restrictions are legitimate, appropriate and necessary.

(170) I will first discuss whether the restrictions were justified by *overriding reasons in the public interest.* In paragraph 96, the EFTA Court presents the State's submitted legitimate considerations as follows:

> "As regards the reasons which may justify a restriction on the provision of services when it comes to the legislation at issue, the Norwegian Government submits that there are several objective justifications. It submits that the national legislation is intended to (i) avoid the risk of a serious undermining of the financial balance of the national social security system; (ii) avoid the risk of the abuse of sickness benefits; (iii) reflect the need to monitor compliance with the requirements for social security benefits; and (iv) facilitate the integration of persons excluded from the labour market and promote a high level of employment."

(171) According to case law from the EFTA Court and the CJEU, EEA law and EU law cannot be extended to cover fraud or misuse, see the EFTA Court's advisory opinion paragraph 97 and CJEU judgment 22 November 2017 in Case C-251/16 *Cussens and Others* paragraph 27. The considerations of avoiding misuse of benefits and controlling that the recipients actually meet the statutory conditions to the extent these conditions in themselves are compatible with EEA law, may therefore in principle justify a restriction. The risk of undermining the financial balance of the social security system may also constitute an overriding general-interest reason, see paragraph 97 of the EFTA Court's advisory opinion.

(172) The EFTA Court also finds that the fourthly submitted consideration – the facilitation of integration of persons excluded from the labour market – constitutes a "legitimate aim of EEA States' social or employment policy", see paragraph 98. The same is concluded by the Arnesen committee in its partial report on page 39, justified as follows:

> "The conditions connected to entitlement to sickness, care and work assessment allowance are justified in the interests of reintegrating persons into working life and promoting full employment. These considerations are found in the Preamble of the EEA Agreement and in Part V of the Agreement. They are compatible with the provisions in TFEU. The committee emphasises in particular Article 9 of TFEU, where a durable high level of employment is mentioned expressly among the targets the Member States and the EU shall take into account."

(173) Furthermore, the EFTA Court discusses in some more detail the significance of employment policy interests when assessing the justifiability of restrictions on the freedom of movement for persons on sickness benefits. The way I read these statements, they concern the assessment itself of whether the restriction in question may be justified in the light of its

nature, i.e. a requirement of stay in combination with a requirement of prior authorisation, see particularly the final part of paragraph 99 and the conclusion in paragraph 106.

(174) Against this background, I find that the conditions in section 11-3 subsection 1, cf. subsection 3, of the National Insurance Act pursue the considerations generally recognised in EEA law, and which, as a starting point, may justify restrictions on the freedom of movement for service recipients.

(175) However, when assessing whether in the individual assessment, the justifiability of the restrictions in the case at hand depends, in my view, on the nature of the restrictions in question.

(176) A requirement of stay in Norway, with a highly limited possibility of obtaining an exception, cannot be justified by a general reference to the objectives of avoiding misuse and of ensuring that persons on cash benefits meet the conditions.

(177) First, the member's fulfilment of the conditions for entitlement to benefits under the National Insurance Act is largely controlled through the notification duty in section 11-7, currently section 11-10, and the general duty to inform in section 21-3. These provisions apply regardless of where the member is physically present and therefore safeguard by far the national insurance authorities' need of control.

(178) Moreover, the restriction is a special condition for temporary stays abroad that does not apply correspondingly to domestic travel or to members of the National Insurance who move to another EEA State. Although the control options may be poorer when the member is staying in another EEA State, I have difficulties finding an adequate argument to justify such a far-reaching restriction as the one we are dealing with. Nor have Norwegian authorities demonstrated that the requirement of stay was necessary to control that the recipient abided by the rules.

(179) The consideration of generally facilitating integration into the labour market may also not justify the conditions in section 11-3 on the freedom to provide services.

(180) The other substantive conditions for work assessment allowance apply regardless of where the member is staying, and it has not been satisfactorily demonstrated that it was with a view to obtaining employment that the member had to be physically present in Norway.

(181) Finally, I endorse the EFTA Court's assessment in paragraph 125 that it is not, in the case at hand, sufficiently substantiated that a right to retain benefits during temporary stays in another EEA State, without requirements of stay and prior authorisation, will undermine the social security system's economic stability.

(182) For the record, I also mention the following:

(183) The way section 11-3 of the National Insurance Act structured, there is a link between the requirement of stay in Norway and the authorisation requirement. In my view, therefore, this case does not provide a basis for assessing in general terms whether an authorisation requirement for a longer stay away from the competent State, or simply a longer stay abroad, constitutes a restriction that cannot be justified under any circumstances and is therefore contrary to Article 36. The relationship between EEA law and such a rule, which would not be linked to a general prohibition against staying abroad, is discussed in more detail in Norwegian Official Report 2021: 8 item 8.2.2.8.

(184) In the light of the conclusion that the conditions in section 11-3 subsection 1, cf. subsection 3, of the National Insurance Act constituted an unlawful restriction under Article 36 of the EEA, I do not consider it necessary to discuss further whether also Article 28 of the EEA Agreement is applicable for a limited part of the case. However, I cannot see that a restriction assessment under Article 28 would differ considerably from the assessment under Article 36 in this case.

Individual assessment of A's case

(185) A was convicted of having stayed in Italy during certain periods without notifying NAV thereof or applying for NAV's approval, and that he thereby subjected NAV to a financial loss or a risk of financial loss because he received benefits to which he was not entitled.

(186) However, the requirement of stay in section 11-3 of the National Insurance Act subsection 1, cf. subsection 3, was contrary to EEA rules during the entire indictment period. The non-compliance with section 11-3 could therefore not form a basis for refusing or stopping payments of work assessment allowance. A did not secure an "unlawful gain" by receiving benefits from NAV to which he was not entitled. This condition for criminal liability in section 270 of the Penal Code 1902 is therefore not met.

(187) A must consequently be acquitted.

(188) Against this conclusion, I do not consider it necessary to discuss the defence counsel's submission that the act was in any case not covered by section 270 subsection 1 (1) of the Penal Code, as the work assessment allowance was paid electronically and on the basis of submitted report card.

Conclusive remarks

(189) I have now demonstrated that the requirement of stay in section 11-3 of the National Insurance Act and the national insurance authorities' application thereof have been contrary to EEA rules during the entire indictment period.

(190) NAV's order of repayment of benefits retained by A during his stays in Italy was therefore unjustified. The prosecution for social security fraud that followed was also based on failing legal premises. There is no doubt that this has economic as well as personal consequences for A.

(191) Punishment is society's strongest reaction to crime, and the courts have an independent responsibility to ensure that there is a legal basis for imposing criminal liability. In this case, it must be acknowledged that the due process guarantees that were to be secured by a court hearing of A's case, did not function sufficiently when the misapplication was not discovered, also not during the Supreme Court's hearing of the case in 2017.

(192) I vote for this

J U D G M E N T :

A, born 00.00.1951, is acquitted.

(193) Justice **Webster:** I agree with Justice Steinsvik in all material respects and with her conclusion.

(194) Justice **Matheson:** Likewise.

(195) Justice **Falkanger:** Likewise.

(196) Justice **Noer:** Likewise.

(197) Justice **Bull:** Likewise.

(198) Justice **Falch:** Likewise.

(199) Justice **Bergh:** Likewise.

(200) Justice **Østensen Berglund:** Likewise.

(201) Justice **Høgetveit Berg:** Likewise.

(202) Justice **Indreberg:** Likewise.

(203) Following the voting, the Supreme Court gave this

J U D G M E N T :

A, born 00.00.1951, is acquitted.