NORGES HØYESTERETT

EFTA Court
- Registry -
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1499 Luxembourg
Luxembourg

Doc 113

Request for an Advisory Opinion

Case No 25-036986SIV-HRET, civil case, appeal against judgment:
Case No 25-056992SIV-HRET, civil case, appeal against judgment:

1. INTRODUCTION

(1) The Supreme Court of Norway (*Norges Høyesterett*) hereby requests an Advisory Opinion from the EFTA Court in Case No 25-036986SIV-HRET and Case No 25-056992SIV-HRET: see section 51a of the Norwegian Courts of Justice Act (*Lov om domstolene*) and Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (SCA).

(2) Both of the cases before the Supreme Court have as their main issue the question whether the private parties are entitled to disability benefit in Norway. Under Norwegian law, entitlement to disability benefit is acquired through continuous membership in the national insurance scheme for a period of five years, previously three years, which is acquired inter alia through having been lawfully resident in Norway. The private parties do not satisfy the conditions based on period of residence in Norway alone, but both have been resident and acquired social security rights in another EEA State – to wit, Spain and Germany, respectively – before moving to Norway. In Spain and Germany, social security coverage is acquired in other ways than solely being resident. The questions referred by the Supreme Court herein concern the principles governing aggregation under Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems ('the Social Security Regulation'), read in conjunction with Article 29 of the EEA Agreement.

(3) The Supreme Court has not previously heard any cases raising questions as to how periods in Norway are to be aggregated/coordinated with periods from another EEA State. There is some case-law from the Court of Appeal (*lagmannsretten*) level, including the judgments under appeal in the present case. An overall objective of the present reference is to obtain clarification as to whether the existing case-law is based on a correct interpretation of the EEA Agreement.

(4) The first question referred seeks clarification as to which periods in another EEA State the Norwegian authorities are to take into account and aggregate with those periods in Norway which give social security coverage. The question seeks to clarify what the conditions are for taking periods completed in other countries into account.

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(5) The Norwegian authorities have obtained information from the Spanish and German authorities on standardised forms as to which periods giving rise to social security coverage in those States the private parties in the cases have. The second question seeks to clarify whether the Norwegian authorities have obtained that information in a correct manner and whether they ought to have obtained other relevant information.

(6) The first paragraph of section 12-2 of the Norwegian National Insurance Act (*folketrygdloven*) has been construed as imposing a requirement of continuous membership in the national insurance scheme for a period of five years, previously three years, prior to the onset of disability. The third question is aimed at clarifying whether the EEA Agreement imposes requirements as to how such a national condition of continuous membership must be applied in practice. As is apparent from what is set out in the following, the information obtained shows that the private parties in both cases before the Supreme Court have had interruptions in their periods of social security coverage in the other country, including in connection with their moving to Norway.

2. OVERVIEW OF THE PARTIES TO THE CASE

(7) The parties involved in Case No 25-036986SIV-HRET – "the Spain case" – are:

Appellant:	A
Counsel:	Advokat John Christian Elden and Advokat Olaf Halvorsen Rønning Elden Advokatfirma AS P.O. Box 6684 St. Olavs plass 0129 Oslo
Respondent:	Norwegian State, represented by the Labour and Welfare Directorate (*Staten v/Arbeids- og velferdsdirektoratet*)
Counsel:	Advokat Anders Narvestad Office of the Attorney General (Civil Affairs) (*Regjeringsadvokaten*) P.O. Box 8012 Dep. 0030 Oslo

(8) The parties involved in Case No 25-036986SIV-HRET – "the Germany case" – are:

Appellant:	B
Counsel:	Advokat Jørn Are Gaski Advokathuset Vest AS Vetrlidsallmenningen 27 5014 Bergen
Respondent:	Norwegian State, represented by the Labour

and Welfare Directorate
(*Staten v/Arbeids- og velferdsdirektoratet*)

Counsel: Advokat Anders Narvestad
Office of the Attorney General (Civil Affairs)
(*Regjeringsadvokaten*)
P.O. Box 8012 Dep.
0030 Oslo

(9) The cases have been joined at the Supreme Court to be heard together.

3. SUMMARY OF PRINCIPAL FACTS

3.1 The Spain case

(10) A was born in Pakistan on XX.XX.1987. He moved to Spain in 2005 and worked there before moving to Norway on 10 April 2013. A is now a Spanish citizen.

(11) The onset of disability has previously been the subject of dispute in the case. For the purposes of the case before the Supreme Court it shall be assumed, on the basis of the Court of Appeal's ruling on the issue, that the onset of A's disability was in January 2016.

(12) A applied for disability benefit in Norway on 19 December 2017, which application was refused by decision of the Norwegian Labour and Welfare Administration (NAV), which decision was upheld by an order of 7 September 2020 of the National Insurance Court (*Trygderetten*). A has twice applied, unsuccessfully, for the case to be reopened before the National Insurance Court and has reapplied for disability benefit, with the result that various decisions and orders have been handed down. It is not considered necessary to describe that administrative process in detail. The disagreement has related to inter alia the time of the onset of A's disability, and whether he has been a member of the national insurance scheme for a sufficiently lengthy period to be entitled to disability benefit.

(13) The decision at issue in the present case was adopted after A reapplied for disability benefit on 29 July 2021. He was refused by NAV decision of 16 November 2021, on the ground that he did not satisfy the requirement laid down in the first paragraph of section 12-2 of the National Insurance Act of membership in the national insurance scheme for a period of five years prior to the onset of disability in January 2016, or the alternative conditions laid down in the second or third paragraph of section 12-2 of the National Insurance Act.

(14) The Norwegian authorities have twice obtained information from the Spanish authorities on the E205 ES form, the first time on 4 April 2019 in connection with the first application procedure and the second time on 22 November 2021. NAV requested additional information and received a response from the Spanish authorities by letter of 17 January 2022.

(15) By order of 1 August 2024, the National Insurance Court upheld the refusal of NAV Appeals (*NAV Klageinstans*), concluding inter alia that the requirement of continuous membership in the national insurance scheme for five years prior to the onset of disability was not fulfilled. The National Insurance Court writes the following in the order:

"NAV has obtained information on periods of insurance from Spain, which shows that he was registered as having periods of insurance in Spain during the following periods:

17.01.2008 – 31.01.2009
02.12.2009 – 19.02.2011
01.08.2011 – 16.12.2011
01.02.2012 – 23.02.2012
02.04.2012 – 17.05.2012
25.09.2012 – 24.12.2012
28.11.2013 – 12.12.2013"

(16) A appealed to Borgarting Court of Appeal (*Borgarting lagmannsrett*), claiming that the National Insurance Court's decision was invalid. Borgarting Court of Appeal ruled on that appeal by judgment and order of 4 February 2025, following a simplified procedure, which found in favour of the State.

(17) The Court of Appeal's judgment states inter alia the following:

"A accordingly does not satisfy the condition of membership in the national insurance scheme in Norway during the five years preceding the onset of disability.

Membership periods in other EEA countries are however included in the assessment of prior membership: see Articles 6 and 45 of Social Security Regulation No 883/2004. As a result, periods of insurance from Norway and periods of insurance from other EEA States can be aggregated: see Article 6 of the Social Security Regulation. It is a requirement, however, that the period of insurance must be continuous, including in the event of aggregation with periods of insurance from EEA States.

According to the information provided by the Spanish authorities, A lacks a period of insurance from Spain in the period from 25 December 2012 until he moved to Norway on 10 April 2013, the date used as a basis by the National Insurance Court. The Court of Appeal refers inter alia to Annex 83 to the statement in defence. In a letter to the Norwegian authorities, the Spanish authorities stated that a condition for membership in Spain is that the person concerned must be in employment, and that this is the reason for the interruptions in the period of insurance in Spain. The Court of Appeal refers inter alia to Annex 86 to the statement in defence.

The Court of Appeal also refers to a translation of a letter sent to A by the Spanish authorities (with "Annex No 233" added by hand). The letter was produced by A on 26 November 2024 under "Miscellaneous documents". It is also apparent from that letter that, in Spain, social security rights are acquired only by persons who are in employment. Hence, residence in Spain is not sufficient on its own.

It is, incidentally, also apparent from the letter to A that the Spanish authorities have sent information to the Norwegian authorities on five occasions. The Court

> of Appeal considers that there is no reason to doubt the information the Spanish authorities have provided to NAV.
>
> In Norway, everyone who is resident in the realm is, as a rule, compulsorily members of the national insurance scheme. Other EEA countries may have other requirements for membership than Norway and, in many other EEA countries, residence is not a sufficient criterion for membership under the relevant country's social security scheme. A number of countries have a requirement of occupational activity, either as a worker or self-employed person."

(18) A has appealed to the Supreme Court, and on 9 May 2025 the Appeals Selection Committee of the Supreme Court (*Høyesteretts ankeutvalg*) ruled as follows:

> "Leave to have the appeal heard by the Supreme Court is granted in respect of the application of the law as it relates to the question whether the requirement of previous membership under section 12-2 of the National Insurance Act is fulfilled. Leave to appeal is otherwise refused."

(19) On 7 October 2025, the judge in charge of preparing the case (*forberedende dommer*) ruled that an Advisory Opinion would be sought from the EFTA Court

3.2 The Germany case

(20) B was born on XX XX 1964 in Morocco. She moved from Morocco to Germany in 1996 and then to Norway in 2005. She is now a German citizen.

(21) The exact date of moving to Norway has previously been the subject of dispute in the case. For the purposes of the case before the Supreme Court it shall be assumed, on the basis of the Court of Appeal's ruling on the issue, that B moved to Norway no earlier than May 2005. The onset of her disability was in April 2008.

(22) B applied for disability benefit on 19 June 2018. NAV obtained information on periods of insurance from the German authorities on the E205 DE form, which is dated 22 August 2019.

(23) By decision of 8 October 2019, NAV refused the claim for disability benefit on the ground that B did not satisfy the condition of continuous membership in the national insurance scheme for a period of three years and/or the German social security scheme prior to the onset of disability. NAV took the view that nor did she satisfy the alternative conditions laid down in the second or third paragraph of section 12-2 [of the National Insurance Act]. The decision states the following with respect to membership in the national insurance scheme in Germany:

> "We have received documentation from the social security authorities in Germany to the effect that you have been a member of their social security scheme during the following periods:
>
> | **As from** | **Up to and including** |
> |---|---|
> | 01.03.2004 | 31.10.2004 |
> | 01.07.2003 | 01.07.2003 |
> | 01.07.1996 | 30.09.2002 |

> We have not included periods stated merely as 8.1.2 as, according to the German forms [sic], they are included only in the calculation of early retirement pension, and based on practice which assumes that these are not periods that are considered for the purposes of entitlement to a German invalidity benefit."

(24) By decision of 15 December 2020, NAV Appeals upheld the order that B was not entitled to disability benefit. B brought the case before the National Insurance Court, which handed down an order 14 December 2022 upholding that decision.

(25) B appealed to Eidsivating Court of Appeal (*Eidsivating lagmannsrett*), which suspended the proceedings because B had also requested that the case be reopened in respect of the earlier refusal. In the dismissal of that request by NAV Appeals, dated 18 August 2023, inter alia the following is stated:

> "In the request for reopening, the appellant states that there was a serious procedural error in that NAV failed to assess her membership in the German social security scheme in accordance with the total period of insurance in Germany. In that connection, reference is made to the order in which the National Insurance Court has noted that the German social security authorities did not indicate any relevant period of insurance after 31 October 2004 and that neither NAV nor the National Insurance Court is to review that information. This is the correct interpretation: see inter alia the judgment in LA-2016-200383."

(26) The proceedings before the Court of Appeal were then resumed. By judgment of 17 February 2025, Eidsivating Court of Appeal found in favour of the State. Inter alia the following is stated in the judgment:

> "Information obtained from the German authorities shows that B acquired periods of insurance in Germany as follows: as from 1 July 1996 up to and including 30 September 2002, as from 1 July 2003 up to and including 1 July 2003 and, lastly, as from 1 March 2004 up to and including 31 October 2004. The Norwegian authorities are to base themselves without question on information from other countries' authorities: see Article 5 of the Implementing Regulation. B may not, therefore, successfully argue that NAV ought to have examined the German rules or that NAV has misapplied the German rules. The Court of Appeal nevertheless notes that there is nothing to support the position that the information from the German authorities is incorrect. During the preparatory stages of the case, it seems as though there was some discussion as to whether the Norwegian authorities had used the correct form to obtain information from the German authorities. The Court of Appeal understands that this submission has been withdrawn, but can in any event not see that any errors were made in obtaining the information.
>
> B has also claimed that Article 51 of the Social Security Regulation, relating to aggregation of periods of insurance, must entail that she is entitled to disability benefit. As stated earlier, it is an unconditional requirement for entitlement to disability benefit under the Norwegian rules that prior periods of insurance must be continuous. The last period in which periods of insurance were acquired conferring entitlement to invalidity benefit under the German rules ended on 31 October 2004. The Court of Appeal interprets the EEA rules as meaning that, if B

had had a period of insurance in Germany until the end of March 2005, it would have been included in the calculation. That is not the case here, however. It cannot be inferred from Article 6 or Article 51 of the Social Security Regulation that the Norwegian authorities have an unconditional obligation to aggregate previous periods of insurance completed in another EEA country and Norwegian periods of insurance, irrespective of when the period of insurance was completed in that other country, as claimed by B. The Court of Appeal accordingly does not take the view that it is contrary to the EEA Agreement or the Social Security Regulation not to aggregate membership periods in Germany and Norwegian periods of insurance."

(27) B has appealed to the Supreme Court. On 25 June 2025, the Appeals Selection Committee of the Supreme Court granted leave to appeal in so far as regards the issue of the application of the law. Leave to appeal was otherwise refused.

(28) On 7 October 2025, the judge in charge of preparing the case ruled that an Advisory Opinion would be sought from the EFTA Court.

4. RELEVANT RULES

4.1 Norwegian legislation

(29) Section 12-2 of the National Insurance Act is worded as follows:

"It is a condition for entitlement to disability benefit that the person concerned has been a member of the national insurance scheme for the five years preceding the onset of disability: see section 12-8. In the assessment of whether the condition is fulfilled, no account shall be taken of periods spent serving with international organisations or bodies of which the Norwegian State is a member, to which it makes financial contributions or to which it is responsible for contributing to staffing.

The condition of five years of prior membership in the first paragraph shall not apply to a person who has been a member of the insurance scheme for at least one year immediately before he or she submits a claim for disability benefit, if

a. the person concerned became disabled before turning 26 years of age and at that time was a member of the national insurance scheme, or
b. the person concerned, after turning 16 years of age, has been a member of the national insurance scheme except for a maximum of five years.

The condition in the first paragraph shall not apply if the person concerned was a member of the national insurance scheme at the time of the onset of disability and the disability benefit in the event of a 100 per cent degree of invalidity:

a. calculated on the basis under the first paragraph of section 12-11 will at least correspond to half of the high rate under the third sentence of the second paragraph of section 12-13, or

b. calculated on the basis of periods of insurance will at least correspond to half of the minimum benefit under the second paragraph of section 12-13.

Future periods of insurance shall not be included in the calculation: see the fifth paragraph of section 12-12."

(30) The requirement of having been a member of the national insurance scheme for five years entered into force on 1 January 2021. Previously, the rule required that the person had to have been a member for a period of three years prior to the onset of disability. Under the transitional provisions, if the claim for disability benefit was submitted before the amendment entered into force – as occurred in the Germany case – the previous three-year membership condition applied.

(31) Membership of the national insurance scheme can be acquired in different ways, including being resident in Norway: see section 2-1 of the National Insurance Act, which is worded as follows:

> "Persons who reside in Norway are compulsorily members of the national insurance scheme.
>
> Residents of Norway are those who stay in Norway, when the stay is intended to last or has lasted at least 12 months. A person who moves to Norway is considered resident from the date of entry.
>
> It is a condition for membership that the person concerned has legal residence in Norway.
>
> In the event of temporary absence from Norway that is not intended to last more than 12 months, the person concerned is still considered resident here. However, this does not apply if the person concerned is to stay or has stayed abroad for more than six months per year for two or more consecutive years."

(32) Membership in the national insurance scheme can also be acquired on the basis of being a worker: see section 2-2 of the National Insurance Act, which is worded as follows:

> "A person who is not a member of the national insurance scheme under section 2-1 is nevertheless compulsorily member of the national insurance scheme if the person concerned is a worker (section 1-8) in Norway or on the Norwegian part of the Continental Shelf in connection with exploration or extraction of oil, gas or other natural resources. This shall apply only if not otherwise provided for in or pursuant to the present Act.
>
> It is a condition that the person concerned is legally able to engage in paid employment in Norway or on the Norwegian Continental Shelf."

(33) In other words, lawful employment in Norway or in the specified industries on the Norwegian Continental Shelf gives rise to being a member of the national insurance scheme, irrespective of place of residence.

(34) Section 1-3 of the National Insurance Act provides:

> "The present Act shall be interpreted and applied in accordance with the principles on free movement and equal treatment as provided for in the Main Part of the EEA Agreement."

(35) Furthermore, section 12-1 a of the National Insurance Act lays down provisions on international social security coordination:

> "Disability benefit is an invalidity benefit under the social security regulation. Provisions in the present chapter shall be disapplied to the extent necessary in respect of relevant provisions in the Main Part of the EEA Agreement, the Social Security Regulation, the Implementing Regulation and bilateral and multilateral social security agreements: see sections 1-3 a and 1-3 b.
>
> The Ministry may, by regulation, issue provisions supplementing or facilitating compliance with provisions on invalidity benefits in the Social Security Regulation and the Implementing Regulation."

(36) Sections 1-3 and 12-1 of the National Insurance Act were added in 2022, but the substantive content was, in reality, the same as previously, through section 1-3 then in force and through national regulations. A new section 1-3 a was also enacted in 2022, covering the implementation of the Social Security Regulation and the Implementing Regulation [Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems], conferring on them the status of Norwegian legislation and giving them primacy corresponding to what is provided for in section 12-1 a of the National Insurance Act.

4.2 The EEA Agreement

(37) The [principle of] free movement of workers is laid down in Article 28 of the EEA Agreement, which provides, inter alia:

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

(38) The principle of coordination of social security benefits is laid down in Article 29 of the EEA Agreement:

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

a. aggregation, for the purpose of acquiring and retaining the right to benefit and of calculating the amount of benefit, of all periods taken into account under the laws of the several countries
b. payment of benefits to persons resident in the territories of Contracting Parties."

(39) The Social Security Regulation is incorporated into Annex VI to the EEA Agreement, pursuant to the Decision of the EEA Joint of 1 July 2011, with effect from 1 June 2012. It provides for the continuation and evolution of corresponding provisions in Regulation (EEC) No 1408/71 [published in the *EEA Supplement to the Official Journal of the European Union*, dated 15 May 2003].

(40) Recitals 4, 5, 9, 10, 13, 14 and 26 of the Social Security Regulation state the following:

"4. It is necessary to respect the special characteristics of national social security legislation and to draw up only a system of coordination.

5. It is necessary, within the framework of such coordination, to guarantee within the Community equality of treatment under the different national legislation for the persons concerned. [...]

9. The Court of Justice has on several occasions given an opinion on the possibility of equal treatment of benefits, income and facts; this principle should be adopted explicitly and developed, while observing the substance and spirit of legal rulings.

10. However, the principle of treating certain facts or events occurring in the territory of another Member State as if they had taken place in the territory of the Member State whose legislation is applicable should not interfere with the principle of aggregating periods of insurance, employment, self-employment or residence completed under the legislation of another Member State with those completed under the legislation of the competent Member State. Periods completed under the legislation of another Member State should therefore be taken into account solely by applying the principle of aggregation of periods. [...]

13. The coordination rules must guarantee that persons moving within the Community and their dependants and survivors retain the rights and the advantages acquired and in the course of being acquired.

14. These objectives must be attained in particular by aggregating all the periods taken into account under the various national legislation for the purpose of acquiring and retaining the right to benefits and of calculating the amount of benefits, and by providing benefits for the various categories of persons covered by this Regulation. [...]

26. For invalidity benefits, a system of coordination should be drawn up which respects the specific characteristics of national legislation, in particular as regards recognition of invalidity and aggravation thereof."

(41) Of particular importance for the present case are Articles 5 and 6 of the Social Security Regulation, which are worded as follows:

> "**Article 5.** ***Equal treatment of benefits, income, facts or events***
>
> Unless otherwise provided for by this Regulation and in the light of the special implementing provisions laid down, the following shall apply:
>
> a. where, under the legislation of the competent Member State, the receipt of social security benefits and other income has certain legal effects, the relevant provisions of that legislation shall also apply to the receipt of equivalent benefits acquired under the legislation of another Member State or to income acquired in another Member State,
> b. where, under the legislation of the competent Member State, legal effects are attributed to the occurrence of certain facts or events, that Member State shall take account of like facts or events occurring in any Member State as though they had taken place in its own territory."

> "**Article 6.** ***Aggregation of periods***
>
> Unless otherwise provided for by this Regulation, the competent institution of a Member State whose legislation makes
>
> – the acquisition, retention, duration or recovery of the right to benefits,
> – the coverage by legislation, or
> – the access to or the exemption from compulsory, optional continued or voluntary insurance,
>
> conditional upon the completion of periods of insurance, employment, self-employment or residence shall, to the extent necessary, take into account periods of insurance, employment, self-employment or residence completed under the legislation of any other Member State as though they were periods completed under the legislation which it applies."

(42) The terms period of insurance, period of employment, period of self-employment and period of residence are defined in Article 1(t), (u) and (v) of the Social Security Regulation:

> "**Article 1.** ***Definitions***
>
> For the purposes of this Regulation:
> [...]
> (t) 'period of insurance' means periods of contribution, employment or self-employment as defined or recognised as periods of insurance by the legislation under which they were completed or considered as completed, and all periods treated as such, where they are regarded by the said legislation as equivalent to periods of insurance;
> (u) 'period of employment' or 'period of self-employment' mean periods so defined or recognised by the legislation under which they were completed, and

all periods treated as such, where they are regarded by the said legislation as equivalent to periods of employment or to periods of self-employment;

(v) 'period of residence' means periods so defined or recognised by the legislation under which they were completed or considered as completed".

(43) Article 6 of the Social Security Regulation has been discussed by Norwegian courts previously. The implications for Norwegian law are, according to a judgment of 9 October 2017 of Agder Court of Appeal (*Agder lagmannsrett*) in Case No LA-2016-200383:

> "There is no doubt that the aggregation principle entails that a period of membership in the national insurance scheme in another EEA country (in this case Spain) is to be regarded as equivalent to membership in the Norwegian national insurance scheme in the determination of whether the eligibility condition of continuous membership for three years can be deemed to be satisfied. This must be understood as meaning that if the requirement laid down in national social security legislation is, for example, membership in the national insurance scheme, then the person concerned must have been a member of the other EEA country's social security scheme by having satisfied the conditions for membership provided for in the other country's relevant legislation, such as a national rule requiring an employment connection; it is not sufficient to have stayed in the other country for a certain time, and thus under the rules on applicable legislation in the regulation have been formally covered by the other country's social security legislation, unless under the other country's social security legislation the stay in itself entailed that the person concerned was insured."

(44) The same interpretation has been applied in a number of other Court of Appeal judgments: see LH-2023-40680, LB-2023-68371 and the judgments under appeal in the present case. The first judgment referred to stated the following with respect to Article 6 of the Social Security Regulation:

> "The Court of Appeal understands the wording as follows: the first sentence indicates that the 'competent institution of a Member State' is to begin with the relevant condition in its own social security legislation, whether that be period of employment, period of self-employment or period of residence. In the last part of the provision, it is provided that periods completed under the same criterion 'under the legislation of any other Member State' is to be taken into account together with periods completed in the country in which the application for a social security benefit has been made. Although the wording of the provision might have been formulated in a more easily accessible manner, the Court of Appeal considers that this is the most logical interpretation, that is to say, the same types of periods are aggregated. This means that where a period of insurance is the national criterion, periods of insurance from other countries and national periods of insurance are to be aggregated."

(45) Furthermore, Regulation (EC) No 987/2009 of the European Parliament and of the Council [of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems] ('the Implementing Regulation') lays down detailed rules on the implementation of the Social Security Regulation, also referred to as the basic regulation. Of particular interest for the present case are Article 12 and Article 5 of the Implementing Regulation.

(46) Article 12 lays down detailed rules on the aggregation of periods, providing inter alia:

> "**Article 12.** ***Aggregation of periods***
>
> 1. For the purposes of applying Article 6 of the basic Regulation, the competent institution shall contact the institutions of the Member States to whose legislation the person concerned has also been subject in order to determine all the periods completed under their legislation.
> 2. The respective periods of insurance, employment, self-employment or residence completed under the legislation of a Member State shall be added to those completed under the legislation of any other Member State, insofar as necessary for the purposes of applying Article 6 of the basic Regulation, provided that these periods do not overlap."

(47) Article 5 contains provisions on the legal value of documents and information obtained from another Member State, providing inter alia:

> "**Article 5.** ***Legal value of documents and supporting evidence issued in another Member State***
>
> 1. Documents issued by the institution of a Member State and showing the position of a person for the purposes of the application of the basic Regulation and of the implementing Regulation, and supporting evidence on the basis of which the documents have been issued, shall be accepted by the institutions of the other Member States for as long as they have not been withdrawn or declared to be invalid by the Member State in which they were issued.
> 2. Where there is doubt about the validity of a document or the accuracy of the facts on which the particulars contained therein are based, the institution of the Member State that receives the document shall ask the issuing institution for the necessary clarification and, where appropriate, the withdrawal of that document. The issuing institution shall reconsider the grounds for issuing the document and, if necessary, withdraw it."

5. SUBMISSIONS OF THE PARTIES

5.1 CASE NO 25-036986 (the Spain case)

(48) Submissions of A:

(49) A submits that he is entitled to disability benefit in Norway under section 12-2 of the National Insurance Act, read in conjunction with section 2-1 thereof and the rules laid down in the Social Security Regulation, and that the National Insurance Court's refusal of 1 August 2024 is accordingly invalid.

(50) A submits, in the main, that his entitlement to disability benefit in Norway follows directly from a correct application of Article 6 of the Social Security Regulation, read in conjunction with section 12-2 of the National Insurance Act and section 2-1 thereof, inasmuch as periods

of lawful residence in Norway and periods of lawful residence in Spain are to be aggregated in the determination of whether the Norwegian conditions for membership in a compulsory social security scheme and entitlement to disability benefit in Norway are satisfied.

(51) The Norwegian requirements laid down in section 12-2 of the National Insurance Act, read in conjunction with section 2-1 thereof, must be viewed as a national legal requirement relating to period of residence for entitlement to disability benefit under the rules on aggregation of periods laid down in Article 6 of the Social Security Regulation.

(52) Under Article 6 of the Social Security Regulation, A is entitled to require that relevant periods completed in Norway and relevant periods completed in Spain be aggregated. In the present case, he is entitled to require that the Norwegian authorities aggregate corresponding periods of lawful residence in Spain under the Spanish rules and the periods of residence completed by him in Norway.

(53) In the application of the aggregation rules laid down in the Social Security Regulation, it is submitted, in the main, that in the aggregation of periods of lawful residence under the other country's law, it is not relevant whether the periods in question have implications for the acquisition of social security benefits under the other country's law. It is submitted, in the alternative, that it is sufficient for aggregation under Article 6 of the [Social Security] Regulation that the period in question completed in another country is a condition under that other country's law for entitlement to the same kind of social security benefits, without there being a requirement that that condition or other conditions for entitlement to social security benefits in that other country are satisfied.

(54) When the competent country's authorities are to assess the periods completed in that other country that are to be taken into account in the application of Article 6 of the Social Security Regulation, under Articles 5 and 12 of the Implementing Regulation the authorities must, as a rule, base themselves on the information on the position of the person applying for a social security benefit as stated in documents issued by that other country.

(55) This presupposes that the competent country has made inquiries to the other country concerning relevant time periods. In the present case, Norway has not made inquiries as to periods of residence, with the result that information relating to periods of insurance cannot be used as a basis in the assessment.

(56) In the alternative, it is submitted that the Norwegian requirement of a five-year continuous period of insurance prior to the onset of disability, if only periods constituting periods of insurance for the purposes of the application of the Social Security Regulation are taken into account, amounts to a restriction and/or indirect discrimination under EEA law which cannot be justified.

(57) The requirement of a five-year continuous period of insurance constitutes a restriction on the right of free movement because it places persons who have exercised their right of free movement at a disadvantage compared to persons who have completed all of their periods of employment in Norway, including in particular persons who have been employed in countries which base entitlement to invalidity benefit on the basis of acquisition periods during reference periods.

(58) The restriction cannot be justified, particularly because is not based on any legitimate objective and is not proportionate.

(59) Submissions of the Norwegian State, represented by the Labour and Welfare Directorate:

(60) When the periods from Norway and Spain are assessed together, in the five-year period prior to the cut-off point, A had 13.6 months without acquisition of entitlement, distributed over four periods. Due to those interruptions, he did not satisfy the affiliation requirement laid down in the first paragraph of section 12-2 of the National Insurance Act. He did not become disabled in Norway or Spain before turning 26 years of age, does not have over five years without qualifying periods in the EEA after turning 16 years of age, and has not had sufficient acquisition of entitlement in Spain or Norway. As a result, nor did he satisfy the affiliation requirements laid down in the second and third paragraphs of section 12-2 [of the National Insurance Act].

(61) A basic requirement in order for a period from another EEA country to be aggregated is that the other State uses the period to confer acquisition of entitlement to a benefit: see Article 6 of the Social Security Regulation, Article 1(t), (u) and (v) of the Social Security Regulation and Article 29of the EEA Agreement. Norway has used the correct official form in its communication with the Spanish authorities. On the basis of what the Spanish authorities have communicated, there is nothing to suggest that Spain allows lawful residence to confer qualification for invalidity benefit. A's stated period of lawful residence must accordingly not be taken into account.

(62) The requirement of having been a member for a certain period under the first paragraph of section 12-2 of the National Insurance Act is a requirement of a "period of insurance". Whether or not the appellant is correct on the point that this is a requirement of a "period of residence" is irrelevant. Norway is under an obligation to aggregate all periods which, under Spanish law, qualify for invalidity benefit.

(63) The State submits that there is no indirect discrimination against A as a worker: see Article 28 of the EEA Agreement, inasmuch as he is treated in the same manner as other persons who have a gap in their acquisition of entitlement to social security benefits. Any discrimination there can in any event be justified.

(64) The first paragraph of section 12-2 of the National Insurance Act must be viewed in context with other eligibility conditions for disability benefit. Under the second paragraph of section 12-2 thereof, the condition of five years of continuous membership does not apply in respect of persons who became disabled at a young age (letter a), or who have not had lengthy interruptions in their membership (maximum five years after turning 16 years of age, (see letter b). This applies irrespective of whether the applicant has been in Norway or another EEA country. Under the third paragraph of section 12-2 thereof, nor does the requirement apply in respect of persons having a specified link to the national insurance scheme. Letter b of the third paragraph will, for example, be fulfilled for everyone who, prior to the onset of disability, has at least 20 years in total of membership in the national insurance scheme or another EEA country's social security system. Exceptions are also made from the membership requirement for persons who are disabled due to occupational injury, including when it occurred in another EEA country: see the first paragraph of section 12-17 of the National Insurance Act. The exceptions show that there is no general requirement of five years of continuous acquisition of entitlement that applies for everyone.

(65) The affiliation requirements laid down in the first to third paragraphs of section 12-2 of the National Insurance Act are the result of a balancing of considerations: see, inter alia, the legislature's preparatory works in draft legislation Ot.prp. nr. 4 (1993–1994) part 3.2.1, Prop. 130 L (2010–2011) part 7.9.4, Prop. 85 L (2016–2017) part 7.4.3.4, 9.10.3 and 9.1.11.1 and Prop. 10 L (2019–2020) part 6.3. One of the objectives has been to have eligibility conditions which are not more generous than elsewhere in the EEA – in particular subject to the proviso that entitlement can be acquired through lawful residence – and, at same time, are not overly stringent. Another objective has been to prevent the possibility of receiving disability benefit from acting as a disincentive for individuals to search for employment.

(66) EEA law entails coordination, not harmonisation, of national social security systems, at the same time as national rules must be applied in such a way that they do not discriminate, directly or indirectly, against EEA citizens. The last-mentioned restriction must, however, be construed in the light of the general rule: the Member States are free to design their own social security systems in accordance with national objectives: see, for example, *Sozialministeriumservice*, C-116/23, EU:C:2024:292, paragraphs 67–68, and recital 17a of the Social Security Regulation. The European Court of Justice (ECJ) has accepted that the States may impose requirements of prior affiliation to a social security system before entitlement to benefits arises. EU law does not provide any guarantee that moving from one country to another will be neutral from a social security standpoint: see *Zyla*, C-272/17, EU:C:2019:49, paragraph 45. Nor is it documented or established that A's gap in acquisition of entitlement is linked to the exercise of free movement as a worker, in contrast to what the ECJ examined in *Klaus*, C-482/93, EU:C:1995:349.

(67) The principle of aggregation of periods concretizes the requirement of equal treatment of EEA nationals. When the Norwegian authorities have aggregated the appellant's qualifying periods from Spain in the determination of whether the membership requirement laid down in the National Insurance Act is satisfied, he is being treated on an equal footing with Norwegian citizens.

(68) The prohibition of indirect discrimination affects national rules which are "intrinsically liable to affect workers who are nationals of other EEA States more than national workers": see *Bygg & Industri Norge AS and Others,* E-2/24, paragraph 70, and *Larcher*, C-523/13, EU:C:2014:2458, paragraph 32. The Norwegian requirement of membership in the national insurance scheme does not, by its very nature, make it more difficult for EEA migrants to acquire rights. If it nevertheless were the case that the requirement is more difficult to satisfy for persons with previous stays in an employment-based system – which has not been proven – it cannot in any event be attributed to the Norwegian rules, but rather to restrictions in the other country's system for which periods qualify for a benefit. If the first paragraph of section 12-2 of the National Insurance Act had been drafted to include a reference period – for example, five years' acquisition of entitlement within a seven-year period – the requirement would still be easier to satisfy for persons having a connection to a residence-based system than to an employment-based system.

5.2 Case No 25-056992 (the Germany case)

(69) Submissions of B:

(70) B submits that she is entitled to disability benefit under the three-year rule then in force under section 12-2 of the National Insurance Act. B came to Norway together with her children. Her husband had come to Norway somewhat earlier. The rules on family reunification, reflected in Article 29 of the EEA Agreement, apply to her case.

(71) Her application for disability benefit was refused. Her "neutral period of insurance" under German rules was not taken into account in the aggregation with the Norwegian one. As a result, she did not satisfy the requirement under the Norwegian rules.

> "Period of insurance" is defined in Article 1(t) of the [Social Security] Regulation as "periods of contribution, employment or self-employment as defined or recognised as periods of insurance by the legislation under which they were completed or considered as completed" and all periods under German law are regarded as equivalent to such periods, including "neutral period of insurance".

(72) It is submitted, in the main, that the term "neutral period of insurance" (see judgment in *Duchon*, C-290/00, EU:C:2002:234) should be recognised in Norwegian law. *Duchon* concerned an Austrian migrant worker who was injured in Germany and subsequently moved back home. In *Adanez Vega*, C-372/02, EU:C:2004:705, the ECJ held that Germany, as the competent State, was not under any obligation to include military service from Spain as a "period of employment". For B, the situation is the opposite. Entitlement to a benefit acquired in Germany is to be included: ref. "neutral period of insurance". The wording of Article 6 of the Social Security Regulation and the definitions of the relevant time periods in Article 1 suggest that all time periods which, under a State's legislation, are a relevant time period are to be taken into account.

(73) Under Article 5 of the Social Security Regulation, rights in one country are to be recognised in the other country and a "neutral period of insurance" is a relevant period which is to be recognised in Germany. In that light, it is logical under Article 5 that it also be recognised under Norwegian rules. Any other outcome would be contrary to Article 29 of the EEA Agreement.

(74) As regards periods of insurance, she is covered under German insurance during both the "neutral period" and the "acquisition period". Both periods are relevant, rather than limiting this to the "acquisition period" for a longer period of insurance. It would be discriminatory, and contrary to the EEA Agreement, to require continuous membership under section 12-2 of the National Insurance Act in which only "acquisition" periods of insurance are taken into account, rather than periods of insurance in which the person concerned is covered.

(75) Under German law, the three-year "acquisition" period can be anytime within the last five years, whilst the Norwegian authorities require that the acquisition period of periods of insurance must be immediately prior to the moving to Norway, and uninterrupted. That the period of insurance is to be continuous and only the "acquisition" periods of insurance are to be taken into account, rather than "neutral periods", entails that the Norwegian authorities have more stringent requirements in relation to her German acquisition than what follows from the German rules. As is apparent from *Tomaszewska*, C-440/09, EU:C:2011:114, paragraph 30, "... the principle of aggregation of insurance, residence or employment periods [...] is one of the basic principles" and one cannot lose social security benefits when moving.

(76) No requirement may be imposed to the effect that an acquired period of insurance is to be immediately prior to and uninterrupted before she moves to Norway, as that is not a condition under the German legislation (SGB book 6, Paragraph 43, second subparagraph). The Norwegian authorities have introduced a "Norwegian" additional condition which is more stringent and precludes the possibility for migrant workers, unemployed persons, etc., from having the opportunity to move to Norway without losing social security rights. This is contrary to the fundamental rights provided for in Articles 28 and 29 of the EEA Agreement on free movement.

(77) If "neutral periods" are excluded, that will affect job seekers, migrant workers, etc., and will be a clear restriction on the right of free movement in a dynamic labour market. The reality is that the Norwegian rules impose a requirement to the effect that a person must have been in employment for a lengthy period immediately before moving to Norway. This infringes the right of free movement and is accordingly an "obstacle".

(78) The EU legislature's reminder in recital 37 [of the Social Security Regulation] on the importance of the principle of the exportability of social security benefits is illustrative: "[a]s the Court of Justice has repeatedly stated, provisions which derogate from the principle of the exportability of social security benefits must be interpreted strictly", which suggests that the Norwegian authorities' practice, under which only the administrative rules under the E204 and E205 are used as a basis for rights, must be considered to be contrary to the EEA Agreement.

(79) Submissions of the Norwegian State, represented by the Labour and Welfare Directorate:

(80) B had to have a continuous qualifying period from 31 March 2005 to 31 March 2008 in order to qualify for disability benefit under the first paragraph of section 12-2 of the National Insurance Act. She had not acquired entitlement that qualified her for invalidity benefit in Germany after 1 November 2004, and in Norway she had a qualifying period from May 2005 at the earliest. She had an interruption of at least six months, including at least one month in the relevant period from 31 March 2005 to 31 March 2008. Because she did not become disabled before turning 26 years of age, has over five years' absence from social security systems in the EEA after turning 16 years of age, and does not have sufficient acquisition of entitlement in Germany or Norway, nor did she satisfy alternative affiliation requirements laid down in the second and third paragraphs of section 12-2 [of the National Insurance Act].

(81) B's submission to the effect that the Norwegian authorities also had to aggregate the period in the spring of 2005, for which she states she had social security coverage in Germany, cannot be upheld. It is not periods with any coverage under the German social security scheme which are to be aggregated under Article 6, but rather periods which qualify for coverage against the same risk as the benefit which is sought from Norway. A period with social security coverage does not come within the scope of Article 5 of the Social Security Regulation, and Article 5 is in any event subordinate to Article 6: see recital 10 of the Social Security Regulation and recital 3 of Decision No H6 of 16 December 2010 [concerning the application of certain principles regarding the aggregation of periods under Article 6 of Regulation (EC) No 883/2004 on the coordination of social security systems] of the Administrative Commission [for the Coordination of Social Security Systems] (32011 D 0212(01)) ("Decision No H6").

(82) The system is that the States, as a clear general rule, are under an obligation to base themselves on other States' communicated periods: see, for example, point 2 and recital 4 of

Decision No H6. It is not required that EEA States' competent institutions develop detailed knowledge of other countries' domestic law, and the State does not have knowledge of which factors in other EEA countries give rise to interruptions in qualifying periods. Nor is this a prerequisite for applying Article 6 of the Social Security Regulation.

(83) Reference is otherwise made to the State's submissions in the Spain case on the issue of discrimination.

5. QUESTIONS

(84) In the light of the foregoing, the Supreme Court refers the following questions to the EFTA Court:

1. When entitlement to invalidity benefit in the competent State (Norway) is subject to a requirement of a prior period of membership in the social security scheme which inter alia can be acquired through a period of residence in that State, which time period(s) in another EEA State (Spain/Germany) is/are then relevant for aggregation with time periods in the competent State under Article 6 of the Social Security Regulation, and subject to which conditions is the aggregation to take place?
   Is account to be taken of:

   – periods of residence in the other State under Article 1(v) of the Social Security Regulation;
   – periods of insurance in the other State under Article 1(t) of the Social Security Regulation; or
   – more/other periods in the other State?

2. In the determination of which time period(s) in another EEA State can be aggregated under Article 6 of the Social Security Regulation, can the competent State base itself solely on the responses given by the other State pursuant to the Implementing Regulation on the E 205 form or more recent equivalents, or must the competent State, in situations such as those at issue in the present cases, obtain additional information, including information relating to period of residence and what constitutes a period of insurance/is regarded as equivalent to such a time period in the other State?

3. Do Article 6 of the Social Security Regulation, and/or Articles 28 and 29 of the EEA Agreement, impose requirements – and, if so, which ones – as to how a national condition of continuous period of insurance/membership in the national insurance scheme as a condition for acquiring invalidity benefit must be applied in cases such as the present ones, in which there is to be aggregation with time periods from another EEA State?

Oslo, 9 February 2026

Ingvald Falch
Supreme Court Justice
Electronic signature