

THE STATUS OF THIRD-COUNTRY NATIONALS, REFUGEES AND STATELESS PERSONS UNDER THE EU SOCIAL SECURITY REGULATIONS AND THE NORDIC CONVENTION ON SOCIAL SECURITY

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In the Nordic countries, the following instruments regulate the coordination of social security cases: Regulation 883/2004 on the coordination of social security systems, the Nordic Convention on Social Security of 2012, and Regulation 1231/2010 which extends the application of Regulation 883/2004 to third-country nationals (TCNs). This article clarifies how the personal scope of these instruments intersect with one another regarding the status of TCNs, refugees and stateless persons. Since the Nordic countries are composed of both EU Member States and EEA/EFTA States, the applicable legal framework may vary depending on the countries involved. In particular because Denmark, Iceland and Norway are not bound by Regulation 1231/2010. To some extent, the Nordic Convention bridges the gap since it extends the scope of Regulation 883/2004 to TCNs. The effects of the Nordic Convention are nevertheless limited to intra-Nordic cases. Therefore, in a scenario involving e.g. Norway and Germany, a TCN would not be able to benefit automatically from the EU/EEA coordination system. On the other hand, since refugees and stateless persons are covered by Regulation 883/2004 they would be able to rely on the coordination system in the same set of circumstances, i.e. between Norway and Germany.

1 INTRODUCTION

In the Nordic countries, there are primarily two instruments in force which regulate the coordination of social security cases. These are Regulation 883/2004 on the coordination of social security systems,¹ and the Nordic Convention on Social Security of 2012 (‘Nordic Convention’).² Another piece of the puzzle is Regulation 1231/2010, which extends the application of Regulation 883/2004 to third-country nationals (‘TCNs’).³ The aim of this article is to clarify how the personal scope of these instruments intersect with each other,⁴

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¹ Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems [2004] OJ L166/1.

² Nordic Convention on Social Security (adopted on 12 June 2012, entered into force 1 May 2014).

³ Regulation (EU) No 1231/2010 of the European Parliament and of the Council of 24 November 2010 extending Regulation (EC) No 883/2004 and Regulation (EC) No 987/2009 to nationals of third countries who are not already covered by these Regulations solely on the ground of their nationality [2010] OJ L344/1.

⁴ Clarifying the personal scope of application is an important task because only if the person concerned is covered will the Regulation apply (provided also that the relevant conditions concerning the material scope are fulfilled). See further in Bernhard Spiegel, ‘Article 2’ in Maximilian Fuchs and Rob Cornelissen (eds), *EU*

specifically regarding the status of TCNs, refugees and stateless persons.⁵ As we shall see, these categories of persons, who are not EEA nationals, may be protected by the EU/EEA social security coordination system if they fall under the scope of the relevant instruments. Coordinating social security cases with regard to these categories of persons may nevertheless pose certain challenges in the Nordic countries. This is partly because the Nordic countries are composed of the three EU Member States Denmark, Finland and Sweden, and two EEA/EFTA States (Iceland and Norway). Depending on the exact countries involved in a given cross-border situation, the applicable legal framework may vary. The fact that the relevant instruments may also *overlap* adds an additional layer of complexity, such as which instrument is applicable, to whom, and whether the outcome matters (the Nordic Convention for instance provides for certain more favourable rights as compared to Regulation 883/2004).

To illustrate the point: A TCN who is resident in Iceland wants to export her Icelandic unemployment benefits to Norway whilst looking for a job. However, Regulation 1231/2010, which is based on Article 79(2)(b) of the Treaty on the Functioning of the European Union ('TFEU'), is only applicable to Finland and Sweden. Denmark has an 'opt-out' in accordance with Protocol No 22.⁶ Regulation 1231/2010 also falls outside the material scope of the Agreement on the European Economic Area ('EEA Agreement'), and is therefore not applicable to Iceland or Norway.⁷ Still, by virtue of Articles 3 and 4 of the Nordic Convention, the application of Regulation 883/2004 is *extended* to TCNs in intra-Nordic cases. Thus, the TCN could export her Icelandic unemployment benefits to Norway, but the Icelandic Social Insurance Administration could arguably refuse to export the benefits to the EU Member State of Germany. To complicate things further, it follows from Denmark's reservation in Article 3(3) of the Nordic Convention that even in intra-Nordic cases complex issues may arise. Denmark's reservation provides that the entitlement to certain types of benefits (such as unemployment benefits) is limited to 'Nordic nationals'. Although Denmark's reservation is unsurprising given that Denmark opted out of Regulation 1231/2010 concerning TCNs, it is questionable whether limiting certain benefits to 'Nordic nationals' is compatible with Regulation 883/2004 which clearly covers refugees and stateless persons.

The present article is structured as follows: Section 2 starts by explaining the *relationship* and the *hierarchy* between the Nordic Convention and Regulation 883/2004. Since the two instruments may overlap and apply to the same territory or persons, clarifying their relations is crucial. Next, Section 3 looks at the personal scope of Regulation 883/2004 and the Nordic Convention, together also with Regulation 1231/2010. This Section aims to clarify who is covered, on what legal basis and why. Thereafter, Section 4 focuses on the conditions which

Social Security Law: A Commentary on EU Regulations 883/2004 and 987/2009 (C.H. Beck, Hart, Nomos 2015) 72.

⁵ According to Article 1(g) and (h) of Regulation 883/2004 the terms 'refugee' and 'stateless person' are given the same meaning as in Article 1 of the Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954), and Article 1 of the Convention relating to the Status of Stateless Persons (adopted 28 September 1954, entered into force 6 June 1960).

⁶ See Articles 1 and 2 of Protocol (No 22) on the position of Denmark, annexed to the Consolidated Version of the Treaty on European Union [2008] OJ C115/13 and to the Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C326/13, according to which Denmark is not taking part in the adoption of Regulation 1231/2010 and is not bound by it or subject to its application.

⁷ Agreement on the European Economic Area [1994] OJ L1/3.

TCNs, refugees or stateless persons must fulfil to come under the personal scope of the relevant instruments, in particular concerning residence requirements and the existence of a cross-border element. Section 5 goes on to provide two examples of certain challenges which may arise between Regulation 883/2004, Regulation 1231/2010 and the Nordic Convention. Finally, Section 6 offers some conclusions.

2 THE INTERACTION BETWEEN REGULATION 883/2004 AND THE NORDIC CONVENTION

Nordic cooperation in social security matters can be traced back to 1954 when the Nordic countries Denmark, Finland, Iceland, Norway and Sweden concluded the Agreement concerning a common Nordic labour market.⁸ Under that Convention, Nordic citizens were permitted to take up residence and work in any of the Nordic countries without being obliged to obtain a residence or work permit.⁹ To facilitate that agreement, the Nordic countries concluded the Nordic Convention on Social Security on 15 September 1955 in Copenhagen.¹⁰ Since then the Nordic Convention has been renewed several times, i.e. in 1981, 1992 and 2003.¹¹ The version currently in force was adopted on 12 June 2012 in Bergen, Norway.

The Nordic Convention is an international treaty, and as a common starting point, all the Nordic countries take a dualistic approach concerning the relationship between international law and domestic law.¹² Thus, international agreements such as the Nordic Convention must, in principle, be incorporated into the domestic legal orders of the Nordic countries to be applicable before national courts.¹³ In the Nordic EU Member States of Denmark, Finland and Sweden, Regulation 883/2004 and implementing Regulation 987/2009 are *directly applicable* pursuant to Article 288 TFEU.¹⁴ The provisions of Regulation 883/2004 may also have *direct effect* if they are unconditional and sufficiently clear and precise.¹⁵ Since the principles of direct applicability and direct effect are not part of EEA law, it follows from Article 7 EEA that Regulations 883/2004 and 987/2009 must be incorporated into the respective legal systems of the two dualistic EEA/EFTA States

⁸ Adam Trier, 'The Nordic Social Security Convention' (1982) 121 *International Labour Review* 259, 259-260.

⁹ *ibid.*

¹⁰ *ibid.*

¹¹ For further reading on the background to these agreements and the interplay with EU/EEA law, see Norwegian Legal Commission, *Trygd over landegrensene. Gjennomføring og synliggjøring av Norges trygdekoordineringsforpliktelser* (NOU 2021:8) 221-223.

<<https://www.regjeringen.no/contentassets/4fbaf542bdfb4718aedd50df235cb9c/nou-2021-8-trygdoverlandegrensene.pdf>> accessed 15 September 2024.

¹² Henrik Wenander, 'The Vision and Legal Reality of Regional Integration in the Nordic States' in Katarina Hyltén-Cavallius and Jaan Paju (eds), *Free Movement of Persons in the Nordic States – EU Law, EEA Law and Regional Cooperation* (Hart 2023) 16-17.

¹³ *ibid.* In Sweden, for example, the Nordic Convention is part of Swedish law on the basis of *Lag om nordisk konvention om social trygghet* (2013:134), in Iceland the Convention is given status as law with *Lög um lögfestingu Norðurlandasamnings um almannatryggingar nr. 119/2013*, and in Norway the Convention applies as Norwegian law on the basis of *Lov om folketrygd (folketrygdloven)* (LOV-1997-02-28-19) s 1-3 b.

¹⁴ Regulation 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 [2009] OJ L284/1.

¹⁵ Paul Craig and Gráinne de Búrca, *EU Law – Text, Cases and Materials* (7th edn, Oxford University Press 2020) 233-234.

Norway and Iceland (Liechtenstein follows a monist approach).¹⁶

The Nordic Convention recognises that the EU/EEA social security regulations are the primary coordination instruments, and that the role of the Convention is merely supplemental. This follows, *inter alia*, from the preamble to the Convention which stipulates that the Convention ‘shall complement the European Union regulations’. Since the Nordic Convention functions as a complementary instrument to Regulation 883/2004, it is somewhat difficult to picture a clear scenario where provisions of the two instruments might collide. Confusion may occur nonetheless,¹⁷ for example regarding which instrument is applicable due to overlap within their geographical or personal scope of application. Article 8 of Regulation 883/2004 therefore specifies the relationship between the Regulation and other coordination instruments. Article 8(1) reads as follows:

This Regulation shall replace any social security convention applicable between Member States falling under its scope. Certain provisions of social security conventions entered into by the Member States before the date of application of this Regulation shall, however, continue to apply provided that they are more favourable to the beneficiaries or if they arise from specific historical circumstances and their effect is limited in time. For these provisions to remain applicable, they shall be included in Annex II. If, on objective grounds, it is not possible to extend some of these provisions to all persons to whom the Regulation applies this shall be specified.

Pursuant to Article 8(1), Regulation 883/2004 *replaces* social security conventions applicable between the Member States within its personal and substantial scope of application.¹⁸ The Court of Justice of the European Union (‘CJEU’) has stated that the ‘principle of replacement’ in Article 8(1) is ‘mandatory in nature and does not, in principle, allow of exceptions’.¹⁹ Yet derogations are possible, if two conditions are fulfilled. First, the international convention must be more favourable to the beneficiaries, or it must arise from specific historical circumstances, in which case its effect must be limited in time. Second, the relevant provisions must be included in Annex II to Regulation 883/2004.

In respect of the EU Member States Denmark, Finland and Sweden, Annex II of Regulation 883/2004 refers to Article 7 of the Nordic Convention on Social Security of 2003

¹⁶ Regulation 883/2004 (n 1) and Regulation 987/2009 (n 14), have been made part of Norwegian law by the *Lov om folketrygd* (n 13) s 1-3 a, and in Iceland the social security regulations have been made part of the Icelandic legal order with an implementing regulation, i.e. *Reglugerð um gildistöku reglugerða Evrópusambandsins um almannatryggingar nr. 442/2012*.

¹⁷ See also Ciarán Burke and Ólafur Ísberg Hannesson, ‘Free movement Rights in Iceland’ in Katarina Hyltén-Cavallius and Jaan Paju (eds), *Free Movement of Persons in the Nordic States – EU Law, EEA Law and Regional Cooperation* (Hart 2023) 215-216.

¹⁸ Heinz-Dietrich Steinmeyer, ‘Article 8’ in Maximilian Fuchs and Rob Cornelissen (eds), *EU Social Security Law: A Commentary on EU Regulations 883/2004 and 987/2009* (C.H. Beck, Hart, Nomos 2015) 133.

¹⁹ See for example Joined Cases C-401/13 and C-432/13 *Vasiliki Balazs v Casa Județeană de Pensii Cluj and Casa Județeană de Pensii Cluj v Attila Balazs* EU:C:2015:26 para. 40, which concerns Articles 6 and 7(2)(c) of 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 [1971] OJ L149/2, the predecessor to Regulation 883/2004 (n 1). As stated by the CJEU in Case C-646/13 *Casa Județeană de Pensii Brăila v E.S. Balazs* EU:C:2015:276 paras. 23-24, Article 8(1) of Regulation 883/2004 replaced Articles 6 and 7(2)(c) of Regulation 1408/71 and since those provisions are substantially similar their interpretation can be transposed to Regulation 883/2004.

(which is however no longer in force) concerning reimbursement of extra travel expenses because of sickness during a stay in another Nordic country.²⁰ Moreover, based on Articles 8(1) and/or 9(2) of implementing Regulation 987/2009, Article 15 of the Nordic Convention on Social Security of 2003 (concerning the reciprocal waiver on the refunding of costs for certain benefits in kind) is included in Annex 1 to that Regulation. As regards the two EEA/EFTA States Iceland and Norway, Annex VI (Social Security) to the EEA Agreement stipulates that Article 7 of the Nordic Convention on Social Security of 2003 shall be added to Annex II of Regulation 883/2004.²¹ Similarly, in relation to Iceland and Norway, Annex VI to the EEA Agreement also adapts Annex 1 of implementing Regulation 987/2009 for the purposes of including Article 15 of the Nordic Convention of Social Security of 2003.

The current Nordic Convention of 2012 is included in Finland's notification to the Commission on the basis of Article 9(1) of Regulation 883/2004.²² According to Article 9(1), the EU Member States shall notify the Commission of any conventions entered into as referred to in Article 8(2). The latter provision stipulates that '[t]wo or more Member States may, as the need arises, conclude conventions with each other based on the principles of this Regulation and in keeping with the spirit thereof'. As noted by Steinmeyer, the aim of this provision is to ensure that the Member States cannot overturn the system of the Regulation through intergovernmental agreements.²³ The provision only allows the Member States to create further-reaching rights, which are essential in relations between two or more Member States due to special situations.²⁴ The preamble to the Nordic Convention clearly specifies that it is 'based on the principles of Regulation (EC) 883/2004 and in line with the basic idea thereof'. On the face of it, the Nordic Convention clearly seems to fulfil the requirement in Article 8(2) of Regulation 883/2004, by providing certain more favourable rights as compared to those found in the Regulation.²⁵

²⁰ See the current consolidated version of Regulation 883/2004 of 31 July 2019 <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02004R0883-20190731>> accessed 10 November 2024.

²¹ Regulation 883/2004 (n 1) and the implementing Regulation 987/2009 (n 14) are incorporated into the EEA Agreement and referred to at points 1 and 2 of Annex VI to the EEA Agreement by Decision of the EEA Joint Committee No 76/2011 of 1 July 2011 amending Annex VI (Social security) and Protocol 37 to the EEA Agreement [2011] OJ L262/33. Joint Committee Decision No 76/2011 entered into force on 1 June 2012.

²² It appears that Finland is the only Nordic EU Member State which notified the Commission of the Nordic Convention on Social Security of 2012. The declarations to the Commission pursuant to Article 9 of Regulation 883/2004 are available on the following website: <https://employment-social-affairs.ec.europa.eu/policies-and-activities/moving-working-europe/eu-social-security-coordination/specialised-information/official-documents/declarations-made-member-states-accordance-article-9-regulation-ec-no-8832004_en?preflang=fr> accessed 12 November 2024. Similarly, it appears that Iceland and Norway did not notify the EFTA Surveillance Authority ('ESA') of the Nordic Convention on Social Security of 2012. The declarations of Iceland and Norway are available here: <https://employment-social-affairs.ec.europa.eu/policies-and-activities/moving-working-europe/eu-social-security-coordination/specialised-information/official-documents/declarations-made-eea-efta-states-and-united-kingdom-accordance-article-9-regulation-ec-no-8832004_en> accessed 12 November 2024.

²³ Steinmeyer (n 18) 134.

²⁴ *ibid.*

²⁵ The present article does not analyse whether the more favourable provisions of the Nordic Convention could constitute some sort of discrimination. For further reading see for example Steinmeyer (n 18) 134-139, and Catherine Jacqueson, 'Free Movement Rights in Denmark' in Katarina Hyltén-Cavallius and Jaan

3 THE PERSONAL SCOPE OF THE SOCIAL SECURITY REGULATIONS AND THE NORDIC CONVENTION

The following Section analyses the personal scope of the relevant instruments, i.e. Regulation 883/2004, Regulation 1231/2010 and the Nordic Convention on Social Security. In the context of Regulations 883/2004 and 1231/2010, emphasis is placed on explaining the relevant legal basis for the inclusion of certain categories of persons. Clarifying the relevant legal basis is particularly helpful for two reasons. First, it explains who is covered and for what reasons. For instance, why are refugees and stateless persons included in the personal scope of Regulation 883/2004 whereas TCNs are generally dealt with in a separate instrument (i.e. Regulation 1231/2010)? In the context of EEA law especially, it appears that Regulation 883/2004 is the only piece of secondary legislation which *explicitly* refers to and covers refugees and stateless persons. Normally, these categories of persons are not covered by EEA law, at least not directly. Second, it helps to explain the complex situation in the Nordic countries, which consist of both EU Member States and EEA/EFTA States. The relevant legal basis partly explains why certain measures are ultimately not incorporated into the EEA Agreement. As will be seen, however, the fusion in the Nordic Convention makes these differences between EU and EEA law less of a problem.

3.1 REGULATION 883/2004

Article 2 of Regulation 883/2004 provides the following:

This Regulation shall apply to nationals of a Member State, stateless persons and refugees residing in a Member State who are or have been subject to the legislation of one or more Member States, as well as to the members of their families and to their survivors.

It shall also apply to the survivors of persons who have been subject to the legislation of one or more Member States, irrespective of the nationality of such persons, where their survivors are nationals of a Member State or stateless persons or refugees residing in one of the Member States.

The following categories of persons are thereby included in the personal scope of Regulation 883/2004: EU nationals, stateless persons and refugees who are *residing* in a Member State, and the members of their families and survivors.²⁶ The Regulation has also been extended to the EEA/EFTA States.²⁷ Therefore, the Regulation also covers EEA/EFTA nationals. For the present analysis, it is important to note that both the *inclusion* of refugees and stateless persons in the personal scope of the Regulation, and its *extension* to

Paju (eds), *Free Movement of Persons in the Nordic States – EU Law, EEA Law and Regional Cooperation* (Hart 2023) 99-100.

²⁶ As noted by Cornelissen, in limited circumstances TCNs can fall under the scope of the Regulation, i.e. as family members or survivors. See further Rob Cornelissen, 'Regulation 1231/2010 on the inclusion of third-country nationals in EU social security coordination: Reach, limits and challenges' (2018) 20(2) *European Journal of Social Security* 86, 87-88.

²⁷ Regulation 883/2004 has also been extended to Switzerland. See the Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons [2002] OJ L114/6.

EEA/EFTA nationals, rests on a *common legal basis*, i.e. Article 48 TFEU.²⁸ This follows from the judgments of the CJEU in *Khalil*,²⁹ and *UK v Council* (concerning extension to the EEA/EFTA States).³⁰

In *Khalil*, the German referring court asked the CJEU whether Article 51 EEC (now Article 48 TFEU) provided sufficient legal basis to include stateless persons and refugees in the personal scope of Regulation 1408/71 (the predecessor to Regulation 883/2004), even though they did not enjoy independent/free-standing free movement rights within the Community. The CJEU answered the question in the affirmative by considering the *historical context* of the inclusion of stateless persons and refugees in the personal scope of the Regulation. The Court pointed out that *before* the Community was founded in 1957, the Member States had already undertaken international obligations such as the 1951 Refugee Convention and the 1954 Convention on the Status of Stateless Persons, to allow refugees and stateless persons to benefit from national social security laws and regulations.³¹ The Court then went on to say that:³²

The Council cannot be criticised for having, in the exercise of the powers which have been conferred on it under Article 51 of the EEC Treaty, also included stateless persons and refugees resident on the territory of the Member States in order to take into account the abovementioned international obligations of those States.

As the Advocate General pointed out in paragraph 59 of his Opinion, coordination excluding stateless persons and refugees would have meant that the Member States, in order to ensure compliance with their international obligations, had to establish a second coordination regime designed solely for that very restricted category of persons.

The CJEU therefore held that Article 48 TFEU provided a sufficient legal basis to include stateless persons and refugees in the personal scope of Regulation 1408/71, but with the caveat that this only applied to a '*very restricted category of persons*'.

Article 48 TFEU also played an important role in *UK v Council*, an action for annulment brought by the United Kingdom against the decision of the EU Council to extend Regulation 883/2004 to the EEA/EFTA States.³³ The UK argued here that the decision had

²⁸ Article 29 EEA corresponds in most parts to Article 48 TFEU and provides for the coordination of social security schemes to facilitate the freedom of movement of workers and self-employed persons within the EEA. For further reading on Article 29 EEA, see Karin Fløistad, 'Article 29' in Finn Arnesen et al (eds), *Agreement on the European Economic Area – A Commentary* (C.H. Beck, Hart, Nomos, Universitetsforlaget 2018) 385-391.

²⁹ Joined Cases C-95/99 to C-98/99 and C-180/99 *Mervett Khalil* (C-95/99), *Issa Chaaban* (C-96/99) and *Hassan Osseili* (C-97/99) v *Bundesanstalt für Arbeit and Mohamad Nasser* (C-98/99) v *Landeshauptstadt Stuttgart and Meriem Addou* (C-180/99) v *Land Nordrhein-Westfalen* EU:C:2001:532.

³⁰ Case C-431/11 *United Kingdom of Great Britain and Northern Ireland v Council of the European Union* EU:C:2013:589. For further reading on that case see e.g. Pauline Melin, *The External Dimension of EU Social Security Coordination: Towards a Common EU Approach* (Brill 2019) 71-73, or Fløistad (n 28) 386-388. On *Khalil* see further reading in Cornelissen (n 26) 88-89.

³¹ *Khalil* (n 29) paras 43-53.

³² *ibid* paras 57-58.

³³ 2011/407/EU: Council Decision on the position to be taken by the European Union within the EEA Joint Committee concerning an amendment to Annex VI (Social Security) and Protocol 37 to the EEA Agreement [2011] OJ L182/12.

been adopted on an incorrect legal basis (i.e. Article 48 TFEU). Since Regulation 883/2004 (unlike its predecessor, Regulation 1408/71) would give rights to non-economically active TCNs (i.e. EEA/EFTA nationals), the UK argued that it ought to have been adopted on the basis of Article 79(2)(b) TFEU instead.³⁴ The CJEU nevertheless dismissed the claim, accepting that Article 48 TFEU constituted the correct legal basis. One of the main reasons was because of *reciprocity*,³⁵ however, an element which was not present in *Khalil*. The Court emphasised that the extension of the social security coordination regime to the EEA/EFTA States benefitted both EU nationals in the EEA/EFTA States and *vice versa*.³⁶

3.2 REGULATION 1231/2010

Under the current EU social security coordination regime, the situation of TCNs is regulated by Regulation 1231/2010, which extends the application of Regulation 883/2004 and implementing Regulation 987/2009.³⁷ The substantive legal basis for the adoption of Regulation 1231/2010 is Article 79(2)(b) TFEU which allows the adoption of measures concerning non-derived free movement and residence rights of TCNs in the Member States. Article 79 TFEU forms part of Title V (Area of Freedom, Security and Justice), in Chapter 2 entitled ‘Policies on border checks, asylum and immigration’. Article 79(1) TFEU provides that the Union shall develop a common immigration policy aimed at ensuring, at all stages, the efficient management of migration flows, fair treatment of TCNs residing legally in the Member States, and the prevention of, and enhanced measures to combat, illegal immigration and trafficking in human beings.

It follows from Article 1 of Regulation 1231/2010 that TCNs must fulfil two conditions in order to rely on Regulations 883/2004 and 987/2009: They must be legally resident in the territory of a Member State, and in a situation which is not confined in all respects within a single Member State (discussed further below in Section 4). Regulation 1231/2010 is applicable to all EU Member States except Denmark, which has an ‘opt-out’.³⁸ Similarly, since Regulation 1231/2010 is based on Article 79(2)(b) TFEU, it is not applicable to the three EEA/EFTA States of Iceland, Norway and Liechtenstein. In fact, of all the Nordic countries, only Finland and Sweden are bound by Regulation 1231/2010. However, as we shall see directly below, since the Nordic Convention also applies to TCNs, the limited applicability of Regulation 1231/2010 to the Nordic countries is less troublesome.

³⁴ For further reading on the extension of Regulation 883/2004 to all nationals of a Member State regardless of economic activity, see Frans Pennings, *European Social Security Law* (7th edn, Intersentia 2022) 38.

³⁵ The reciprocity element is erog. mentioned by Fløistad (n 28) 388. The reciprocity element was also recalled in a recent CJEU judgment, in Case C-329/23 *Sozialversicherungsanstalt der Selbständigen v Dr. W M and Bundesminister für Soziales, Gesundheit, Pflege und Konsumentenschutz* EU:C:2024:802 para 38.

³⁶ *UK v Council* (n 30) para 55. A similar action was brought against the Council’s decision to extend the personal scope of Regulation 883/2004 to Swiss nationals, with similar findings of the CJEU. See the judgment of the CJEU in Case C-656/11 *United Kingdom of Great Britain and Northern Ireland v Council of the European Union* EU:C:2014:97.

³⁷ On the lengthy process of adopting Regulation 895/2003 (the previous measure to Regulation 1231/2010) see Melin (n 30) 30-32.

³⁸ Protocol (No 22) on the position of Denmark (n 6).

3.3 THE NORDIC CONVENTION ON SOCIAL SECURITY

The current Nordic Convention of 2012 is applicable to the ‘Nordic countries’. According to Article 1(1), this means Denmark, Sweden, Norway, Finland and Iceland.³⁹ Moreover, the Convention also covers Greenland, the Faroe Islands and the Åland Islands, provided that these territories have agreed that the Convention shall apply to them.⁴⁰ As regards the personal scope of application, Article 3(1) of the Convention simply refers to the personal scope of Regulation 883/2004, i.e. Article 2. Thus, all persons covered by Regulation 883/2004 are also covered by the Convention, so long as they are or have been subject to the laws of a Nordic country (which normally is based on residence). Moreover, based on Article 3(2) of the Convention, it also applies to TCNs who are or have been subject to the laws of a Nordic country, together with their relatives or survivors. Thus, the personal scope of the Nordic Convention is considerably *broader* than that which follows from Regulation 883/2004 alone.

Next, Article 4 of the Convention provides that the application of the EU social security regulations is *extended to all persons* who are covered by the Convention and are *resident* in a Nordic country. This means that nationality is in fact irrelevant for the purposes of determining whether the Convention is applicable.⁴¹ What matters is that the person concerned is resident in a Nordic country. The extension of the personal scope of the EU social security regulations via the Nordic Convention appears to be mostly relevant for TCNs and their family members or survivors, since Nordic nationals are already covered by virtue of Article 2(1) of Regulation 883/2004 in intra-Nordic cases.⁴² However, Article 4 of the Nordic Convention of 2003 played a role in the *Jonsson* case, which concerned a Nordic (Swedish) national who worked for a Norwegian company on the Norwegian archipelago of Svalbard.⁴³ That territory is exempted from the scope of application of the EEA Agreement pursuant to Protocol 40 EEA. Normally, Regulation 883/2004 would not therefore be

³⁹ Article 6 of the Convention also provides that for the purposes of applying Title II of Regulation 883/2004, work related to research and exploitation of natural resources on *the continental shelf* should also be considered work performed in that country. In Case C-347/10 *A. Saemink v Raad van bestuur van het Uitvoeringsinstituut werknemersverzekeringen* EU:C:2012:17, the CJEU dealt with issues related to the applicability of Regulation 883/2004 to the continental shelf. See an analysis of that judgment in Pennings (n 34) 33-34. For further reading on the geographical scope of EEA law see Halvard Haukeland Fredriksen, ‘The Geographical Reach of EEA Law after Scanteam’ in Tryggvi Gunnarsson et al (eds), *Afmálsrit: Páll Hreinsson sextugur 20. febrúar 2023* (Fons Juris 2023) 263-280.

⁴⁰ In relation to Greenland and the Faroe Islands see Jeppe Kofod, ‘BKI nr 15 af 23/08/2019 Bekendtgørelse om udvidelse til Færøerne og Grønland af nordisk konvention af 12. juni 2012 om social sikring med tilhørende administrativ aftale’ (Udenrigsministeriet, 23 August 2019)

<<https://www.retsinformation.dk/eli/ltr/2019/15>> accessed 15 November 2024, where it is stated that the Nordic Convention on Social Security of 2012 is extended to the Faroe Islands and Greenland with effect from 1 May 2015.

⁴¹ Burke and Ísberg Hannesson, ‘Free movement Rights in Iceland’ (n 17) 215.

⁴² The extension is also relevant for persons in Greenland and the Faroe Islands, areas which for other purposes are normally not part of the geographical scope of EU/EEA cooperation. See also Christian N K Franklin, ‘Free Movement Rights in Norway’ in Katarina Hyltén-Cavallius and Jaan Paju (eds), *Free Movement of Persons in the Nordic States – EU Law, EEA Law and Regional Cooperation* (Hart 2023) 190.

⁴³ Case E-3/12 *Staten v/ Arbejdsdepartementet v Stig Arne Jonsson* [2013] EFTA Ct. Rep. 136. Paragraph 1 of Protocol 40 to the EEA Agreement on Svalbard provides that: ‘*When ratifying the EEA Agreement, the Kingdom of Norway shall have the right to exempt the territory of Svalbard from the application of the Agreement*’.

applicable to Svalbard. In *Jonsson*, however, the EFTA Court cited Protocol 40 EEA before going on to state that:⁴⁴

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

By virtue of Article 4 of the Nordic Convention, the predecessor to Regulation 883/2004 was therefore deemed applicable to a defendant who was a member of the Norwegian National Insurance Scheme during his employment on Svalbard and resident in Sweden. The *Jonsson* case thus demonstrates a situation where, by virtue of the Convention, the geographical scope of Regulation 883/2004 is extended to a territory which for other purposes is normally not covered by EEA law, thus also bringing it within the jurisdiction of the EFTA Court. To date, the EFTA Court has not dealt with a case concerning a TCN who by virtue of the Convention comes within the personal scope of Regulation 883/2004.

The material scope of the Nordic Convention mirrors the scope of Regulation 883/2004, as stipulated in Article 2 of the Convention. The material scope of the Regulation is defined in Article 3 and covers e.g. sickness benefits, invalidity benefits, old-age benefits, unemployment benefits, survivors' benefits and maternity and equivalent paternity benefits. Additionally, the Convention also provides for certain more favourable rights which *supplement* the Regulation.⁴⁵ This includes Article 7, concerning the reimbursement of the costs of a return journey to the country of residence on account of sickness occurring during a stay in another Nordic state; the so-called 'five year rule' in Article 10, which provides for an exception to the rules in Article 61(2) of Regulation 883/2004 concerning requirements for periods of insurance of employment; and Article 15, which provides for exceptions to Articles 35, 41 and 65 of the Regulation, by introducing a waiver of reimbursement between the Nordic countries in relation to certain benefits in kind, e.g. concerning work accidents, maternity, or unemployment benefits.

4 REQUIREMENTS OF (LEGAL) RESIDENCE AND A CROSS-BORDER ELEMENT

To fall under the personal scope of Regulation 883/2004, Regulation 1231/2010, or the Nordic Convention, TCNs, refugees and stateless persons must fulfil certain requirements related to residence and the existence of a cross-border element. The residence requirements are nevertheless phrased in somewhat different terms in each of these instruments, and their exact meaning may vary slightly. Moreover, depending on whether these categories of persons are covered by EU or EEA law, the possibilities to fulfil the cross-border

⁴⁴ *Staten v/ Arbeidsdepartementet v Stig Arne Jonsson* (n 43) para 18, in part II of the judgment on legal background.

⁴⁵ Franklin, 'Free Movement Rights in Norway' (n 42) 191.

requirement may differ. The first part of this section explains the residence requirements, followed by a discussion on the requirement of a cross-border element.

4.1 RESIDENCE REQUIREMENTS

In the context of Regulation 1231/2010, Article 1 stipulates that TCNs must be legally resident in the territory of a Member State and in a situation which is not confined in all respects within a single Member State.⁴⁶ In *Balandin*, the CJEU clarified the meaning of the first condition, i.e. ‘legally resident in a Member State’ for the purposes of Regulation 1231/2010.⁴⁷ As stated *inter alia* by the Court, the notion of ‘legal residence’ here is not the same as the concept of ‘residence’ in Article 1(j) of Regulation 883/2004 (i.e. the place where a person habitually resides).⁴⁸ The latter concept is intended to determine the Member State to which the persons concerned are most closely connected and thus to whose legislation they are therefore subject.⁴⁹

As further stated by the Court, the concept of ‘legal residence’ within the meaning of Regulation 1231/2010 reflects the EU legislature’s decision to extend the personal scope of the social security regulations to TCNs, subject to the prior condition that they must remain lawfully on the territory of the relevant Member State.⁵⁰ As noted by Melin, the first condition therefore demonstrates that the social security situation of a TCN will be dependent upon his/her immigration status.⁵¹ She further notes that the requirement of legal residency can for example be fulfilled on the basis of EU instruments such as the Blue Card Directive 2009/50,⁵² the Long-Term Residence Directive 2003/109,⁵³ or the Researcher Directive 2016/801,⁵⁴ or by virtue of international or domestic immigration rules.⁵⁵

As regards refugees and stateless persons, it follows from Article 2(1) of Regulation 883/2004 that they must be *resident* in an EEA State.⁵⁶ This ‘additional condition’ was recently highlighted by the EFTA Court in its judgment in *Maitz*, which concerned an Austrian national working as a lawyer in Liechtenstein and residing in Switzerland. The EFTA Court stated the following, with reference to the previous CJEU judgment in *Chuck*.⁵⁷

⁴⁶ For further reading on these two conditions see Cornelissen (n 26) 91-93.

⁴⁷ Case C-477/17 *Raad van bestuur van de Sociale verzekeringsbank v D. Balandin and Others* EU:C:2019:60. See also the subsequent order of the CJEU in Case C-523/20 *Koppány 2007 Kft. v Vas Megyei Kormányhivatal* EU:C:2021:160.

⁴⁸ *Raad van bestuur van de Sociale verzekeringsbank v D. Balandin and Others* (n 47) para 34.

⁴⁹ *ibid* para 36.

⁵⁰ *ibid* para 38.

⁵¹ Melin (n 30) 33-34.

⁵² Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purpose of highly qualified employment [2009] OJ L155/17.

⁵³ Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents [2004] OJ L16/44.

⁵⁴ Directive 2016/801/EU of the European Parliament and of the Council of 11 May 2016 on the conditions of entry and residence of third-country nationals for the purposes of research, studies, training, voluntary service, pupil exchange schemes or education projects and au pairing (recast) [2016] OJ L132/21.

⁵⁵ Melin (n 30) 33-34.

⁵⁶ See also Pennings (n 34) 38.

⁵⁷ Case E-5/22 *Christian Maitz v AHV-IV-FAK* [2023] EFTA Court judgment of 24 January 2023, para 37. In its judgment in Case C-331/06 *K. D. Chuck v Raad van Bestuur van de Sociale Verzekeringsbank* EU:C:2008:188 para 30, the CJEU stated the following: ‘Article 2 of that regulation requires only, for its application, the fulfilment of two conditions: the worker must be a national of one of the Member States (or be a stateless

Article 2(1) of Regulation 883/2004 provides that the regulation is applicable to nationals of EEA States, stateless persons and refugees residing in an EEA State who are or have been subject to the legislation of one or more EEA States, and to members of their families and their survivors. The European Court of Justice has held in relation to the equivalent provision of Regulation 883/2004's predecessor, 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 (OJ 1971 L 149, p. 2), that Article 2 prescribes an additional condition vis-à-vis stateless persons and refugees, namely, that they must be resident in an EEA State, whereas in respect of nationals of EEA States, this condition does not apply (compare the judgment in *Chuck*, C-331/06, EU:C:2008:188, paragraph 30). This entails that the provisions of Regulation 883/2004 may apply to EEA nationals, regardless of whether or not they are resident in an EEA State.

It is not entirely clear whether the additional condition of residence in Regulation 883/2004 means that refugees and stateless persons must be residing *legally* in the territory of a Member State, a condition which is explicitly stipulated in relation to TCNs pursuant to Article 1 of Regulation 1231/2010. Based on a reading of *Balandin*, however, it seems clear that the condition of residence in the context of Article 2(1) of Regulation 883/2004, which is only applicable to stateless persons and refugees, serves a different purpose than the concept of 'residence' in Article 1(j). Moreover, the 1951 Refugee Convention and the 1954 Convention on the Status of Stateless Persons (which are referred to in Article 1(g) and (h) of Regulation 883/2004) both provide in their Articles 24 that the Contracting Parties shall accord to refugees and stateless persons *lawfully staying* in their territory the same treatment as is accorded to their nationals with respect to *inter alia* social security. This seems to imply that refugees and stateless persons must, according to Article 2(1) of Regulation 883/2004, be legally resident in an EEA State, i.e. on the basis of domestic immigration law and/or the relevant secondary legislation in EU law. For instance, if the person concerned has received international protection and subsequently a residence permit in a Member State according to the Qualification Directive 2011/95.⁵⁸

Finally, it follows from Article 4 of the Nordic Convention that the application of Regulation 883/2004 is extended to all persons who are *resident* in a Nordic country. The concept of residence is defined in Article 5 of the Convention, which provides that a person shall be considered to be resident in a Nordic country *in accordance with the laws of the country concerned*. Thus, residence is determined with reference to the relevant national law (e.g. in Norway, the Immigration Act of 15 May 2008).⁵⁹ Article 5 also stipulates that in the case of a conflict about which legislation is to be applied, the person concerned is considered

person or refugee residing within the territory of one of the Member States) and be or have been subject to the legislation of one or several Member States'.

⁵⁸ Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJ L337/9. This Directive is not part of EEA law.

⁵⁹ *Lov om utlendingers adgang til riket og deres opphold her (utlendingsloven)* (LOV-2008-05-15-35).

to be resident in the Nordic country where he or she is registered in the national register, unless there are any particular indications to the contrary.

4.2 CROSS-BORDER ELEMENT

The requirement of a cross-border element underpins the application of all the relevant instruments, i.e. Regulation 883/2004, Regulation 1231/2010 and the Nordic Convention.⁶⁰ Within a clearly defined national situation, there is never a need for coordination of two States' social security systems.⁶¹ The cross-border requirement applies to anyone who wants to avail themselves of the relevant instruments, i.e. EU nationals, TCNs, refugees, stateless persons, etc. In relation to Regulation 883/2004, the CJEU has on several occasions stressed the importance of a cross-border element being present.⁶² For instance in *Khalil*, the Court stated that workers who were stateless persons and refugees residing in the territory of one of the Member States and their family members, could not rely on rights conferred by the former Social Security Regulation 1408/71 where they were in a situation which was 'confined in all respects within that one Member State'.⁶³ In general, the cross-border element is not interpreted strictly, and it is enough if the facts of the case are not limited to a single state, for example where the person is a national of another EEA State, or when parents stay in a different EEA state than their children.⁶⁴ Accordingly, moving beyond borders is not required as such.

In the context of EEA law, it could in fact be more of a challenge for TCNs, stateless persons and refugees to exercise free movement rights. This is because immigration policy and residence rights for TCNs fall outside the scope of the EEA Agreement.⁶⁵ As a result, neither the Schengen *acquis* nor the Common European Asylum System are part of EEA law.⁶⁶ The situation is therefore somewhat different than in EU law, where refugees, stateless persons and TCNs may enjoy certain, albeit sometimes limited, free movement

⁶⁰ Unlike Regulation 883/2004 or the Nordic Convention, the cross-border requirement is *explicitly* referred to in Article 1 of Regulation 1231/2010 concerning TCNs. However, Spiegel (n 4) 73-74, notes that although the cross-border requirement is not explicitly referred to in Regulation 883/2004, it could be deducted from the wording 'who are or have been subject to the legislation of one or more Member States' in Article 2(1) and (2). The same could also be said about the Nordic Convention, which in its preamble refers to e.g. 'persons who move between the Nordic countries'.

⁶¹ Jaan Paju, *The European Union and Social Security Law* (Hart 2017) 22.

⁶² See further Spiegel (n 4) 74-76.

⁶³ *Khalil* (n 29), para. 72.

⁶⁴ Spiegel (n 4) 75, and Pennings (n 34) 29. On the consequences of Regulation 1231/2010 not being applicable to Switzerland, see Case C-247/09 *Alketa Xhymshiti v Bundesagentur für Arbeit - Familienkasse Lörrach* EU:C:2010:698, where the Court held that the condition of a cross-border element was not fulfilled since the situation concerned a non-member country (Switzerland) and a single Member State (Germany). For further reading, see Cornelissen (n 26) 94-95.

⁶⁵ As also stipulated in the specific Joint Declaration by the Contracting Parties to Decision of the EEA Joint Committee No 158/2007 incorporating Directive 2004/38/EC of the European Parliament and of the Council into the Agreement [2007] OJ L124/23. For further reading on the incorporation and status of Directive 2004/38 in EEA law, see Christian N K Franklin, 'Square Pegs and Round Holes: The Free Movement of Persons Under EEA Law' (2017) 19 Cambridge Yearbook of European Legal Studies 165, 165-186. See also Ciarán Burke and Ólafur Ísberg Hannesson, 'Citizenship by the back door?' (2015) 52 Common Market Law Review 1111, 1111-1134. See also Christian N K Franklin and Halvard Haukeland Fredriksen, 'Of Pragmatism and Principles: The EEA Agreement 20 Years On' (2015) 52 Common Market Law Review 629, 638-640.

⁶⁶ Franklin, 'Free Movement Rights in Norway' (n 42) 181-182.

and/or residence rights based on the relevant applicable secondary legislation, such as the Long-Term Residence Directive (which is not part of EEA law). Under EEA law, in particular Directive 2004/38,⁶⁷ TCNs, refugees and stateless persons who are family members of EEA nationals may however enjoy *derived* free movement and residence rights.⁶⁸

5 SOME PROBLEMS AND CHALLENGES

According to the picture which has emerged so far, the Nordic Convention, Regulation 883/2004 and Regulation 1231/2010 may all play a role in social security coordination cases involving the Nordic countries and other EEA States. The interaction between those instruments may however cause some challenges, resulting in questions such as who is covered, on what basis and in which area. These kinds of challenges are referred to in the report of the Norwegian Legal Commission (NOU:2021:8 – *Trygd over landegrensene*), which also provides a few examples on certain complex scenarios, e.g. concerning the inclusion of Greenland or Svalbard in the Nordic Convention, and whether TCNs who are insured and resident in a Nordic country can export certain social security benefits to other EEA States.⁶⁹ In addition to those examples, the following two scenarios are presented.

5.1 SCENARIO 1: THE STATUS OF REFUGEES/STATELESS PERSONS VIS-À-VIS TCNS

Upon applying for international protection, the Norwegian immigration authorities grant person A with refugee status in accordance with the 1951 Refugee Convention. A, who is resident and employed in Norway and thus a member of the national insurance scheme, subsequently becomes ill and is entitled to sickness benefits. Since refugees fall under the personal scope of Article 2(1) of Regulation 883/2004, A would be entitled to export her sickness benefits to all the EU Member States, the EEA/EFTA States and Switzerland. In contrast, if A would be a TCN without refugee status, she would not be covered by Regulation 883/2004, and Regulation 1231/2010 would not be applicable since Norway is not bound by it. Thus, the possibility to export the benefits for example to the EU Member State of Germany seems precluded. However, by virtue of Regulation 883/2004 *via* the Nordic Convention, she could export her Norwegian sickness benefits to another Nordic country, e.g. Iceland.

⁶⁷ Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EE [2004] OJ L158/77, incorporated into the EEA Agreement at point 1 of Annex V and point 3 of Annex VIII to the Agreement by EEA Joint Committee Decision No 158/2007 (n 65).

⁶⁸ See for example the recent judgment of the EFTA Court in Case E-6/23 *MH v Påtalemyndigheten* [2024] EFTA Court judgement of 2 July 2024, paras 36-37. Also, as noted by Franklin, 'Free Movement Rights in Norway' (n 42) 181-182, certain free-standing rights for TCNs may flow from Directive 2004/38.

⁶⁹ Norwegian Legal Commission, *Trygd over landegrensene: Gjennomføring og synliggjøring av Norges trygdekoordineringsforpliktelse* (n 11) 225.

5.2 SCENARIO 2: DENMARK'S LIMITATION OF CERTAIN BENEFITS TO NORDIC NATIONALS

Even in intra-Nordic cases complex issues can emerge. This is especially because of Denmark's reservation to the application of the Nordic Convention to TCNs. Article 3(3) of the Convention states that only 'Nordic nationals' are entitled to family benefits, unemployment benefits and basic pension in Denmark. Article 3(3) is further detailed in Annex 3 of the Administrative Agreement to the Convention, which explains that these limitations apply to 'persons who are not nationals of European Economic Area (EEA) countries or Switzerland (nationals of third countries), given that nationals of EEA countries and Switzerland enjoy rights under the Regulation'. The background to Denmark's limitation in Article 3(3) is that Denmark is not bound by Regulation 1231/2010. It seems, however, that Article 3(3) of the Convention excludes by definition not only TCNs but arguably also refugees and stateless persons who are not nationals of an EEA State or Switzerland. In any event, because refugees and stateless persons are clearly covered by the personal scope of Regulation 883/2004, which moreover is directly applicable in Denmark, these categories of persons should be able to fully rely on the Regulation concerning unemployment benefits, basic pension and family benefits.

6 CONCLUDING REMARKS

In any area of law where overlapping sets of rules apply, complex legal issues may naturally follow. This is especially the case when it comes to coordinating social security cases in the Nordic countries which are composed of both EU Member States and EEA/EFTA States, and where three different legal instruments may all have a role to play. The Nordic Convention has been in place since 15 September 1955, thus soon celebrating 70 years of existence. Today, the role of the Convention is merely supplemental in relation to the EU social security regulations, which function as the primary coordination instruments. However, the Convention still has an important role to play. In addition to providing for certain more favourable rights, the Convention also extends the application of Regulation 883/2004 to TCNs who are resident in a Nordic country. The inapplicability of Regulation 1231/2010 in intra-Nordic situations (i.e. to Denmark, Iceland and Norway) is therefore less problematic. The Convention has also played in favour of Nordic nationals, as follows from the judgment of the EFTA Court in *Jonsson*. In that case, it was precisely because of the Nordic Convention that a Swedish national who was working in Svalbard (and resident in Sweden) fell within the scope of protection of EEA law (Regulation 1408/71) and therefore also the jurisdiction of the EFTA Court.

The direct inclusion of refugees and stateless persons in the personal scope of Regulation 883/2004 is admittedly rather peculiar in the context of EEA law, an area of law which for most purposes does not cover matters related to immigration or residence rights for TCNs, unlike EU law. In fact, that is precisely the reason why Regulation 1231/2010 has not been incorporated into the EEA Agreement. However, the CJEU judgment in *Khalil* explains why refugees and stateless persons were included specifically in the personal scope of Regulation 883/2004, i.e. because of certain international commitments which the EU Member States had undertaken before the Community was founded in 1957, such

as the 1951 Refugee Convention. In its recent judgment in *Maitz*, the EFTA Court explicitly referred to the inclusion of refugees and stateless persons in the personal scope of Regulation 883/2004 without questioning the lawfulness of that inclusion, which might perhaps be taken to suggest implicit endorsement.⁷⁰ In any case, it is difficult to see why the inclusion of refugees and stateless persons in Regulation 883/2004 (the aim of which is merely coordination rather than harmonisation) could create problems in EEA law. In the end, these categories of persons must satisfy the requirements of being resident in an EEA state and in a cross-border situation, similarly to TCNs under Regulation 1231/2010.

Despite the fact that refugees, stateless persons and TCNs have in common that they are not EEA nationals, their status is not entirely the same under the EU/EEA social security regulations. Since refugees and stateless persons are covered by Regulation 883/2004, they may benefit from the EU/EEA coordination system in all the EU Member States and the EEA/EFTA States.⁷¹ In contrast, the possibility for TCNs to rely on Regulation 883/2004 via Regulation 1231/2010 seems excluded when it comes to Denmark, Iceland or Norway. Of course, in such scenarios the Nordic Convention might kick in and bring the TCN concerned within the scope of application of Regulation 883/2004 in an intra-Nordic scenario. Denmark, however, reserved certain rights to 'Nordic nationals' under Article 3(3) of the Nordic Convention, as further stipulated in Annex 3 to the Administrative Agreement. In the absence of Denmark's participation in Regulation 1231/2010, the reservation in Article 3(3) concerning TCNs is logical – although similar reservations were not made by Iceland or Norway, which are not bound by Regulation 1231/2010, either. The problem with Denmark's reservation is, however, that it appears to be too broad, since it could effectively exclude refugees and stateless persons who are not Nordic nationals to the entitlement of certain rights and benefits under Regulation 883/2004. However, altering the scope of an EU regulation, which is directly applicable in Denmark, is not permitted. Thus, refugees and stateless persons should be able to rely on Regulation 883/2004, for instance if they want to export Icelandic unemployment benefits to Denmark while searching for a job.

⁷⁰ Of course, the *Maitz* case (n 57) did not concern issues related to the status of refugees and stateless persons. See, however, for comparison, Opinion of AG Jacobs in Joined Cases C-95/99 to C-98/99 and C-180/99 *Khalil* EU:C:2000:657 paras 40-44.

⁷¹ For reasons of simplification Switzerland is not mentioned here.

LIST OF REFERENCES

Burke C and Ísberg Hannesson Ó, 'Citizenship by the back door?' (2015) 52 Common Market Law Review 1111

DOI: <https://doi.org/10.54648/cola2015082>

— —, 'Free movement Rights in Iceland' in Hyltén-Cavallius K and Paju J (eds), *Free Movement of Persons in the Nordic States – EU Law, EEA Law and Regional Cooperation* (Hart 2023)

DOI: <https://doi.org/10.5040/9781509951871.ch-010>

Cornelissen R, 'Regulation 1231/2010 on the inclusion of third-country nationals in EU social security coordination: Reach, limits and challenges' (2018) 20(2) European Journal of Social Security 86

DOI: <https://doi.org/10.1177/1388262718771784>

Craig P and de Búrca G, *EU Law – Text, Cases and Materials* (7th edn, Oxford University Press 2020)

DOI: <https://doi.org/10.1093/he/9780198856641.001.0001>

Floistad K, 'Article 29' in Arnesen F et al (eds), *Agreement on the European Economic Area – A Commentary* (C.H. Beck, Hart, Nomos, Universitetsforlaget 2018)

DOI: <https://doi.org/10.5771/9783845275796-385>

Franklin C N K and Fredriksen H H, 'Of Pragmatism and Principles: The EEA Agreement 20 Years On' (2015) 52 Common Market Law Review 638

DOI: <https://doi.org/10.54648/cola2015049>

Franklin C N K, 'Square Pegs and Round Holes: The Free Movement of Persons Under EEA Law' (2017) 19 Cambridge Yearbook of European Legal Studies 165

DOI: <https://doi.org/10.1017/cel.2017.8>

— —, 'Free Movement Rights in Norway' in Hyltén-Cavallius K and Paju J (eds), *Free Movement of Persons in the Nordic States – EU Law, EEA Law and Regional Cooperation* (Hart 2023)

DOI: <https://doi.org/10.5040/9781509951871.ch-009>

Fredriksen H H, 'The Geographical Reach of EEA Law after Scanteam' in Gunnarsson T et al (eds), *Afmálsrit: Páll Hreinsson sextugur 20. febrúar 2023* (Fons Juris 2023)

Jacqueson C, 'Free Movement Rights in Denmark' in Hyltén-Cavallius K and Paju J (eds), *Free Movement of Persons in the Nordic States – EU Law, EEA Law and Regional Cooperation* (Hart 2023)

DOI: <https://doi.org/10.5040/9781509951871.ch-006>

Melin P, *The External Dimension of EU Social Security Coordination: Towards a Common EU Approach* (Brill 2019)

DOI: <https://doi.org/10.1163/9789004415331>

Paju J, *The European Union and Social Security Law* (Hart 2017)

DOI: <https://doi.org/10.5040/9781509911585>

Pennings F, *European Social Security Law* (7th edn, Intersentia 2022)

Spiegel B, 'Article 2' in Fuchs M and Cornelissen R (eds), *EU Social Security Law: A Commentary on EU Regulations 883/2004 and 987/2009* (C.H. Beck, Hart, Nomos 2015)

DOI: <https://doi.org/10.5771/9783845257662-87>

Steinmeyer HD, 'Article 8' in Fuchs M and Cornelissen R (eds), *EU Social Security Law: A Commentary on EU Regulations 883/2004 and 987/2009* (C.H. Beck, Hart, Nomos 2015)

DOI: <https://doi.org/10.5771/9783845257662-150>

Trier A, 'The Nordic Social Security Convention' (1982) 121 *International Labour Review* 259

Wenander H, 'The Vision and Legal Reality of Regional Integration in the Nordic States' in Hyltén-Cavallius K and Paju J (eds), *Free Movement of Persons in the Nordic States – EU Law, EEA Law and Regional Cooperation* (Hart 2023)

DOI: <https://doi.org/10.5040/9781509951871.ch-002>