



28.08.2013

## NOTICE TO MEMBERS

Subject: Petition 0475/2010 by Alberto Paz Viñas (Spanish), on the transfer of his pension rights

Petition 1326/2010 by Cipriano Ricardo Lustres Martínez (Spanish), on behalf of the Long Hope Association, on the situation of Spanish seafarers who worked as crew members on vessels flying the Norwegian flag

### **1. Summary of petition 0475/2010**

The petitioner, a seafarer who worked on vessels flying the Norwegian flag from 1971 to 1985, indicates that, despite payment of all Norwegian taxes and social security contributions, he is unable to obtain a pension since the Norwegian authorities do not recognise his pension entitlements and are accordingly refusing to transfer them to the Spanish social security system.

### **Summary of petition 1326/2010**

The petitioner, who represents an association of Spanish seafarers who worked as crew members on vessels flying the Norwegian flag, outlines the problems they are encountering in claiming their Norwegian state pension entitlements. The Norwegian Government refuses to recognise the pension entitlements of those belonging to this particular category, considering them to be non-resident (prior to 1994), while the Spanish Government refuses to recognise the years in question worked abroad, for which no certificate has been issued by the Norwegian authorities in respect of contributions paid.

## 2. Admissibility

0475/2010: Declared admissible on 8 September 2010.

1326/2010: Declared admissible on 9 February 2011. Information requested from the Commission under Rule 202(6).

## 3. Commission reply, received on 9 December 2010

### Petition 0475/2010

Under the agreement on the European Economic Area, which entered into force on 1 January 1994, the provisions on social security coordination set out in Regulation 1408/71 (amended by Regulation 883/2004) also apply in relations with Iceland, Liechtenstein and Norway.

The Commission contacted the EFTA Secretariat and the Norwegian authorities to clarify the pension entitlements of Spanish seafarers working on Norwegian vessels and the transitional provisions contained in the association agreement. The following reply can be given on the basis of the information provided.

#### Concerning the period prior to 1994

- Spanish seafarers who worked on Norwegian vessels prior to 1994 were not members of the Norwegian pension scheme. In practice, social security contributions were never paid by seafarers or their employers because Norwegian law made residence in Norwegian territory compulsory for membership of the Norwegian pension scheme. Spanish seafarers who did not satisfy this condition could not therefore join the pension scheme in Norway. The transitional provisions do not apply in this case. Under Article 87(1) of Regulation 883/2004, no rights shall be acquired pursuant to the Regulation for the period before its date of application in the territory of the State concerned.

- However, if some seafarers were able to pay contributions in Norway, the latter must respect the transitional provisions set out in the new simplified Regulation 883/2004, Article 87(4) of which states: ‘Any benefit which has not been awarded or which has been suspended by reason of the nationality or place of residence of the person concerned shall, at the request of that person, be provided or resumed with effect from the date of application of this Regulation in the Member State concerned, provided that the rights for which benefits were previously provided have not given rise to a lump-sum payment.’

#### Concerning the period after 1994

- The residence condition cannot be required after 1994 as it does not comply with Regulation 883/2004. The latter states in practice that a person pursuing an occupation on board a vessel flying the flag of a Member State is subject to the legislation of that State (Article 11(4)). *The vessel is deemed to be the territory of the flag State.*

The Commission is aware of the difficult circumstances of Spanish seafarers working prior to

1994 without being members of the Norwegian pension scheme. However, the Commission has no way of remedying this situation and calling for retrospective membership for these seafarers in Norway.

It should be noted that Regulation 883/2004 makes it possible for the competent authorities of Member States to enter into bilateral agreements in the interest of certain persons or categories of persons (Article 16). With a view to social justice, the competent Spanish and Norwegian authorities could therefore make contact to conclude such a bilateral agreement in the interest of the workers in question.

### Conclusions

The petitioner is invited to forward any document proving that he has paid social security contributions in Norway so that the Commission can reach a decision in full knowledge of the facts.

#### **4. Commission reply (REV), received on 16 December 2011**

##### **Petitions 0475/2010 and 1326/2010**

##### Comments by the Commission

With regard to petitions 0475/2010 and 1326/2010, Spanish seafarers who worked on Norwegian vessels prior to 1994 were not members of the Norwegian pension scheme. In practice, Norwegian law made residence in Norwegian territory compulsory for membership of the Norwegian pension scheme. Spanish seafarers who did not satisfy this condition could not therefore join the pension scheme in Norway.

If some seafarers were able to pay contributions in Norway, the latter must respect the transitional provisions set out in the new simplified Regulation 883/2004, Article 87(4) of which states: ‘Any benefit which has not been awarded or which has been suspended by reason of the nationality or place of residence of the person concerned shall, at the request of that person, be provided or resumed with effect from the date of application of this Regulation in the Member State concerned, provided that the rights for which benefits were previously provided have not given rise to a lump-sum payment’.

The insurance periods of the Spanish seafarers who were able to pay contributions in Norway ought to be taken into account, and the Commission will inform the supervisory authority of this. As the Commission stressed in its previous reply to the European Parliament and in its answer to written question E-9577/2011, it has no way of calling for Norway to grant retrospective membership for these seafarers.

With regard to the action the Commission took on behalf of 10 000 Spanish citizens who had worked in Gibraltar, it should be noted that the freedom of movement principle applies in Gibraltar, and the Commission therefore had the authority to take action on the basis of the treaty. Where Norway is concerned, this responsibility lies with the supervisory authority.

The Commission has also pointed out that it is aware of the difficult circumstances of Spanish seafarers working prior to 1994 without being members of the Norwegian pension scheme. It has stressed that Article 17 of Regulation 1408/71 made it possible for the competent

authorities of Member States to enter into bilateral agreements in the interest of certain persons or categories of persons (Regulation 883/2004, Article 16). In the interests of social justice, the competent Spanish and Norwegian authorities could therefore make contact to conclude such a bilateral agreement in the interest of the workers in question. The Commission encourages the conclusion of such an agreement, but does not have the authority to call on the countries concerned to do this.

### Conclusion

The Commission is not empowered to intervene on behalf of the petitioners.

## **5. Commission reply (REV II), received on 28 September 2013**

### **Petitions 0475/2010 and 1326/2010**

The Commission has repeatedly stated that it is aware of the difficult circumstances of Spanish seafarers who worked prior to 1994 without being members of the Norwegian pension scheme. It has stressed that Article 17 of Regulation 1408/71 made it possible for the competent authorities of Member States to enter into bilateral agreements in the interest of certain persons or categories of persons (see new Regulation 883/2004, Article 16). In the interests of social justice, the competent Spanish and Norwegian authorities could therefore make contact to conclude such a bilateral agreement in the interest of the workers in question. The Commission encourages the conclusion of such an agreement, but it does not have the authority to call on the countries concerned to act in that respect.

The Commission welcomes the stance taken by the Norwegian Ombudsman, who has called on the Norwegian authorities to come up with a fair solution for the 12 000 Spanish seafarers who worked on Norwegian vessels before 1994 and who (according to the claimants) paid a total of approximately NOK 3.5 million in tax. Following this development, the Commission updated the EFTA Surveillance Authority so that it would be in a position to take appropriate action within its remit.

The Commission would also point out that it remains open to the Norwegian authorities to seek a preliminary ruling from the Court of Justice of EFTA (known simply as the EFTA Court), which is responsible for interpreting the Agreement on the European Economic Area.

Lastly, the Commission would draw the petitioner's attention to the possibility of taking a case against Norway in the European Court of Human Rights (ECHR) on the grounds of failure to follow the court's case law, specifically its judgment of 16 September 1996 in *Gaygusuz v. Austria*. The ECHR found in the *Gaygusuz* judgment that a social security benefit constituted a 'pecuniary right', one of the aims of social security being to give people economic security. In the light of that judgment, there can be no doubt that social security benefits are part of an individual's assets, as they constitute an entitlement vis-à-vis social security funds. To strip a person of that entitlement without objective justification thus violates the right to property as laid down in the European Convention on Human Rights.

### Conclusion

The Commission repeats that it is not empowered to intervene on the petitioner's behalf.