



E-2/22-10

REPORT FOR THE HEARING

in Case E-2/22

REQUEST to the Court under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice by the Norwegian National Insurance Court (*Trygderetten*), in the case between

A

and

the Labour and Welfare Directorate,

concerning the interpretation of Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems.

I Introduction

1. By letter of 26 January 2022, registered at the Court on 27 January 2022, the National Insurance Court (*Trygderetten*) requested an Advisory Opinion in the case pending before it between A and the Labour and Welfare Directorate (*Arbeids- og velferdsdirektoratet*).

2. The case before the National Insurance Court concerns a rejection of a claim for transitional benefit (*overgangsstønad*) lodged by A, a Swedish national. When the claim was submitted, A had been resident in Norway for just under two years. Prior to that, she had been resident and working in Sweden for several years. The claim was rejected on the grounds that A had not been a member of the Norwegian social security system in the last three years prior to the submission of her claim and accordingly did not fulfil the requirement in Section 15-2 of the Norwegian National Insurance Act (*folketrygdloven*), as it was worded prior to 1 January 2021.

3. According to the National Insurance Court, the case raises the question of whether the Norwegian Labour and Welfare Administration (“NAV”) may disregard the time spent in Sweden in its calculation of whether the applicant fulfils the membership requirement set out in Section 15-2 of the National Insurance Act. It considers that the answer to that question appears to depend in particular on whether the transitional benefit is a benefit falling within the material scope of Regulation (EC) No 883/2004.

II Legal background

EEA law

4. Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (OJ 2004 L 166, p. 1), as corrected by OJ 2005 L 200, p. 1, (“the Regulation”) was incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 76/2011 of 1 July 2011 (OJ 2011 L 262, p. 33, and EEA Supplement 2011 No 54, p. 46), which entered into force on 1 June 2012, and is referred to at point 1 of Annex VI (Social security) to the EEA Agreement.

5. Article 1 of the Regulation, headed “Definitions”, reads, in extract:

For the purposes of this Regulation:

...

(z) ‘family benefit’ means all benefits in kind or in cash intended to meet family expenses, excluding advances of maintenance payments and special childbirth and adoption allowances mentioned in Annex I.

6. Article 3 of the Regulation, headed “Matters covered”, reads, in extract:

1. This Regulation shall apply to all legislation concerning the following branches of social security:

...

(b) maternity and equivalent paternity benefits;

...

(j) family benefits.

...

3. *This Regulation shall also apply to the special non-contributory cash benefits covered by Article 70.*

...

5. *This Regulation shall not apply to:*

(a) *social and medical assistance or*

...

7. Article 6 of the Regulation, headed “Aggregation of periods”, reads:

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.

8. Article 70(2)(a)(i) of the Regulation, headed “General provision”, reads:

2. *For the purposes of this Chapter, ‘special non-contributory cash benefits’ means those which:*

(a) *are intended to provide either:*

(i) *supplementary, substitute or ancillary cover against the risks covered by the branches of social security referred to in Article 3(1), and which guarantee the persons concerned a minimum subsistence income having regard to the economic and social situation in the Member State concerned;*

...

National law and practice

9. Section 15-1 of the National Insurance Act provides that the purpose of benefits under Chapter 15 of the National Insurance Act is to secure income for members having sole care of children and to provide those members with temporary assistance for self-help, so that they may become self-supporting through their own work.

10. The first paragraph of Section 15-2 of the National Insurance Act, headed “Prior membership”, reads, in the version applicable at the material time:

It is a requirement for entitlement to benefits under this Chapter that the person concerned has been a member of the social security system in the last three years prior to her or his submission of a claim for a benefit.

11. Section 15-3 of the National Insurance Act provides that, in order to receive benefits, the member and the child must, as a main rule, stay in Norway.

12. Section 15-4 of the National Insurance Act, headed “Single mother or father”, reads:

Benefits under this Chapter may be granted to a member who is a single mother or father and has sole care of a child.

‘Mother’ or ‘father’ shall also include someone who has acquired parental responsibility due to death under Section 38 of the Children Act (barnelova).

‘Single mother or father’ refers to a member who is single, separated or divorced. A member who lives together with a person with whom he or she has a child or is divorced or separated from, or lives in a marital-like relationship in the same household without a common child shall not be deemed to be a single mother or father. If the member is married, that person shall be deemed to be a single mother or father when the cohabitation ceases and a petition is made to have the marriage dissolved through an application for separation and divorce submitted to the County Governor or by legal proceedings being brought before the courts. If a member has another child with the same partner whilst receiving benefits for a ‘single mother or father’ for a common child, neither of the parents shall be deemed to be a single mother or father. The same applies if the mother or father has previously received benefits under this Chapter for a common child.

A mother or father has the sole care of a child when she or he consistently has clearly more of the day-to-day care than the other parent. Neither of the parents shall be deemed to have sole care of the child by living arrangements as referred to in the fourth paragraph of Section 1-5 or other close living arrangements. The Ministry may issue regulations on what is to be deemed to be other close living arrangements.

The member shall have the burden of proving that he or she is a single mother or father with sole care of a child.

13. Section 15-5 of the National Insurance Act, headed “Transitional benefit”, reads

A transitional benefit is granted to a member who, due to having care of a child, is temporarily unable to be self-supporting through his or her own work, or can only access employment following a period of adjustment or education.

Benefits may be given to a single mother or father who has a child that is under eight years old. For a member who is prevented from working due to having care of a child that requires special supervision, transitional benefit may be granted until the child becomes 18 years old. Exceptions may be made to the age limit in the first sentence in connection with extensions under the third sentence of the second paragraph, fourth paragraph and fifth paragraph of Section 15-8.

A member who without reasonable cause has terminated an employment relationship during the last six months preceding the time of application shall not receive transitional benefits.

14. Section 15-6 of the National Insurance Act, headed “Occupational activity obligation”, reads:

When the youngest child has turned one year, the member must, in order to be entitled to transitional benefit either:

- a) be in employment amounting to at least half of full-time;*
- b) have registered with the Labour and Welfare Administration as a genuine job-seeker;*
- c) complete education or training amounting to at least half of full-time which the Labour and Welfare Administration considers necessary and appropriate for the member to obtain or retain employment; or*
- d) establishes her or his own business, see the third paragraph of Section 4-6.*

The Labour and Welfare Administration shall, as needed, summon the person concerned for discussions to consider further measures in respect of the member and whether measures should be implemented with a view to transition to employment.

A member who is a genuine job-seeker, see letter b) in the first paragraph, must report in every 14 days to the Labour and Welfare Administration. The Labour and Welfare Administration shall determine how such reporting shall take place.

The activity obligation shall not apply if the member is prevented from working due to care of a child requiring special supervision as referred to in the third paragraph of Section 15-8.

If the member is not in occupational activity as referred to in the first paragraph, transitional benefit shall nevertheless be granted if the child does not have a satisfying supervision arrangement and this is not attributable to the member. The same applies if the single mother or father or the child has an illness that prevents occupational activity. The sickness must be documented by a medical certificate.

The Ministry may issue regulations on which education may be approved and the requirement of being a genuine job-seeker.

15. Section 15-7 of the National Insurance Act provides that the annual transitional benefit amounts to 2.25 times the basic amount (*grunnbeløpet*) (NOK 106 399), which at the time of the request, corresponded to NOK 239 397.

16. Section 15-8 of the National Insurance Act, headed “Benefit period”, reads:

*A transitional benefit may be granted for a total of three years. A member who has previously received transitional benefits for an entire benefit period may be granted a new benefit period until the child is entitled to a place in kindergarten under Section 16 of the Kindergarten Act (*barnehageloven*). In addition, in connection with childbirth, benefits may be granted up until two months before the birth.*

The benefit period may be extended by up to two years when the single mother or father is taking necessary and appropriate education, see letter c) of the first paragraph of Section 15-6. If the single mother or father has sole care of more than two children or acquired sole care of a child or children under 18 years old, the benefit period may be extended by up to three years. The benefit period may be further extended to and including the month in which a commenced educational year ends. A benefit is usually not given after the occupational qualification has been obtained.

The benefit period may be extended until the child becomes 18 years old if the member is prevented from working because the child requires special supervision due to disability, sickness or major social problems. The child’s physical or psychological condition must be documented by a doctor. Documentation must also be submitted showing that the member is prevented from working as a result of the child’s condition.

In direct connection with an ongoing benefit period, the benefit period may be extended by up to two years if the member or the child has a temporary illness that

prevents the member from working. The sickness must be documented with a medical certificate.

In direct connection with an ongoing benefit period, the benefit period may, in special cases, be extended by up to six months pending the start of school, child supervision, a specific offer of employment or after the member has registered as a genuine job-seeker with the Labour and Welfare Administration.

The Ministry may issue regulations on the calculation of the length of the benefit period, including division and shortening of the benefit period.

17. Section 15-9 of the National Insurance Act, headed “Deduction against income”, reads, in extract:

The transitional benefit is reduced based on employment income which the member has or can be expected to receive.

The transitional benefit shall not be reduced if the employment income on an annual basis is less than half of the basic amount. The benefit shall be reduced by 45% of income over half of the basic amount.

The following shall be deemed equivalent to employment income: unemployment benefits under Chapter 4, sickness benefits under Chapter 8, benefits in the event of sickness of a child or other close relative under Chapter 9, work assessment allowance under Chapter 11 and pregnancy and parental benefits under Chapter 14.

...

18. Section 15-10 of the National Insurance Act, headed “Childcare benefits for single mothers or fathers in employment, etc.”, reads:

A childcare benefit is granted to a member who must leave necessary supervision of a child to others due to employment or establishing their own business, see the third paragraph of Section 4-6. The benefit shall be independent of entitlement to and the period of the transitional benefit.

The benefit may be granted until the child has completed the fourth year of school. For a child who has completed the fourth year of school, a childcare benefit may be given when the child must have significantly more supervision than what is usual for a child of that age, or when the member must, due to his or her work, be absent from the home for periods longer than or at different times than what a usual workday entails. A childcare benefit may also be given for up to one year when the member has a temporary sickness that prevents the person concerned from working.

The benefit shall be 64% of documented expenses for child supervision up to the amounts fixed by the Parliament (Stortinget). No benefit shall be given when the pensionable income is more than six times the basic amount.

The Ministry may issue regulations on childcare benefits.

19. Section 15-11 of the National Insurance Act, headed “Supplemental benefits and support for school fees, etc.”, reads:

A member who completes education or training under letter c) of the first paragraph of Section 15-6 may be granted supplemental benefits covering in whole or in part:

a. expenses for daily travel in connection with the clarification or completion of the education;

b. expenses for travels to the home in connection with the education;

c. necessary expenses for relocation from the home in connection with the education or in connection with work following completion of the education;

d. necessary expenses for child supervision in connection with the clarification or completion of the education;

e. necessary extra housing expenses in connection with the clarification or completion of the education;

f. benefit to cover documented expenses for teaching aids.

A relocation benefit under letter c) of the first paragraph may also be granted to a member who has to move from their home in order to commence employment at another location. The relocation benefit shall only be granted when the member has moved during a period when he or she is entitled to the transitional benefit or within six months after the transitional benefit lapses.

A childcare benefit under letter d) of the first paragraph can also be granted to a member who is registered with the Labour and Welfare Administration as a genuine job-seeker under letter b) of the first paragraph of Section 15-6.

Benefits for coverage of school fees, etc., may be granted on the basis of the rates for school fees from the Norwegian State Educational Loan Fund (Statens lånekasse for utdanning). Education at private educational institutions confers entitlement to benefits only in special cases.

Supplemental benefits and support for school fees, etc., are granted only for the time period in which the single mother or father is entitled to a transitional benefit.

The Ministry may issue regulations laying down more detailed rules governing the supplemental benefits, school fees and education at private educational institutions.

20. Section 15-13 of the National Insurance Act, headed “The relationship to other social security benefits, etc.”, reads:

The transitional benefit under this Chapter lapses in so far as the person concerned receives subsistence benefits under the social security system in the form of pension or a transitional benefit as surviving spouse, disability benefits or equivalent benefits from abroad. The same applies when the person concerned receives a collective agreement-based pension (avtalefestet pensjon – AFP) for which pension points are credited, see Section 3-19.

21. Norwegian Regulation No 1341 of 21 November 2015 on benefits for single mothers or fathers under Chapter 15 of the National Insurance Act (*Forskrift av 21. november 2015 nr. 1341 om stønad til enslig mor eller far etter folketrygdloven kapittel 15*) (“Regulation No 1341”) contains supplementary rules.

22. Section 1 of Regulation No 1341, headed “Persons who have previously been members”, reads:

The first paragraph of Section 15-2 of the National Insurance Act on prior membership shall not apply to persons who have previously been long-term members and who become a member again following an interruption of less than 10 years.

23. Section 2 of Regulation No 1341, headed “Exception from the requirement of prior membership”, reads:

Even though a person does not fulfil the requirement in Section 1, an exception can be made to the provisions on prior membership when warranted by particular reasons. Emphasis shall be placed on whether:

- a) the benefit situation arose whilst she or he was a member of the social security system;*
- b) she or he has previously been a member; and*
- c) she or he had particular reasons for coming to Norway apart from pursuing employment or education.*

If the single mother or father was not a member when the benefit situation arose, an exception can only be made if he or she previously was a long-term member.

III Facts and procedure

24. In its request, the National Insurance Court describes the facts of the case as follows:

25. A is a Swedish national. She moved to Norway in August 2017 when her spouse at the time – a Norwegian national – obtained a job in Norway. Immediately before moving to Norway, she had resided and been employed in Sweden for over five years. Prior to moving to Norway, she had been in Norway a number of times, but had never been resident in the country.

26. A separated from her spouse in the spring of 2019. The County Governor (*Fylkesmannen*) issued a separation permit (*separasjonsbevilling*) on 21 June 2019.

27. A applied for transitional benefit on 24 June 2019. In the application, she stated that she was expecting a child, with an expected due date of 25 July 2019. It was further stated in the application that A had been accepted at an educational institution in Oslo from the autumn and would be studying for a bachelor's degree there in the period 2019–2022. The field in the application relating to employment for the last six months, was left blank. The other information in the case file confirms that A was not employed at the time of the application and that she subsequently has had no employment income in Norway nor has she been registered as an employed person in Norway.

28. By decision of 26 June 2019, the NAV Employment and Benefits Office (*NAV Arbeid og ytelser*) rejected the application for a transitional benefit. The reasoning was that Section 15-2 of the National Insurance Act required three years' prior membership in the social security system, whilst A only had just under two years.

29. A's child was born on 28 July 2019. According to the information in the case file, the child's father is a Swedish national resident in Sweden and is not expected to have much contact with the child.

30. The rejection of A's application for transitional benefit was upheld by decision of 29 October 2019 of NAV Appeals (*NAV Klageinstans*), on the same grounds as were found at the lower instance.

31. In the appeal to the National Insurance Court, A argues that the rejection was contrary to the EEA rules. She contends that the transitional benefit has to be considered a "maternity benefit" under Article 3(1)(b) of the Regulation and that the Regulation accordingly applies in her case. She submits that, under Article 6 of the Regulation, she is entitled to have the time in Sweden included for the purposes of determining whether she fulfilled the membership requirement provided for in Section 15-2 of the National Insurance Act.

32. NAV Appeals disagrees. It refers to established and consistent administrative practice going back to when the EEA Agreement was concluded, according to which transitional benefits are presumed to fall outside the material scope of the Regulation and its predecessor Regulation (EEC) No 1408/71. Since the Regulation does not apply in the case, Section 15-2 of the National Insurance Act has to be interpreted literally, to the effect that membership in the social security system refers to a period of membership in Norway.

33. Against this background, the National Insurance Court decided to stay the proceedings and refer the following questions to the Court:

1. **Does a benefit such as the transitional benefit (*overgangsstønad*) – see the first paragraph of Section 15-5 of the National Insurance Act, read in conjunction with the first sentence of the second paragraph – come within the material scope of Regulation (EC) No 883/2004 according to:**
 - a. Article 3(1), in particular (j), or
 - b. Article 3(3), read in conjunction with Article 70?
2. **Is it of any significance for the assessment under question 1) that there is a requirement of occupational activity for continued entitlement to a benefit when the youngest child becomes one year old, see Section 15-6 of the National Insurance Act?**

IV Written observations

34. Pursuant to Article 20 of the Statute of the Court and Article 90(1) of the Rules of Procedure, written observations have been received from:

- the Norwegian Government, represented by the Labour and Welfare Directorate, represented by Ida Thue, acting as Agent;
- the European Commission (“the Commission”), represented by Denis Martin and Bernd-Roland Killmann, acting as Agents; and
- the EFTA Surveillance Authority (“ESA”), represented by Ewa Gromnicka, Erlend Møinichen Leonhardsen and Melpo-Menie Josephides, acting as Agents.

V Proposed answers submitted

The Norwegian Government represented by the Labour and Welfare Directorate

35. The Norwegian Government represented by the Labour and Welfare Directorate submits that the questions posed by the referring court should be answered as follows:

A benefit such as the transitional benefit, cf. Section 15-5 of the Norwegian National Insurance Act, falls outside the scope of Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems.

In the alternative:

A benefit such as the transitional benefit, cf. Section 15-5 of the Norwegian National Insurance Act, must be regarded as a special non-contributory cash benefit within the meaning of Article 70 of 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 Commission

36. The Commission considers that the questions from the National Insurance Court should be answered as follows:

Question 1:

A benefit such as the transitional benefit at issue in the main proceedings constitutes a “family benefit” within the meaning of Article 3(1)(j) of Regulation (EC) No 883/2004, read together with Article 1(z) of that regulation.

Question 2:

A requirement of occupational activity for continued entitlement to a benefit when the youngest child reaches a certain age is not of any significance for the assessment of a “family benefit” within the meaning of Article 3(1)(j) of Regulation (EC) No 883/2004, read together with Article 1(z) of that regulation.

ESA

37. ESA requests the Court to answer the questions from the national court as follows:

Question 1:

A benefit such as the transitional benefit (overgangsstønad) comes within the material scope of Regulation 883/2004 as a family benefit within the meaning of Article 3(1)(j).

Question 2:

A requirement of occupational activity for continued entitlement to a benefit when the child reaches 1 year of age is of no significance for the classification of transitional benefit as a family benefit within the meaning of Article 3(1)(j) read together with Article 1(z) of that Regulation.

Páll Hreinsson
Judge-Rapporteur