



# THE NATIONAL INSURANCE COURT (TRYGDERETTEN)

The Registry  
EFTA Court  
1, rue du Fort Thüngen  
L-1499 Luxembourg  
Luxembourg

## REQUEST FOR AN ADVISORY OPINION IN APPEAL CASE NO 20/1763

### Parties

**Appellant:** A

**Counsel:** Self-represented

**Respondent:** Labour and Welfare Directorate (*Arbeids- og velferdsdirektoratet*)  
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### Introduction

- 1) The National Insurance Court (*Trygderetten*) hereby requests an Advisory Opinion from the EFTA Court in Appeal Case No 20/1763 *A v Arbeids- og velferdsdirektoratet*, see Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (SCA).
- 2) The case concerns a claim for a transitional benefit (*overgangsstønad*) lodged by a Swedish national. When the claim was submitted, the Appellant 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 the Appellant had not been a member of the social

security system in the last three years prior to the submission of the application 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. The case raises the question whether the Norwegian Labour and Welfare Administration (NAV) may disregard the time spent in Sweden in its calculation of whether the Appellant fulfils the membership requirement in Section 15-2. The answer to that question seems in particular to depend on whether the transitional benefit is a benefit falling within the material scope of Regulation (EC) No 883/2004.

### **Background**

- 3) A is a Swedish national. She moved to Norway in August 2017 when her spouse at the time – a Norwegian national – got 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.
- 4) A was separated in the spring of 2019. The County Governor (*Fylkesmannen*) issued a separation permit (*separasjonsbevilling*) on 21 June 2019.
- 5) A applied for a transitional benefit on 24 June 2019. In the application, she stated that her expected due date was 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 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 been registered as an employed person in Norway.
- 6) 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.
- 7) The 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 will not have much contact with the child.
- 8) The rejection was upheld by decision of 29 October 2019 of NAV Appeals (*NAV Klageinstans*), on the same grounds as at the lower instance.
- 9) In the appeal to the National Insurance Court, A argued that the rejection was contrary to the EEA rules. She expressed the position that a transitional benefit had to be considered a "maternity benefit" under Article 3(1)(b) of Regulation (EC) No 883/2004 and that that regulation accordingly applied in the case. She submitted that, under Article 6 of that regulation, she was 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.
- 10) NAV Appeals disagreed with that position in its letter to the National Insurance Court. Reference was made to established and consistent administrative practice going back to when the EEA Agreement was concluded, according to which transitional benefits were presumed

to fall outside the material scope of Regulation (EC) No 883/2004 and its predecessor Regulation (EEC) No 1408/71. Since Regulation [No 883/2004] did not apply in the case, Section 15-2 of the National Insurance Act had to be interpreted literally, to the effect that membership in the social security system referred to a period of membership in Norway.

### **National rules**

- 11) Chapter 15 of the National Insurance Act is entitled “Benefits for single mothers or fathers” (*Stønad til enslig mor eller far*). The chapter is placed in Part V of the National Insurance Act: Benefits relating to course of life and family situation (*Ytelser knyttet til livsløp og familiesituasjon*).
- 12) Section 15-1 of the National Insurance Act provides that “[t]he purpose of benefits under this Chapter 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”.
- 13) Chapter 15 of the National Insurance Act contains three different types of benefits for single mothers and fathers. The requirements in Sections 15-2 to 15-4 of the National Insurance Act are common for all three types of benefits. Sections 15-5 to 15-9 regulate the particular form of benefit known as the transitional benefit. Sections 15-10 and 15-11 relate to the other two forms of benefits, which are not relevant in the present case. Nevertheless, a brief description of these will be given at the very end, as these types of benefits are relevant for determining which risk is covered by the benefits to single mothers or fathers under Chapter 15 of the National Insurance Act.
- 14) Under the first paragraph of Section 15-2 of the National Insurance Act, five years’ prior membership in the social security system is required for entitlement to benefits under Chapter 15. That provision is worded as follows:

#### **“Section 15-2. *Prior membership***

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 five years prior to her or his submission of a claim for a benefit.”

Before 1 January 2021, the requirement was three years’ prior membership. In the case pending before the National Insurance Court, the three-year requirement is the applicable one.

- 15) It follows from the first paragraph of Section 15-3 of the National Insurance Act that in order to receive benefits, the member and the child must stay in Norway.
- 16) Section 15-4 of the National Insurance Act provides that benefits under Chapter 15 of the National Insurance Act may be granted to a member who is a single mother or father and has sole care of a child:

**“Section 15-4. Single mother or father**

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.”

- 17) The more detailed requirements for transitional benefit are provided for in Section 15-5, which reads:

**“Section 15-5. Transitional benefit**

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 that 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.”

The first paragraph provides the basic requirements for entitlement to transitional benefits. The wording requires a causal connection between the lack of ability to be self-supporting and care of a child. It follows from Circular R15-00 that the requirement of causal connection is deemed to be fulfilled if the provider finds it necessary to refrain from paid work to care for the child herself or himself. This applies until the youngest child becomes one year old. After that time, a requirement to engage in occupational activity applies, see Section 15-6 of the National Insurance Act. The first sentence of the second paragraph of Section 15-5 provides the general rule concerning the child's age. As a general rule, transitional benefits may be given until the youngest child becomes eight years old, although after the child becomes one year old certain requirements (activity requirements) are imposed for continued entitlement to a benefit.

18) The rules on activity obligations follow from Section 15-6 of the National Insurance Act:

**“Section 15-6. Occupational activity obligation**

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.”

- 19) 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 currently corresponds to NOK 239 397.
- 20) Section 15-8 of the National Insurance Act contains rules on the length of the benefit period:

**“Section 15-8. *Benefit period***

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 calculations of the length of the benefit period, including division and shortening of the benefit period.”

- 21) Section 15-9 of the National Insurance Act has rules on deduction against income and reads:

**“Section 15-9. *Deduction against income***

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.

...”

- 22) Transitional benefits are taxed as employment income and is pensionable, see Section 3-15 of the National Insurance Act, read in conjunction with Section 12-2(c) of the Tax Act (*skatteloven*).
- 23) The transitional benefit lapses in so far as the member receives other subsistence benefits under the social security system, see Section 15-13:

**“Section 15-13. *The relationship to other social security benefits, etc.***

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.”

- 24) 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*) contains supplementary rules. Of particular relevance for the case pending before the National Insurance Court are Sections 1 and 2 of that regulation, which read:

**“Section 1. *Persons who have previously been members***

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.

**Section 2. *Exception from the requirement of prior membership***

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. It shall be emphasised 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.”

It follows from Circular R15-00 that since the provisions in Regulation [No 1341] as cited above are “worded in a somewhat discretionary manner”, the understanding of them has been developed through administrative practice. In the present case, NAV found that there were no particular reasons warranting an exception to the provisions on prior membership. In that assessment, NAV emphasised the fact that A’s membership in the social security system at the time of application was well under the three years required under the general rule, that her social/family connection to Norway is not sufficiently strong and that the father of the child is a Swedish national resident in Sweden, meaning that he does not have any connection to Norway. The latter seems to be a factor that has developed through administrative practice.

- 25) The provisions of the Main Part of the EEA Agreement apply as Norwegian law and, in the event of conflict, prevail over the provisions of the National Insurance Act, see Sections 1 and 2 of the Norwegian EEA Act (*EØS-loven*) and Section 1-3 of the National Insurance Act. Regulation (EC) No 883/2004 was incorporated into Norwegian law through Regulation No 585 of 22 June 2012. Regulation [No 585] was given effect as from 1 June 2012, see Section 2 of that regulation. Regulation [No 883/2004] prevails over the provisions of the National Insurance Act, see Section 1 of Regulation [No 585] and Section 1-3 of the National Insurance Act.
- 26) As stated initially, there are also two other forms of benefits provided for in Chapter 15 of the National Insurance Act: 1) childcare benefits for single mothers or fathers in employment (*stønad til barnetilsyn til enslig mor eller far som er i arbeid*) (Section 15-10); and 2) supplemental benefits and support for school fees, etc. (*tilleggsstønader og stønad til skolepenger mv*) (Section 15-11).
- 27) Section 15-10 of the National Insurance Act on childcare benefits for single mothers or fathers reads:

**“Section 15-10. *Childcare benefits for single mothers or fathers in employment, etc.***

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.”

- 28) Section 15-11 of the National Insurance Act on supplemental benefits and support for school fees, etc., reads:

**“Section 15-11. *Supplemental benefits and support for school fees, etc.***

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 provision 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 provision or completion of the education;
- e. necessary extra housing expenses in connection with the provision 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.”

### **Reason for the request**

- 29) In the case pending before the National Insurance Court, it seems clear that the Appellant fulfils the requirements for receiving transitional benefits under Sections 15-3 to 15-5 of the National Insurance Act. Her entitlement to benefits thus depends on the membership requirement in Section 15-2. If Regulation (EC) No 883/2004 applies to the case, it seems not doubtful that the Appellant, under Article 6 of that regulation, is entitled to have her time in Sweden included in the calculation on whether she fulfils the membership requirement in Section 15-2 of the National Insurance Act. On that basis, it is necessary to clarify whether transitional benefit comes within the material scope (*ratione materiae*) of Regulation (EC) No 883/2004.
- 30) Article 3 of Regulation (EC) No 883/2004 has the title “Matters covered” and Article 3(5) provides that “[t]his Regulation shall not apply to social [...] assistance”. Thus a distinction is drawn between “social security benefits”, which fall within the scope of the Regulation, and “social assistance”, which does not.
- 31) In the more detailed classification of a benefit, the European Court of Justice (“ECJ”) emphasises in particular the benefit’s purpose and conditions, see Case C-372/18, *Dreyer*, paragraph 31. The two decisive criteria for determining whether a benefit is to be regarded as a social security benefit falling within the scope of the Regulation seem to be, first, whether the benefit is granted according to statutory requirements rather than after an individual assessment of personal needs, and, second, whether the benefit relates to one of the types of social risks explicitly listed in Article 3(1) of Regulation (EC) No 883/2004, see *Dreyer*, paragraph 32. The criteria are cumulative.
- 32) As regards the first criterion, the ECJ has stated that it will be fulfilled where the benefit is granted on the basis of objective requirements which, if they are met, confer entitlement to the benefit, without the competent authority being able to take account of other personal circumstances, see *Dreyer*, paragraph 33 with further references. In the National Insurance Court’s view, the wording of Section 15-5 of the National Insurance Act (“granted” – “ytes”) suggests that the member is legally entitled to a transitional benefit if the requirements are fulfilled. The National Insurance Court has also noted – and this is considered potentially relevant for the EEA law classification of the benefit – that the requirement of causal connection in the first paragraph of Section 15-5 in practice will be deemed to be met if the provider opts to refrain from paid employment in order to care for the child herself or himself until the child is one year old.
- 33) As regards the second criterion, the National Insurance Court does not share the Appellant’s view that transitional benefits must be regarded as a “maternity benefit” under Article 3(1)(b) of Regulation (EC) No 883/2004. The National Insurance Court has however some doubt as to whether a transitional benefit is to be regarded as a “family benefit” under Article 3(1)(j). “Family benefit” is defined in Article 1(z) as “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”. That definition seems very broad in scope. In Circular R15-00, the transitional benefit is described as a “subsistence benefit”. In Case C-78/91 *Hughes*, the ECJ held that a benefit referred to as a “family credit”, that was given to low-income families, constituted a family benefit as it was reserved for families with children, and the amount of the benefit varied according to the age of the children, see paragraph 19:

“[family credit] (...) is intended to meet family expenses, as is clear in particular from the fact that it is paid only where the claimant’s family includes one or more children and from the fact that the amount of the benefit varies according to the age of the children.”

Similarly, in Case C-449/16 *Martinez Silva*, the ECJ held that an Italian benefit given to households with at least three children under 18 years old and having an income under a certain threshold was to be regarded as a family benefit under Article 3(1)(j) of Regulation (EC) No 883/2004. The following is from paragraph 24:

“[the child benefit] is consequently granted without any individual and discretionary assessment of the claimant’s personal needs, on the basis of a legally defined situation. Secondly, [the child benefit] consists in a sum of money paid to those recipients each year in order to meet family expenses. It is therefore a cash benefit intended, by means of a public contribution to a family’s budget, to alleviate the financial burdens involved in the maintenance of children.”

The wording of the last sentence has been used by the ECJ in several cases as a factor suggesting that the benefit must be regarded as a family benefit, see Case C-177/12 *Lachheb*, paragraph 35 with further references.

- 34) In light of the ECJ’s case-law, the National Insurance Court takes the view that there is much to suggest that a transitional benefit must be regarded as a social security benefit falling within the material scope of Regulation (EC) No 883/2004. The National Insurance Court observes that a transitional benefit seems to be granted on the basis of objective and statutory requirements which, if they are met, confer entitlement on the member to the benefit. It can further be stated that a transitional benefit must be regarded as a family benefit under Article 3(1)(j), since the benefit is granted to a particular category of families, i.e., families consisting of a single parent and a child or several children, and the purpose of the benefit is to alleviate the burden of providing for that group of families, see the definition in Article 1(z) of the Regulation. The National Insurance Court nevertheless has some doubt as to the EEA law classification of the transitional benefit. The question also presumably has major implications for a large number of cases. The National Insurance Court observes that Norwegian authorities have ever since the EEA Agreement was concluded, assumed that benefits given to sole providers fall outside the material scope of the EEA Agreement, see the draft legislative proposal submitted to the Parliament concerning consent to ratification of the Agreement on the European Economic Area (EEA), signed in Oporto on 2 May 1992 (*St.prp. nr. 100 (1991–1992) Om samtykke til ratifikasjon av Avtale om Det europeiske økonomiske samarbeidsområdet (EØS) undertegnet i Oporto 2. mai 1992*), Chapter 6.4.3. This reinforces that the question should be referred to the EFTA Court for final clarification.
- 35) Although the transitional benefit formally speaking is one benefit, the question may be asked whether it is in fact a number of different benefits, with different eligibility requirements. What the National Insurance Court needs to have clarified is the EEA law classification of the “normal cases”, i.e, where a benefit is given to a single parent with a child under eight years old, see the first sentence of the second paragraph of Section 15-5 of the National Insurance Act. As stated earlier, when the youngest child becomes one year old, certain requirements are imposed (activity requirements) on the benefit recipient for continued entitlement to the benefit, see Section 15-6 of the National Insurance Act. On this basis, the National Insurance Court finds it appropriate also to refer a question as to whether a requirement of occupational activity for continued entitlement to the benefit when the youngest child becomes one year old

affects or modifies the nature of the benefit as a social security benefit or social assistance for the purposes of Regulation (EC) No 883/2004.

- 36) Should the EFTA Court conclude that a transitional benefit does not come within the material scope of Regulation (EC) No 883/2004, the National Insurance Court's preliminary view is that EEA law, including Directive 2004/38/EC (the Citizens' Rights Directive), does not preclude the application of a requirement such as that in Section 15-2 of the National Insurance Act to an economically inactive person in A's situation. Should the EFTA Court have a different view on this, then the National Insurance Court looks forward to receiving guidance as to which rules then apply.

### **The parties' submissions**

- 37) **The Appellant**, A, has in her appeal to the National Insurance Court inter alia submitted:
- 38) When she moved to Norway in the summer of 2017, it was not primarily to pursue work or education in Norway, but because her (fully Norwegian) spouse had moved to Norway in March/April 2016, when he got a job there.
- 39) NAV found that she had lived in Norway for one year and 10 months when she applied for a transitional benefit on 24 June 2019 and that, before she moved to Norway, she lived in Sweden for approximately five years. This is essentially correct.
- 40) Prior living time in Sweden must be included in the determination of whether the requirement of three years' membership in the social security system in Section 15-2 of the National Insurance Act is fulfilled. This follows from Article 6 of Regulation (EC) No 883/2004.
- 41) That Regulation (EC) No 883/2004 applies to a benefit such as a transitional benefit, follows from Article 3(1)(b), which in the English language version reads:
- “1. This Regulation shall apply to all legislation concerning the following branches of social security:
- ...
- (b) maternity ... benefits;”
- 42) That the English language version uses the expression “maternity benefits” suggests that the scope is not limited to benefits given in connection with “pregnancy and childbirth” (“*svangerskap og fødsel*”), as is used in the Norwegian language version. This interpretation is supported by the other language versions, see inter alia the French and German language versions. The Swedish and Danish language versions both use the expression “motherhood” (“*moderskap*”), which is broader than what is used in the Norwegian version. On this basis, it is submitted that according to Article 3(1)(b), the Regulation applies not only to benefits given in connection with *becoming* a mother, but also benefits given in connection with *being* a mother. The latter is the case for the transitional benefit.
- 43) Chapter 15 of the National Insurance Act concerns “Benefits for single mothers or fathers”, and thus comes directly within the scope of Regulation (EC) No 883/2004. The same applies

for the specific benefit transitional benefit which, under Section 15-5 of the National Insurance Act, is “granted to a member who, due to having care for a child, is temporarily unable to be self-supporting through his or her own work, or that can access employment only following a period of adjustment or education”.

- 44) **The Respondent**, the Labour and Welfare Directorate, has submitted:
- 45) The benefits in Chapter 15 of the National Insurance Act, including a transitional benefit, relate to a different risk than what comes under Article 3(1)(a) to (j) of Regulation (EC) No 883/2004.
- 46) The transitional benefit relates to the risk of encountering difficulties in being self-supporting through one’s own income when caring for a child alone. The benefit is intended to assist in self-assistance, so that the benefit recipient is able to become self-supporting through his or her own work.
- 47) Consequently, the benefits in Chapter 15, including the transitional benefit, are not intended to cover family expenses, see Article 3(1)(j) of Regulation (EC) No 883/2004, read in conjunction with Article 1(z). Nor can the transitional benefit be regarded as a “maternity benefit”, see Article 3(1)(b).
- 48) The purpose of the transitional benefit is to secure a minimum income for persons who have become sole providers for a child, not to give a contribution towards the maintenance of that child. Another important purpose of the benefit is to ensure that the benefit recipient has an income while he or she is in the process of becoming self-supporting through his or her own work.
- 49) A full transitional benefit is given at a fixed rate which is at the same level as other temporary income guarantee schemes. The rate is approximately at the same level as the minimum benefit for work assessment allowance (benefits to secure income in the event of temporary sickness) under Chapter 11 of the National Insurance Act, which according to Section 11-20(1) is set at 2 G [G being the basic amount] per year. It is stated in the preparatory works that it is desirable that these two benefits are at the same level, see [draft legislative proposal submitted to the Odelsting] Ot.prp. nr. 77 (2007–2008), part 4, and proposal Prop. 54 L (2009 – 2010), part 3.2. The transitional benefit was raised from 2 G to 2.25 G for tax reasons, see Prop. 23 L (2013–2014). This shows that the sole purpose of the transitional benefit is to secure income for the member, not to cover family expenses or expenses relating to providing for the child.
- 50) The transitional benefit is thus also the same amount, irrespective of how many children one has.
- 51) In addition to secure a minimum income, another purpose of the benefits under Chapter 15 is to provide incentive for and facilitate the person’s eventually becoming self-supporting. This is the reason why there is a requirement of occupational activity (Section 15-6), why the benefit period as a general rule is limited to three years (Section 15-8) and why it is conferred entitlement to benefits that make it possible to complete education with a view to eventually becoming self-supporting (Section 15-11). Persons who are in employment may receive a benefit for necessary childcare under Section 15-10, so that they can continue to be self-supporting through their own income.

- 52) Under Norwegian law, costs relating to family expenses and providing for the children are covered through other benefits.
- 53) Reference is made, first, to cash benefits, see Act No 41 of 26 June 1998 on cash benefits (*lov av 26. juni 1998 nr. 41 om kontantstøtte*), and to child benefits under Act No 4 of 8 March 2002 on child benefits (*lov av 8. mars 2002 nr. 4 om barnetrygd*). These two benefits, which have the purpose to cover family expenses, are classified as family benefits, see Article 3(1)(j) of Regulation (EC) No 883/2004. Under Section 9 of the Act on child benefits, a single mother or father receives child benefits for one child more than the actual number of children (expanded child benefit). This additional amount is intended to contribute towards covering extra expenses incurred by a parent for family expenses as a result of the person concerned being the sole provider for the child and lives alone.
- 54) Second, the other parent is obliged to contribute towards providing for the child/children by paying a monthly maintenance payment under Act No 7 of 8 April 1981 relating to Children and Parents (*lov av 8. april 1981 nr. 7 om barn og foreldre*). It is the child who is entitled to the maintenance payment, whilst the parent with whom the child lives pays the child-related costs and receives the maintenance payment on behalf of the child. If the maintenance payment from the party liable to pay is not paid on time or if the party liable to pay the maintenance is unable to pay, single parents may receive an advance maintenance payment (*bidragsforskott*), which is a State benefit for sole providers, see Act No 2 of 17 February 1989 (*lov av 17. februar 1989 nr. 2 om bidragsforskott*). This is intended to ensure that sole providers have the funds to maintain the children at a certain level each month.
- 55) Case-law from the ECJ shows that the fact that there is a requirement that the person has a child in order to receive a benefit, is not in itself sufficient for the benefit to be regarded as a family benefit for the purposes of the Regulation. Reference is made to the judgment in Case C-299/05 *Commission v Parliament*, where the Commission argued that Finnish and Swedish rules on childcare benefits had to be regarded as family benefits because both benefits were intended to meet the families' expenses resulting from the child's disability or sickness, see paragraphs 36–38. The ECJ held that the benefits were intended to enable the parents to provide for the care, supervision and possibly rehabilitation of the children. It was accordingly held that the benefits had to be classified as sickness benefits, see Article 3(1)(a) and paragraphs 57–59.
- 56) Similarly, benefits under Chapter 9 of the National Insurance Act (benefits in the event of sickness of a child or other close relatives) are classified as sickness benefits, see Article 3(1)(a). Although those benefits are intended to compensate for the loss of employment income for working parents in the event of sickness of a child or childminder and a child's disability, they are not regarded as family benefits under Article 3(1)(j), see Article 1(z).
- 57) Here a clear parallel to the transitional benefit can be seen. In both cases, it is the child who is the cause of the parent's difficulty in being self-supporting. For benefits under Chapter 9, it relates to the child's sickness. For benefits under Chapter 15, it relates to the fact that the parent is alone in caring for the child. And just as benefits under Chapter 9 must be regarded as relating to the risk of sickness (Article 3(1)(a)), benefits under Chapter 15 must be regarded as relating to the risk of being alone in caring for a child. This merely confirms that it is a particular kind of risk (*sui generis*) which is not falling within any of the alternatives referred to in Article 3(1).

- 58) If the EFTA Court were to conclude that the transitional benefit comes within the scope of the Regulation because it relates to the risk “family expenses”, see Article 3(1)(j), read in conjunction with Article 1(z), NAV submits that it must then be a non-contributory cash benefit under Article 70(2)(a)(i). Reference is made to the fact that the transitional benefit is non-contributory and is intended to secure the member a minimum subsistence income.

### **Questions**

- 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?

Oslo, 26 January 2022

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Member of the National Insurance Court