JUDGMENT OF THE COURT
3 May 2006

Failure of a Contracting Party to fulfil its obligations – free movement of workers – social security for migrant workers with family members residing in an EEA State other than the State of employment – regional residence requirement for family benefits – Article 73 of Regulation EEC 1408/71 – Article 7(2) of Regulation EEC 1612/68 – discrimination – justification on grounds of promoting sustainable settlement

In Case E-3/05,

EFTA Surveillance Authority, represented by Niels Fenger, Director, and Arne Torsten Andersen, Officer, in the Department of Legal & Executive Affairs, acting as Agents, Brussels, Belgium,

Applicant,

v

The Kingdom of Norway, represented by Karen Fløistad, Advocate, Attorney General for Civil Affairs, and Ingeborg Djupvik, Adviser, Department for Legal Affairs, Ministry of Foreign Affairs, acting as Agents, Oslo, Norway,

Defendant,

APPLICATION for a declaration that the Kingdom of Norway has failed to fulfil its obligations pursuant to Article 73 of the Act referred to at point 1 of Annex VI to the EEA Agreement (Council Regulation EEC No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community), as adapted to the EEA Agreement by Protocol 1 thereto; alternatively by maintaining the same requirement, failed to fulfil its obligations pursuant to Article 7(2) of the Act referred to at Point 2 of Annex V (Council Regulation EEC No 1612/68 of 15 October 1968 on freedom of movement for workers within the Community), as adapted to the EEA Agreement by Protocol 1 thereto.

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THE COURT,

composed of: Carl Baudenbacher, President, Thorgeir Örlygsson (Judge-Rapporteur) and Henrik Bull, Judges,

Registrar: Henning Harborg,

having regard to the written pleadings of the parties and the written observations of the Commission of the European Communities, represented by Denis Martin and Nicola Yerrell, Members of its Legal Service, acting as Agents, and the written observations of the United Kingdom, represented by Clare Jackson of the Treasury Solicitor's Department, acting as Agent, and by Eleanor Sharpston QC,

having regard to the Report for the Hearing,

having heard oral argument of the Applicant, represented by its Agent Arne Torsten Andersen, the Defendant, represented by its Agent Karen Fløistad, and the Commission of the European Communities, represented by its Agent Nicola Yerrell, at the hearing on 14 February 2006,

gives the following

Judgment

I Facts and pre-litigation procedure

1 By an application lodged at the Court on 12 April 2005, the EFTA Surveillance Authority (hereinafter "ESA" or the "Applicant") brought an action under Article 31(2) of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice seeking a declaration that the Kingdom of Norway (hereinafter "Norway" or the "Defendant") has, by maintaining in force a residence requirement for granting a regional supplement to Norwegian family allowances, failed to fulfil its obligations pursuant to Article 73 of the Act referred to at point 1 of Annex VI to the EEA Agreement (Council Regulation EEC No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, hereinafter referred to as "Regulation 1408/71"), as adapted to the EEA Agreement by Protocol 1 thereto; alternatively

by maintaining the same requirement, failed to fulfil its obligations pursuant to Article 7(2) of the Act referred to at Point 2 of Annex V (Council Regulation EEC No 1612/68 of 15 October 1968 on freedom of movement for workers within the Community, hereinafter referred to as "Regulation 1612/68"), as adapted to the EEA Agreement by Protocol 1 thereto.

2 Under Norwegian law, parents living together with their children below the age of 18 are entitled to family allowances if they reside in Norway. By virtue of Norwegian implementation of Regulation 1408/71, this entitlement is extended to workers employed in Norway but residing in another EEA State with their children. A supplement to these family allowances (hereinafter the "Finnmark Supplement") is granted to parents residing with their children in the county of Finnmark or in one of seven municipalities in the county of Troms, adjacent to Finnmark (hereinafter "the designated area"). For the 2005 budget year the Finnmark supplement amounted to NOK 3840 per child per year.

3 The Finnmark supplement was one of many measures (hereinafter the "Finnmark package") introduced in the late 1980's in order to reverse a negative trend of lack of jobs, failing business, lack of qualified personnel and decreasing population figures that prevailed in the designated area. Other measures include various tax exemptions and tax reductions, reduction in electricity consumption charges and annual debt deductions on Norwegian Government student loans for people resident and working in the designated area. The measures in the Finnmark package are either personal economic benefits, such as the Finnmark supplement, or benefits directed to business and industry, such as regionally differentiated social security tax.

4 By a letter of 28 April 1999, ESA informed the Government of Norway that it had received a complaint on 8 April 1999 against the Government of Norway. The complaint, which was forwarded by the Commission of the European Communities (hereinafter the "Commission"), was from a person working in Finnmark but residing in Finland with her child. Through her employment in Norway she was entitled to, and granted, Norwegian family allowances in respect of her child. Her application for the Finnmark supplement was, however, turned down because she did not reside in the designated area. The Government of Norway replied to ESA by a letter of 17 June 1999 and by a fax of 26 August 1999.

5 On 23 October 2000, ESA issued a letter of formal notice stating that the Finnmark supplement should be classified as a family benefit according to Regulation 1408/71. It held that Article 73 of the Regulation obliged Norway to lift the regional residence requirement and to grant the Finnmark supplement to

EEA workers employed in the designated area but residing in another EEA State with their children, as if they were residing at the actual place of employment.

6 By a letter of 18 December 2000 the Government of Norway replied to the letter of formal notice and expressed the view that the practice regarding the Finnmark supplement was in accordance with Article 73 of Regulation 1408/71. The Government of Norway argued that Article 73 of Regulation 1408/71 is to be interpreted to the effect that the frontier worker and the relevant members of his family are considered as if they were residing in the territory of the State of employment as such, and not specifically at the actual place of employment. The Government also submitted that the rules governing the Finnmark supplement apply equally to all nationals of EEA States, including Norwegians. In the Government's view, Article 73 was not designed to ensure better rights than those accorded to the State's own nationals.

7 ESA issued a supplementary letter of formal notice on 18 December 2003. In addition to restating its argumentation based on Regulation 1408/71, it submitted that even if Regulation 1408/71 was not applicable as submitted by the Government of Norway, the Finnmark supplement would be incompatible with Article 7(2) of Regulation 1612/68, as it was indirectly discriminatory and could not be objectively justified.

8 By a letter of 2 April 2004 the Government of Norway replied to the supplementary letter of formal notice. It reiterated its previously stated arguments concerning Regulation 1408/71, and added that the Finnmark supplement did not breach Article 7(2) of Regulation 1612/68 since it was non-discriminatory.

9 On 14 July 2004, ESA issued a reasoned opinion maintaining the position expressed in the first and the supplementary letter of formal notice. The Government of Norway replied by a letter of 13 December 2004, in which it reiterated its views and arguments laid down in previous correspondence. Subsequently, ESA filed the present application.

II Legal background

EEA law

10 Article 28 of the EEA Agreement reads:

> 1. Freedom of movement for workers shall be secured among EC Member States and EFTA States.

2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of EC Member States and EFTA States as regards employment, remuneration and other conditions of work and employment.

3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:

(a) to accept offers of employment actually made;

(b) to move freely within the territory of EC Member States and EFTA States for this purpose;

(c) to stay in the territory of an EC Member State or an EFTA State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;

(d) to remain in the territory of an EC Member State or an EFTA State after having been employed there.

4. The provisions of this Article shall not apply to employment in the public service.

5. Annex V contains specific provisions on the free movement of workers.

11 Article 29 EEA reads:

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

(a) aggregation, for the purpose of acquiring and retaining the right to benefit and of calculating the amount of benefit, of all periods taken into account under the laws of the several countries;

(b) payment of benefits to persons resident in the territories of Contracting Parties.

12 Council Regulation EEC No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community as updated and amended by Regulation EC No 118/97 (OJ L 28 30.1.1997, p. 1) and amended by Regulation EC No 631/2004 of the European Parliament and of the Council (OJ L 100 6.4.2004, p. 1) is listed in Annex VI to the EEA Agreement.

13 Article 1 of Regulation 1408/71 contains definitions. Article 1(b) reads:

Frontier worker means any employed or self-employed person who pursues his occupation in the territory of a Member State and resides in the territory of another Member State to which he returns as a rule daily or at least once a week; …

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14 Article 1(j) of Regulation 1408/71 reads:

> Legislation means in respect of each Member State statutes, regulations and other provisions and all other implementing measures, present or future, relating to the branches and schemes of social security covered by Article 4(1) and (2) or those special non-contributory benefits covered by Article 4 (2a).
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> …

15 Article 1(u)(i) of Regulation 1408/71 reads:

> The term family benefits means all benefits in kind or in cash intended to meet family expenses under the legislation provided for in Article 4 (1) (h), excluding the special childbirth or adoption allowances referred to in Annex II;

16 Article 3 paragraph 1 of Regulation 1408/71 reads:

> Subject to the special provisions of this Regulation, persons resident in the territory of one of the Member States to whom this Regulation applies shall be subject to the same obligations and enjoy the same benefits under the legislation of any Member State as the nationals of the State.

17 Article 4 defines the material scope of Regulation 1408/71. Article 4(1) (h) reads:

> 1. This Regulation shall apply to all legislation concerning the following branches of social security:
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> …
>
> (h) family benefits.

18 Article 4 paragraph 2b reads:

> This Regulation shall not apply to the provisions in the legislation of a Member State concerning special non-contributory benefits, referred to in Annex II, Section III, the validity of which is confined to part of its territory.

19 Article 5 of Regulation 1408/71 reads:

> The Member States shall specify the legislation and schemes referred to in Article 4(1) and (2), … in declarations to be notified and published in accordance with Article 97.

20 In point 1(h) in Norway's declaration (OJ C 127 29.05.2003 p. 6), provided for pursuant to Article 5 of Regulation 1408/71, the Act of 8 March 2002 No 4 on Family Allowances *(Lov om barnetrygd)* is listed as one of the legislations and schemes referred to in Article 4(1) and (2) of Regulation 1408/71.

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21 Article 13 of Regulation 1408/71 states in paragraph 2(a):

> 2. Subject to Articles 14 to 17:
>
> (a) a person employed in the territory of one Member State shall be subject to the legislation of that State even if he resides in the territory of another Member State or if the registered office or place of business of the undertaking or individual employing him is situated in the territory of another member State;

22 Article 73 of Regulation 1408/71 reads:

> An employed or self-employed person subject to the legislation of a Member State shall be entitled, in respect of the members of his family who are residing in another Member State, to the family benefits provided for by the legislation of the former State, as if they were residing in that State, subject to the provisions of Annex VI.

23 Council Regulation EEC No 1612/68 of 15 October 1968 on freedom of movement for workers within the Community (OJ L 257, 19.10.1968, p. 2) is listed in Annex V to the EEA Agreement.

24 Paragraphs 1 and 2 of Article 7 of Regulation 1612/68 read:

> 1. A worker who is a national of a Member State may not, in the territory of another Member State, be treated differently from national workers by reason of his nationality in respect of any conditions of employment and work, in particular as regards remuneration, dismissal, and should he become unemployed, reinstatement or re-employed;
>
> 2. He shall enjoy the same social and tax advantages as national workers.

25 Article 42 paragraph 2 of Regulation 1612/68 reads:

> This regulation shall not affect measures taken in accordance with Article 51 [now Article 42] of the Treaty.

Regulation 1408/71 is a measure taken in accordance with ex-Article 51 (now Article 42) EC.

National law

26 According to Section 2(1) in combination with Section 4 of Act of 8 March 2002 No 4 on Family Allowances (*Lov om barnetrygd)* (hereinafter the "Family Allowances Act"), parents living together with their children below the age of 18 are entitled to family allowances if they reside in Norway. Workers employed in Norway but residing in another EEA State with their children are, however, not subject to this residence requirement.

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27 Section 10 of the Family Allowances Act reads:

> Family allowances are paid at rates fixed by the Parliament in its decision on the yearly budget.

28 The Finnmark supplement is granted pursuant to Section 2(1) of the Family Allowances Act. It is decided by Stortinget (the Parliament) in the fiscal budget each year whether the supplement is to be maintained. It was first introduced in 1988 and from that time, the yearly Norwegian budgets, including the budget for 2005, have contained the rates for the Finnmark supplement. According to the Parliament's decision, the supplement is only paid to families residing in the designated area.

29 Reference is made to the Report for the Hearing for a fuller account of the facts, the procedure and the pleas and arguments of the parties, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

III Arguments of the parties

30 The Application is based on the plea that the Defendant has failed to fulfil its obligations pursuant to Article 73 of Regulation 1408/71, and alternatively under Article 7(2) of Regulation 1612/68 by maintaining in force a residence requirement for granting the Finnmark supplement.

31 As concerns Article 73 of Regulation 1408/71, the Applicant submits that it precludes an EEA State from making the entitlement to or the amount of a given family benefit dependent on residence. That applies not only to national but also to regional residence requirements. In its view, Article 73 is to be interpreted to the effect that the family of a migrant worker is to be regarded as residing at the actual place of employment. The Applicant refers in this respect to the purpose of Regulation 1408/71 and in particular to the purpose of Article 73 of the Regulation as described in case law of the Court of Justice of the European Communities (hereinafter the "ECJ"), inter alia Case C-255/99 *Humer* [2002] ECR I-1205, paragraph 39, Case C-333/00 *Maaheimo* [2002] ECR I-10087, paragraph 34 and Case 104/80 *Beeck* v *Bundesanstalt für Arbeit* [1981] ECR 503, paragraph 7. The Applicant also contends that a regional residence requirement will per definition deny regional family benefits to a migrant worker in respect of members of his or her family falling under Article 73. Consequently, that Article would be void of any meaning as concerns such benefits if it did not automatically lift such a requirement. It submits that an *a contrario* interpretation of Article 4(2b) shows that the Regulation is meant to apply to regional benefits and that since the Finnmark supplement is not listed in Annex II, Section III of Regulation 1408/71, Article 73 must be applied in its entirety to the supplement.

32 The Applicant submits that Article 73 contains an absolute rule and therefore does not allow for any exceptions as would be the case if a general discrimination test would be applicable under that Article. This, it argues, follows inter alia from the intention of Article 73 and from the system in Regulation 1408/71. The Regulation contains a general rule prohibiting discrimination in Article 3 and specific rules, such as Article 73, that deal with residence requirements. The Applicant states that whereas the former has been regarded by the ECJ as allowing for exceptions, exceptions have never been considered under Article 73. Moreover, the Applicant argues that Article 3 cannot be applied to a measure which falls within the ambit of a specific provision in Regulation 1408/71 and refers in that regard to Case C-372/02 *Adanez-Vega* v *Bundesanstalt für Arbeit* [2004] ECR I-10761. In any event, the Applicant submits that the resident requirement related to the Finnmark supplement is indirectly discriminatory and non-justified. As such it would be in breach of Article 73 even if it was interpreted as allowing for exceptions.

33 As an alternative claim, the Applicant submits that the residence requirement is in breach of Article 7(2) of Regulation 1612/68. The Applicant explains that the alternative claim must be understood in light of the Defendant's position in the pre-litigation phase, during which the Defendant had not recognised that the Finnmark Supplement falls under Regulation 1408/71. The Applicant leaves it to the discretion of the Court to evaluate whether there is any practical need for a separate assessment of the contested measure under Regulation 1612/68, should the Court find that it is contrary to Regulation 1408/71. If the Court, however, finds that the contested measure is in conformity with Regulation 1408/71 no supplementary question regarding Regulation 1612/68 will in the Applicant's view arise.

34 The Applicant submits in relation to the substantive conditions of Article 7(2) of Regulation 1612/68 that, according to long standing case law, a condition of residence for entitlement to a social advantage must be regarded as indirectly discriminatory since it is intrinsically liable to affect migrant workers more than national workers, and since there is a consequent risk that it will place migrant workers at a particular disadvantage.

35 As concerns possible justification, the Applicant notes that the Finnmark supplement is part of a package of measures intended to reach various specific aims. In its view, the Finnmark supplement is not an adequate means for attaining all these aims. As concerns the aim of promoting sustainable settlement, the Applicant does not contest that the aim is, in abstract, a legitimate aim and that the Finnmark supplement may be suitable to reach that aim. In the Applicant's view, it could, however, be equally well attained if the circle of beneficiaries would be extended to include migrant workers. The Applicant also argues that the

Defendant could apply other alternative measures that are less restrictive, such as the subvention of day-care facilities for children in the designated area.

36 The Defendant claims that the application is unfounded, as Norway has not failed to fulfil its obligations under Article 73 of Regulation 1408/71, or Article 7(2) of Regulation 1612/68, by restricting the Finnmark supplement to those residing in the designated area, and that the contested measure is in any event justified on grounds of promoting sustainable settlement.

37 The Defendant argues that Regulation 1408/71, for the purposes of the present case, calls for the application of the classical discrimination approach including an assessment of whether the measure is objectively justified. The Defendant submits that the Applicant's understanding of Article 73 of Regulation 1408/71 is not in line with the wording, scope and purpose of the Regulation. It points out that the Regulation is only meant to co-ordinate and not to harmonise national social security systems and aims at ensuring equal treatment of national workers and workers from other EEA States. In this respect, the Defendant refers inter alia to case C-543/03 *Dodl* v *Tiroler Gebietskrankenkasse* [2005] I-5049, paragraph 47. The Defendant argues that the Applicant's understanding would mean that the Regulation interferes with the content and structure of the Norwegian social security system, and would undermine the whole purpose of the regional benefit.

38 In the view of the Defendant, a distinction must be drawn between national residence requirements and regional residence requirements. The Defendant argues that the case law of the ECJ does not support the Applicant's understanding of Article 73 of the Regulation, and refers in that regard to Case C-124/99 *Borawitz* v *Landesversicherungsanstalt Westfalen* [2000] ECR I-7293. The Defendant submits that the contested measure is not indirectly discriminatory and is therefore neither in breach of Article 73 of Regulation 1408/71 nor in breach of Article 7(2) of Regulation 1612/68. In the Defendant's view, the residence requirement in question is in fact likely to affect national workers to a greater extent than migrant workers, since it is more likely that commuting workers will live in other parts of Norway than in other EEA States. Moreover, the situation of a parent raising a child in the designated area is not comparable to that of a worker commuting to the same area but not raising a child there.

39 In any event, the Defendant submits that the residence requirement is objectively justified. In its view, the Finnmark supplement pursues a legitimate aim which is to promote sustainable settlement in certain sparsely populated parts of Norway, and is suitable for the attainment of this aim. The Defendant points out that the payment creates an advantage for families who settle in the area compared to families living outside the area. The objective of the supplement would be undermined if families who do not reside in the area would also get the

supplement. As concerns possible alternative measures, the Defendant submits that it has not been able to find measures that to the same degree reach the target group and can be allocated at a minimum of administrative and financial cost. In its view, the alternative measures pointed out by the Applicant would not meet with the political objective behind the Finnmark supplement. The Defendant submits, inter alia, that the suggested measures regarding support to child-care facilities in the region would not benefit all families living in the area. Neither would such a measure entail the same element of choice for the beneficiaries with regard to how they want to raise their children. The Defendant also emphasises that commuters do not have the same impact on the local community as residents. Finally, the Defendant argues that the amount of the Finnmark supplement does not go beyond what is necessary to motivate people to settle in the area.

40 As concerns ESA's argument in relation to Article 4(2b) of Regulation 1408/71, the Defendant expresses the view that there is no need to list the Finnmark supplement as an exception to the Regulation, given that it is non-discriminatory and objectively justified.

41 The Commission of the European Communities submits, as regards Article 73 of Regulation 1408/71, that the Contracting Parties may, in principle, impose a regional residence requirement, subject to the overriding principle of equal treatment. The Commission concurs with the arguments of the Applicant in relation to the discriminatory nature of the regional residence requirement. As concerns possible justification, the Commission submits that the aim of the Finnmark supplement, i.e. to promote sustainable settlement and stimulate business and industry, could constitute a legitimate aim. In its view however, Norway has failed to prove that the regional residence requirement is a proportionate means of achieving this objective. The Commission therefore concludes that the regional residence requirement violates both Article 73 of Regulation 1408/71 and Article 7(2) of Regulation 1612/68.

42 The United Kingdom, in its observations, mainly focuses on the interpretation of Regulation 1612/68 and the issue of exportability of social advantages falling within Article 7(2) of Regulation 1612/68. The United Kingdom argues that Article 7(2) does not normally envisage the export of social advantages. Should the Court, however, consider that the Finnmark supplement is exportable under Article 7(2), it notes that any discrimination arising from the residence requirement is indirect and thus potentially capable of justification. Moreover, the United Kingdom notes that the Applicant expressly accepts that the promotion of sustainable settlement is a legitimate aim and that therefore the outcome of the case rests on whether the Court accepts Norway's arguments as to the proportionality of the measures chosen to achieve that aim.

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IV Findings of the Court

43 The application is based on the plea that the regional residence requirement for the granting of the Finnmark supplement violates Article 73 of Regulation 1408/71 and, alternatively, Article 7(2) of Regulation 1612/68.

44 With regard to Regulation 1408/71, the dispute essentially concerns two legal questions. First, whether Article 73 entails, as the Applicant submits, a rule according to which no residence requirements are permitted, neither national nor regional, or whether Article 73, as submitted by the Defendant, only provides that the family of a migrant worker shall be deemed to be residing in the State of employment as such. Regional residence requirements would then be allowed as long as they are non-discriminatory or objectively justified. Second, if Article 73 does not prohibit all regional residence requirements, the parties disagree on whether the regional residence requirement in question discriminates against migrant workers and, if so, whether it is justified.

45 The Finnmark supplement is granted pursuant to Section 2(1) of the Family Allowances Act. Norway's declaration, provided pursuant to Article 5 of Regulation 1408/71, lists the Family Allowances Act as an Act concerning family benefits within the meaning of Article 4(1)(h) of the Regulation. Moreover, the Finnmark supplement comes within the definition of family benefits under Article 1(u)(i) of the Regulation. Therefore, the Finnmark supplement constitutes a family benefit within the meaning of the Regulation.

46 Regulation 1408/71 was adopted to further the free movement of workers. It provides for a system of coordination of social security legislation within the EEA and is intended to ensure equal treatment with respect to different social security legislation within the EEA. The overall goal is to avoid that migrant workers are deterred from exercising their right to freedom of movement. To further this objective, the Regulation sets up, in Title II, a complete and uniform system of choice of law rules. Those rules are intended to prevent the simultaneous application of more than one national social security system to persons covered by the Regulation, and to ensure that those persons are not left without social security because there is no legislation applicable to them (see Case E-3/04 *Tsomakas* v *Norway* [2004] EFTA Court Report 95, paragraph 27).

47 Article 73 of Regulation 1408/71 forms part of Title III on "Special provisions relating to the various categories of benefits" and stipulates, in the context of the EEA Agreement, that a worker subject to the legislation of an EEA State shall be entitled to the family benefits provided for by the legislation of that EEA State for members of his family residing in the territory of another EEA State, as if they were residing in the territory of the first EEA State. The provision is intended to

prevent EEA States from making entitlement to and the amount of family benefits dependent on residence of the members of the worker's family in the EEA State providing the benefits, so that EEA workers are not deterred from exercising their right to freedom of movement (see for comparison, inter alia, Case C-543/03 *Dodl*, paragraph 46).

48 Article 73 of Regulation 1408/71 goes together with the rule laid down in Article 13(2)(a) in Title II of that Regulation, which stipulates that a worker employed in the territory of one EEA State shall be subject to the legislation of that State even if he or she resides in the territory of another EEA State. That arrangement stems from the objective of the Regulation to guarantee all workers who are EEA nationals, and who move within the EEA, equal treatment with regard to different national laws and the enjoyment of social security benefits irrespective of the place of their employment or of their residence. Article 73 must be interpreted uniformly in all Contracting Parties regardless of the arrangements made by national law on the acquisition of entitlement to family benefits (see for comparison, inter alia, Case C-543/03 *Dodl*, paragraph 47).

49 Article 73 of Regulation 1408/71 does not itself confer any entitlement to family benefits. Such benefits are granted on the basis of the relevant provisions of national law (see for comparison Case C-266/95 *García* v *Bundesanstalt für Arbeit* [1997] ECR I-3279, paragraph 29). Accordingly, Article 73 does not limit the rights of the Contracting Parties to determine the conditions for entitlement to family benefits, provided that migrant workers are, with respect to their family residing in another EEA State, treated equally with national workers in the State of employment. In this respect, Article 73 clarifies that for the purpose of a worker's family benefits, a requirement of residence in the State in which the worker has his place of employment may not be imposed in relation to the worker's family living outside that State, once the worker, under Article 13 paragraphs (1) and (2)(a), is subject to the social security legislation, including legislation on family benefits, of that State.

50 Considering the above, the Court holds that Article 73 of Regulation 1408/71 is not to be interpreted to the effect that the family of a migrant worker is to be regarded as residing at the actual place of employment and thereby automatically entitled to regional benefits such as the one in question. Such an interpretation follows neither from the wording of the Article, which only points to the legislation of the State in which the worker has his or her place of employment; nor does it follow from the purpose of the Regulation (see paragraph 46 above) that a worker living with his or her family outside the state of employment and therefore outside the designated area, should necessarily receive more favourable treatment than workers living with their families in Norway but outside the designated area.

51 Furthermore, the scheme of Regulation 1408/71 does not lead to the conclusion that Article 73 is to be interpreted as proposed by the Applicant. In that regard, it is irrelevant that the Finnmark supplement has not been listed by Norway pursuant to Article 4(2b) of the Regulation in Annex II, Section III of the Regulation, and is therefore not excluded from the scope of application of the Regulation. It is consistent with the scheme of the Regulation to subject such regional benefits to a requirement of being non-discriminatory or objectively justified, a principle which is contained in the Regulation in the form of Article 3(1).

52 As concerns the application of Article 3(1) of Regulation 1408/71, the Court notes that the situation in the present case is not comparable to the one dealt with by the ECJ in Case C-372/02 *Adanez-Vega*, referred to above. In that case, the ECJ found that Article 3 of Regulation 1408/71 could not be applied if that would mean rewriting a specific provision which was applicable to the case at hand. In the present case, the application of Article 3 to the regional residence requirement would not entail a rewrite of Article 73 of Regulation 1408/71, regarding both its wording and its purpose and place in the overall scheme of the Regulation.

53 Therefore, the Court holds that Article 73 of Regulation 1408/71 does not contain a prohibition against a regional residence requirement such as the one at issue in the present case, which is linked to a regional supplement to a family benefit, and that the Regulation only prohibits such a measure if it is found to entail unjustified discrimination against migrant workers.

54 Consequently, the Court must examine whether the regional residence requirement in question is in breach of Article 3(1) of Regulation 1408/71. In the context of the EEA Agreement, Article 3(1) is to ensure, in accordance with Article 28 EEA, equal treatment in matters of social security, without distinction based on nationality, by abolishing all discrimination deriving from the national legislation of the EEA States (see for comparison Case C-124/99 *Borawitz*, paragraph 23).

55 The regional residence requirement in question applies equally to national and migrant workers, and is therefore not directly discriminatory. However, the requirement of equal treatment in Article 3(1) of Regulation 1408/71 prohibits not only direct discrimination based on nationality, but also indirect discrimination which, through the application of other distinguishing criteria, leads in fact to the same result.

56 A provision of national law must be regarded as indirectly discriminatory if it is intrinsically liable to affect migrant workers more than national workers, and if there is a consequent risk that it will place the former at a particular disadvantage. It is not necessary in this respect to find that the provision in question does in practice affect a substantially higher proportion of migrant workers. It is sufficient

that it is liable to have such an effect (see Case C-237/94 *O'Flynn* v *Adjudication Officer* [1996] ECR I-2617, paragraphs 20 and 21). A regional residence requirement such as the one in question is liable to operate to a particular disadvantage for migrant workers, since within the relevant group – parents subject to Norwegian legislation on family allowance – most of the workers who fulfil the regional residence requirement for receiving the Finnmark supplement are likely to be Norwegian nationals. In this respect, it does not matter whether the requirement also negatively affects national workers (see, for comparison, Cases C-266/95 *García*, paragraph 35; C-281/98 *Angonese* v *Cassa di Risparmio di Bolzano* [2000] ECR I-4139, paragraphs 40 and 41; and C-388/01 *Commission* v *Italy* [2003] ECR I-721, paragraphs 14 and 15).

57 Next, it needs to be examined whether the contested measure can be objectively justified. The Finnmark supplement was introduced as a part of a package of measures with the overall aim of promoting sustainable settlement in the designated area, where there has been a decline in population, and where living conditions are particularly difficult due to inter alia harsh climate, vast distances and sparse population. The residence requirement in question therefore stems from a regional policy goal – to prevent an area from being depopulated – which can in principle be regarded as a legitimate aim (see for comparison Case C-302/97 *Konle* v *Austria* [1999] ECR-I 3099, paragraph 40 and as concerns services Case E-1/03 *EFTA Surveillance Authority* v *Iceland* [2003] EFTA Court Report 143, paragraph 35; and further Case E-6/98 *Norway* v *EFTA Surveillance Authority* [1999] EFTA Court Report, 74, paragraph 70.

58 Whereas certain other measures included in the Finnmark package seem to directly be aimed at promoting business and industry in order indirectly to promote sustainable settlement, there is no indication in appropriation bills or Government Reports to Parliament dealing with the Finnmark package that the aim of the supplement is to promote business and industry. Rather, the Court is convinced that the aim of the supplement, which was introduced in 1989 prior to the other measures constituting the Finnmark package, is to promote a sustainable settlement directly, see Report to Parliament (Stortingsmelding) No 8 (2003–2004) at page 45. There is nothing in the case file to suggest that the application of the measure in question is not in accordance with this motivation. Therefore, the Court can not attach importance to the question of whether the Supplement was also intended indirectly to stimulate business and industry in the designated area.

59 In order to be justified, the residence requirement must be suitable for securing the objective which it pursues, and must not exceed what is necessary in order to achieve it, so as to accord with the principle of proportionality.

60 As concerns the suitability of the contested measure, the Court finds that families residing in an area obviously contribute to the sustainable settlement of that area. Moreover, ensuring that children grow up in a certain area is especially important for maintaining or increasing its population. It is clear that people who have been raised in a given area will be more attached to that area, emotionally and otherwise, than people who have not been raised there. Granting a benefit to families residing with children in the designated area is a measure capable of motivating them to maintain a residence or to settle there. The regional residence requirement in question is therefore suitable to attain the particular aim pursued.

61 The Applicant suggests that the aim of the Finnmark supplement could be equally well attained if it were also granted to migrant workers employed in the designated area. The Defendant argues that families residing in a particular area are likely to contribute to and integrate in the local society more than commuters, and that extending the Finnmark supplement to commuters could contradict the aim of promoting sustainable settlement in the designated area. The Court shares the Defendant's view. In that regard, the number of commuting migrant workers affected is irrelevant. As to whether less restrictive measures than the Finnmark supplement would have sufficed, the Court notes that the Finnmark supplement supports in an objective way all families bringing up children up to the age of 18 in the designated area irrespective of their particular needs. Other measures pointed out by the Applicant are directed towards certain groups of families defined in a narrower way, such as those families that have children of child-care age. Bearing this in mind, the Court holds that the Defendant has sufficiently shown that other equally efficient but less restrictive means do not exist.

62 On those grounds, the Court holds that the residence requirement for the granting of the Finnmark supplement is indirectly discriminatory against migrant workers but that it is objectively justified on grounds of promoting sustainable settlement in the designated area. The contested measure therefore does not violate Regulation 1408/71.

63 Having reached this conclusion, the Court, in turning to the alternative claim that the residence requirement for the granting of the Finnmark supplement would violate Article 7(2) of Regulation 1612/68, refers to Article 42(2) of that Regulation. Pursuant to this provision, a measure which has been taken in accordance with Regulation 1408/71 does not fall to be assessed under Regulation 1612/68 (see, to this effect, Case 122/84 *Scrivner* v *Centre public d'aide sociale de Chastre* [1985] ECR I-1027, paragraph 16; the Opinion of Advocate General Alber in Case C-35/97 *Commission* v *France* [1998] ECR I-5325, paragraph 14; and the judgment of the ECJ in that case, paragraphs 42 to 44). Consequently, since the Court has found the measure at issue in the case at hand to be in

accordance with Regulation 1408/71, Article 7(2) of Regulation 1612/68 is not applicable.

64 It follows from the above that the application must be dismissed as unfounded.

V Costs

65 Under Article 66(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. The Defendant has asked that the Applicant be ordered to pay the costs. Since the latter has been unsuccessful in its application, it must be ordered to pay the costs. The costs incurred by the United Kingdom and the Commission of the European Communities are not recoverable.

On those grounds,

THE COURT

hereby:

1. Dismisses the application.

2. Orders the EFTA Surveillance Authority to pay the costs of the Defendant.

Carl Baudenbacher Thorgeir Örlygsson Henrik Bull

Delivered in open court in Luxembourg on 3 May 2006.

Henning Harborg
Registrar

Carl Baudenbacher
President