



JUDGMENT OF THE COURT

14 December 2007

(Failure by a Contracting Party to fulfil its obligations – Article 4(1) and (2a) of Regulation EEC 1408/71 – social security benefits and special non-contributory benefits – legal effect of Annex IIa to Regulation EEC 1408/71 listing special non-contributory benefits – Decision 1/95 of the EEA Council on the entry into force of the EEA Agreement for Liechtenstein)

In Case E-5/06,

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

Applicant,

v

The Principality of Liechtenstein, represented by Dr Andrea Entner-Koch, Director of the EEA Coordination Unit, acting as Agent, Vaduz, Liechtenstein,

Defendant,

APPLICATION for a declaration that the Principality of Liechtenstein has failed to fulfil its obligations pursuant to Articles 19(1) and (2), 25(1) and 28(1) of the Act referred to at point 1 of Annex VI to the EEA Agreement, i.e. 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.

THE COURT,

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

Registrar: Skúli Magnússon,

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having regard to the written pleadings of the parties and the written observations of the United Kingdom, represented by Elizabeth O'Neill, Treasury Solicitors, acting as Agent, and Christopher Vajda QC; and of the Commission of the European Communities, represented by Viktor Kreuzschitz, its Legal Advisor, and Nicola Yerrell, a member of its Legal Service, acting as Agents,

having regard the Report for the Hearing,

having heard oral argument of the Applicant, represented by its Agent Niels Fenger, the Defendant, represented by its Agent Dr Andrea Entner-Koch, the United Kingdom represented by Christopher Vajda QC and the Commission of the European Communities, represented by Nicola Yerrell, at the hearing on 3 October 2007,

gives the following

Judgment

I The application

- 1 By application lodged at the Court Registry on 14 November 2006, the EFTA Surveillance Authority (hereinafter "ESA") brought an action under the second paragraph of Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (hereinafter "SCA"). ESA is seeking an order from the EFTA Court that the Principality of Liechtenstein (hereinafter "Liechtenstein" or "the Defendant") has failed to fulfil its obligations pursuant to Articles 19(1) and (2), 25(1) and 28(1) of the Act referred to at point 1 of Annex VI to the Agreement on the European Economic Area (hereinafter "EEA" or the "EEA Agreement"), i.e. 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 "Regulation 1408/71"), as adapted to the EEA Agreement by Protocol 1 thereto.

II Facts and pre-litigation procedure

- 2 On certain conditions laid down in Liechtenstein law, persons resident in Liechtenstein are entitled to the so-called helplessness allowance (*Hilflosenentschädigung*). This allowance takes the form of a monthly payment.
- 3 By letter of 18 November 2003, ESA informed the Liechtenstein Government that, on 10 November 2003, it had received a complaint alleging that the requirement of residence in Liechtenstein for entitlement to helplessness allowance was not in accordance with EEA law. In its reply of 22 December 2003, the Liechtenstein Government stated that, in a decision of 12 February 2003, the highest Liechtenstein Administrative Court (*Verwaltungsgerichtshof*,

formerly *Verwaltungsbeschwerdeinstanz*) had held the allowance to be a special non-contributory social security benefit that should be granted only to residents in Liechtenstein. Furthermore, the Government argued that the allowance had been qualified as a special non-contributory benefit when the Principality of Liechtenstein acceded to the EEA Agreement.

- 4 By letter of 2 November 2004, ESA informed the Liechtenstein Government of its preliminary conclusion that the helplessness allowance was a sickness benefit in cash that should be granted also to beneficiaries in other EEA States. In its reply of 3 January 2005, the Liechtenstein Government maintained the views expressed in its previous answer.
- 5 On 6 April 2005, ESA issued a letter of formal notice concluding that, by applying a requirement of residence in Liechtenstein for entitlement to helplessness allowance, the Principality of Liechtenstein was in breach of Articles 19(1) and (2), 25(1) and 28(1) of Regulation 1408/71. The conclusion applied to all employed or self-employed persons who were covered by the social security legislation of Liechtenstein pursuant to Regulation 1408/71, unemployed persons who received unemployment benefits from Liechtenstein while seeking work in another EEA State, and persons who were entitled to draw a Liechtenstein pension, but resided in another EEA State where they would not be entitled to similar sickness cash benefits, as well as members of these persons' families.
- 6 In its reply of 17 June 2005, the Liechtenstein Government maintained that the helplessness allowance qualified as a 'special' benefit within the meaning of Article 4(2a) of the Regulation. The Government stressed that there were two systems in place in Liechtenstein which covered the need for domiciliary care: the basic system, on the one hand, of which the helplessness allowance was a part, and the sickness insurance system, on the other hand, of which domiciliary health care was a part. It was argued that these two benefits should be distinguished, and that only the latter benefit was a sickness insurance benefit in accordance with Article 4(1) of Regulation 1408/71. The helplessness allowance was a "mixed-type benefit", with characteristics both of social security and social assistance, thereby rightfully belonging in Annex IIa to Regulation 1408/71.
- 7 Also in the reply, the importance for Liechtenstein of the listing of the helplessness allowance in Annex IIa to Regulation 1408/71 was emphasised. Furthermore, it was argued that the other Contracting Parties to the EEA Agreement had made an assessment of the benefit against the conditions for listing it in Annex IIa, and that the Principality of Liechtenstein had adapted its scheme in order to fit those conditions. Therefore, the Principality of Liechtenstein could in good faith rely on the consensus and the result reached by the Contracting Parties.
- 8 On 22 March 2006, ESA delivered a reasoned opinion, stressing that, irrespective of the basis for listing the allowance in Annex IIa to Regulation 1408/71, the case law of the Court of Justice of the European Communities (hereinafter "the ECJ")

had confirmed that the listing itself did not have constitutive effect. This interpretation was, according to ESA, equally valid in the EEA.

- 9 In its reasoned opinion, ESA further maintained that the helplessness allowance should be classified as a social security benefit according to Article 4(1) of Regulation 1408/71 since it was based on a legally defined position, without any individual and discretionary assessment of personal needs.
- 10 Also in its reasoned opinion, ESA alleged that the allowance did not, in any event, constitute a ‘special’ benefit within the meaning of Article 4(2a) of Regulation 1408/71. In this regard, ESA pointed out, in particular, that the allowance was not granted on a precondition of financial need. ESA maintained that the allowance should be classified as an exportable benefit in cash and not as a non-exportable benefit in kind.
- 11 In its reply of 30 June 2006, the Liechtenstein Government maintained the position set out in its reply to the letter of formal notice. As an alternative argument, it was put forward that, should the helplessness allowance be a sickness benefit, the allowance, in any event, constituted a benefit in kind and not a cash benefit.

III Legal background

EEA law

- 12 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.*

- 13 Regulation 1408/71 is referred to at point 1 of Annex VI to the EEA Agreement. The Regulation is adapted to the EEA Agreement by way of Protocol 1 thereto and the adaptations contained in Annex VI. Regulation 1408/71 states:

- 14 Under Title I *General provisions*:

Article 4 Matters covered:

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

- (a) sickness and maternity benefits;*

- (b) *invalidity benefits, including those intended for the maintenance or improvement of earning capacity;*
- (c) *old-age benefits;*
- (d) *survivors' benefits;*
- (e) *benefits in respect of accidents at work and occupational diseases;*
- (f) *death grants;*
- (g) *unemployment benefits;*
- (h) *family benefits.*

2. *This Regulation shall apply to all general and special social security schemes, whether contributory or non-contributory, and to schemes concerning the liability of an employer or shipowner in respect of the benefits referred to in paragraph 1.*

2a. *This Regulation shall also apply to special non-contributory benefits which are provided under legislation or schemes other than those referred to in paragraph 1 or excluded by virtue of paragraph 4, where such benefits are intended:*

- (a) *either to provide supplementary, substitute or ancillary cover against the risks covered by the branches of social security referred to in paragraph 1 (a) to (h);*

or

- (b) *solely as specific protection for the disabled.*

[...]

4. *This Regulation shall not apply to social and medical assistance.*

15 Under Title I *General provisions:*

Article 10a *Special non-contributory benefits, paragraph 1:*

Notwithstanding the provisions of Article 10 and Title III, persons to whom this Regulation applies shall be granted the special non-contributory cash benefits referred to in Article 4 (2a) exclusively in the territory of the Member State in which they reside, in accordance with the legislation of that State, provided that such benefits are listed in Annex IIa. Such benefits shall be granted by and at the expense of the institution of the place of residence.

16 As referred to at point 1 adaptation (m) of Annex VI to the EEA Agreement, the following has been added to Annex IIa *Special non-contributory benefits* to Regulation 1408/71:

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[...]

(d) *Helplessness allowance (Law on supplementary benefits to the old age, survivors' and invalidity insurance of 10 December 1965 as revised on 12 November 1992).*

17 Under Title III Special provisions relating to the various categories of benefits, Chapter I Sickness and maternity:

Section 2 Employed or self-employed persons and members of their families:

Article 19 Residence in a Member State other than the competent State – General rules:

1. An employed or self-employed person residing in the territory of a Member State other than the competent State, who satisfies the conditions of the legislation of the competent State for entitlement to benefits [...] shall receive in the State in which he is resident:

(a) benefits in kind provided on behalf of the competent institution by the institution of the place of residence in accordance with the provisions of the legislation administered by that institution as though he were insured with it;

(b) cash benefits provided by the competent institution in accordance with the legislation which it administers. [...]

2. The provisions of paragraph 1 shall apply by analogy to members of the family who reside in the territory of a Member State other than the competent State in so far as they are not entitled to such benefits under the legislation of the State in whose territory they reside. [...]

18 Under Title III Special provisions relating to the various categories of benefits, Chapter I Sickness and maternity:

Section 3 Unemployed persons and members of their families:

Article 25(1):

An unemployed person who was formerly employed or self-employed and to whom the provisions of Article 69(1) or Article 71(1)(b)(ii), second sentence apply and who satisfies the conditions laid down in the legislation of the competent State for entitlement to benefits in kind and cash benefits [...] shall receive for the period of time referred to in Article 69(1)(c):

(a) benefits in kind which become necessary on medical grounds for this person during his stay in the territory of the Member State where he

is seeking employment, taking account of the nature of the benefits and the expected length of the stay. These benefits in kind shall be provided on behalf of the competent institution by the institution of the Member State in which the person is seeking employment, in accordance with the provisions of the legislation which the latter institution administers, as if he were insured with it;

- (b) cash benefits provided by the competent institution in accordance with the provisions of the legislation which it administers. [...]*

19 Under Title III Special provisions relating to the various categories of benefits, Chapter I Sickness and maternity:

Section 5 Pensioners and members of their families:

Article 28 Pensions payable under the legislation of one or more States, in cases where there is no right to benefits in the country of residence, paragraph 1:

A pensioner who is entitled to a pension under the legislation of one Member State or to pensions under the legislation of two or more Member States and who is not entitled to benefits under the legislation of the Member State in whose territory he resides shall nevertheless receive such benefits for himself and for members of his family, in so far as he would [...] be entitled thereto under the legislation of the Member State or of at least one of the Member States competent in respect of pensions if he were resident in the territory of such State. The benefits shall be provided under the following conditions:

- (a) benefits in kind shall be provided on behalf of the institution referred to in paragraph 2 by the institution of the place of residence as though the person concerned were a pensioner under the legislation of the State in whose territory he resides and were entitled to such benefits;*
- (b) cash benefits shall, where appropriate, be provided by the competent institution as determined by the rules of paragraph 2, in accordance with the legislation which it administers.*

National law

20 Pursuant to Article 3bis(1) of the Liechtenstein Act of 10 December 1965 on Supplementary Benefits to Old-age, Survivors' and Invalidity Insurance (hereinafter "the Supplementary Benefits Act"):

persons with residence in Liechtenstein are, irrespective of their economic circumstances, entitled to the helplessness allowance (Hilflosenentschädigung), if they are helpless and are not entitled to a helplessness allowance under the law of mandatory accident insurance or a comparable benefit provided by a foreign social insurance. Persons

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having completed their 65th year are entitled to the helplessness allowance if they are helpless at least in the medium degree and elderly within the meaning of Article 1bis.

- 21 Persons who are at least 64 years of age, or who draw an old-age pension, are considered elderly under Article 1bis of the Supplementary Benefits Act.
- 22 According to Article 3bis(3) of the Supplementary Benefits Act, a person is considered to be helpless if he or she permanently requires a degree of help from third persons or personal surveillance in order to carry out daily tasks. The Defendant has listed getting up, getting dressed and undressed, nutrition, personal hygiene and social interaction as examples of daily tasks. For persons over the age of 65, “permanently” means that the state of helplessness has been present without substantial interruption during the previous three months, for persons under this age the relevant period is one year.
- 23 The helplessness allowance is awarded irrespective of whether the recipient is entitled to a sickness insurance benefit or a pension on any other basis.
- 24 In 2006, the allowance amounted to between CHF 430 and CHF 860 per month depending on the degree of helplessness. As of 1 January 2007, the amounts awarded per month are CHF 442, CHF 663 and CHF 884 in cases of helplessness of a low, medium and high degree, respectively.
- 25 The allowance is granted without reference to the recipient’s income and the size of his property. It is, in other words, not means-tested. Nor is it a condition that the recipient lives in his or her own home, as also persons residing in special homes for the elderly or the disabled are entitled to the allowance.
- 26 Where the recipient resides in a special home for the elderly or the disabled, an additional charge, equivalent to the amount paid out in helplessness allowance, is added to the monthly fee paid to the institution.
- 27 The helplessness allowance is financed from the State budget and is not linked to past contributions.
- 28 The recipient of the allowance does not have to be sick in the strict sense of the word, so for instance an elderly person would qualify for the allowance. Nor is the allowance contingent upon the need for medical care. Rather, health care costs are met according to the provisions of the Sickness Insurance Act of 24 November 1971 (hereinafter “the Sickness Insurance Act”).
- 29 A separate benefit, domiciliary health care (*Leistungen bei häuslicher Pflege*) is provided for under the Sickness Insurance Act up to an amount of CHF 100 per day. According to Article 62(3) of the Sickness Insurance Regulation of 14 March 2000, the amount is reduced if the recipient also draws helplessness allowance. However, an exemption from this curtailment is provided for if the recipient of a helplessness allowance is also entitled to means-tested

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supplementary benefits or if the allowance has been awarded solely for the purpose of helping the recipient to maintain social interaction.

- 30 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.

IV Arguments of the parties

- 31 The application is based on the plea that Liechtenstein has failed to fulfil its obligations pursuant to Articles 19(1) and (2), 25(1) and 28(1) of Regulation 1408/71 by maintaining in force a residence requirement for granting the helplessness allowance.
- 32 ESA argues that the listing of the helplessness allowance in Annex IIa to Regulation 1408/71 does not have constitutive effect. Reference is made to the ECJ's judgments in Cases C-215/99 *Jauch* [2001] ECR I-1901 (hereinafter "*Jauch*"), at paragraphs 16–22; C-43/99 *Leclere and Deaconescu* [2001] ECR I-4265, at paragraph 36; C-160/02 *Skalka* [2004] ECR I-5613 (hereinafter "*Skalka*"), at paragraphs 19–21; C-154/05 *Kersbergen-Lap* [2006] ECR I-6249 (hereinafter "*Kersbergen-Lap*"); and, concerning Annex II to Regulation 1408/71, C-286/03 *Hosse* [2006] ECR I-1771 (hereinafter "*Hosse*"), at paragraph 22.
- 33 Accordingly, ESA contends that despite the listing in Annex IIa, the Court must assess whether the allowance fulfils the criteria under Article 4(2a) or whether the allowance falls under Article 4(1), as these provisions are mutually exclusive.
- 34 ESA details how the ECJ has found German and Austrian care allowances not to fall under Article 4(2a) but rather under Article 4(1)(a) as sickness benefits in cash. It is maintained that the Liechtenstein helplessness allowance is the same kind of benefit as those care allowances. Particular reference is made to Case C-160/96 *Molenaar* [1998] ECR I-843 (hereinafter "*Molenaar*"), *Jauch*, *Hosse* and Joined Cases C-502/01 and C-31/02 *Gaumain-Cerri and Barth* [2004] ECR I-6483 (hereinafter "*Gaumain-Cerri*").
- 35 ESA further emphasises how the ECJ has underlined that the provisions of Regulation 1408/71 must be interpreted in light of the objective of Article 42 EC, which is to contribute to the establishment of the greatest possible freedom of movement for migrant workers. The aims of Articles 39–42 EC would not be attained if, as a consequence of the exercise of their right to freedom of movement, workers were to lose the social security advantages guaranteed to them by the legislation of one Member State. Particular reference is made to *Hosse*, at paragraphs 24–25.
- 36 ESA contends that the relationship between Annex IIa and Articles 4(2a) and 10a of Regulation 1408/71 is the same in the EEA and the EC legal order. In both contexts, the relationship between the inclusion of the benefit in Annex IIa and

the provisions of the Regulation itself is purely one of interpretation between different provisions in the same legal instrument.

- 37 While, according to ESA, the Defendant argued during the pre-litigation procedure that the inclusion of the Liechtenstein benefit should be treated in a manner different from the inclusion of benefits from other Contracting Parties, no statements by the Contracting Parties supporting that view have been adduced. Nor was any specific adaptation stipulating that the case law of the ECJ should not apply to Liechtenstein negotiated. Furthermore, referring to the Defendant's argument during the pre-litigation procedure that the non-exportability of the benefit was of particular importance to Liechtenstein, ESA finds no reason to believe that the Defendant is the only State having attached importance to the non-exportability of a particular benefit. Both under EC law and in the EEA, a given benefit can only be included in the Annex if the other Member States/Contracting Parties agree thereto, and both in the EU and in the EEA, one must expect that the other States studied the benefit in question before giving that consent.
- 38 Turning to the application of Article 4(1) in the present case, ESA submits that according to the ECJ, a benefit may be regarded as a social security benefit within the meaning of Article 4(1) in so far as it is: first, granted without any individual or discretionary assessment of personal needs to recipients on the basis of a legally defined position, and second, provided that it concerns one of the risks expressly listed in Article 4(1) of Regulation 1408/71. Reference is made to Cases 249/83 *Hoeckx* [1985] ECR 973, at paragraphs 12–14, 122/84 *Scrivner* [1985] 1027, at paragraphs 19–21, and C-78/91 *Hughes* [1992] ECR I-4839 (hereinafter "*Hughes*"), at paragraph 15. Moreover, the ECJ has found that benefits to persons reliant on care "must be regarded as 'sickness benefits' within the meaning of Article 4(1)(a) of Regulation No 1408/71". Reference is made to *Hosse*, at paragraph 38.
- 39 ESA submits that the helplessness allowance is granted on the basis of legally defined criteria which, if met, confer entitlement to the benefit. The competent authority has no power to take account of other personal circumstances and thus no discretion to assess personal need on the basis of criteria other than those defined in the law.
- 40 As to the second condition for Article 4(1) to be applied, ESA acknowledges that there is, in medical terms, a difference between sickness (which is expressly listed in Article 4(1)) and reliance on care, as argued by the Defendant. However, to ESA this difference is immaterial for the classification of the allowance under Regulation 1408/71. According to ESA, the ECJ has held that the notion of sickness benefits has to be interpreted broadly and that it covers care benefits. Reference is made to the opinion of Advocate General Kokott in *Hosse*, at point 53.

- 41 As regards the link between the allowance and health care, ESA maintains that the helplessness allowance constitutes the same kind of benefit as the care allowances at issue in *Molenaar*, *Jauch*, *Gaumain-Cerri* and *Hosse*.
- 42 As to Article 4(2a)(b), ESA points out that a benefit must not only be a “special non-contributory benefit” but also intended “solely” to provide “specific” protection for disabled persons, in order for this provision to apply. However, ESA submits, the helplessness allowance is a general benefit granted to all persons in need of care. Hence, although the allowance is surely of particular advantage to many disabled persons, it is not limited to that group. This is so, as some beneficiaries, in particular the elderly, cannot necessarily be considered as disabled persons. Reference is made to the opinion of Advocate General Kokott in *Hosse*, at point 79.
- 43 Presupposing that the helplessness allowance falls under Article 4(1), ESA finally addresses the question of whether the allowance is to be regarded as a benefit in cash or in kind. The ECJ has held, it is admitted, that the term ‘benefits in kind’ does not exclude the possibility that such benefits may comprise payments made by the debtor institution, in particular in the form of direct payments or the reimbursement of expenses. Reference is made to Case 61/65 *Vaassen v Beambtenfonds Mijnbedrijf* [1966] ECR English special edition 261, at page 278 and *Molenaar*, at paragraph 31. However, the ECJ has also held that a given benefit cannot be classified as a benefit in kind if it takes the form of financial aid which enables the standard of living of persons requiring care to be improved as a whole, in other words to compensate for the additional expense brought about by their condition. ESA contends that this will e.g. be the case if: (i) the benefit is periodical; (ii) the benefit is not subject either to certain expenditure, such as care expenditure, having already been incurred, or *a fortiori* to the production of receipts for the expenditure incurred; (iii) the allowance is fixed and independent of the costs actually incurred by the recipient in meeting his daily requirements; (iv) recipients are to a large extent unfettered in their use of the sums thus allocated to them, e.g. the allowance may be used by the recipients to remunerate a member of their family or entourage who is assisting them on a voluntary basis. This is so, ESA contends, even if the benefit in question is designed to cover certain costs entailed by reliance on care rather than to compensate for loss of earnings on the part of the recipient. Reference is made to *Molenaar*, at paragraphs 34–35, *Gaumain-Cerri*, at paragraphs 26–27, *Hosse*, at paragraph 48, *Jauch*, at paragraph 35 and Case C-466/04 *Herrera* [2006] ECR I-5341, at paragraphs 32–33.
- 44 ESA’s analysis of the case and its conclusions are shared by the Commission.
- 45 The Defendant, Liechtenstein, notes that in December 2006, Liechtenstein authorities received information that by decision of 6 February 2006, the complainant’s pension fund in his EEA State of residence had retroactively recognised his right to a pension there, with effect as of 1 October 2003. The complainant therefore was not only entitled to draw a pension under Liechtenstein legislation but also under the legislation of the EEA State where he

resided. In such a situation, Article 27 of Regulation 1408/71 determines that the pensioner shall receive the benefits in question in the country of residence. Against this background, the Defendant points out that irrespective of the outcome of the present Application, the complainant's request could not be satisfied by the Liechtenstein authorities, as under the rules of Regulation 1408/71 the Defendant was not the competent State for awarding the benefit in question. Therefore, it is contended, the case should not have been pursued further against the Defendant. It is added that it is up to the Court to decide whether it deems it necessary to deal with the Application or not.

- 46 The Defendant acknowledges the dynamic character of the EEA Agreement as well as the principle of homogeneity in the EEA. However, it is contended that the entry of the Liechtenstein helplessness allowance into Annex IIa was a matter of great concern when the Principality of Liechtenstein negotiated accession to the EEA Agreement. At that time, Annex IIa was considered as having constitutive effect, meaning that benefits listed therein were recognised as being non-exportable. According to the Defendant, this can be derived from the fact that until 2001 the ECJ did not question whether the listing of a benefit in Annex IIa was compatible with Community law. Reference is made to Cases C-20/96 *Snares* [1997] ECR I-6057 (hereinafter "*Snares*"), at paragraph 32, C-297/96 *Partridge* [1998] ECR I-3467 (hereinafter "*Partridge*"), at paragraph 33 and C-90/97 *Swaddling* [1999] ECR I-1075 (hereinafter "*Swaddling*"), at paragraph 24. In view of Liechtenstein's accession to the EEA, the helplessness allowance was taken out of the contribution-based system and entered into the tax-financed system. On the basis of these changes, the Contracting Parties agreed to enter the helplessness allowance as a non-exportable benefit into Annex IIa to Regulation 1408/71, by EEA Council Decision No 1/95 of 10 March 1995 on the entry into force of the Agreement on the European Economic Area for the Principality of Liechtenstein (hereinafter "EEA Council Decision 1/95").
- 47 According to the Defendant, the non-exportability of the helplessness allowance was a condition *sine qua non* when acceding to the EEA. The entry in Annex IIa was the result of the accession negotiations and has thus to be considered as the result of a consent amongst the Contracting Parties that the Liechtenstein helplessness allowance does not have to be exported to residents in other EEA States. The fact that the Liechtenstein entry into Annex IIa formed part of EEA Council Decision 1/95 is vital, as this Decision follows the rules of public international law. Hence, the Defendant submits, the Decision is binding upon the parties to it and must be performed by them in good faith. When applying a residence requirement, Liechtenstein is thus relying in good faith on this agreement.
- 48 It is also noted that in order to vitiate the argument that the Liechtenstein entry into Annex IIa has constitutive effect, ESA refers to judgments of the ECJ which were rendered after the date of signature of the EEA Agreement. According to the Defendant, it goes without saying that under Article 6 EEA such judgments are not binding in EEA law (although pursuant to Article 3(2) SCA "due

account” has to be paid to relevant developments in the case law of the ECJ after the date of signature of the EEA Agreement).

- 49 The Defendant and ESA concur that the helplessness allowance qualifies as a non-contributory benefit, as its financing derives solely from compulsory taxation. As opposed to ESA, however, the Defendant contends that the helplessness allowance is a special benefit intended as specific protection for the disabled within the meaning of Article 4(2a)(b) of Regulation 1408/71.
- 50 The Defendant further submits that the essential criterion for a “sickness benefit”, on the other hand, is the need of a sick person for medical care. However, in Liechtenstein this is provided under the sickness insurance system, while the helplessness allowance is received regardless of any sickness and regardless of any need for medical care.
- 51 It is admitted that there is a certain link between the two systems. The amount of the domiciliary care benefits awarded by the Sickness Insurance can be reduced if the recipient also draws helplessness allowance. The Defendant notes, however, that domiciliary care benefits do not have to be reduced if the recipient of a helplessness allowance also draws means-tested supplementary benefits or if the allowance has been awarded solely for the purpose of helping the recipient maintain social intercourse. This illustrates the “special” nature of the helplessness allowance as a “mixed” benefit between social security and social assistance.
- 52 The Defendant stresses that the helplessness allowance differs from the German and Austrian care allowances at issue in *Molenaar* and *Jauch*. Those benefits were contribution-based and had a purpose more closely linked to health care. The Liechtenstein system is not comparable to this.
- 53 Furthermore, the Defendant contends that the British attendance allowance and the British disability living allowance at issue in *Snares* and *Partridge* bear a greater resemblance to the Liechtenstein helplessness allowance.
- 54 As to whether the helplessness allowance constitutes a benefit in cash or in kind, the Defendant draws attention to the fact that the allowance is not only granted to persons living in their own home but also to persons residing in special homes for the elderly or the disabled. If a person resides in such a home, a certain daily or monthly fee has to be paid. In case of the recipient of a helplessness allowance, an additional charge is added to the normal fee. The amount of this extra charge is the exact equivalent to the amount granted as helplessness allowance. In this instance, the allowance is clearly a benefit in kind, since it covers the exact costs met by the recipient.
- 55 The Defendant considers it important that elderly and handicapped persons should be enabled to remain in familiar surroundings (preferably their own home) and be looked after by persons whom they are close to (normally family members). Therefore, it is found to be only just and fair when the same charge

that a special home can put on its bill is awarded as a benefit to those who stay at home with their family. The amounts of the helplessness allowance are small and cover only basically or partially the burden encountered by the carer or the carers. In a situation like this, the carer (often a family member) is not asked to provide the administration with a bill for his or her services. The administration has to show a certain level of respect and trust towards the recipient and the carer, and leave it to the discretion of the recipient to use the benefit awarded in the way it was intended, i.e. to reward or to compensate the carer or the carers for their help.

- 56 The United Kingdom asserts, *inter alia*, that in *Snares* and *Partridge*, the ECJ did consider the nature of the benefits at stake in light of the criteria for hybrid (or “special”) benefits set out in the case law. It is argued that the ECJ concluded that the allowances were in substance such hybrid benefits, and thus that those judgments did not depend on any possible constitutive effect of a listing in Annex IIa to Regulation 1408/71.

V Findings of the Court

General

- 57 For the reasons set out in paragraph 45 above, the Defendant invites the Court to decide whether it is necessary to deal with ESA’s application. The Court notes that the application, which has been brought under Article 31 SCA, raises the Liechtenstein residence requirement for helplessness allowance as a general issue. It is thus irrelevant whether, in the individual case which may have prompted ESA’s interest in the matter, it has turned out that granting such allowances would fall under the competence of another EEA State.

The relationship between Article 10a and Annex IIa of Regulation 1408/71

- 58 The Defendant alleges that even though Annex IIa of Regulation 1408/71 is not considered to have constitutive effect in recent case law by the ECJ, Liechtenstein’s listing of the helplessness allowance in that Annex must nevertheless have such effect. The arguments for this position are set out in paragraphs 46–48 above.
- 59 Under Article 10a of Regulation 1408/71, persons to whom the Regulation applies shall be granted “the special non-contributory cash benefits referred to in Article 4(2a)” exclusively in the territory of the EEA State in which they reside, “provided that such benefits are listed in Annex IIa”.
- 60 Article 28(1) EEA provides that free movement for workers shall be secured within the European Economic Area. Self-employed persons are to be granted free movement according to Article 31(1) EEA. The aim of Regulation 1408/71 is to facilitate the exercise of this freedom, cf. Article 29 EEA. If Annex IIa were to have constitutive effect where the criteria under Article 4(2a) are not fulfilled, a situation could arise in which the coordination of social security benefits sought

by Regulation 1408/71 would not be achieved, to the detriment of the individual concerned. For instance, in a person's State of residence a certain type of allowance may be considered as falling under Article 4(1) and therefore as an exportable benefit which the person would have to claim from another State. Where that other State has had the same type of allowance listed in Annex IIa contrary to Articles 4(2a) and 10a, the person concerned then loses his or her right to the allowance if the listing is deemed to have constitutive effect. Thus, in order to safeguard the interests of individuals who have availed themselves of the right to free movement under the EEA Agreement, it is necessary to interpret Articles 4(2a), 10a and Annex IIa of the Regulation to the effect that listing in the Annex is only a necessary, but not a sufficient, precondition for considering a certain benefit as non-exportable under Article 10a.

- 61 This is in conformity with recent case law of the ECJ which has clarified that entries in Annex IIa do not have constitutive effect. Particular reference is made to *Jauch*, *Skalka* and *Hosse*, respectively at paragraphs 21–22, 19–21 and 25.
- 62 Under the system of Regulation 1408/71, as amended by Regulation 1247/92, the entries in Annex IIa are not a matter only for the State concerned. In the EC, the Annex was adopted as an integral part of Regulation 1247/92 under the relevant decision-making procedure laid down in the EC Treaty. In the EEA, the content of the Annex is a matter to be agreed upon by all Contracting Parties under the decision-making procedure of that Agreement. Thus, the fact that Liechtenstein gained the acceptance of the other Contracting Parties for its entries in Annex IIa does not in itself put that State in a position different from that of any other Contracting Party to the EEA Agreement.
- 63 Moreover, in its interpretation of the EEA Agreement, the Court cannot be bound by mere expectations of the Contracting Parties as to the exact content of the obligations the Parties enter into. Neither Decision 1/95 of the EEA Council, invoked by the Defendant, nor the Declarations annexed to that Decision, contain anything which could lead to the understanding that Liechtenstein's obligations under Articles 4, 10a and Annex IIa of Regulation 1408/71 are different from those of the other Contracting Parties.
- 64 The Court concludes from this that Liechtenstein's listing of the helplessness allowance in Annex IIa of Regulation 1408/71 does not suffice to make this allowance a non-exportable benefit under Article 10a of the Regulation.

The helplessness allowance and Article 4 of Regulation 1408/71

- 65 ESA argues that the helplessness allowance constitutes a sickness benefit under Article 4(1)(a) of Regulation 1408/71 and therefore cannot be considered a "special non-contributory benefit" falling under Article 4(2a) of the Regulation. The Defendant, on the other hand, argues that the allowance is solely intended as a specific protection for the disabled and rightly listed in Annex IIa as a "special non-contributory benefit" covered by Article 4(2a)(b) of the Regulation.

- 66 It follows from the scheme of Regulation 1408/71 that the concept of ‘social security benefit’ under Article 4(1) and the concept of ‘special non-contributory benefit’ within the meaning of Article 4(2a) are mutually exclusive (see for comparison *Hosse*, at paragraph 36).
- 67 Article 4(2a) was introduced into Regulation 1408/71 by Regulation 1247/92. It follows from recital 8 of the preamble to Regulation 1247/92 that the new paragraph 2a of Article 4 applies to non-contributory benefits which are “special” in the sense that they exhibit features both of social security and of social assistance.
- 68 In order to qualify under Article 4(2a) of Regulation 1408/71, a benefit not only has to be “special” in the particular meaning explained above. It also has to fulfil the more detailed requirements of either *litra a* or *litra b* of Article 4(2a).
- 69 The Defendant has only invoked Article 4(2a)(b) which covers special non-contributory benefits intended “solely as specific protection for the disabled”. The allowance in question does not fulfil that requirement. It is awarded to all those who permanently require a degree of help in order to carry out certain daily tasks without any qualification as to why they are helpless, including *inter alia* those who are helpless due to old age. Consequently, the helplessness allowance is not solely intended for the disabled.
- 70 Thus, the helplessness allowance does not meet the criteria under Article 4(2a)(b).
- 71 As concerns Article 4(1) of Regulation 1408/71, the ECJ has consistently held that a benefit is to be regarded as a social security benefit where it is granted, without any individual and discretionary assessment of personal needs, to the recipients on the basis of a statutorily defined position and relates to one of the risks expressly listed in Article 4(1) of Regulation 1408/71 (see, *inter alia*, *Hosse*, at paragraph 37, *Moleenar*, at paragraph 20, *Jauch*, at paragraph 25, and Case C-299/05 *Commission v European Parliament and Council*, judgment of 18 October 2007, not yet reported, at paragraph 56).
- 72 ESA submits that the allowance fulfils these criteria with regard to the risk of sickness, as listed in Article 4(1)(a) of the Regulation. This is contested by the Defendant, arguing that providing care cannot be compared to medical assistance.
- 73 As already noted, the allowance in question is granted to all who fulfil legally defined criteria as to their need for personal assistance in their daily lives. Therefore, it is granted without any individual and discretionary assessment of personal need and on the basis of a statutorily defined position.
- 74 As regards the question of whether the allowance can be considered a ‘sickness benefit’ within the meaning of *litra a* of Article 4(1), the Court notes that also other benefits falling under Article 4(1) are exportable, see Article 10 with regard

to *inter alia* invalidity and old-age. The ECJ has consistently held that benefits which aim to improve the state of health and the quality of life of persons reliant on care are essentially intended to supplement sickness insurance benefits and must be regarded as ‘sickness benefits’ (see, with regard to care allowances largely similar to the one in question, *Molenaar* and *Jauch*, both at paragraphs 24–25). If the helplessness allowance were to be considered a different type of benefit where the recipient’s need for care does not result from sickness in the strict sense of the word, the export of the allowance would have to follow several different sets of rules. That would make the legal situation less transparent for all parties involved. This would go against the aim of Regulation 1408/71, which is to facilitate the free movement of persons. On these grounds, benefits such as the Liechtenstein helplessness allowance must be characterised as “sickness benefits” within the meaning of Article 4(1)(a) of Regulation 1408/71.

The helplessness allowance as a ‘cash benefit’

- 75 In case the Court should come to the conclusion that the helplessness allowance falls outside the scope of Article 4(2a) and inside the scope of Article 4(1), then the Defendant argues that the allowance must be regarded not as a ‘cash benefit’ but as a benefit ‘in kind’, cf. paragraphs 54 and 55 above. Consequently, it would be for the person’s State of residence to award such a benefit under Articles 19(1)(a), 25(1)(a) and 28(1)(a) of Regulation 1408/71.
- 76 The Court notes that the allowance is awarded based on fixed rates depending on the degree of helplessness and that these rates determine the additional charge mentioned in paragraphs 54 and 55 above. It is thus questionable whether that charge can be said to be a cost brought about by the person’s condition and in turn covered by the helplessness allowance. Moreover, where the allowance is paid to recipients still living at home, it is in any event difficult to see how the fixed amounts could provide exact cover for costs brought about by the recipients’ condition. In addition, it is clear from the written observations made by the Defendant that it is left to the recipients’ discretion to use the allowance as intended. Under these circumstances, the helplessness allowance cannot be considered a benefit in kind, see for comparison *Molenaar*, at paragraphs 31–34. Rather, it must be considered a ‘cash benefit’ under Articles 19(1)(b), 25(1)(b) and 28(1)(b) of Regulation 1408/71.

Conclusion

- 77 In light of the above, the Court holds that the Principality of Liechtenstein, by applying a requirement of residence for entitlement to the helplessness allowance, has failed to fulfil its obligations pursuant to Articles 19(1) and (2), 25(1) and 28(1) of the Act referred to at point 1 of Annex VI to the EEA Agreement, i.e. 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.

VI Costs

78 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. Since the EFTA Surveillance Authority has requested that the Principality of Liechtenstein be ordered to pay the costs and the latter has been unsuccessful, it must be ordered to pay the costs. The costs incurred by the United Kingdom and by the Commission of the European Communities are not recoverable.

On those grounds,

THE COURT

hereby:

- 1. Declares that the Principality of Liechtenstein, by applying a requirement of residence for entitlement to the helplessness allowance, has failed to fulfil its obligations pursuant to Articles 19(1) and (2), 25(1) and 28(1) of the Act referred to at point 1 of Annex VI to the EEA Agreement, i.e. 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.**
- 2. Orders the Principality of Liechtenstein to bear the costs of the proceedings.**

Carl Baudenbacher

Thorgeir Örlygsson

Henrik Bull

Delivered in open court in Luxembourg on 14 December 2007.

Skúli Magnússon
Registrar

Carl Baudenbacher
President