**JUDGMENT OF THE COURT**
11 September 2013

*(Failure by an EEA/EFTA State to fulfil its obligations – Regulation (EEC) No 1408/71 – Regulation (EEC) No 574/72 – Social security for migrant workers)*

In Case E-6/12,

**EFTA Surveillance Authority**, represented, first, by Xavier Lewis, Director, and Fiona Cloarec, Officer, and subsequently by Xavier Lewis, Director, and Auður Ýr Steinarsdóttir, Officer, Legal and Executive Affairs, acting as Agents,

*applicant,*

v

**Kingdom of Norway**, represented by Marius Emberland, Advokat, Office of the Attorney General (Civil Affairs), and Vegard Emaus, Adviser, Ministry of Foreign Affairs, acting as Agents,

*defendant,*

APPLICATION for a declaration that, by maintaining in force the administrative practice of not assessing whether a child, living together with another parent outside Norway, is mainly dependent on the parent who is living in Norway and separated from the other parent, the Kingdom of Norway is in breach of Article 1(f)(i), second sentence, in conjunction with Article 76 of the Act referred to at point 1 of Annex VI to the Agreement on the European Economic Area (Regulation (EEC) No 1408/71 of the Council 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 amended), as adapted to the EEA Agreement by Protocol 1 thereto,

THE COURT,

composed of: Carl Baudenbacher, President, Per Christiansen and Páll Hreinsson (Judge-Rapporteur), Judges,

Registrar: Gunnar Selvik,

having regard to the written pleadings of the parties and the written observations of the European Commission (the "Commission"), represented by Johan Enegren and Viktor Kreuschitz, acting as Agents,

having regard to the Report for the Hearing,

having heard oral argument of the EFTA Surveillance Authority ("ESA"), represented by Auður Ýr Steinarsdóttir, the defendant, represented by Marius Emberland, and the Commission, represented by Viktor Kreuschitz, at the hearing on 30 April 2013,

gives the following

## Judgment

### I Introduction

1 This case concerns an application brought by ESA against Norway that a Norwegian administrative practice refusing family benefits in certain cases to workers in Norway constitutes an infringement of Article 1(f)(i) in conjunction with Article 76 of Regulation (EEC) No. 1408/71.

2 The practice in question concerns a failure to assess whether a child of a person working in Norway is mainly dependent upon that parent, although the parents are separated and the child lives with the other parent in an EEA State other than Norway.

### II Legal context

*EEA law*

Regulation No 1408/71

3 At the relevant time, the Act referred to at point 1 of Annex VI to the EEA Agreement was Regulation (EEC) No 1408/71 of the Council 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 amended, as adapted to the EEA Agreement by Protocol 1 thereto (OJ, English

Special Edition 1971 (II), p. 416) ("the Regulation" or "Regulation No 1408/71").

4 Article 1(f)(i) of the Regulation defines the term "member of the family" as follows:

> *'member of the family' means any person defined or recognised as a member of the family or designated as a member of the household by the legislation under which benefits are provided …; where however, the said legislations regard as a member of the family or a member of the household only a person living under the same roof as the employed or self-employed person or student, this condition shall be considered satisfied if the person in question is mainly dependent on that person. …*

5 Article 1(u)(i) of the Regulation defines the term "family benefits" as follows:

> *'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 allowances mentioned in Annex I.*

6 Article 4(1) of the Regulation provides:

> *[Regulation No 1408/71] shall apply to all legislation concerning the following branches of social security:*
>
> …
>
> *(h) family benefits.*

7 Chapter 7 of the Regulation regulates the coordination of family benefits in cross-border cases.

8 Article 73 of the Regulation provides:

> *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 provisions of Annex VI.*

9 Article 75 of the Regulation states that:

> *1. Family benefits shall be provided, in the cases referred to in Article 73, by the competent institutions of the State to the legislation of which the employed or self-employed person is subject and, in the cases referred to in Article 74, by the competent institution of the State under the legislation of which an unemployed person who was formerly employed or self-employed receives unemployment benefits. They shall be provided in accordance with the provisions administered by such institutions, whether*

*or not the natural or legal person to whom such benefits are payable is residing or staying in the territory of the competent State or in that of another Member State.*

*2. However, if the family benefits are not used by the person to whom they should be provided for the maintenance of the members of the family, the competent institution shall discharge its legal obligations by providing the said benefits to the natural or legal person actually maintaining the members of the family, at the request of, and through the agency of, the institution of their place of residence or of the designated institution or body appointed for this purpose by the competent authority of the country of their residence.*

10 Article 76(1) of the Regulation provides:

*Where, during the same period, for the same family member and by reason of carrying on an occupation, family benefits are provided for by the legislation of the Member State in whose territory the members of the family are residing, entitlement to the family benefits due in accordance with the legislation of another Member State, if appropriate under Article 73 or 74, shall be suspended up to the amount provided for in the legislation of the first Member State.*

Regulation No 574/72

11 Regulation No 1408/71 is accompanied by an implementing regulation, that is, Council Regulation (EEC) No 574/72 of 21 March 1972 laying down the procedure for implementing Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to their families moving within the Community, as amended (OJ, English Special Edition 1972 (I), p. 160) ("Regulation No 574/72").

12 At the relevant time, Regulation No 574/72 was referred to at point 2 of Annex VI to the EEA Agreement.

13 Article 10 of Regulation No 574/72 concerns rules applicable in the case of overlapping of rights to family benefits or family allowances for employed or self-employed persons and provides:

*1.*

*(a) Entitlement to benefits or family allowances due under the legislation of a Member State, according to which acquisition of the right to those benefits or allowances is not subject to conditions of insurance, employment or self-employment, shall be suspended when, during the same period and for the same member of the family, benefits are due only in pursuance of the national legislation of another Member State or in*

*application of Articles 73, 74, 77 or 78 of the Regulation, up to the sum of those benefits*

*(b) However, where a professional or trade activity is carried out in the territory of the first member State:*

*(i) in the case of benefits due either only under national legislation of another Member State or under Articles 73 or 74 of the Regulation to the person entitled to family benefits or to the person to whom they are to be paid, the right to family benefits due either only under national legislation of that other Member State or under these Articles shall be suspended up to the sum of family benefits provided for by the legislation of the Member State in whose territory the member of the family is residing. The cost of the benefits paid by the Member State in whose territory the member of the family is residing shall be borne by that Member State;*

*(ii) in the case of benefits due either only under national legislation of another Member State or under articles 77 or 78 of the Regulation, to the person entitled to these benefits or to the person to whom they are payable, the right to these family benefits or family allowances due either only under the national legislation of that other Member State or in application of those Articles shall be suspended; where this is the case, the person concerned shall be entitled to the family benefits or family allowances of the Member State in whose territory the children reside, the cost to be borne by that Member State, and, where appropriate, to benefits other than the family allowances referred to in Article 77 or Article 78 of the Regulation, the cost to be borne by the competent State as defined by those Articles.*

…

*3. Where family benefits are due, over the same period and for the same member of the family, from two Member States pursuant to Articles 73 and/or 74 of the Regulation, the competent institution of the Member State with legislation providing for the highest levels of benefit shall pay the full amount of such benefit and be reimbursed half this sum by the competent institution of the other Member State up to the limit of the amount provided for in the legislation of the latter Member State.*

*National law*

14 The Norwegian authority responsible for assessing requests for family benefits is the Norwegian Labour and Welfare Service (*Arbeids- og velferdsetaten*, "the NAV").

15 Regulation No 1408/71 and Regulation No 574/72 were made part of the Norwegian legal order by Regulation 1204 of 30 June 2006 on the incorporation of the social security regulations in the EEA Agreement (*Forskrift av 30 juni*

*2006 nr. 1204 om inkorporasjon av trygdeforordningene i EØS-avtalen*, "the Norwegian incorporating regulation"), in force at the relevant time.

16 The second paragraph of Section 1 of the Norwegian incorporating regulation provides:

> *The provisions in the following laws are to be set aside insofar as it is necessary in relation to [Regulations Nos 1408/71 and 574/72]:*
>
> …
>
> - *The Child Benefits Act of 8 March 2002.*

17 The granting of child benefits in Norway is governed by the Child Benefits Act of 8 March 2002 (*lov av 8. mars 2002 nr. 4 om barnetrygd*, the "Child Benefits Act"). Norway has notified the benefits provided under the Child Benefits Act as included under Article 4(1)(h) of the Regulation (OJ 2003 C 127, p. 36).

18 Section 2, paragraph 1, of the Child Benefits Act states that parents who have a child under the age of eighteen years living with them permanently are entitled to child benefits if the child is resident in Norway in accordance with the provisions of Section 4 of that Act. The child benefit is a flat amount unrelated to the parents' income and is not means tested in other ways.

19 Entitlement to child benefits in Norway is enjoyed by a parent living permanently with the child, not the child. The child benefit is paid to the parent.

20 In determining where a child lives and with which parent, for the purpose of disbursing child benefits, reference is made to section 36 of the Children Act of 8 April 1981 (*lov av 8 april 1981 nr. 7 om barn og foreldre (barnelova)*, "the Children Act"). Section 36 reads as follows:

> *The parents may agree that the child shall live permanently either with one of them or with both of them.*
>
> *If the parents fail to agree, the court must decide that the child shall live permanently with one of them. When special reasons so indicate, the court may nevertheless decide that the child shall live permanently with both of them.*

*The administrative practice in question*

21 The details of the administrative practice in question have been described as follows by ESA and have been confirmed by the Norwegian Government.

22 When the NAV assesses an application for child benefits pursuant to the Child Benefits Act, it takes the relevant circumstances into account to ensure that the benefit is paid to the parent with whom the child lives permanently.

23 In cases where the parents are married or living together, the relation to the child is assumed. If the parents are not living together, the benefit is paid to the parent with whom the child lives permanently. Where the child shall live permanently is determined by applying Chapter 5 of the Children Act. The parents may choose with whom the child is to live permanently.

24 The residency requirement ("living with them permanently [and] the child is resident in Norway") of Section 2 of the Child Benefits Act (see paragraph 18 above) is not applied to persons covered by the Regulation. Instead, in cross-border situations, where one parent works in Norway and the Regulation applies, the NAV assesses whether the parent working in Norway has his "regular abode" with his family in the other EEA State during the periods when he is not working in Norway. "Regular abode" does not require the parent working in Norway to spend a specified amount of time with his family outside Norway.

25 If the parent has his regular abode with his family in another EEA State, the NAV considers the requirement of "living permanently together" with the child to be fulfilled. In such a case, the child benefit may be granted. However, if this is not the case, for example, for reasons of separation or divorce, the child benefit will be refused or the grant of child benefits stopped.

## III Background to the dispute and pre-litigation procedure

26 In June 2010, two unresolved cases in the SOLVIT database (the online problem solving network in which EEA States work together to solve, without legal proceedings, problems caused in the application of internal market law by public authorities) were brought to the attention of ESA. The two cases concerned mothers working and residing with their child in Lithuania and in Slovakia, respectively. In both cases, the parents of the child were separated and the father was residing and working in Norway. It appears in the Lithuanian case that the father did not apply for the benefit. In the other case, the benefit was stopped as the mother moved to Slovakia with the child.

27 The mothers were entitled to family benefits in their respective State of residence. They both requested the differential amount between the higher Norwegian benefits to which the father, in Norway, would be entitled under the Norwegian social security system and the benefits to which they were entitled in their State of residence (the "topping-up" of the first benefit in the State of residence). However, the Norwegian authorities denied both applications.

28 By a letter of 9 July 2010, ESA informed the Norwegian Government that it had opened an own-initiative case regarding the granting of child benefits by the Norwegian authorities in cases where one parent lives and works in Norway and the other parent resides, together with the child, in another EEA State. ESA requested further information from the Norwegian Government on the issue.

29 The Norwegian Government replied on 10 September 2010 and confirmed that a parent who does not have a child living permanently with him is not entitled to child benefits.

30 At a meeting with ESA on 11 November 2010, Norway confirmed that child benefits cannot be granted in circumstances such as those described in paragraph 25 above.

31 On 8 December 2010, ESA issued a letter of formal notice. The Norwegian Government replied by letter of 8 February 2011.

32 On 6 July 2011, ESA delivered a reasoned opinion, maintaining the conclusions it had reached in the letter of formal notice and claiming that the Kingdom of Norway was in breach of Articles 1(f)(i) and 76 of the Regulation. The Norwegian Government replied on 6 October 2011.

33 The case was discussed again at a meeting on 10 and 11 November 2011. Further correspondence took place on 2 December and 21 December 2011. On 28 March 2012, ESA decided to bring the matter before the Court.

## IV Procedure and forms of order sought

34 By application lodged at the Court on 25 June 2012, ESA brought the present action. ESA requested the Court to declare that:

1. *By maintaining in force the administrative practice of not assessing whether a child, living together with another parent outside Norway, is mainly dependent on the parent who is living in Norway and separated from the other parent, the Kingdom of Norway is in breach of Article 1(f)(i), second sentence, in conjunction with Article 76 of the Act referred to at point 1 of Annex VI to the Agreement on the Economic Area (Regulation (EEC) No. 1408/71 of the Council 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 amended), as adapted to the EEA Agreement by Protocol 1 thereto.*

2. *The Kingdom of Norway bear the costs of the proceedings.*

35 In its defence, lodged at the Court on 29 August 2012, Norway requested the Court to declare that:

1. *By maintaining in force the administrative practice of not assessing whether a child, living together with another parent outside Norway, is mainly dependent on the parent who is living in Norway and separated from the other parent, the Kingdom of Norway complies with Article 1(f)(i), second sentence, in conjunction with Article 76 of the Act referred to at point 1 of Annex VI to the Agreement on the European Economic Area (Regulation (EEC) No. 1408/71 of the Council 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 amended), as adapted to the EEA Agreement by Protocol 1 thereto.*

2. *The EFTA Surveillance Authority bear the costs of the proceedings.*

36 On 5 October 2012, ESA submitted its reply to the defence.

37 On 12 November 2012, Norway submitted its rejoinder. On the same date, the Commission submitted its written observations pursuant to Article 20 of the Statute of the Court.

38 Reference is made to the Report for the Hearing for a more complete account of the facts, the pre-litigation procedure and the legal background as well as the arguments of the parties and the written observations, which are mentioned or discussed hereinafter only insofar as is necessary for the reasoning of the Court.

## V The action

*Arguments of the parties*

39 First, ESA – supported by the Commission – notes that, under Article 4(1)(h) of the Regulation, family benefits are benefits intended to enable one of the parents to be devoted to the raising of a young child. They are designed, more specifically, to remunerate the service of bringing up a child, to meet the other costs of caring for and raising a child and, as the case may be, to mitigate the financial disadvantages entailed in giving up income from an occupational activity. The provision is essential when assessing whether Norway applied the definition of a "member of the family" correctly. According to ESA it is uncontested that the family benefits in the present case fall within this definition.

40 ESA reiterates its position stated in the reasoned opinion of 6 July 2011 and notes that the Norwegian legislation requires the child to be "living permanently with" the parent (or the parent working in Norway to have his "regular abode" with the family in the other EEA State). The correct application of Article 1(f)(i) requires that in cases where the worker in Norway is found not to have his regular abode with his child, the NAV must assess whether the child living together with the other parent outside Norway is "mainly dependent on" the parent working in Norway. However, the Norwegian authorities fail to make such an assessment. This constitutes an infringement of Article 1(f)(i) of the Regulation.

41 Second, ESA argues that, by failing to undertake that assessment, the administrative practice in question also results in the incorrect application of Article 76 and results in a concomitant breach of this provision. In its view, this is clear following the judgment of the Court of Justice of the European Union ("ECJ") in Case C-363/08 *Slanina* [2009] ECR I-11111. ESA adds that the

administrative practice in question deters workers from exercising their right to move freely within the EEA and violates the objectives of Articles 73 and 76 of Regulation No 1408/71. It contends that when applying the Regulation to a given case it is irrelevant whether the parents are divorced or not.

42 The Norwegian Government, although confirming that ESA correctly describes the administrative practice in question, contests the application. It stresses that only the parent with whom the child lives permanently will qualify for child benefits pursuant to Section 2 of the Child Benefits Act. The worker must have his regular abode with his child when he is not working in Norway. In general, the NAV does not examine how much time the applicant spends in Norway and how often he visits his family. Only if the NAV has received information indicating that the worker does not have his regular abode with the child during the periods when he is not working in Norway (such as when the parents are separated) will the NAV examine this more closely.

43 The Norwegian Government considers that the Court is called upon to consider the compatibility of the administrative practice in question only when the parent living with the child outside Norway is already entitled to family benefits in the EEA State of residence and, by the application in Norway, seeks to increase the disbursement of public benefits as defined in the SOLVIT cases.

44 First, the Norwegian Government argues that a definitional norm such as the one set out in Article 1(f)(i), second sentence, of the Regulation cannot be infringed per se, since it does not in its own right impose obligations on EEA States and merely defines aspects of the scope of norms that do.

45 Second, even though Article 76 of the Regulation contains obligations for EEA States, the relevant provision in the present case should be Article 73 of the Regulation. Only the latter provision imposes obligations on EEA States.

46 Were the Regulation to be applied as ESA contends, this would mean that in cross-border situations applicants for child benefits would be granted child benefits in Norway without satisfying the conditions established in the Child Benefits Act. Since national law determines the entitlement to child benefits, rights which do not exist at the national level cannot be created by virtue of the Regulation. This is confirmed by the fact that Article 73 of the Regulation only applies to situations where benefits are provided by national law.

47 Third, the central issue is not whether the parent in Norway “lives” there, but whether the parent in Norway “works” there. What is essential to the NAV’s assessment is that the parent residing and working in Norway does not live with the other parent and their mutual child even when he or she visits or stays in the other EEA State where the child resides and that the parent working and residing in Norway has consequently not applied for child benefits.

48 The Norwegian Government cannot see how ESA can argue that the NAV’s practice deters nationals of the EEA/EFTA States and EU citizens from

exercising their right to freedom of movement. A worker from an EEA State is treated in the same way as a Norwegian worker. Thus, migrant workers are not in a disadvantaged position.

49 The Norwegian Government adds that the judgment in *Slanina*, cited above, does not develop the ECJ's case law and contends that the present case should have been closed, just as ESA closed its Case 2573/2002 without further measures after receiving reassurances from the Norwegian Government that a benefit would be granted in cross-border cases when the parent staying away from the child had his regular abode with the child during the period he was not working in Norway.

50 Finally, the Norwegian Government argues that the application should be dismissed because the requirement of dependency does not exist in national law. In no circumstances do the Norwegian authorities disburse child benefits on the basis of a dependency criterion, as this is simply not the requirement in the Child Benefits Act. There is also no basis for ESA's claim that an assessment under the Regulation requires account to be taken of whether a family member is "mainly dependent" on the worker.

51 The Norwegian Government submits further that Article 1(f)(i) of the Regulation is a definitional norm, which cannot clarify the criterion "living permanently with" in the Child Benefits Act. Nor can the provision overrule a national eligibility requirement. Finally, there is nothing in Article 73 of the Regulation to imply that such an assessment must be made in the light of that provision. That is clear from the case law of the ECJ, which stresses that the Regulation intends simply to coordinate, but not harmonise, child benefits in the EEA.

52 The Commission, in its written observations, supports the application of ESA and adds that the Norwegian administrative practice threatens the effectiveness of Articles 72 to 76a of the Regulation.

53 As regards the criterion of "mainly dependent", the Commission submits that a child is normally mainly dependent on both parents until it has sufficient means to cover its living costs. The situation where the parents live separately does not deprive the parent not living in the same household of parental rights and obligations. When the legislation applied by an EEA State defines as members of the family only the persons who live in the same household, the fact that the member of the family who does not satisfy the household condition is mainly dependent on the claimant could be established either by a decision of the national competent institution that the claimant is obliged to provide maintenance payments, or by documents proving the regular transmission of part of the earnings of the parent concerned or by other appropriate means.

54 Finally, at the oral hearing, the Commission pointed out that the arguments of the Norwegian Government seem to neglect the primacy of EEA law. It is clear that the definition in Article 1(f)(i) of the Regulation must be taken into account when applying and interpreting Article 73 of the Regulation. Further, there is nothing

to suggest that ESA argues for an extensive interpretation of the Regulation or the provision of additional rights. Instead, these are family benefits provided in Norway. As to the argument that the definition in Article 1(f)(i) cannot overrule a condition set out in national law, the Commission concludes by stating that, pursuant to the principle of primacy, EU law and EEA law can always overrule national law.

*Findings of the Court*

Introductory remarks

55 During the pre-litigation procedure, ESA has limited the proceedings to the Norwegian administrative practice relating to the application of Articles 1(f)(i) and 76 of the Regulation for the purposes of family benefits under the Child Benefits Act. It is undisputed that benefits under the Child Benefits Act constitute a "family benefit" within the meaning of Article 4(1)(h) of the Regulation.

56 The parties agree on the facts of the case, the description of the legislation and on the content of the administrative practice of the NAV. They agree, in particular, that, when applying the Child Benefits Act in situations where the Regulation is also applicable, the NAV does not assess whether a child, living together with one parent in an EEA State outside Norway, is mainly dependent on the parent who is living in Norway and who is separated from the other parent.

57 Contrary to the considerations of the Norwegian Government that the assessment of the Court should be limited to situations as those defined by the SOLVIT cases, ESA contends in general terms that the alleged infringement follows from the administrative practice of the NAV when it applies the Regulation. However, ESA has not made any claims that an infringement has taken place concerning the manner in which that regulation was made part of the legal order in Norway.

58 The Court notes that even if the applicable national legislation itself complies with EEA law, a failure to fulfil obligations may arise due to the existence of an administrative practice which infringes EEA law when the practice is, to some degree, of a consistent and general nature (see, for comparison, Cases C-278/03 *Commission* v *Italy* [2005] ECR I-3747, paragraph 13, C-135/05 *Commission* v *Italy* [2007] ECR I-3475, paragraph 21, and C-416/07 *Commission* v *Greece* [2009] ECR I-7883, paragraph 24).

59 The two SOLVIT cases alone, which concern two different situations, would in any event be insufficient to show a practice of a consistent and general nature (see, for comparison, Cases C-441/02 *Commission* v *Germany* [2006] ECR I-3449, paragraph 52, C-156/04 *Commission* v *Greece* [2007] ECR I-4129, paragraph 51, C-342/05 *Commission* v *Finland* [2007] ECR I-4713, paragraph 35, and C-489/06 *Commission* v *Greece* [2009] ECR I-1797, paragraphs 50 to 53).

60 However, the Norwegian Government has confirmed the administrative practice in question as a general approach of the NAV in cross-border situations. This is clear from the reply of the Norwegian Government to the letter of formal notice of 8 February 2011, its reply to the reasoned opinion of 6 October 2011 and in particular the letter from the Norwegian authorities to ESA of 21 December 2011.

61 In their letter of 21 December 2011 to ESA, the Norwegian authorities confirmed that Norway would pay the top-up benefit, but not if the parents were divorced and the child did not live permanently with the parent working in Norway.

62 The Norwegian Government has added in the defence that the essential element in the NAV's assessment is that the parent residing and working in Norway does not live with the other parent and their mutual child even when he or she visits or stays in the other EEA State and that the parent working and residing in Norway has consequently not applied for child benefits. If the parents are separated this may indicate that the parent no longer has his regular abode with the child during the periods when he is not working in Norway.

63 Therefore, it must be considered that the administrative practice in question is of a consistent and general nature.

64 As to whether the administrative practice in question constitutes an infringement of the Regulation, the parties appear to disagree as to how the Regulation is to be interpreted and applied. The Government of Norway claims, in particular, that since the Child Benefit Act does not contain a criterion of dependency, the NAV is not required to make an assessment of that kind under Articles 1(f)(i) and 76 of the Regulation as ESA contends. The Commission, on the other hand, countered this argument at the hearing with the EU principle of primacy and argues that EU law and EEA law can always overrule national law.

65 With a view to determining the applicability of the Regulation in Norway, and taking account of the special features of the functioning of the EEA Agreement (see Cases E-9/97 *Sveinbjörnsdottir* [1998] EFTA Ct. Rep. 95, paragraph 59, E-4/01 *Karlsson* [2002] EFTA Ct. Rep. 240, paragraph 37, E-2/02 *Bellona* [2003] EFTA Ct. Rep. 52, paragraph 36, E-2/03 *Ákæruvaldið* [2003] EFTA Ct. Rep. 185, paragraph 28, and E-1/07 *Criminal proceedings against A* [2007] EFTA Ct. Rep. 246, paragraph 37), the Court recalls that pursuant to Article 7 EEA, regulations shall, as such, be, or be made, part of the internal legal order of the Contracting Parties.

66 Moreover, it must be recalled that the EEA Agreement requires that incorporated EEA rules shall prevail in cases of possible conflict with other statutory provisions (see, to that effect, Cases E-11/12 *Koch and Others*, judgment of 13 June 2013, not yet reported, paragraph 119, and E-15/12 *Wahl*, judgment of 22 July 2013, not yet reported, paragraph 54).

67 Therefore, the Commission is correct to assume that, in a situation such as in the present case, where the Regulation has been incorporated into national law, it is binding in its entirety and directly applicable and shall prevail over other national provisions (see, to that effect, Cases E-1/07 *Criminal proceedings against A*, cited above, paragraphs 38 and 39, and E-4/07 *Þorkelsson* [2008] EFTA Ct. Rep. 3, paragraph 47).

68 However, as the Norwegian Government correctly observes, this does not mean that, in determining whether the administrative practice infringes the Regulation, the character of the Regulation may be ignored. Even though a regulation which has been incorporated into national law is binding in its entirety and directly applicable and shall prevail over other national provisions, it cannot carry effects beyond its field of application, as established in EEA law and through the case law of the Court and the ECJ. Thus, the existence of an infringement resulting from the administrative practice must be assessed in light of the relevant provisions of EEA law.

69 According to its preamble, the Regulation was adopted to further the free movement of workers, as laid down in Article 28 EEA. It provides for a system of coordination of social security legislation and is intended to ensure equal treatment under the various national legislations. The overall goal is to prevent migrant workers from being deterred from exercising their right to freedom of movement under the EEA Agreement.

70 To that end, the Regulation establishes, 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 Cases E-3/04 *Tsomakas and Others* [2004] EFTA Ct. Rep. 95, paragraph 27, E-3/05 *ESA* v *Norway* [2006] EFTA Ct. Rep. 102, paragraph 46, and E-3/12 *Jonsson*, judgment of 20 March 2013, not yet reported, paragraph 54).

71 It must also be kept in mind that, according to established case law, the Regulation provides for coordination of the applicable national law and not harmonisation of the social security legislations of the EEA States (see *Tsomakas and Others*, cited above, paragraph 27, and *Jonsson*, cited above, paragraph 55). This entails, first, that the choice of law rules of the Regulation are binding in the sense that a Contracting Party cannot decide the extent to which its own legislation or that of another State applies (see *Tsomakas and Others*, cited above, paragraph 28).

72 Second, the Regulation does not detract from the power of the EEA States to organise their social security systems. In the absence of harmonisation at EEA level, it is thus for each EEA State to determine in national legislation the conditions on which social security benefits are granted. However, in such circumstances, the EEA States must nevertheless comply with EEA law when exercising that power (see *Jonsson*, cited above, paragraph 55).

73 It must be recalled that the factual situation described in the pre-litigation procedure and which forms the basis of ESA's claim is the situation where a person working in Norway, who is separated, has his children residing with his former spouse in another EEA State. Also, although not being an essential element in ESA's claim, in the SOLVIT cases mentioned by ESA in its application, the former spouse, who is working, residing in the other EEA State has applied in Norway for a "top-up" of the family benefits he or she is already paid in the other EEA State, invoking a right to family benefits under the Regulation for the children on account of the fact that the other spouse is working in Norway. However, these applications have been turned down by the NAV.

74 The Court will assess ESA's two pleas separately.

Alleged infringement of Article 76 of the Regulation

75 As ESA, the Commission and the Norwegian Government have submitted, family benefits to employed or self-employed persons which fall under Article 76 of the Regulation are family benefits which have been provided pursuant to Article 73 of the Regulation.

76 However, the Government of Norway questions whether Article 76 of the Regulation is the proper legal basis for ESA's claim and argues that Article 73 of the Regulation would have been more appropriate.

77 Article 73 of the Regulation provides – as the Norwegian Government emphasised in its defence and at the hearing – that an employed or self-employed person subject to the legislation of an EEA State shall be entitled, in respect of the members of his family who are residing in another EEA State, to the family benefits provided for by the legislation of the former State, as if they were residing in that State (see *Tsomakas and Others*, cited above, paragraph 47).

78 The purpose of Article 73 is to prevent an EEA State from being able to refuse to grant family benefits on account of the fact that a member of the worker's family resides in an EEA State other than that providing the benefits. Such a refusal could deter EEA workers from exercising their right to freedom of movement and would therefore constitute an obstacle to that freedom (see, for comparison, Cases 228/88 *Bronzino* [1990] ECR 531, paragraph 12, C-321/93 *Imbernon Martínez* [1995] ECR I-2821, paragraph 21, C-245/94 and C-312/94 *Hoever and Zachow* [1996] ECR I-4895, paragraphs 32 and 34, and C-255/99 *Humer* [2002] ECR I-1205, paragraph 40).

79 Where there is an overlap between rights under the legislation of the State of residence of the family members and rights under the legislation of the State of employment, provisions such as Articles 13 and 73 of the Regulation (No 1408/71) must be compared with the "anti-overlap" rules appearing in that Regulation and also in Regulation No 574/72 (Cases C-543/03 *Dodl and*

*Oberhollenzer* [2005] ECR I-5049, paragraph 49, and C-16/09 *Schwemmer* [2010] ECR I-9717, paragraph 43).

80 The first relevant anti-overlap rule, Article 76 of the Regulation, is the subject of the present plea. This provision is intended to resolve cases where entitlement to family benefits under Article 73 of that Regulation overlaps with entitlement to family benefits under the national legislation of the family member's State of residence by reason of carrying on an occupation (see, for comparison, *Slanina*, cited above, paragraph 36).

81 However, benefits which are based on residence do not fall under Article 76 of the Regulation, but under another, second, anti-overlap rule, Article 10 of Regulation No 574/72, since they are provided under the national legislation of the State of residence not by reason of carrying on an occupation (see, for comparison, *Dodl and Oberhollenzer*, paragraphs 54 and 55, and *Schwemmer*, paragraphs 46 and 47, both cited above).

82 The latter provision covers situations where there is an overlap between entitlement under Article 73 of the Regulation and entitlement to receive family benefits under the national legislation of the State of residence, irrespective of any professional or trade activity (see, for comparison, *Dodl and Oberhollenzer*, cited above, paragraph 54).

83 Article 10 of Regulation No 574/72, as both its heading and its wording demonstrate, is intended only to resolve cases of overlapping rights to family benefits where they are simultaneously due in both the relevant child's EEA State of residence, irrespective of conditions of insurance or employment, and, in application either of the national legislation of another EEA State or of Article 73 of the Regulation (No 1408/71), in the EEA State of employment (see, for comparison, *Schwemmer*, cited above, paragraph 51).

84 It may be added that, according to settled case law, it is irrelevant in the context of Article 10 of Regulation No 574/72 whether the parents are divorced (see, for comparison, Case C-119/91 *McMenamin* [1992] ECR I-6393, paragraph 24, and *Dodl and Oberhollenzer*, cited above, paragraph 58).

85 The main difference in the application of these anti-overlap rules is the potential reversal of the priority of the overlapping benefits. In some cases, the benefit due in the State of employment has priority and is to be "topped up" by the benefit in the State of residence of the family member, if the latter is higher. In other cases, this priority is reversed, and the benefit due in the State of residence of the family member gains priority (see, for a summary on this question, Opinion of Advocate General Geelhoed in *Dodl and Oberhollenzer*, cited above, points 22 to 26).

86 Having regard to the foregoing, it is for ESA to show how the administrative practice has infringed the anti-overlap rule in Article 76 of the Regulation.

87 First, as defined by ESA and as understood by the Norwegian Government in the present proceedings, the State of employment and residence of the worker is Norway. ESA has limited itself to define the EEA State of residence of the family members as any EEA State other than Norway. Moreover, ESA has not provided any information about the national legislation in these other EEA States.

88 Second, ESA has not expressly invoked Article 10 of Regulation No 574/72 in its application or during the pre-litigation procedure. ESA does not allege any infringement of Article 73 of the Regulation (No 1408/71). ESA only claims that the administrative practice in question infringes the anti-overlap rule in Article 76 of the Regulation.

89 However, having regard to the interest of the EEA/EFTA State concerned to prepare its defence, the Court cannot assess whether the administrative practice in question may infringe Article 73 of the Regulation (No 1408/71) or Article 10 of Regulation No 574/72. That would have widened the subject-matter of the action as delimited in the pre-litigation procedure and the application (see, to that effect, Case E-16/11 *ESA* v *Iceland*, judgment of 28 January 2013, not yet reported, paragraph 223, and, for comparison, Case C-195/04 *Commission* v *Finland* [2007] ECR I-5331, paragraph 18 and case law cited).

90 Third, the application does not mention the legal nature of any family benefits outside Norway. It limits itself to summarising the nature of the Child Benefits Act. It is therefore uncertain whether a family benefit due to a worker in the State of employment – that is, according to the application, Norway – would overlap with a family benefit provided by reason of carrying on an occupation or a family benefit payable under the legislation of the other EEA State, according to which acquisition of the right to those benefits or allowances is not subject to conditions of insurance, employment or self-employment. Therefore, the application does not contain sufficient information to determine which overlap rule should apply and which would be infringed as a result of the administrative practice in question.

91 Fourth, ESA has not provided any information or arguments concerning the actual situations of the families concerned in the other EEA States. It is uncertain whether the alleged infringement is limited to family benefits in situations where the other parent is not engaged in a professional activity or is limited to situations where such an activity is carried out, or both.

92 Therefore, ESA has failed to show that, in a consistent and general manner, the NAV has applied the anti-overlap rules laid down in Article 76 of the Regulation (No 1408/71) in a way that infringes the EEA Agreement or, for that matter, how the NAV applies Article 10 of Regulation No 574/72. In this respect, it must be recalled that the applicability of these two provisions and their application in each individual case depends on various factors such as the State of residence and the State of employment of the parents and their child, the nature of the legislation applicable, the nature of the benefit, the situation of the two parents

and their child and whether the parent not working in Norway carries out a professional or trade activity.

93 It follows therefore that ESA's plea alleging that the administrative practice in question infringes Article 76 of the Regulation must be dismissed.

Alleged infringement of Article 1(f)(i) of the Regulation

94 ESA maintains its position set out in its reasoned opinion and argues that the administrative practice also infringes Article 1(f)(i) of the Regulation. In contrast, the Norwegian Government submits that were the Regulation to be applied as ESA suggests this would create new rights under the Regulation beyond its mere coordination of national social security systems. Further, the Court recalls that the Government of Norway has argued that the absence of a national requirement for dependency in relation to the payment of child benefits means that Article 1(f)(i) cannot be applied in Norway.

95 The basic rule in allocating competence in respect of social security benefits is laid down in Article 13 of the Regulation which, in its first paragraph, establishes that an EEA worker shall be subject to the legislation of a single EEA State and, in its second paragraph, provides that that State shall be the EEA State of employment, even if the worker resides in the territory of another EEA State.

96 Article 73 of the Regulation extends that rule to the enjoyment of family benefits. Family benefits are defined in Article 1(u)(i) of the Regulation as all benefits in kind or in cash intended to meet family expenses under the legislation provided for in Article 4(1)(h) of the Regulation. As noted above, at paragraph 55, benefits under the Child Benefits Act constitute a "family benefit" within the meaning of Article 4(1)(h) of the Regulation.

97 Article 73 of the Regulation provides that an employed or self-employed person subject to the legislation of an EEA State shall be entitled, in respect of members of his family who are residing in another EEA State, to the family benefits provided for by the legislation of the former State, as if they were residing in that 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, *inter alia*, *Humer*, cited above, paragraph 40).

98 That arrangement stems from the objective of the Regulation, as set out in Article 3 thereof, 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 residence. Article 73 must be interpreted uniformly in all EEA States regardless of the arrangements made by national law on the acquisition of entitlement to family benefits (see Case E-3/05 *ESA* v *Norway*, cited above, paragraph 48).

99 The entitlement to family benefits in respect of a child under Article 73 of the Regulation is conditional upon the child coming within the personal scope of the Regulation (compare *Slanina*, cited above, paragraph 23).

100 Article 1(f)(i) of the Regulation provides rules, for coordination purposes, on how an EEA State must interpret and apply the criterion of "residence" used in national law – such as the Child Benefits Act – in the context of the Regulation.

101 Article 1(f)(i) of the Regulation defines the term "member of the family" for the purposes of the Regulation. It provides that a "member of the family" means "any person defined or recognized as a member of the family or designated as a member of the household by the legislation under which benefits are provided…; where, however, the said legislations regard as a member of the family or a member of the household only a person living under the same roof as the employed or self-employed person or student, this condition shall be satisfied if the person in question is mainly dependent on that person".

102 It is clear from the wording of Article 73 read together with Article 1(f)(i) of the Regulation that the purpose of those provisions is to ensure that if the main provider of a family makes use of the right to move freely within the EEA family benefits for dependent family members should not be lost.

103 It is of no importance whether the parents are divorced. Although the Regulation does not expressly cover family situations following a divorce there is nothing to justify the exclusion of such situations from the scope of the Regulation (see, for comparison, *Humer*, cited above, paragraphs 42 and 43, and *Slanina*, cited above, paragraph 30).

104 The Court recalls that Section 2, paragraph 1, of the Child Benefits Act states that parents who have a child under the age of eighteen years living with them permanently are entitled to child benefits if the child is resident in Norway.

105 Further, for the purpose of providing benefits under the Child Benefits Act to parents who fall under the Regulation with a child living abroad, the NAV verifies instead whether the parents have their regular abode with the child there. However, when applying the rules of the Regulation and the Child Benefits Act, the NAV does not assess whether a child of a person working in Norway is mainly dependent upon that parent, although the parents are separated and the child lives with the other parent in an EEA State other than Norway.

106 However, Article 1(f)(i) of the Regulation requires that where national legislation regards as a "member of the family" only a person living under the same roof as the employed or self-employed person or student (requiring, for example, "regular abode with the child" or "live[s] permanently with the child"), this condition shall be considered satisfied if the person in question is mainly dependent on that person (see, for comparison, *Slanina*, cited above, paragraph 27).

107 Therefore, when the Regulation is applied, for example, where, in accordance with Article 73 of the Regulation, benefits are provided pursuant to Section 2, paragraph 1, of the Child Benefits Act, the national authorities such as the NAV must respect Article 1(f)(i) of the Regulation when national legislation on family benefits regards as a "member of the family" only a member of the household or a person living under the same roof as the employed or self-employed person or student.

108 The Norwegian Government has put forward essentially two arguments in its defence. First, it contends that national law imposes no requirement of dependency in relation to entitlement to child benefit and that the Regulation cannot create new rights under national law. Second, it argues that Article 1(f)(i) of the Regulation is merely a definitional norm, which is incapable itself of being infringed, and which cannot overrule a national eligibility criterion.

109 These arguments must be rejected. As noted in paragraph 71 above, the choice of law rules of the Regulation are binding in the sense that an EEA State cannot decide the extent to which its own social security legislation or that of another State applies. Moreover, as noted in paragraphs 100 and 101 above, Article 1(f)(i) defines the personal scope of the Regulation with regard to members of the family.

110 Article 1(f)(i) of the Regulation does not create new conditions of entitlement under national social security schemes. Instead, for coordination purposes, it provides rules on how, in cross-border situations, the EEA State must interpret and apply the criterion of member of the family used in national law.

111 Moreover, in the present case, a correct application of Article 1(f)(i) of the Regulation is essential for the correct application of the choice of law rules of the Regulation. It is for the national authorities, taking the wording and purpose of the Regulation into account, to determine whether a member of the family is mainly dependent on a person falling under the Regulation. By not making this assessment, the Norwegian administrative practice renders the choice of law rules in the Regulation ineffective. The administrative practice therefore infringes Article 1(f)(i) of the Regulation. An EEA State cannot avoid the binding force of the choice of law rules in the Regulation by unilaterally removing certain categories of persons – in this case separated parents – from its scope.

112 In that context, it must be recalled that national authorities cannot justify a condition of living together which has the consequence that a person with dependent members of his family resident in another EEA State may not receive child benefits only because he is separated from the other parent. To do so would deprive that aspect of the definition of member of the family in the Regulation of its effectiveness (see, for comparison, to that effect, Case C-212/00 *Stallone* [2001] ECR I-7625, paragraph 22).

113 Therefore, having regard to the findings in paragraph 67 above, the argument of the Norwegian Government that, given the absence of a national requirement for

dependency in relation to the entitlement for child benefits, the administrative practice in question does not infringe Article 1(f)(i) of the Regulation must also be rejected in this context.

114 As a consequence, it must be held that, by continuing this administrative practice under the Child Benefits Act, Norway has failed to comply with Article 1(f)(i) of the Regulation. Therefore this plea must be upheld.

## VI Costs

115 Under Article 66(3) of the Rules of Procedure, where each party succeeds on some and fails on other heads, the Court may order that the costs be shared or that the parties bear their own costs. Since both ESA and Norway have been partially successful, each party should bear its own costs. The costs incurred by the European Commission are not recoverable.

On those grounds,

THE COURT

hereby:

1. **Declares that, by maintaining in force the administrative practice under the Child Benefits Act of not assessing whether a child, living together with another parent outside Norway, is mainly dependent on the parent who is living in Norway and separated from the other parent, the Kingdom of Norway is in breach of Article 1(f)(i), second sentence, of the Act referred to at point 1 of Annex VI to the Agreement on the European Economic Area (Regulation (EEC) No 1408/71 of the Council 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 amended), as adapted to the EEA Agreement by Protocol 1 thereto;**

2. **Dismisses the application as to the remainder; and,**

3. **Orders each party to bear its own costs.**

Carl Baudenbacher Per Christiansen Páll Hreinsson

Delivered in open court in Luxembourg on 11 September 2013.

Gunnar Selvik
Registrar

Carl Baudenbacher
President