E-6/12-25

REPORT FOR THE HEARING
in Case E-6/12

APPLICATION to the Court pursuant to 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 in the case between the

EFTA Surveillance Authority

and

The Kingdom of Norway

seeking a declaration that, by maintaining in force the administrative practice of not assessing whether a child, living together with another parent outside the Kingdom of Norway ("Norway"), is mainly dependent on the parent who is living in Norway and separated from the other parent, 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.

I Introduction

1. The EFTA Surveillance Authority ("ESA") contends that, in the assessment of the entitlement for family benefits, the administrative practice of the Norwegian authorities not to assess 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 constitutes a failure to fulfil obligations under the EEA Agreement, since that practice infringes 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 ("Regulation No 1408/71").[1]

2. Norway contests the action.

II Legal background

EEA law

3. Regulation No 1408/71 is incorporated in the EEA Agreement as point 1 of Annex VI.

4. Article 1(f)(i) of Regulation No 1408/71 defines the term "member of the family":

> 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 considered satisfied if the person in question is mainly dependent on that person. …*

5. 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.*

6. Chapter 7 of Regulation No 1408/71 regulates the coordination of family benefits in cross-border cases.

7. Article 73 of Regulation No 1408/71 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*

[1] OJ, English Special Edition 1971 (II), p. 416.

legislation of the former State, as if they were residing in that State, subject to the provisions of Annex VI.

8. Article 75(1) of the Regulation states that:

Family benefits shall be provided, in the cases referred to in Article 73, by the competent institution 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.

9. Article 75(2) of the Regulation provides:

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 Regulation No 1408/71 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.

National law

11. The granting of child benefits in Norway is governed by the Child Benefits Act of 8 March 2002 (*lov av 8. mars 2002 om barnetrygd*, the "Child Benefits Act"). Norway has notified the benefits provided for under the Child Benefits Act as being covered by Article 4(1)(h) of Regulation No 1408/71.[2]

[2] OJ 2003 C 127, p. 36.

12. 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.

13. In determining, for the purpose of awarding child benefits, where a child lives and with which parent, reference is made to section 36 of the Children Act of 8 April 1981 (*lov av 8 april 1981 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.*

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

15. Since the alleged infringement has occurred as a result of the practice of the NAV, a summary description of this practice is set out below in the arguments of the parties.

III Pre-litigation procedure

16. In June 2010, two unresolved cases in the SOLVIT database (an 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 the ESA. These two cases concerned two mothers who were working and residing with their child in Lithuania, in one case, and in Slovakia, in the other. In both cases, the parents of the child were separated and the father of the child 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.

17. 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, outside Norway. ESA requested further information from the Norwegian Government on the issue.

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

19. 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 16 above.

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

21. On 6 July 2011, ESA delivered a reasoned opinion, maintaining the conclusions it had reached in the letter of formal notice. The Norwegian Government replied on 6 October 2011.

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

23. On 18 June 2012, ESA brought the matter before the Court.

IV Forms of order sought by the parties

24. ESA requests the Court to declare that:

(i) *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.*

(ii) *Norway bear the costs of the proceedings.*

25. Norway contests the application and requests the Court to declare that:

(i) *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.

(ii) ESA bear the costs of the proceedings.

V Written procedure

26. Written arguments have been received from the parties:

- the EFTA Surveillance Authority, represented first by Xavier Lewis, Director, and Fiona M. Cloarec, Officer, Department of Legal & Executive Affairs, acting as Agents, and later by Xavier Lewis, Director, and Auður Ýr Steinarsdóttir, Officer, Department of Legal & Executive Affairs, acting as Agents;

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

27. Pursuant to Article 20 of the Statute of the Court and Article 97 of the Rules of Procedure, written observations have been received from:

- the European Commission ("Commission"), represented by Johan Enegren and Viktor Kreuschitz, members of the Legal Service, acting as Agents.

VI Arguments of the parties

ESA

28. ESA understands that entitlement to child benefits in Norway is enjoyed by the parent, not the child. In cases where the parents are married or living together, the relationship to the child is assumed. The child benefit is paid to the parents. If the parents are not living together, the benefit is paid to the parent with whom the child lives permanently.

29. ESA infers that where a child shall live permanently is determined in accordance with Chapter 5 of the Children Act. The parents may choose with whom the child is to live permanently. When NAV assesses an application for child benefits, it takes account of the relevant circumstances to ensure that the benefit is paid to the parent with whom the child lives permanently.

30. In cross-border situations, where one parent works in Norway, 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. ESA understands that the notion of "regular abode" does not require the parent working in Norway to spend a specific amount of time with his family outside Norway.

31. According to the information available to ESA, 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 benefit may be granted. However, if he does not, for example, for reasons of separation or divorce, the child benefit will be refused or the case re-assessed and the child benefits stopped.

32. ESA understands that the residency requirement in Section 2 of the Child Benefits Act does not apply to persons covered by Regulation No 1408/71.

33. In June 2010, two unresolved cases in the SOLVIT database were brought to the attention of ESA. The two cases concerned two mothers who were working and residing with their child in Lithuania, in one case, and in Slovakia, in the other. In both cases, the parents of the child were separated and the father of the child was residing and working in Norway.

34. The mothers were entitled to family benefits in their respective countries of residence. They both requested payment of the difference between the amount to which they were entitled in their country of residence and the higher Norwegian child benefits to which the father, in Norway, would be entitled under the Norwegian social security system. ESA understands that the applications for the Norwegian child benefits were made on the basis of provisions governing situations where there is an overlapping right to family benefits, in particular, Article 76 of Regulation No 1408/71.

35. However, both applications for child benefits were refused by the NAV. ESA understands that they were refused on the basis that either the father had never applied for such benefits in Norway, and/or the parents of the child were divorced or not married and could therefore not be considered to be members of one family.

36. ESA contends that the core issue in this case is the interpretation and application – in cases involving persons working in Norway with their family residing in another EEA State – of the criterion under Norwegian law that, for entitlement to child benefits in respect of a child under the age of eighteen, the parent must live permanently together with the child.

37. According to ESA, this practice is contrary to Regulation No 1408/71.

38. ESA asserts that the practice infringes Article 1(f)(i), in conjunction with Article 76, of Regulation No 1408/71. In its view, this assessment is confirmed by case law of the Court of Justice of the European Union ("ECJ").

39. In support of this contention, ESA notes, first, as regards the infringement of Regulation No 1408/71, that, according to case law, for the purposes of Article 4(1)(h) of Regulation No 1408/71, family benefits are benefits intended to enable one of the parents to devote himself or herself to the raising of a young child, and 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.[3] In its view, this interpretation of family benefits is crucial to the assessment whether Norway applied the concept of "member of the family" correctly.[4] According to ESA, it is uncontested that the child benefits at issue in the present case fall within this case-law definition of family benefits.

40. ESA asserts that the objective of Article 73 of Regulation No 1408/71 is to prevent EEA States from making entitlement to and the amount of family benefits dependent on residence of the members of the workers' family in the EEA State providing the benefit, so that EEA workers are not deterred from exercising their right to freedom of movement.[5]

41. In ESA's view, where as a result of national practice a parent residing with their child in one EEA State is precluded from receiving the higher amount of family benefits payable in accordance with the law of the EEA State of residence of the other parent this puts them in a disadvantaged position and can without a doubt have the effect of deterring such persons from exercising their right to free movement since the total amount of the family benefits payable to the families in question is dependent on their State of residence.

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[3] Reference is made to Case C-275/96 *Anne Kuusijärvi* [1998] ECR I-3419, paragraph 60.

[4] Reference is made to Case C-363/08 *Slanina* [2009] ECR I-11111.

[5] Reference is made to Case C-543/03 *Dodl and Oberhollenzer* [2005] ECR I-5049, paragraphs 45 to 46, and Case C-16/09 *Schwemmer* [2010] ECR I-9717, paragraph 41.

42. ESA submits that the purpose of Article 76 of Regulation No 1408/71 is 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 members' State of residence by reason of the carrying on of an occupation.[6] In that connection, ESA continues, the principles underlying Regulation No 1408/71 require that if the amount of the family allowances actually received in the EEA State of residence is less than the amount of allowances provided for by the legislation of another EEA State, the worker is entitled to a supplement to the allowances from the competent institution of the latter State equal to the difference between the two amounts.[7]

43. 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 State). ESA contends that the correct application of Article 1(f)(i) of Regulation No 1408/71 requires that, in cases where the worker in Norway is found not to have his regular abode with his child, the NAV must assess, in the alternative, whether the child living together with the other parent outside Norway is "mainly dependent on" the parent working in Norway.

44. ESA argues that the NAV currently fails to make this assessment of dependency.

45. Consequently, ESA asserts that the administrative practice according to which, in cross-border cases, 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 without also assessing whether the child is "mainly dependent on" the parent working in Norway infringes Article 1(f)(i), second sentence, in conjunction with Article 76, of Regulation No 1408/71.

46. Moreover, ESA contends, this conclusion finds support in the case law of the ECJ.

47. ESA refers, in this regard, first, to *Slanina*, cited above in footnote 4. In its view, this case supports its contention that, in omitting to assess whether a child is "mainly dependent on" a parent working in Norway, the NAV infringes Regulation No 1408/71. According to ESA, in assessing whether the criterion "living permanently together" is satisfied, the NAV must in all cases assess the issue of dependency. A simple assumption in that regard does not suffice.

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[6] Reference is made to *Slanina*, cited above, paragraph 36.

[7] Reference is made to Case 24/88 *Georges* [1989] ECR 1905, paragraph 11, and Case 153/84 *Ferraioli* [1986] ECR 1401, paragraph 18.

48. Second, ESA contends that the NAV practice contradicts the very objectives of Articles 73 and 76 of Regulation No 1408/71. Its practice leads to migrant workers being put in a disadvantaged position, as they may be prevented from receiving the correct amount of family benefits to which they are entitled. ESA underlines that, as regards social security allowances, a migrant worker is in a special position that must be distinguished from purely internal situations (where both of the parents fall under the same national social security system). The rights under Regulation No 1408/71 are closely linked to the free movement of workers.[8]

49. Third, ESA asserts that, according to the case law of the ECJ, in applying Regulation No 1408/71, it is irrelevant whether the parents are divorced in a given case.[9]

50. ESA refers to information submitted by the Norwegian Government and claims that the Government confirmed that if a married worker, working in Norway while his spouse and child remained in Germany, were to divorce, the Norwegian authorities would stop paying the difference between the amount of the German and Norwegian child benefits.[10]

51. In the absence of harmonisation at EEA level, ESA acknowledges that it is for the legislation of each EEA State to determine, first, the conditions concerning the right or duty to be insured with a social security scheme and, second, the conditions for entitlement to benefits. However, it observes that the EEA States must nevertheless comply with EEA law when exercising those powers.[11]

52. Finally, ESA stresses that the legislation of the EEA on the co-ordination of national social security legislation, taking account in particular of the underlying objectives, cannot, save in the case of an express exception in conformity with those objectives, be applied in such a way as to deprive a migrant worker or those dependent on him of the enjoyment of benefits granted simply by virtue of the legislation of an EEA State.[12]

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[8] Reference is made to *Ferraioli*, cited above, paragraph 17.

[9] Reference is made to Case C-255/99 *Humer* [2002] ECR I-1205, paragraphs 42 to 43, *Slanina*, cited above, paragraph 30, and *Schwemmer*, cited above, paragraph 37.

[10] Reference is made to the meeting between ESA and Norway on 10 and 11 November 2011 and the letter from Norway to ESA of 21 December 2011.

[11] Reference is made to Case C-158/96 *Kohll* [1998] ECR I-1931, paragraphs 18 to 19; Case C-56/01 *Inizan* [2003] ECR I-12403, paragraph 17; C-157/99 *Geraets-Smits and Peerbooms* [2001] ECR I-5473, paragraphs 44 to 46; Case C-385/99 *Müller-Fauré and van Riet* [2003] ECR I-4509, paragraph 100; and Case C-372/04 *Watts* [2006] ECR I-4325, paragraph 92.

[12] Reference is made to *Schwemmer*, cited above, paragraph 58.

Norway

53. Norway denies the alleged infringement and claims that it has complied with its obligations pursuant to Article 28 EEA as detailed in Regulation No 1408/71.

54. Norway claims that Article 1(f)(i) of Regulation No 1408/71 does not in its own right impose obligations on EEA States, it merely defines aspects of the scope of norms that do. Second, Article 76 is not the correct legal basis for the alleged infringement, since the legal obligation in question follows from Article 73 of Regulation No 1408/71. Moreover, the relevant fact is not whether the parent in Norway is "living" in Norway, as suggested by ESA. What is crucial is whether the parent in Norway is "working" in Norway.

55. The Norwegian Government suggests that the issue may be summarised as follows:

> *Does Norway, 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, comply with Articles 76 read in conjunction with Article 73 of Regulation No 1408/71?*

56. Norway states that the benefits in question are granted to the parent with whom the child is living permanently. It is not a benefit belonging to and payable to the child itself. Consequently, the benefits can be distinguished from those at issue in *Humer*, to which ESA refers.[13]

57. Norway affirms that its administrative authorities disburse child benefits in cross-border cases as long as the parent working in Norway has his "regular abode" with the child when in the EEA State in which the child lives.

58. Norway contends that the Court's assessment must be limited to the Norwegian practice exemplified by two cases in the SOLVIT database, to which ESA refers.

59. Norway submits that the cases in question concerned applications for child benefits submitted by one of the parents in instances where (i) the applicant for benefits was working and residing in an EEA State other than Norway, where (ii) the child lived permanently with the applicant in that country and where (iii) the other parent of the child in question was residing and working in Norway and (iv) not (also) living permanently with the child, i.e. not having his or her regular abode

[13] Reference is made to *Humer*, cited above.

in the other EEA State together with the child and the other parent and (v) therefore did not apply himself for child benefit pursuant to the Child Benefits Act.

60. Norway states that, in an intra-Norwegian context and where the parents no longer live together, the NAV will likewise reject applications for child benefit where the applicant does not live permanently with the child in question.

61. In Norway's view, the crucial factor 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. It stresses that, in reaching its assessment, the Court should take account of those aspects of the dispute at hand.

62. The Norwegian Government underlines that the Court is called upon to consider the compatibility of the Norwegian administrative practice only as regards the situation where the parent living outside Norway seeks to increase the disbursement of public benefits.

63. According to the Norwegian Government, it should be noted that the "living permanently with" requirement does not mean that the worker must stay continuously with the spouse and child in order to be entitled to child benefit. Rather, this requirement entails that the worker must have his regular place of abode with his child during the periods 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 (i.e. in situations where parents have separated), NAV may examine this closer.

64. Norway asserts that, for the purposes of benefit entitlement, the NAV never examines whether a child is mainly dependent on the applicant as this is of no relevance. Instead, every parent who has a child living with him or her permanently is entitled to child benefits, regardless of the parent's financial contribution to the child. Child benefit is not dependent on means. The legislation does not in any instance require an assessment of whether or not the child is (mainly) dependent on the parent.

65. Norway advances legal argument in support of the NAV practice. This can be summarised as follows.

66. First, Norway underlines the fact that Regulation No 1408/71 does not harmonise the legislation of the EEA States. Instead, national legislation determines the entitlement to benefits. Consequently, it is for the legislative authorities of each EEA State to determine the conditions for both insurance coverage and the

entitlement to benefits under a social security scheme. Norway observes that ESA formally concedes as much in its application to the Court. However, it continues, ESA fails to see that this crucial aspect must necessarily have consequences for the assessment whether Norway has infringed its EEA obligations. In Norway's view, ESA simply does not appreciate the ramifications that must follow from this national legislative competence in terms of EEA law.

67. Norway asserts that rights which do not exist at the national level cannot be created by virtue of Regulation No 1408/71. Coordination legislation, such as the Regulation, cannot override national criteria for entitlement as long as those criteria comply with EEA law.[14]

68. Norway observes that the Norwegian Child Benefits Act does not mention "member of the family" as a criterion.

69. In its view, this feature alone strongly suggests that Norwegian practice fully complies with EEA law.

70. Norway contends that an objective of Article 73 of Regulation No 1408/71 is to guarantee to family members of a worker who are residing in another EEA State the grant of the family benefits provided for by the applicable legislation of the State to which the worker is affiliated. In the present case, as exemplified by the SOLVIT cases, the applicants were not granted benefits from Norway as the domestic legal criteria were not satisfied.[15]

71. In Norway's view, it is inconceivable that ESA can argue that the NAV's practice deters EEA citizens from exercising their right to freedom of movement.[16] It contends that the practice of the NAV not to assess whether the child living in another EEA State is "mainly dependent" on the parent residing and working in Norway cannot sensibly "deter" such person from exercising their right to freedom of movement. ESA has not demonstrated that the Norwegian legislation or practice has such deterrent effect on the persons in question.

72. The Norwegian Government maintains further that considerations of equal treatment, which is another underlying purpose of Article 73 of Regulation 1408/71, do not support ESA's view but strengthen Norway's submission. It stresses that

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[14] Reference is made to Case C-266/95 *Merino García* [1997] ECR I-3279, paragraphs 27 and 29; Case E-3/05 *ESA* v *Norway* [2006] EFTA Ct. Rep. 104, paragraph 49; *Kohll*, cited above, paragraph 18; Joined Cases C-4/95 and C-5/95 *Stöber and Others* [1997] ECR I-511, paragraph 36; and Case C-349/87 *Paraschi* [1991] ECR I-4501, paragraph 15.

[15] Reference is made to Joined Cases C-245/94 and C-312/94 *Hoever and Zachow* [1996] ECR I-4895, paragraph 32, and *Humer*, cited above, paragraph 39.

[16] Reference is made to Case C-321/93 *Martínez* [1995] ECR I-2821, paragraph 21, and *Hoever and Zachow*, cited above, paragraph 34.

Article 73 provides that a worker shall be entitled to family benefits in respect of family members "as if they were residing in that State".

73. Norway contends that the reason for not disbursing child benefit in cases such as the SOLVIT cases is not the fact that the child is not living in Norway. Rather, it is the fact that the child does not live permanently with the worker who would otherwise be entitled to apply for benefits. Therefore, Norway continues, a father working in Oslo is in this sense treated similarly whether his child is living next door or in another EEA State. Accordingly, a migrant worker is not put in a disadvantageous position.

74. Norway asserts further that were workers to be entitled family benefits as ESA contends this would result in a greater right to benefits in cross-border situations than in wholly domestic situations. This would result in unequal treatment between workers subject to the same legislation and entail an overreach of the relevant EEA obligations to the detriment of intra-Norwegian cases.

75. Norway observes that in 2005 ESA closed a similar complaint against Norway.[17] Now, in the light of recent developments in case law, in particular the *Slanina* judgment, ESA appears to argue for a different reading of the national provisions.[18] In Norway's view, ESA reads too much into that judgment. It sheds very little light on the central issue in the present case, that is, whether the practices of the NAV constitute an infringement of Articles 73 and 76 of Regulation No 1408/71, seen in the light of Article 28 EEA. Moreover, Norway observes, in *Slanina*, the national requirements for receiving benefits were satisfied by the person in question and, in any event, *Slanina* has rarely been applied in subsequent case law.

The Commission

76. The Commission supports the application of ESA.

77. The Commission emphasises the need, in the case of separated parents, to distinguish between maintenance payments and family benefits, at issue in the present case.

78. It observes that there is no harmonised definition of "member of the family" for the purposes of Regulation No 1408/71. Article 1(f)(i) of that regulation refers to national (social security) legislation under which benefits are provided. Consequently, it is the legislation applicable to the applicant (normally the parent) which is decisive in determining who is considered a family member. Moreover,

[17] Reference is made to ESA Case 2573/2002.

[18] Reference is made to *Slanina*, cited above, in particular paragraphs 48 and 49.

were "living under the same roof" requirements for family benefits to be applied literally in a cross-border context, this would disadvantage a migrant worker. This is also the case, the Commission contends, where the parents are divorced.[19]

79. In the Commission's view, it is not the purpose of Article 1(f)(i) of Regulation No 1408/71 to add a new criterion to national legislation. It simply clarifies how a national criterion must be interpreted and applied in a cross-border context.

80. The Commission contends that, according to settled ECJ case law, when Member States lay down legislation regulating the right or the obligation to become affiliated to a social security scheme, they are obliged to comply with the provisions of EU law in force. In particular, such legislation may not have the effect of excluding persons to whom it applies pursuant to Regulation No 1408/71.[20]

81. The Commission shares the view of ESA that the purpose of Regulation No 1408/71 is to make it easier for migrant workers and to prevent Member States from introducing residence requirements which may deter workers from moving freely within the Union.

82. In the Commission's view, it follows from *Slanina* that where the legislation under which benefits are provided only regards persons living under the same roof as the employed or self-employed person as members of the family, this condition shall be considered satisfied if the family member in question is mainly dependent on that person.[21] That is the case, when the parent is required to pay maintenance in respect of the child.[22]

83. The Commission contends that, in a situation such as that described by the Norwegian Government in the present case, the children – or, where applicable, the mothers on behalf of the children – can rely directly on Articles 73 and 74 of Regulation No 1408/71 to claim from the Norwegian authorities, pursuant to Article 76, the difference between the family benefits payable in Norway and those payable in the country of residence in relation to their children living with them in another Member State. The intervention of the workers residing in Norway is not required at all.

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19 Ibid., paragraph 30.

20 Reference is made Case C-347/10 *Salemink*, judgment of 17 January 2012, not yet reported, paragraphs 39 and 40; Case C-135/99 *Elsen* [2000] ECR I-10409, paragraph 33; Case C-2/89 *Kits van Heijningen* [1990] ECR I-1755, paragraphs 20 and 21; and Case 275/81 *Koks* [1982] ECR 3013, paragraph 10.

21 Reference is made to *Slanina*, cited above, paragraph 26 et seq.

22 Ibid., paragraph 27.

84. The Commission contends that, contrary to what is claimed by the Norwegian Government, in *Slanina* the condition of living in the same household was not fulfilled. Moreover, in its view, the interpretation suggested by the Norwegian Government would deprive Articles 72 to 76a of Regulation No 1408/71 of their *effet utile*.

85. In the Commission's view, the concept of "mainly dependent" in Article 1(f)(i) of Regulation No 1408/71, which overrides national requirements of "living under the same roof" or "living in the same household", is an EU-wide notion and must be considered a matter for EU law or, where appropriate, EEA law to interpret. Therefore, it is not for the legislation of the Member State concerned to define in which cases a child can be considered "mainly dependent".

86. According to the Commission, when the legislation applied by an institution only defines as members of the family 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 shall 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.

87. In the Commission's view, the case law of the ECJ should be understood as not preventing Norway from establishing the parameters for family benefits such as age, number of dependent children, amount to be granted, frequency of payments, etc.[23] However, it does not allow Norway to introduce criteria which are not compatible with Regulation No 1408/71, in particular Articles 72 to 76a.

Páll Hreinsson
Judge Rapporteur

[23] Reference is made to Case C-120/95 *Decker* [1998] ECR I-1831, paragraph 23; *Kohll*, cited above, paragraph 19; *Kits van Heijningen*, cited above, paragraph 20; *Elsen*, cited above, paragraph 33; and Case C-227/03 *van Pommeren-Bourgondiën* [2005] ECR I-6101, paragraph 39.