



## JUDGMENT OF THE COURT

2 June 2016\*

*(Coordination of social security systems – Article 87(2) of Regulation (EC) No 987/2009  
– Binding effect of medical findings)*

In Case E-24/15,

REQUEST to the Court under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice by the Princely Court of Appeal (*Fürstliches Obergericht*), in the case between

**Walter Waller**

and

**Liechtensteinische Invalidenversicherung,**

concerning the interpretation of Article 87(2) of Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems,

THE COURT,

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

Registrar: Gunnar Selvik,

having considered the written observations submitted on behalf of:

- Walter Waller, represented by Mag. Antonius Falkner, Rechtsanwalt;
- the Government of Belgium, represented by Liesbet Van der Broek and Marie Jacobs, Legal Advisers, Ministry of Foreign Affairs, acting as Agents;

---

\* Language of the request: German

- the Government of Liechtenstein, represented by Dr Andrea Entner-Koch and Thomas Bischof, Deputy Director, EEA Coordination Unit, acting as Agents;
- the Government of Norway, represented by Christian Fredrik Fougner Rydning, Agent, Ministry of Foreign Affairs and Tonje Skjeie, Advocate, Office of the Attorney General (Civil Affairs), acting as Agents;
- the EFTA Surveillance Authority (“ESA”), represented by Maria Moustakali, Officer, and Íris Ísberg, Temporary Officer, Department of Legal Affairs, acting as Agents; and
- the European Commission (“the Commission”), represented by Denis Martin and Jonathan Tomkin, members of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

having heard oral argument of the Government of Belgium, represented by Liesbet Van der Broek; the Government of Liechtenstein, represented by Thomas Bischof; the Government of Norway, represented by Christian Fredrik Fougner Rydning; ESA represented by Íris Ísberg; and the Commission, represented by Jonathan Tomkin, at the hearing on 20 April 2016.

gives the following

## **Judgment**

### **I Legal background**

*EEA law*

1 Article 28(1) and (2) EEA reads:

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

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

The basic Regulation

2 Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (OJ 2004 L 200, p. 1) (“the basic Regulation”) has been made part of the EEA Agreement by Joint

Committee Decision No 76/2011 of 1 July 2011 (OJ 2011 L 262, p. 33), and is referred to at point 1 of Annex VI to the Agreement.

3 Article 46(3) of the basic Regulation reads:

*A decision taken by an institution of a Member State concerning the degree of invalidity of a claimant shall be binding on the institution of any other Member State concerned, provided that the concordance between the legislation of these Member States on conditions relating to the degree of invalidity is acknowledged in Annex VII.*

4 Article 82 of the basic Regulation reads:

*Medical examinations provided for by the legislation of one Member State may be carried out at the request of the competent institution, in another Member State, by the institution of the place of residence or stay of the claimant or the person entitled to benefits, under the conditions laid down in the Implementing Regulation or agreed between the competent authorities of the Member States concerned.*

The implementing Regulation

5 Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems (OJ 2009 L 284, p. 1) (“the implementing Regulation”) has been made part of the EEA Agreement by Joint Committee Decision No 76/2011, and is referred to at point 2 of Annex VI to the Agreement.

6 Article 5(1) of the implementing Regulation reads:

*Documents issued by the institution of a Member State and showing the position of a person for the purposes of the application of the basic Regulation and of the implementing Regulation, and supporting evidence on the basis of which the documents have been issued, shall be accepted by the institutions of the other Member States for as long as they have not been withdrawn or declared to be invalid by the Member State in which they were issued.*

7 Article 49(2) of the implementing Regulation reads:

*Where Article 46(3) of the basic Regulation is not applicable, each institution shall, in accordance with its legislation, have the possibility of having the claimant examined by a medical doctor or other expert of its choice to determine the degree of invalidity. However, the institution of a Member State shall take into consideration documents, medical reports and administrative information collected by the institution of any other Member State as if they had been drawn up in its own Member State.*

8 Article 87(1) and (2) of the implementing Regulation reads:

*1. Without prejudice to other provisions, where a recipient or a claimant of benefits, or a member of his family, is staying or residing within the territory of a Member State other than that in which the debtor institution is located, the medical examination shall be carried out, at the request of that institution, by the institution of the beneficiary's place of stay or residence in accordance with the procedures laid down by the legislation applied by that institution.*

*The debtor institution shall inform the institution of the place of stay or residence of any special requirements, if necessary, to be followed and points to be covered by the medical examination.*

*2. The institution of the place of stay or residence shall forward a report to the debtor institution that requested the medical examination. This institution shall be bound by the findings of the institution of the place of stay or residence.*

*The debtor institution shall reserve the right to have the beneficiary examined by a doctor of its choice. However, the beneficiary may be asked to return to the Member State of the debtor institution only if he or she is able to make the journey without prejudice to his health and the cost of travel and accommodation is paid for by the debtor institution.*

#### *National law*

9 According to Article 53(1) and (5) of the Invalidity Insurance Act (*Gesetz über die Invalidenversicherung; LR 831.20*), a person is entitled to an invalidity pension when regarded as having a degree of invalidity of at least 40%. A quarter pension is granted where the degree of invalidity is at least 40%, a half pension is granted where the degree of invalidity is at least 50%, and a full pension is granted where the degree of invalidity is at least 67%. Invalidity is defined as a long-term incapacity to work caused by damage to physical or mental health as a result of congenital defect, illness or accident.

10 The Insurance Fund takes the decision whether to grant a claim for benefits under the Invalidity Insurance Act. Pursuant to Article 78 of that act, a decision may be challenged by an administrative complaint before the Insurance Fund, which shall review its decision. A reviewed decision may be appealed to the Princely Court of Appeal for judicial review.

11 According to the Princely Court of Appeal, the procedure before the Insurance Fund is regulated by a principle of unfettered evaluation of evidence. This entails that the Insurance Fund will also determine the factual circumstances of the case. The same principle applies to judicial review before the Princely Court of Appeal if an appeal is brought against the Insurance Fund's decision.

## II Facts and procedure

- 12 Mr Waller is a German national, residing in Germany. He was employed in Liechtenstein from 1988 to 2000. From 2011 the Liechtenstein Invalidity Insurance Fund (*Liechtensteinische Invalidenversicherung*) (“the Insurance Fund”) granted him a full invalidity pension.
- 13 According to the referring court, the appellant applied for a reassessment of his continued entitlement to the invalidity pension in 2013. The Insurance Fund requested the German statutory pension scheme to perform a medical examination of Mr Waller. A doctor appointed by the German statutory pension scheme provided information in a medical report under the exchange of data system established by the implementing Regulation (in this case using the E 213 form). Although the appellant’s medical condition had improved, his ability to work was still found to be reduced. In the medical report the doctor concluded, *inter alia*, that the appellant had a work capacity of less than three hours per day and that this condition would continue to apply for another two years.
- 14 After considering the medical report, but also information from the appellant’s general practitioner stating that Mr Waller was no longer capable of working, the internal medical service of the Insurance Fund considered his degree of invalidity to be 59%. Accordingly, the Insurance Fund reduced Mr Waller’s invalidity pension from 100% to 50%.
- 15 The appellant lodged an administrative complaint against that decision. After contacting the medical officer of the German statutory pension scheme, the Insurance Fund was informed that a work capacity of less than three hours per day corresponded to full incapacity under German social security law and that a more precise quantification of the appellant’s incapacity to work could not be carried out.
- 16 The Insurance Fund rejected Mr Waller’s complaint. He challenged that decision before the Princely Court of Appeal. Mr Waller argues, in essence, that the respondent based its reduction of his invalidity pension solely on the Insurance Fund’s internal medical service’s understanding of the information given in the medical report, namely that he had some capacity to work.
- 17 On 17 September 2015, the Princely Court of Appeal decided to stay the proceedings and refer the following questions to the Court:
  - (1) *Does the fact that under the second sentence of Article 87(2) of Regulation No 987/2009 the debtor institution shall be bound by the findings of the institution of the place of stay or residence preclude the debtor institution from challenging those findings – and thus the information stated in the detailed medical report provided in form E 213 – in its procedure?*

- (2) *If the answer to the first question is in the affirmative: Does that binding effect also apply in court proceedings which, under national procedural rules, follow on from the proceedings before a debtor institution.*

18 Reference is made to the Report for the Hearing for a fuller account of the legal framework, the facts, the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only insofar as is necessary for the reasoning of the Court.

### **III Answers of the Court**

19 The present case concerns legal issues that the Court dealt with to some extent in Case E-13/15 *Bautista*, [2015] EFTA Ct. Rep. 720. That case involved invalidity pension payments from the Liechtenstein Insurance Fund to a beneficiary resident in Spain. That beneficiary was also examined by the national statutory pension scheme upon the request of the Insurance Fund. In *Bautista* the Court had reason to review the binding effect of the findings of the institution of the place of stay or residence. Accordingly, in answering the questions in the present case the Court will refer to relevant reasoning contained in *Bautista*.

#### *The first question*

#### Observations submitted to the Court

- 20 The appellant, ESA and the Commission submit that the binding effect of opinions obtained through the institution of the place of stay of the insured person applies only insofar as the debtor institution does not invoke its independent right to obtain an opinion from a doctor of its own choice (reference is made, *inter alia*, to *Bautista*, cited above, paragraph 39). Since the Insurance Fund has not made use of this right, it is bound by the findings of the institution of the appellant's place of residence and thus cannot challenge the information contained in the medical report.
- 21 The Liechtenstein Government submits that Article 49(2) of the implementing Regulation constitutes a *lex specialis* in the context of the determination of the degree of invalidity. Pursuant to this provision, a medical report from the institution of the place of stay or residence shall be taken into account. The debtor institution is, however, not bound to follow it.
- 22 In the alternative, the Liechtenstein Government contends that the principle of equal treatment, found, *inter alia*, in Article 4 of the basic Regulation, appears to preclude an absolute binding effect for the findings of the institution of the place of stay or residence of the beneficiary, since that binding effect would only benefit a recipient or beneficiary examined in the place of stay or residence, and not someone examined in the State where the debtor institution is located.
- 23 The Norwegian Government submits that the binding effect mentioned in Article 87(2) of the implementing Regulation is limited to the medical findings. Therefore, the binding effect does not apply to legal findings in the debtor institution's

subsequent assessment. This view is supported by the Belgian Government, which asserts that the debtor institution is exclusively competent to assess under national legislation the incapacity of a claimant. However, the debtor institution must make this evaluation in light of the findings of the medical expert of the institution of the place of stay or residence.

- 24 The Norwegian Government adds that, in its view, Article 87 of the implementing Regulation does not entail an obligation to request the institution of the place of stay or residence to conduct the medical examination. First, Article 82 of the basic Regulation merely states that an examination “may” be carried out. Furthermore, the wording “shall be carried out” in Article 87(1) of the implementing Regulation may simply refer to an obligation on the institution of the place of stay or residence to carry out an examination on request or to conduct the examination according to its legislation. It does not entail an obligation to request the institution of the place of stay or residence to perform this examination.

#### Findings of the Court

- 25 By its first question, the national court asks whether a debtor institution is precluded from challenging the findings contained in form E 213 in an administrative procedure, given the binding effect of such findings laid down in Article 87(2) of the implementing Regulation.
- 26 The Government of Liechtenstein submits that Article 49(2) of the implementing Regulation is the relevant provision in the present case. However, the Court rejects this submission. The relevant provision is Article 87(2) of the implementing Regulation because this provision is a particular rule concerning medical examinations (see *Bautista*, cited above, paragraph 36).
- 27 In relation to the binding effect of medical findings provided for in Article 87(2) of the implementing Regulation, the Court held in *Bautista*:

*36 ... When a recipient or claimant of benefits is staying or residing in an EEA State other than that of the debtor institution, the debtor institution must request the institution in that other EEA State to perform the medical examination. It follows from the second sentence of Article 87(2) that the debtor institution requesting the medical examination is bound by such findings.*

*37 The purpose of a binding effect on the debtor institution within the meaning of Article 87(2) is to enable recipients or claimants of social security rights in another EEA State to exercise their right to free movement. That freedom would be counteracted if the debtor institution could question the findings of the institution of the claimant’s place of stay or residence.*

28 At paragraph 40 of that judgment, the Court held further

*40 ... the binding effect mentioned in Article 87(2) applies to medical findings, not to the legal assessment of whether the claimant is entitled to benefits. The debtor institution is competent to assess under national law any entitlement to invalidity benefits, inter alia, based on the medical findings.*

29 The Insurance Fund is therefore bound by the medical findings made by the doctor appointed by the German statutory pension scheme who examined Mr Waller. If the Insurance Fund has deviated from the medical findings, this would be tantamount to challenging those findings. That would not be compatible with the binding effect required by Article 87(2) of the implementing Regulation. However, whether there has been a deviation from those findings constitutes a matter of fact and is thus for the referring court to assess.

30 The Court adds that the binding effect of medical findings provided for in Article 87(2) applies only as long as the debtor institution has not invoked its right to have the beneficiary examined by a doctor of its choice (see *Bautista*, cited above, paragraph 39). In the present case, the Insurance Fund has not invoked this right.

31 The Government of Norway has argued that under Article 87 of the implementing Regulation it is optional whether to request an examination by the institution of the place of stay or residence. However, the Court notes that it is implicit in the coordination scheme that requests for medical examinations are to be exchanged between competent authorities in the EEA States as a matter of mutual trust. If a debtor institution could proceed directly to an examination by a doctor of its choice that scheme would be undermined.

32 The answer to the first question referred is that Article 87(2) of the implementing Regulation precludes the debtor institution from challenging the medical findings of the institution of the place of stay or residence in the administrative procedure.

*The second question*

Observations submitted to the Court

33 The appellant submits that the binding effect applies in court proceedings following an administrative procedure before the debtor institution. That view is essentially supported by the Liechtenstein Government in its alternative line of argument (reference is made to the judgment in *Herbosch Kiere*, C-2/05, EU:C:2006:69, paragraph 33).

34 The Commission concurs and adds that the effectiveness of it would be undermined if the binding effect of medical findings did not apply in court proceedings triggered by the very fact that the competent institution did not comply with such findings.

35 ESA argues that the binding effect mentioned in Article 87(2) of the implementing Regulation does not apply in court proceedings when a recipient or claimant wants



to challenge the medical findings. ESA refers to paragraphs 41 to 44 of *Bautista*, cited above, and the principle of equal treatment. It submits that a recipient or claimant must be entitled to challenge the decisions of the debtor institution in national court proceedings.

- 36 The Belgian Government states that the second question is identical to the question referred in *Bautista*. In that case the Belgian Government argued that to deprive an individual of the right to present evidence to the contrary in national court proceedings would run counter to the fundamental right to have one's case examined by an independent and impartial tribunal allowing for evidence to be challenged.
- 37 The Norwegian Government submits that the binding effect does not apply in court proceedings, since Article 87(2) of the implementing Regulation limits this effect to the debtor institution. Reference is also made to the principle of national procedural autonomy.

#### Findings of the Court

- 38 By its second question the referring court asks whether the binding effect of medical findings also applies in court proceedings which follow on from the administrative proceedings before the debtor institution.
- 39 The binding effect applies to the debtor institution, not to the recipient or claimant. The Court held in *Bautista* that the purpose of that binding effect is to enable recipients or claimants of social security rights to exercise their right to free movement according to EEA law. Also, there is nothing in the wording of Article 87(2) of the implementing Regulation to prevent a recipient or a claimant from challenging the medical findings in the administrative procedure before the debtor institution (see *Bautista*, cited above, paragraphs 37 and 41). The same reasoning must apply in court proceedings that follow an administrative procedure before the debtor institution, as the same considerations are valid in both instances.
- 40 However, it appears that Mr Waller does not wish to challenge the medical findings in question. On the contrary, he argues that those findings must be considered binding in a judicial review following the administrative procedure. This may suggest that his argument before the national court is that the Insurance Fund erred in not properly relying on the medical findings made by the institution of the place of stay or residence, in other words that the Fund did not respect the binding effect provided for in Article 87(2) of the implementing Regulation.
- 41 As indicated above, Article 87(2) of the implementing Regulation is an expression of the mutual trust needed for the coordination scheme, which reflects the principle of loyalty laid down in Article 3 EEA. Taking account of the purpose of Article 87, it follows that the authorities, including the courts, of the EEA State in which the debtor institution is situated, are not entitled to scrutinise medical findings when the debtor institution is itself bound by these (compare, by analogy, *Herbosch Kiere*, cited above, paragraphs 30 to 33). To permit such scrutiny would

undermine the effectiveness of EEA law and impair legal certainty for the recipient or claimant of a social security benefit.

- 42 The answer to the second question is therefore that the binding effect mentioned in Article 87(2) of the implementing Regulation applies in court proceedings following an administrative proceeding before the debtor institution, such as in the present case.

#### IV Costs

- 43 The costs incurred by the Governments of Belgium, Liechtenstein and Norway, ESA and the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are a step in the proceedings pending before the national court, any decision on costs for the parties to those proceedings is a matter for that court.

On those grounds,

#### THE COURT

in answer to the questions referred to it by the Princely Court of Appeal hereby gives the following Advisory Opinion:

- (1) Article 87(2) of Regulation (EC) No 987/2009 precludes the debtor institution from challenging the medical findings of the institution of the place of stay or residence in the administrative procedure.**
- (2) The binding effect mentioned in Article 87(2) of Regulation (EC) No 987/2009 applies in court proceedings following on from an administrative proceeding before the debtor institution in a situation such as that of the present case.**

Carl Baudenbacher

Per Christiansen

Páll Hreinsson

Delivered in open court in Luxembourg on 2 June 2016.

Gunnar Selvik  
Registrar

Carl Baudenbacher  
President