



## JUDGMENT OF THE COURT

1 February 2008\*

*(Invalidity pension rights – free movement of workers – Regulation (EEC) No 1408/71 – Regulation (EEC) No 574/72)*

In Case E-4/07,

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 Héraðsdómur Reykjavíkur (Reykjavík District Court), Iceland, in a case pending before it between

**Jón Gunnar Þorkelsson**

and

**Gildi-lífeyrissjóður (Gildi Pension Fund)**

concerning rules on the free movement of workers within the EEA,

THE COURT,

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

Registrar: Skúli Magnússon,

---

\* Language of the Request: Icelandic.

having considered the written observations submitted on behalf of:

- the Plaintiff, represented by Stefán Geir Þórisson, Supreme Court Attorney;
- the Defendant, represented by Hörður Felix Harðarson, Supreme Court Attorney, acting as Agent, assisted by Tryggvi Þórhallsson, District Court Attorney;
- the Government of Iceland, represented by Sesselja Sigurðardóttir, First Secretary and Legal Officer, Ministry for Foreign Affairs, acting as Agent;
- the EFTA Surveillance Authority, represented by Arne Torsten Andersen, Senior Officer, and Lorna Young, Officer, Department of Legal & Executive Affairs, acting as Agents, assisted by Ólafur Jóhannes Einarsson, Officer, Internal Market Affairs Directorate; and
- the Commission of the European Communities, represented by Viktor Kreuzschitz, Legal Adviser, and Nicola Yerrell, a member of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

having heard oral argument of the Plaintiff, represented by Stefán Geir Þórisson, the Defendant, represented by Hörður Felix Harðarson, the EFTA Surveillance Authority, represented by Lorna Young, and the Commission of the European Communities, represented by Nicola Yerrell, at the hearing on 17 October 2007,

gives the following

## **Judgment**

### **I Facts and procedure**

- 1 The Plaintiff is an Icelandic mariner who, having lived and worked in the Republic of Iceland (hereinafter “Iceland”), in September 1995 moved to Denmark where he still resides. He continued to work as a mariner in Denmark, and paid contributions to a Danish pension fund. On 16 September 1996 the Plaintiff, while at work on board a Danish fishing vessel, suffered an accident causing his invalidity. The Plaintiff has been assessed with an invalidity rating of 75%.

- 2 The Plaintiff had accrued rights to pension payments from several Icelandic pension funds at the time of the accident. Pension premiums had been paid to Lífeyrissjóður Vestfirðinga (the West Fjords Pension Fund) from 1975 to 1987, to Lífeyrissjóður Austurlands (the Eastern Iceland Pension Fund) from 1991 to 1995, most recently in August 1995, and to the Defendant, then Lífeyrissjóður sjómanna (the Mariners' Pension Fund), now Gildi-lífeyrissjóður (Gildi Pension Fund), from 1969 to 1995, most recently in September 1995.
- 3 For his accident, the Plaintiff was awarded a lump-sum payment of DKK 99 653.12 from his Danish pension fund. With this pension fund, it appears that the Plaintiff had not acquired rights to any other benefits for his accident. He does, however, receive a monthly pension of DKK 1 620 (approximately EUR 210) from the Danish municipality where he lives. In Iceland, since 1 October 1996, the Plaintiff has received invalidity pensions from the pension funds named above in accordance with his accrued points and the assessment of his loss of working capacity.
- 4 However, on the grounds of failing to meet a condition of having paid contributions to the Defendant for at least six of the 12 months preceding the accident, the Plaintiff has not been found to have a right to have his invalidity pension calculated on the basis of projected points, i.e. pension points that he would have been able to accrue with the Defendant, had he remained a member of that pension fund and continued working until reaching the age of retirement. The dispute between the parties concerns this right to projection of entitlements.
- 5 The Plaintiff has brought an action before Héraðsdómur Reykjavíkur and demanded such payment from the Defendant. He bases his claim on the view that he is entitled to an invalidity pension with account taken of projected pension points with the Defendant, since the rules of the fund regarding projection and the relevant provisions of the Agreement on Relations between the Icelandic Pension Funds infringe provisions of the Agreement on the European Economic Area (hereinafter the "EEA Agreement" or "EEA") on the free movement of workers, in particular Articles 28 and 29 and the rules based thereon.
- 6 By a letter dated 19 March 2007, registered at the EFTA Court on 26 March 2007, Héraðsdómur Reykjavíkur put a request to the Court for an Advisory Opinion on the following three questions:
  1. *Does the term 'social security' as it is to be understood under the EEA Agreement, and in particular Article 29 of the main text of the Agreement and Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community,*

*cover the entitlement to invalidity benefit that arises in pension fund schemes such as the Icelandic one?*

2. *Whether or not the answer to Question 1 is in the affirmative, the District Court asks whether the provisions of the EEA Agreement on the free movement of workers, and in particular Articles 28 and 29, can be interpreted as meaning that a rule in the Articles of Association of Icelandic pension funds which makes the right to a specific benefit (the right to projection of entitlements) subject to the condition that the individual involved has paid premiums to an Icelandic pension fund that is a party to the Agreement on Relations between the Pension Funds, for at least 6 of the 12 months preceding the date of an accident, is compatible with the EEA Agreement when the reason why the individual is unable to meet this condition is that he has moved to another State within the EEA in order to pursue employment comparable to that which he pursued previously, and he has paid into a pension fund in that State?*
3. *Is Council Regulation (EEC) No 1408/71 of 14 June 1971, on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, to be interpreted as meaning that workers are to present their compensation claims in the state in which they were resident and in which they had social security entitlements at the time of their injury?*

## **II Legal background**

### *National Law*

- 7 According to Icelandic law, workers are obliged to belong to a pension fund which as a main principle shall be the pension fund of their respective occupation or workers' group. Icelandic pension funds are in general established on the basis of agreements between workers' and employers' organisations, but certain funds are governed by special legislation. In the event of loss of working capacity, fund members are entitled to an invalidity benefit.
- 8 The Mariners' Pension Fund (hereinafter also the "MPF") was established by special legislation, Act No 78/1970. The Act provided detailed instructions for the fund including provisions which made invalidity pensions based on projected rights mandatory. These rules were upheld when the 1970 Act was replaced by Act No 49/1974 on the MPF (hereinafter "the 1974 Act").
- 9 The 1974 Act was later replaced by Act No 94/1994 on the MPF (hereinafter "the 1994 Act") which was in force at the time of the Plaintiff's accident. The Act laid

down general rules on the organisation and the objectives of the fund. It stipulated that all mariners hired on board Icelandic vessels were in general to be members of the fund. However, mariners could apply for a permission from the Minister of Finance to remain outside the fund. In order to qualify for an exemption they had to fulfil their insurance obligation by paying contributions to the respective regional fund. The Act left the content of most rights and entitlements to be laid down in a 'regulation' decided upon by the board of the fund and approved by the workers' and employers' organisations and the Minister of Finance. Thus it was left to the 'regulation' to provide rules on whether invalidity pensions should be awarded on the basis not only of the contributions already made (accrued rights) but also of contributions which the member would have paid had he or she continued to be a member until the age of retirement (projected rights). According to information submitted by the parties during the oral hearing, most, if not all, Icelandic pension funds offered invalidity pensions which included pensions based on projected rights. This included the MPF, to which the Plaintiff belonged immediately before he moved from Iceland, and which at the time was the only pension fund for mariners.

- 10 According to the 'regulation' of the MPF which was in force at the time of the Plaintiff's accident, a fund member who suffered a loss of working capacity of 40% or more was entitled to an invalidity pension from the fund based on projection, provided that he had (a) paid premiums to the fund for at least three of the preceding four calendar years and accrued not less than one point for each of the years; (b) paid premiums to the fund for at least 6 months and for at least 100 days during the preceding 12 months; and (c) suffered a reduction of income as a result of the loss of working capacity.
- 11 The 'regulation' of the MPF did not provide for contributions, paid to funds to which a member had belonged previously, to be taken into account when determining whether the conditions for an invalidity pension based on projected rights were fulfilled. However, an agreement of 14 December 1983 on the relations between the pension funds, to which the MPF was a party, provided for such a right, subject to certain conditions, for persons moving between funds which were parties to the agreement.
- 12 The 1994 Act also left it to the 'regulation' to lay down the contributions to be paid by employees and employers who were members of the fund. According to information offered by the parties during the oral hearing, it seems that funds which offered invalidity pensions based on projected rights did not give their members a right to opt for invalidity pensions based on accrued rights only against lower contributions.
- 13 The 1994 Act was replaced by Act No 45/1999 on the MPF. Act No 45/1999 was repealed by Act No 137/2004 which stipulates that as from 1 January 2005, the

Defendant is governed by the Pension Act No 129/1997. The Pension Act lays down general rules on the operation of pension funds in Iceland. Article 15(2) of the Act states that invalidity pension rights are to be projected in accordance with the rules specified in further detail in the Articles of Association of the pension funds, provided that the member in question has paid into a fund for at least three of the preceding four years, including at least six months of the preceding twelve-month period.

- 14 It is undisputed among the parties that the Plaintiff's case falls to be assessed under the 1994 Act.

*EEA Law*

- 15 Article 28(1) EEA reads:

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

- 16 Article 29 EEA reads:

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

- (a) aggregation, for the purpose of acquiring and retaining the right to benefit and of calculating the amount of benefit, of all periods taken into account under the laws of the several countries;*
- (b) payment of benefits to persons resident in the territories of Contracting Parties.*

- 17 Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community (hereinafter "Regulation 1408/71") is referred to at point 1 of Annex VI to the EEA Agreement. Unless otherwise indicated, the following provisions are quoted with the wording applicable, subject to Protocol 1 of the EEA Agreement and the adaptations contained in Annex VI, at the time of the Plaintiff's accident.

- 18 Under Title I *General provisions*, Article 1 *Definitions*, item (j):

*legislation means in respect of each Member State statutes, regulations and other provisions and all other implementing measures, present or future, relating to the branches and schemes of social security covered by Article 4*

*(1) and (2) or those special non-contributory benefits covered by Article 4 (2a).*

*The term excludes provisions of existing or future industrial agreements, whether or not they have been the subject of a decision by the authorities rendering them compulsory or extending their scope. However, in so far as such provisions:*

- (i) serve to put into effect compulsory insurance imposed by the laws and regulations referred to in the preceding subparagraph; or*
- (ii) set up a scheme administered by the same institution as that which administers the schemes set up by the laws and regulations referred to in the preceding subparagraph,*

*the limitation on the term may at any time be lifted by a declaration of the Member State concerned specifying the schemes of such a kind to which this Regulation applies. Such a declaration shall be notified and published in accordance with the provisions of Article 97.*

*[...]*

19 Under Title I *General provisions*, Article 1 *Definitions*, item (r):

*periods of insurance means periods of contribution or period of employment or self-employment as defined or recognized as periods of insurance by the legislation under which they were completed or considered as completed, and all periods treated as such, where they are regarded by the said legislation as equivalent to periods of insurance;*

20 Under Title I *General provisions*, Article 4 *Matters covered*, paragraph 1(b) and (e):

*This regulation shall apply to all legislation concerning the following branches of social security:*

*[...]*

- (b) invalidity benefits, including those intended for the maintenance improvement of earning capacity;*

*[...]*

- (e) benefits in respect of accidents at work and occupational diseases;*

- 21 Under Title I *General provisions*, Article 5 *Declarations by the Member States on the scope of this Regulation*:

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

- 22 Point I(b) of Iceland's original Declaration pursuant to Article 5 (OJ C 398 of 31.12.1994 p. 10):

*Invalidity benefits:*

*[...]*

*Act on the Seamen's Pension Fund (49/1974 with later amendments)*

*[...]*

- 23 Point I(b) in the later Declaration made by Iceland pursuant to Article 5 (OJ C 135 of 2.6.2005 p. 11):

*Invalidity benefits:*

*[...]*

*The Pension Act No 129/1997 with later amendments*

*[...]*

*The Act on the Seamen Pension Fund No 45/1999 with later amendments*

*[...]*

- 24 Under Title I *General provisions*, Article 10 *Waiving of residence clauses – Effect of compulsory insurance on reimbursement of contributions*, paragraph 1:

*Save as otherwise provided in this Regulation invalidity, old-age or survivors' cash benefits, pension for accidents at work or occupational diseases and death grants acquired under the legislation of one or more Member States shall not be subject to any reduction, modification, suspension, withdrawal or confiscation by reason of the fact that the recipient resides in the territory of a Member State other than that in which the institution responsible for payment is situated.*

*[...]*

- 25 Under Title III *Special provisions relating to the various categories of benefits*, Chapter 2 *Invalidity*, Section 2 *Employed persons or self-employed persons subject either only to legislation under which the amount of invalidity benefit*



*depends on the duration of periods of insurance or residence or the legislation of this type and of the type referred to in Section 1:*

*Article 40 General provisions, paragraph 1:*

*An employed person or a self-employed person who has been successively or alternately subject to the legislation of two or more Member States, of which at least one is not of the type referred to in Article 37 (1), shall receive benefits under the provisions of Chapter 3, which shall apply mutatis mutandis [...].*

26 Under Title III *Special provisions relating to the various categories of benefits, Chapter 3 Old age and death (pensions):*

*Article 44 General provisions for the award of benefits where an employed or self-employed person has been subject to the legislation of two or more Member States, paragraph 1:*

*The rights to benefits of an employed or self-employed person who has been subject to the legislation of two or more Member States [...] shall be determined in accordance with this Chapter.*

*Article 45 Consideration of periods of insurance or of residence completed under the legislations to which an employed person or self-employed person was subject, for the acquisition, retention or recovery of the right to benefits, paragraphs 1 and 5:*

*1. Where the legislation of a Member State makes the acquisition, retention or recovery of the right to benefits, under a scheme which is not a special scheme within the meaning of paragraph 2 or 3, subject to the completion of periods of insurance or of residence, the competent institution of that Member State shall take account, where necessary, of the periods of insurance or of residence completed under the legislation of any other Member State, be it under a general scheme or under a special scheme and either as an employed person or a self-employed person. For that purpose, it shall take account of these periods as if they had completed under its own legislation.*

*[...]*

*5. Where the legislation of a Member State makes the acquisition, retention or recovery of the right to benefits conditional upon the person concerned being insured at the time of the materialization of the risk, this condition shall be regarded as having been satisfied in the case of insurance*

*under the legislation of another Member State, in accordance with the procedures provided in Annex VI for each Member State concerned.*

**Article 46 Award of benefits, paragraph 2:**

*Where the conditions required by the legislation of a Member State for entitlement to benefits are satisfied only after application of Article 45 and or Article 40 (3), the following rules shall apply:*

- (a) the competent institution shall calculate the theoretical amount of the benefit to which the person concerned could lay claim provided all periods of insurance and/or of residence, which have been completed under the legislation of the Member States to which the employed person or self-employed person was subject, have been completed in the State in question under the legislation which it administers on the date of the award of the benefit. If, under this legislation, the amount of the benefit is independent of the duration of the periods completed, the amount shall be regarded as being the theoretical amount referred to in this paragraph;*
- (b) the competent institution shall subsequently determine the actual amount of the benefit on the basis of the theoretical amount referred to in the preceding paragraph in accordance with the ratio of the duration of the periods of insurance or of residence completed before the materialization of the risk under the legislation which it administers to the total duration of the periods of insurance and of residence completed before the materialization of the risk under the legislations of all the Member States concerned.*

**27 Under Title VI Miscellaneous provisions:**

**Article 86 Claims, declarations or appeals submitted to an authority, institution or tribunal of a Member State other than the competent State, paragraph 1:**

*Any claim, declaration or appeal which should have been submitted, in order to comply with the legislation of one Member State, within a specified period to an authority, institution or tribunal of that State shall be admissible if it is submitted within the same period to a corresponding authority, institution or tribunal of another Member State. In such a case the authority, institution, or tribunal receiving the claim, declaration or appeal shall forward it without delay to the competent authority, institution or tribunal of the former State either directly or through the competent authorities of the Member State concerned. The date on which such claims, declarations or appeals were submitted to the authority, institution or tribunal of the Second State shall be*

*considered as the date of their submission to the competent authority, institution or tribunal.*

- 28 As referred to at point 1, adaptation (t), cf. originally adaptation (n), of Annex VI to the EEA Agreement, the following has been added to Annex VI *Special procedures for applying the legislations of certain Member States* to Regulation 1408/71 (cf. Article 89 of the Regulation), as regards Iceland, under point ZA, cf. previously point P, originally point O:

*Where employment or self-employment in Iceland has terminated and the contingency occurs during employment or self-employment in another State to which this Regulation applies and where the disability pension of both the social security and the supplementary pension schemes (pension funds) in Iceland no longer includes the period between the contingency and the pensionable age (future periods), periods of insurance under the legislation of another State to which this Regulation applies shall be taken into consideration for the requirement of the future periods as if they were periods of insurance in Iceland.*

- 29 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 (hereinafter “Regulation 574/72”) is referred to at point 2 of Annex VI to the EEA Agreement. Unless otherwise indicated, the following provisions are quoted with the wording applicable, subject to Protocol 1 of the EEA Agreement and the adaptations contained in Annex VI, at the time of the Plaintiff’s accident.
- 30 Under Title IV *Implementation of the special provisions of the Regulation relating to the various categories of benefits*, Chapter 3 *Invalidity, old-age and death (pensions)*, the Section on *Submission and investigation of claims for benefits*:

*Article 36 Claims for old-age and survivors’ benefits (excluding orphans’ benefits) and invalidity benefits in cases not referred to in Article 35 of the implementing Regulation:*

*1. In order to receive benefits under Articles 40 to 51 of the Regulation, except in the cases referred to in Article 35 of the implementing Regulation, the person concerned shall submit a claim to the institution of the place of residence in accordance with the procedure provided for by the legislation administered by that institution. If the employed or self-employed person has not been subject to that legislation, the institution of the place of residence shall forward the claim to the institution of the Member State to whose legislation he was last subject, indicating the date on which the claim was*

*submitted. That date shall be regarded as the date on which the claim was submitted to the latter institution.*

*2. Where a claimant resides in the territory of a Member State to whose legislation the employed or self-employed person has not been subject, he may submit his claim to the institution of the Member State to whose legislation the employed or self-employed person was last subject.*

*[...]*

*4. A claim for benefits sent to the institution of one Member State shall automatically involve the concurrent award of benefits under the legislation of all the Member States in question whose conditions the claimant satisfies except where, under Article 44 (2) of the Regulation, the claimant asks for postponement of any old-age benefits to which he would be entitled under the legislation of one or more Member States.*

- 31 Under the following Section on *Investigation of claims for benefits in respect of invalidity, old age and survivors in the cases referred to in Article 36 of the implementing Regulation*:

*Article 41 Determination of the investigating institutions:*

*1. Claims for benefit shall be investigated by the institution to which they have been sent or forwarded in accordance with the provisions of Article 36 of the implementing Regulation. This institution is hereinafter referred to as the 'investigating institution'.*

*2. The investigating institution shall forthwith notify claims for benefits to all the institutions concerned on a special form, so that the claims may be investigated simultaneously and without delay by all these institutions.*

*Article 48 Notification to the claimant of the decisions of the institutions, paragraph 1:*

*The final decision taken by each of the institutions concerned shall be notified to the investigating institution. Each of these decisions must specify the grounds and time-limits for appeal provided for by the legislation in question. When all these decisions have been received, the investigation institution shall communicate them to the claimant in his own language by means of a summarized statement to which the aforesaid decisions shall be appended. Periods allowed for appeals shall commence only on the date of receipt of the summarized statement by the claimant.*

- 32 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 in so far as is necessary for the reasoning of the Court.

### **III Findings of the Court**

#### *The first question*

- 33 By its first question, Héraðsdómur Reykjavíkur essentially asks whether invalidity pensions based on projected rights fall under Regulation 1408/71 when the entitlement to such pensions is based on a scheme such as that described in paragraphs 7–12 above.
- 34 The Plaintiff argues that this is the case. He emphasises that Icelandic law obliges persons working in Iceland to pay premiums to an Icelandic pension fund. Further reference is made to Article 4(1) of Regulation 1408/71 whereby the Regulation applies to legislation concerning *inter alia* invalidity benefits. Moreover, the Plaintiff quotes Article 5, obliging the EEA States to specify such legislation, and points out that the 1974 Act on the MPF with later amendments was accordingly specified under the heading “Invalidity benefits” in Iceland’s declaration pursuant to this Article. Both the EFTA Surveillance Authority (hereinafter “ESA”) and the Commission of the European Communities (hereinafter “the Commission”) also base their respective submissions on the view that Regulation 1408/71 covers entitlement to invalidity benefits that arise in pension fund schemes such as the Icelandic one, including pensions based on projected rights.
- 35 The Defendant submits that benefits based on projection do not constitute “social security” and thus fall outside the scope of Regulation 1408/71. If the Regulation were to apply to such benefits, it is contended that they constitute special non-contributory benefits subject to Article 10a of the Regulation. The Defendant distinguishes in this respect between, on the one hand, ‘acquired’ (or ‘accrued’) rights to benefits and, on the other hand, the right to projection of entitlements. According to the Defendant, Regulation 1408/71 is based on a premise identical to one in Icelandic law, under which the right to invalidity benefits based on projection is said not to constitute an ‘acquired right’. Reference is made to the wording of Article 29 EEA which, in the view of the Defendant, calls for the coordination only of ‘acquired’ social security rights. The Defendant also cites the sixth recital of the preamble to the Regulation which states that the provisions for coordination must guarantee that persons falling under the Regulation “retain the rights and advantages acquired and in the course of being acquired”. The Government of Iceland maintains that Regulation 1408/71 covers the entitlement to invalidity benefits that arises in pension fund schemes such as the Icelandic one. However, as part of its observations concerning the second question from the national court, the Government argues that a right to projection of invalidity

benefits cannot be considered an ‘acquired right’ and that the Regulation is only intended to prevent citizens from losing their ‘acquired rights’ when moving within the EEA.

- 36 The Court notes that the distinction between benefits excluded from the scope of Regulation 1408/71 and those which fall within its scope is based essentially on the constituent elements of the particular benefit, in particular its purposes and the conditions on which it is granted, and not on whether a benefit is classified as a social security benefit by national legislation (see Case C-78/91 *Hughes* [1992] ECR I-4839, at paragraph 14). The pension at issue in this case is a benefit granted on the basis of invalidity within the meaning of Article 4(1)(b), without any individual and discretionary assessment of personal needs. Already for that reason it does not fall under Articles 4(2a) and 10a as a non-exportable ‘special non-contributory benefit’ (see Case E-5/06, *ESA v Liechtenstein*, judgment of 14 December 2007, not yet reported, at paragraph 71).
- 37 The question is, however, whether only pensions based on accrued rights are covered by the Regulation whereas pensions based on projected rights are not, as claimed by the Defendant and the Government of Iceland.
- 38 Regulation 1408/71 does not harmonise the material content of the social security benefits which it covers. The Regulation merely coordinates social security benefits, to the extent they exist at the national level, in relation to the categories of persons covered by the Regulation. One of the coordination issues regulated by Regulation 1408/71 is to which extent contributions made to foreign pension funds must be equated to contributions made to the fund offering the benefit when establishing whether the conditions for the acquisition or retention of a benefit are fulfilled. This coordination is the same in nature when applied to the award of benefits based on projected rights as when applied to the award of benefits based on accrued rights.
- 39 The above mentioned arguments of the Defendant based on the wording of Article 29 EEA and of Regulation 1408/71 must be rejected. Such a limitation to the general scope of the Regulation would, in light of its aim to facilitate the free movement of workers, have to be based on clear wording. The wording of Article 29 EEA and the Regulation does not, however, support such a distinction. In the context of Article 29 EEA and the preamble to the Regulation, a benefit based on projected rights may be considered as an “acquired” right to the extent the person in question fulfils the conditions under national law for being awarded such a benefit.
- 40 Consequently, pensions based on projected rights as such fall inside the scope of Regulation 1408/71.

- 41 As Article 4(1) makes Regulation 1408/71 applicable only to “legislation” concerning social security, it must further be decided whether the pension scheme in question is based on “legislation” within the meaning of the Regulation. The term “legislation” is defined in Article 1(j), first subparagraph, as “statutes, regulations and other provisions and all other implementing measures, present or future, relating to the branches and schemes of social security” covered *inter alia* by Article 4(1). However, Article 1(j), second subparagraph, excludes from the term “legislation” “provisions of existing or future industrial agreements, whether or not they have been the subject of a decision by the authorities rendering them compulsory or extending their scope”. This limitation may be lifted by a declaration of the EEA State concerned in relation to provisions which serve *inter alia* to “put into effect compulsory insurance imposed by laws and regulations referred to” in the first subparagraph of Article 1(j).
- 42 The 1994 Act on the MPF as well as previous and subsequent legislation pertaining to that fund form part of a social security system under which membership in a pension fund is mandatory for all workers. However, the 1994 Act left the material content of the benefits offered by the MPF to be regulated in a ‘regulation’ which then, according to the Act, had to be approved by the workers’ and employers’ organisations and the Minister of Finance. This raises the question of whether the MPF’s ‘regulation’ at the time of the Plaintiff’s accident was “legislation” within the meaning of the first subparagraph of Article 1(j) of Regulation 1408/71, or whether it qualified as provisions of industrial agreements under the second subparagraph of Article 1(j). In this respect, the role of the Minister is relevant.
- 43 If, under a system such as that established by the 1994 Act, a decision on whether a fund should offer benefits based on projection of rights is entirely left to the workers’ and employers’ organisations, the provisions establishing such pension rights fall under the second subparagraph of Article 1(j) of Regulation 1408/71 as provisions of industrial agreements. If, on the other hand, the system is based on the premise that the Minister can impose this type of social security benefit on the fund, the ‘regulation’ constitutes “implementing measures” falling under the first subparagraph of article 1(j) in relation to that type of pension.
- 44 It is for the national court to decide whether, according to the criteria set out above, the rules at issue pertaining to the invalidity pension based on projected rights fall under the first or the second subparagraph of Article 1(j) of Regulation 1408/71.
- 45 Under Article 5 of Regulation 1408/71, all “legislation and schemes” referred to in Article 4(1) are to be specified in declarations submitted by the EEA States and published in the Official Journal of the European Communities (now: the Official Journal of the European Union). In relation to social security schemes referred to

in the second subparagraph of Article 1(j), this declaration also serves the purpose of lifting the reservation on such schemes and thereby subjecting them to the scope of the Regulation.

- 46 It is therefore necessary to assess whether the fact that the Icelandic declaration at the time of the Plaintiff's accident had not been updated to refer to the 1994 Act has any consequences in law. At that time, the declaration still listed "Act on Seamen's Pension Fund (49/1974 with later amendments)" as one of the acts establishing invalidity benefit schemes covered by Article 4(1)(b) of the Regulation. The declaration was not updated until 2004 when a reference to Act No 45/1999 on the MPF replaced the reference to the 1974 Act.
- 47 In relation to social security legislation falling under the first subparagraph of Article 1(j), the fact that the legislation has not been specified in the declaration referred to in Article 5 of Regulation 1408/71 is not of itself proof that the legislation falls outside the scope of the Regulation, see for comparison Case 35/77 *Beerens* [1977] ECR 2249, at paragraph 9. That would go against the aim of Regulation 1408/71 to facilitate the free movement of persons, see case E-5/06 *ESA v Liechtenstein*, judgment of 14 December 2007, not yet reported, at paragraph 74. Thus, if the national court should classify the invalidity pension based on projected rights at issue as falling under the first subparagraph of Article 1(j), the content of the declaration at the time of the Plaintiff's accident is not relevant for the applicability of the Regulation.
- 48 In case the national court should come to the conclusion that an 'industrial agreement' is at issue, it follows from the second subparagraph of Article 1(j) of Regulation 1408/71 that the relevant social security scheme falls under the Regulation in so far as this follows from the declaration made pursuant to that provision. The second subparagraph of Article 1(j) only calls for the "schemes" based on industrial agreements to be specified. The provision does not require a specific reference to the "legislation" in question in order for the declaration to be valid. Thus, the fact that the Icelandic declaration remained unchanged when the MPF went from being regulated by the 1974 Act to being regulated by the 1994 Act does not by itself render the Regulation inapplicable to the invalidity pension based on projected rights offered by the MPF under the 1994 Act.
- 49 The Defendant's argument that the declaration has no legal effect because it was not submitted to the Icelandic pension funds for approval must also be rejected. The second subparagraph of Article 1(j) of the Regulation does not require such clearance which, consequently, is purely an internal matter for the State concerned, in its relationship with the pension funds.



- 50 Having established that the declaration has legal effect, it further needs to be considered whether it nevertheless must be interpreted as excluding pensions based on projected rights. Iceland's declaration in 1994, citing the 1974 Act, did not by its wording purport to exclude pensions based on projected rights. Furthermore, although the provisions of the 1994 Act did not, as the 1974 Act, require invalidity pensions to be based on projected as well as accrued rights, pensions based on projected rights remained a part of the invalidity pension scheme of the MPF and as such mandatory for mariners. Thus, it must be concluded that the invalidity pension scheme continued to be covered by the Regulation with regard to both accrued and projected rights.
- 51 The text concerning Icelandic invalidity pensions which was added as an EEA adaptation to Annex VI to the Regulation confirms this interpretation of the declaration. As shall be demonstrated in paragraphs 60–62 below, it addresses the question of how to take into account periods of insurance in other EEA States with regard to the condition that a fund member must have paid contributions to the fund for a certain period preceding the date of an accident in order to qualify for an invalidity pension based on projected rights.
- 52 Consequently, irrespective of whether the MPF's 'regulation' falls under the first or the second subparagraph of Article 1(j) of Regulation 1408/71, the answer to the first question by Héraðsdómur Reykjavíkur must be that the term "social security", as it is to be understood under Article 29 EEA and Regulation 1408/71, covers the entitlement to an invalidity benefit that arises in pension fund schemes such as the one at issue in the main proceedings, including pensions based on projected rights.

*The second question*

- 53 By its second question, Héraðsdómur Reykjavíkur essentially asks whether it is compatible with EEA law to subject the entitlement to invalidity benefits based on projected rights, such as those at issue in the main proceedings, to the condition that a member of a pension fund must have paid contributions to a fund belonging to a certain group of funds for a specific period preceding the date of an accident and thereby exclude contributions paid into social security systems in other EEA States in relation to work there.
- 54 The national court in its question refers to "the provisions of the EEA Agreement on the free movement of workers, and in particular Articles 28 and 29 EEA". The Court finds that the question falls to be considered first and foremost under Regulation 1408/71, interpreted in light of the principle of free movement of workers, as laid down in Article 28 EEA (see for comparison Case C-168/88

*Dammer* [1989] ECR 4553, at paragraph 22 and C-227/89 *Rönfeldt* [1991] ECR 323, at paragraph 24).

- 55 Referring in particular to Article 45(1) of Regulation 1408/71 and the Icelandic entry in Annex VI to the Regulation, the Plaintiff suggests answering the second question in the negative. He argues that it is irrelevant that he could have continued to pay contributions to the Defendant after moving to another EEA State. ESA and the Commission submit, on the basis that the sole reason why the Plaintiff did not fulfil the 6 month requirement was that he had exercised his right to free movement and taken up work in another EEA State, that his periods of insurance under the pension scheme there must be taken into account by the Defendant. This is said to follow from Article 45(5) of Regulation 1408/71. In their view, this conclusion is reinforced by the above-mentioned Icelandic entry in Annex VI to the Regulation, which makes specific provisions for access to projected invalidity benefits.
- 56 The Defendant finds that answering the second question in the negative may give rise to “reverse discrimination” as workers moving domestically may be put in a less favourable position than workers moving to another EEA State. It is argued that this contravenes the principle laid down in Article 3 of Regulation 1408/71 and that answering the second question in the negative thus would not be justified. The Defendant also adduces that the Agreement on Relations between the Icelandic Pension Funds is an agreement between independent parties, falling outside the scope of Regulation 1408/71, and that the pension fund to which the Defendant paid contributions in another EEA State was not a party to that Agreement. Further, the Defendant contends that the Icelandic entry in Annex VI to the Regulation does not apply to pensions based on projected rights.
- 57 The provisions of Regulation 1408/71 pertaining to invalidity benefits distinguish between two main categories of persons: on the one hand, persons that are subject only to legislation under which the amount of invalidity benefits is independent of the duration of periods of insurance (see Articles 37 to 39) and, on the other hand, persons that are either subject only to legislation under which the length of insurance is relevant in this respect or subject to legislations of both types. For the latter category, Article 40 of the Regulation provides that the provisions of Chapter 3 under Title III, pertaining to old age and death, shall apply *mutatis mutandis*. Thus, for this category, Article 45 lays down the conditions for acquisition, retention or recovery of the right to benefits and Article 46 regulates the calculation of the amount.
- 58 The amount of an invalidity pension based on projected rights is calculated on the basis of the contributions which the member would have paid had he or she remained a member until the age of retirement. The length of insurance is

therefore relevant when calculating the amount of the benefit. It cannot matter in this respect that the length of insurance is based on projection. It is in any case Article 46, not Article 39, which lays down rules capable of regulating this kind of calculation. Consequently, Article 45 applies to the question of whether the Plaintiff's right to a pension based on projected rights can be made subject to the condition that he had paid premiums to the Defendant for at least 6 of the 12 months preceding the date of an accident.

- 59 Article 45(1) lays down the general principle that when the competent institution decides whether it is under an obligation to provide a pension to a person to whom the Regulation applies, the institution shall take account of periods of insurance under the legislation of any other EEA State as if these periods had been completed under its own legislation. Article 45(5) then prescribes that where the acquisition, retention or recovery of the right to benefits is conditional upon the person concerned being insured at the time of the materialisation of the risk, this condition shall be regarded as having been satisfied in the case of insurance under the legislation of another EEA State, in accordance with the procedures provided in Annex VI for each EEA State concerned.
- 60 The provisions on invalidity benefits in Regulation 1408/71 refer to Annex VI in only two places, Articles 37 and 45(5). As concluded above, Article 37 is not applicable. Therefore, Iceland's entry in Annex VI, as quoted in paragraph 28 above, clarifies the application of Article 45(5) to the condition that members of Icelandic pension funds must have paid contributions to the fund for a certain period which is close in time to the materialization of the risk causing the invalidity, in order to qualify for an invalidity pension based on projected rights.
- 61 The adaptation first stipulates that it applies "[w]here employment ... in Iceland has terminated and the contingency occurs during employment or self-employment in another State ... and where the disability pension ... in Iceland no longer includes the period between the contingency and the pensionable age (future periods)". Within the context of Article 45(5), this refers to the situation where a person no longer qualifies for a pension based on projected rights because of having taken up work abroad and for that reason having ceased to pay contributions to the Icelandic pension fund system, as Icelandic funds, at the outset, only recognise contributions made to the fund in question.
- 62 The adaptation then provides that "periods of insurance under the legislation of another State to which this Regulation applies shall be taken into consideration for the requirement of the future periods as if they were periods of insurance in Iceland". In relation to the condition that the individual concerned paid contributions to the relevant fund for a certain period preceding the date of an accident, this means that contributions made to the social security system of

another EEA State shall be taken into account as if they had been made to the competent Icelandic fund.

- 63 In this respect, the agreement between Icelandic pension funds providing for coordination of periods where members move from one Icelandic pension fund to another is irrelevant for the legal situation under the Regulation. The Regulation is not based on any assumption of such network agreements.
- 64 Moreover, the Regulation does not contain any general reservation to the effect that it must under no circumstances lead to a more favourable result than that which would have been the result of change of residence or work within a single State.
- 65 It is not a condition for Article 45 of the Regulation to apply that the person concerned be barred from continuing his membership in the social security scheme of his previous State of residence or employment. Such a condition could force persons availing themselves of the right to free movement to be members of several legislation-based social security schemes at the same time. This would go against the purpose of the Regulation which is to facilitate the free movement of persons *inter alia* by making such parallel memberships unnecessary. Therefore, it does not matter whether or not the Plaintiff was barred from continuing his membership in an Icelandic pension fund, including the Defendant.
- 66 Based on the above, the answer to the second question must be that it is not compatible with Article 45(5) of Regulation 1408/71 for a pension fund to subject the entitlement to invalidity benefits based on projected rights, such as those at issue in the main proceedings, to the condition that a fund member must have paid contributions to a fund belonging to a certain group of funds for a specific period preceding the date of an accident and thereby exclude contributions paid into social security systems in other EEA States in relation to work there.

*The third question*

- 67 By its third question, Héraðsdómur Reykjavíkur asks whether Regulation 1408/71 means that workers are to present their compensation claims in the State in which they were resident and in which they had social security entitlements at the time of their injury.
- 68 The Plaintiff adduces essentially that, under Article 10(1) of Regulation 1408/71, benefits such as those at issue in the case at hand must be paid to a migrant from the EEA State where the benefits were acquired, irrespective of where in the EEA that person resides. The Defendant, on the other hand, argues that under the single State rule in Regulation 1408/71, an individual can only rely on the social security system of the EEA State where he or she works. Moreover, it is alleged that, in

any case, the Defendant is not a competent institution for the Icelandic social security system under Regulations 1408/71 and 574/72.

- 69 The Government of Iceland points to Article 36(1) of Regulation 574/72, under which persons such as the Plaintiff are to present their claims to the institution of the place of their residence, but does not specifically comment on the consequences of such a claim being presented to an institution in another EEA State. Likewise, ESA cites Article 36(1). However, by referring further to Article 36(3), ESA argues that where a claimant submits his claim to the institution of the EEA State of which he is a national, that institution shall forward the claim to the competent institution. In any event, referring to Article 86(1) of Regulation 1408/71, ESA submits that failure to present a claim to the correct authorities cannot affect the worker's right to a benefit. Referring to Articles 36(4) and 41 of Regulation 574/72, ESA adds that the submission of a claim shall automatically involve the concurrent award of benefits under the legislation of all of the EEA States under whose legislation the claimant is entitled to benefits. Referring also to Article 48 of Regulation 574/72, ESA then suggests that whichever institution the claim is submitted to, calculations made by Icelandic authorities in accordance with Article 41 of Regulation 574/72 are subject to judicial review by Icelandic courts. Similarly, referring in particular to Articles 36 and 41 of Regulation 574/72, the Commission argues that a failure to submit the claim to the correct authorities cannot in any way be relied upon to rule out that claim. The Commission further argues that it would, in any event, be for the Defendant to examine the Plaintiff's entitlement to the additional projected invalidity pension upon having the claim forwarded from another institution.
- 70 The Court notes that the question of which institution is competent to deal with the claim is regulated first and foremost in Regulation 574/72. According to Article 36(1) of that Regulation, persons claiming benefits pursuant to *inter alia* Article 40 of Regulation 1408/71 shall submit their claims to the institution of the place of residence.
- 71 The purpose of Regulations 1408/71 and 574/72 is to facilitate the free movement of persons. Seen in light of that aim, Regulation 1408/71 cannot be interpreted to the effect that a person's right under the Regulation depends on the claim being submitted to the correct institution according to the detailed and technical provisions of Regulation 574/72. This also follows from Article 86(1) of Regulation 1408/71 which is based on the premise that a claim may be validly lodged in any EEA State. It is then for the relevant institution in that State to forward the claim to the competent institution.
- 72 Furthermore, according to Article 36(4) of Regulation 574/72, a claim for benefits sent to the institution of one EEA State shall automatically involve the concurrent

award of benefits under the legislation of all the EEA States in question whose conditions the claimant satisfies. To this end, Article 41(1) of Regulation 574/72 provides that claims for benefit shall be investigated by the institution to which they have been sent or forwarded, the “investigating institution”. Under Article 41(2), the investigating institution shall forthwith notify claims for benefits to all the institutions concerned, so that the claims may be investigated simultaneously and without delay by all institutions. According to Article 48 of the same Regulation, the final decision taken by each of the institutions concerned shall be notified to the investigating institution.

- 73 This entails that, in any case, it is the Defendant which will have to make the final decision as to awarding the Plaintiff an invalidity pension based on projected rights.
- 74 Article 48 of Regulation 574/72 also provides that when the relevant decisions have been received by the investigating institution, it shall communicate them to the claimant. Periods allowed for appeals shall commence only on the date of receipt of the communication by the claimant. However, this may not be interpreted to mean that a person can be deprived of any right he or she may have under national law to have established, already at an earlier stage, his legal rights by a court of law, see for comparison *Dammer*, at paragraph 21 and *Rönfeldt*, at paragraph 26.
- 75 The answer to the third question must be that under Regulation 574/72, persons shall present their claims in the State where they were resident and where they had social security entitlements at the time of their injury. However, the lodging of a claim with the relevant institution of another EEA State is without prejudice to the right to benefits under Regulation 1408/71. It is in any case for each institution concerned to make the final decision as to whether the claimant must be awarded the benefit which has been claimed from that institution.

#### **IV Costs**

- 76 The costs incurred by the Government of Iceland, 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 Héraðsdómur Reykjavíkur, any decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by Héraðsdómur Reykjavíkur hereby gives the following Advisory Opinion:

- 1. The term “social security”, as it is to be understood under Article 29 EEA and Regulation 1408/71, covers the entitlement to an invalidity benefit that arises in pension fund schemes such as the one at issue in the main proceedings, including pensions based on projected rights.**
- 2. It is not compatible with Article 45(5) of Regulation 1408/71 to subject the entitlement to invalidity benefits based on projected rights, such as those at issue in the main proceedings, to the condition that a member of a pension fund must have paid contributions to a fund belonging to a certain group of funds for a specific period preceding the date of an accident and thereby exclude contributions paid into social security systems in other EEA States in relation to work there.**
- 3. Under Regulation 574/72, persons shall present their claims in the State where they were resident and where they had social security entitlements at the time of their injury. However, the lodging of a claim with the relevant institution of another EEA State is without prejudice to the right to benefits under Regulation 1408/71. It is in any case for each institution concerned to make the final decision as to whether the claimant must be awarded the benefit claimed from that institution.**

Carl Baudenbacher

Thorgeir Örlygsson

Henrik Bull

Delivered in open court in Luxembourg on 1 February 2008.

Skúli Magnússon  
Registrar

Carl Baudenbacher  
President