**JUDGMENT OF THE COURT**

29 July 2022*

(*Articles 6 and 21 of Regulation (EC) No 883/2004 – Social security – Migrant worker – Equality of treatment – Calculation of maternity benefit*)

In Case E-5/21,

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 Reykjavík District Court (*Héraðsdómur Reykjavíkur*), in the case between

**Anna Bryndís Einarsdóttir**

and

**the Icelandic Treasury,**

concerning the interpretation of Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, and in particular Articles 6 and 21 of that regulation,

THE COURT,

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

Registrar: Ólafur Jóhannes Einarsson,

having considered the written observations submitted on behalf of:

– Anna Bryndís Einarsdóttir, represented by Hulda Rós Rúriksdóttir, attorney;

– the Icelandic Government, represented by Guðrún Sesselja Arnardóttir, acting as Agent;

– the Czech Government, represented by Martin Smolek and Jiří Vláčil, acting as Agents;

* Language of the request: Icelandic. Translations of national provisions are unofficial and based on those contained in the documents of the case.

– the EFTA Surveillance Authority ("ESA"), represented by Ewa Gromnicka, Ingibjörg Ólöf Vilhjálmsdóttir, Claire Simpson and Melpo-Menie Joséphidès, acting as Agents; and

– the European Commission ("the Commission"), represented by Denis Martin and Nicola Yerrell, acting as Agents;

having regard to the Report for the Hearing,

having heard oral argument on behalf of Anna Bryndís Einarsdóttir, represented by Hulda Rós Rúriksdóttir; the Icelandic Government, represented by Guðrún Sesselja Arnardóttir; ESA, represented by Ingibjörg Ólöf Vilhjálmsdóttir; and the Commission, represented by Nicola Yerrell, at the remote hearing on 27 April 2022,

gives the following

**Judgment**

## I Legal background

*EEA law*

1 Article 28(1) of the Agreement on the European Economic Area ("the EEA Agreement" or "EEA") reads:

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

2 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.*

3 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 166, p. 1), as corrected by OJ 2004 L 200, p. 1, and OJ 2007 L 204, p. 30, ("the Regulation") was incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 76/2011 of 1 July 2011 (OJ 2011 L 262, p. 33, and EEA Supplement 2011 No 54,

p. 46), and is referred to at point 1 of Annex VI (Social Security) to the EEA Agreement. Constitutional requirements were indicated by Iceland and Liechtenstein. The requirements were fulfilled by 31 May 2012 and that decision entered into force on 1 June 2012.

4 Recital 9 of the Regulation reads:

> *The Court of Justice has on several occasions given an opinion on the possibility of equal treatment of benefits, income and facts; this principle should be adopted explicitly and developed, while observing the substance and spirit of legal rulings.*

5 Article 5 of the Regulation, entitled "Equal treatment of benefits, income, facts or events", reads:

> *Unless otherwise provided for by this Regulation and in the light of the special implementing provisions laid down, the following shall apply:*
>
> *(a) where, under the legislation of the competent Member State, the receipt of social security benefits and other income has certain legal effects, the relevant provisions of that legislation shall also apply to the receipt of equivalent benefits acquired under the legislation of another Member State or to income acquired in another Member State;*
>
> *(b) where, under the legislation of the competent Member State, legal effects are attributed to the occurrence of certain facts or events, that Member State shall take account of like facts or events occurring in any Member State as though they had taken place in its own territory.*

6 Article 6 of the Regulation, entitled "Aggregation of periods", reads:

> *Unless otherwise provided for by this Regulation, the competent institution of a Member State whose legislation makes:*
>
> - *the acquisition, retention, duration or recovery of the right to benefits,*
> - *the coverage by legislation, or*
> - *the access to or the exemption from compulsory, optional continued or voluntary insurance,*
>
> *conditional upon the completion of periods of insurance, employment, self-employment or residence shall, to the extent necessary, take into account periods of insurance, employment, self-employment or residence completed under the legislation of any other Member State as though they were periods completed under the legislation which it applies.*

7 Article 21 of the Regulation, entitled “Cash benefits”, reads:

> *1. An insured person and members of his/her family residing or staying in a Member State other than the competent Member State shall be entitled to cash benefits provided by the competent institution in accordance with the legislation it applies. By agreement between the competent institution and the institution of the place of residence or stay, such benefits may, however, be provided by the institution of the place of residence or stay at the expense of the competent institution in accordance with the legislation of the competent Member State.*
>
> *2. The competent institution of a Member State whose legislation stipulates that the calculation of cash benefits shall be based on average income or on an average contribution basis shall determine such average income or average contribution basis exclusively by reference to the incomes confirmed as having been paid, or contribution bases applied, during the periods completed under the said legislation.*
>
> *3. The competent institution of a Member State whose legislation provides that the calculation of cash benefits shall be based on standard income shall take into account exclusively the standard income or, where appropriate, the average of standard incomes for the periods completed under the said legislation.*
>
> *4. Paragraphs 2 and 3 shall apply* mutatis mutandis *to cases where the legislation applied by the competent institution lays down a specific reference period which corresponds in the case in question either wholly or partly to the periods which the person concerned has completed under the legislation of one or more other Member States.*

*National law*

8 The Icelandic Maternity/Paternity and Parental Leave Act No 95/2000 (“the Leave Act”) establishes the conditions for entitlement to maternity/paternity benefit and the calculation methods. The basic rule is contained in Article 4, which states that the Maternity/Paternity Leave Fund (“the Leave Fund”) shall make payments to parents “who hold entitlements to payments during maternity/paternity leave under Article 13”.

9 Article 13 of the Leave Act is entitled “Parents’ rights to payments from the Maternity/Paternity Leave Fund”. Article 13(1) sets out the rights acquisition period and reads, in extract:

> *A parent … acquires the right to payments from the Maternity/Paternity Leave Fund after she/he has been active on the domestic labour market for six consecutive months prior to the birth of a child … However, in the case of a parent who begins taking maternity/paternity leave before the birth of the child …, the date on which the parent begins taking maternity/paternity leave shall be taken as the base regarding that parent’s entitlement.*

10 Article 13(2) of the Leave Act provides that payments from the Leave Fund to a parent shall be based on a percentage of her or his average total wages on the domestic labour market based on the reference period, and reads, in extract:

> *The Maternity/Paternity Leave Fund's monthly payment to an employee ... during maternity/paternity leave shall amount to 80% of her/his average total wages, ... these being based on a continuous twelve-month period ending six months prior to [the birth month] ... "Wages" here shall include all forms of wage and other remuneration according to the Insurance Levy Act, ... Only average total wages for those months during the reference period in which the parent was on the domestic labour market shall be taken into account, cf. also the second paragraph of Article 13 a, irrespective of whether wages under the second sentence or calculated remuneration under the fifth paragraph were paid. In no case shall fewer than four months be taken as a reference base when average total wages are calculated.*

11 Article 13(4) of the Leave Act provides for the situation where an employee has acquired the right to payments under the rights acquisition period but has not worked on the domestic market during the earnings reference period. It reads:

> *When an employee meets the conditions of the first paragraph but has not worked on the domestic labour market during the reference period as specified in [paragraph one], she/he shall acquire the right to minimum payments under the [seventh paragraph].*

12 Article 13(7) of the Leave Act provides that the minimum payment to a parent holding a 50 to 100 per cent job shall never be less than a minimum threshold.

13 Article 13(12) of the Leave Act provides for the situation where the employee has not been active on the domestic labour market for the full six months of the rights acquisition period. It reads, in extract:

> *When a parent has worked on the domestic labour market for at least the last month of the rights acquisition period under the first paragraph, the Directorate of Labour shall, to the extent necessary, take account of his/her working periods as an employee or a self-employed individual in another Member State of the Agreement on the European Economic Area, ... during the rights acquisition period, provided that the parent's work conferred rights on him/her under the legislation of the State in question regarding maternity/paternity leave. If, on the other hand, the parent worked on the domestic labour market for less than the last month of the rights acquisition period under the first paragraph, then the Directorate of Labour shall assess whether the parent in question is to be regarded as having worked on the domestic labour market for the purposes of this Act with the consequence that account is to be taken, to the extent necessary, of his/her working periods as an employee or a self-employed individual in another Member State of the Agreement on the European Economic Area, ..., during the rights acquisition period, provided that the parent's work conferred*

*rights on him/her under the legislation of the State in question regarding maternity/paternity leave. A condition for this shall be that the parent began work on the domestic labour market within ten working days of stopping work on the labour market of the other State within the EEA, … The parent shall submit the required certificate of accrued employment periods and insurance periods in the other State, according to the provisions of the agreements, together with her/his application for payments from the Maternity/Paternity Leave Fund under Article 15.*

14 Article 15(3) and (4) of the Leave Act read, in extract:

*Calculation of payments to a parent on maternity/paternity leave shall be based on data which the Directorate of Labour shall acquire on parents' income from tax returns, tax authorities' records of income tax (PAYE) and insurance levy payments. The Directorate of Labour shall seek confirmation from the tax authorities that the data from the records of income tax and insurance levy payments corresponded to the taxes levied by the tax authorities in respect of the reference periods under the second, fifth and sixth paragraphs of Article 13. ….*

*The tax authorities shall supply the Directorate of Labour with the data necessary to apply this Act.*

## II Facts and procedure

15 Ms Einarsdóttir pursued postgraduate studies in medicine in Denmark and was employed on a full-time basis there from 1 September 2015. On 17 September 2019 she moved to Iceland. She was pregnant at that time. After arriving in Iceland, she began working at the National University Hospital of Iceland. Her first working day was 30 September 2019.

16 On 15 January 2020, Ms Einarsdóttir notified her employer about the proposed structure of her maternity leave. On 22 January 2020, she submitted her application for payments from the Leave Fund. The application was accompanied by payslips from the National University Hospital of Iceland for November and December 2019, and a confirmation from Denmark of her domicile there since 2015 and of her wage payments. On 26 March 2020 her baby was born.

17 Ms Einarsdóttir's application was approved by the Leave Fund's decision of 3 March 2020. In that decision she was informed of the payment schedule, which entailed that the monthly payments would amount to ISK 184 119 for 100 per cent maternity leave. This calculation resulted from the fact that the Leave Fund had not taken her income earned in Denmark into consideration when determining the maternity benefit. Accordingly, she would only receive the basic minimum payments during her maternity leave. Ms Einarsdóttir brought an appeal against this decision to the Welfare Appeals Committee, which upheld in a ruling of 2 September 2020 the Leave Fund's conclusion.

18 According to the request, the parties to the main proceedings do not dispute the fact that Ms Einarsdóttir began working in Iceland on 30 September 2019, which was within ten working days of when she stopped working in Denmark. It is also not disputed that Ms Einarsdóttir had worked full-time in Denmark before moving to Iceland and that the work she had done there had conferred entitlement to maternity leave under Danish law. It follows from the request that it is established that Ms Einarsdóttir received wages in Denmark throughout the entire period designated in Article 13 of the Leave Act as the reference period for wages.

19 On 25 January 2021, Ms Einarsdóttir brought an action to annul the decision by the Welfare Appeals Committee concerning her application for payments during her maternity leave. She submits that the decision is contrary to the rules on the European Economic Area, which Iceland has undertaken to comply with. The parties to the main proceedings disagree on whether income earned by Ms Einarsdóttir during her work in Denmark must be taken into account in order to determine the amount of the maternity benefit payments.

20 Against this background, Reykjavík District Court decided to request an Advisory Opinion from the Court. The request, dated 8 December 2021, was registered at the Court on 13 December 2021. The District Court has referred the following question to the Court:

> *Does Article 6 of Regulation (EC) No 883/2004, on the coordination of social security systems (cf. also Article 21(3) of the Regulation), oblige an EEA State, when calculating payments in connection with maternity/paternity leave, to calculate reference income on the basis of a person's aggregate wages on the labour market across the entire European Economic Area? Does it infringe the aforementioned provision and the principles of the EEA Agreement (see, for example, Article 29 EEA) if only a person's aggregate wages on the domestic labour market are taken into account?*

21 Reference is made to the Report for the Hearing for a fuller account of the legal framework, the facts, the procedure and the proposed answers submitted to the Court. Arguments of the parties are mentioned or discussed hereinafter only insofar as it is necessary for the reasoning of the Court.

## III Answer of the Court

22 By the first part of its question, the referring court asks whether Article 6 of the Regulation, read in conjunction with Article 21(3), obliges an EEA State to calculate reference income on the basis of a person's aggregate wages on the labour market across the entire European Economic Area when calculating payments related to maternity/paternity leave. By the second part of its question, the referring court asks whether Article 6 and the principles of the EEA Agreement are infringed if only aggregate wages on the domestic labour market of a person are taken into account. The Court finds it appropriate to answer these two parts together.

23 Article 6 of the Regulation implements the basic principle of aggregation of periods of employment for assessing the entitlement to benefits as laid down in Article 29(a) EEA. This principle is intended to ensure that exercise of the right to free movement does not have the effect of depriving workers of social security advantages that they would have been entitled to if they had spent the relevant working time in only one EEA State, in this case in Iceland. Such a situation might discourage EEA workers from exercising their right to freedom of movement and would therefore constitute an obstacle to that freedom (compare the judgment in *Zakład Ubezpieczeń Społecznych I Oddział w Warszawie,* C-866/19, EU:C:2021:865, paragraph 29 and case law cited).

24 However, Article 6 of the Regulation concerns entitlement to benefits, and not how benefits are calculated. It follows from the request that it is not disputed that Ms Einarsdóttir meets the conditions for entitlement to maternity benefit under Icelandic law. The referring court's question is whether income received in other EEA States must be taken into account in the calculation of the benefit to which Ms Einarsdóttir is entitled.

25 As also expressed in recital 9 of the Regulation, Article 5 of that regulation enshrines the principle of equal treatment of benefits, income and facts (compare the judgment in *Caisse d'assurance retraite et de la santé au travail d'Alsace-Moselle*, C-769/18, EU:C:2020:203, paragraph 42). Article 5(a) of the Regulation provides that, where, under the legislation of the competent EEA State, the receipt of income has certain legal effects, the relevant provisions of that legislation also apply to income acquired in another EEA State (compare the judgment in *Bocero Torrico,* C-398/18 and C-428/18, EU:C:2019:1050, paragraph 30). However, Article 5 is applicable unless the Regulation provides otherwise. Specific rules on the calculation of cash benefits are set out in Article 21(2) to (4) of the Regulation.

26 The question refers explicitly to Article 21(3) of the Regulation. However, ESA and the Commission argue that Article 21(2) of the Regulation is relevant in the present case. The Court notes that it is a matter for the referring court to determine which of these paragraphs is applicable in the main proceedings.

27 Article 21(2) of the Regulation provides that the competent institution of an EEA State whose legislation stipulates that the calculation of cash benefits shall be based on average income or on an average contribution basis shall determine such average income or average contribution basis exclusively by reference to the incomes confirmed as having been paid, or contribution bases applied, during the periods completed under the said legislation. Under Article 21(3), the same applies to cases where the calculation of the cash benefits is based on standard income.

28 Article 21(4) of the Regulation provides that paragraphs 2 and 3 shall apply *mutatis mutandis* to cases where the legislation applied by the competent institution lays down a specific reference period which corresponds in the case in question either wholly or partly to the periods which the person concerned has completed under the legislation of one or more other EEA States.

29 Irrespective of whether the qualifying income for the calculation of the cash benefit is determined under Article 21(2) or (3), the calculation of the cash benefit is linked to the income paid in the domestic labour market (compare the judgment in *Bergström*, C-257/10, EU:C:2011:839, paragraph 49). Accordingly, the calculation of a cash benefit is not to be based on income received in other EEA States.

30 However, attributing no income to periods of employment completed in other EEA States is incompatible with Article 21(2) and (3). The purpose of the Regulation is to coordinate the social security systems of EEA States in order to guarantee that the right to free movement of persons can be exercised effectively. Accordingly, that regulation seeks to prevent the situation in which a worker who, having exercised his or her right of free movement, has worked in more than one EEA State is treated less favourably than a worker who has worked in only one EEA State, without objective justification. The right to free movement of persons would be impeded if an EEA national were to be placed at a disadvantage in his or her State of origin solely for having exercised that right (compare the judgment in *Bundesagentur für Arbeit*, C-29/19, EU:C:2020:36, paragraphs 33 and 34 and case law cited).

31 Article 21 of the Regulation must be interpreted in the light of Article 29 EEA (see Case E-8/20 *Criminal proceedings against N*, judgment of 5 May 2021, paragraph 46 and case law cited). The objective pursued by Article 29 EEA entails, in particular, that migrant workers must not lose their right to social security benefits or have the amount of those benefits reduced because they have exercised their right to free movement (compare the judgment in *Bosmann*, C-352/06, EU:C:2008:290, paragraph 29). The Regulation has been adopted to give effect to Article 29 EEA and further the free movement of workers.

32 The obligation not to put migrant workers who have availed themselves of their right to free movement at a disadvantage does not mean, however, that Article 21(2) and (3) of the Regulation, by not allowing the income earned in another EEA State to be taken into account for the calculation of cash benefits, must be regarded as contrary to the objective set down in Article 29 EEA. That obligation merely implies that those benefits must be the same for the migrant worker as they would have been if he or she had not availed themself of their right to free movement (compare the judgment in *Nemec*, C-205/05, EU:C:2006:705, paragraph 41).

33 Accordingly, Article 21(2) and (3) of the Regulation, interpreted in accordance with the objective set out in Article 29 EEA, requires that the qualifying income of a migrant worker for periods of employment completed in another EEA State than that of the competent institution must be calculated by taking into account the notional income of a person who is employed, in the EEA State of the competent institution, in a situation comparable to the migrant worker's situation and who has professional experience and qualifications comparable to the migrant worker's professional experience and qualifications (compare the judgment in *Bergström*, cited above, paragraph 52).

34 According to the request, the calculation of the maternity benefit in the present case is based on income received in a continuous 12-month period ending six months prior to

the month in which the child is born. However, at no time shall fewer than four months be taken into account when calculating average income. The six-month period prior to giving birth is only relevant for the entitlement to maternity benefit. Thus, the calculation of the amount of the benefit is separated from the assessment of entitlement to that benefit. In the present case, Ms Einarsdóttir's income during the 12-month reference period for the calculation of the benefit was earned in Denmark. She received income in Iceland only during the six-month period relevant for the entitlement of benefits. As a result of applying the calculation rules under Icelandic law, Ms Einarsdóttir would only receive the minimum payment of maternity benefit, as if she had not had any income from work during the 12-month reference period.

35 In circumstances such as those of the main proceedings, Article 21(2) and (3) of the Regulation requires that the qualifying income of a migrant worker such as Ms Einarsdóttir must be calculated by taking into account the income of a person who is employed in Iceland in a situation comparable to that migrant worker and who has professional experience and qualifications comparable to that of the migrant worker. According to the request, Ms Einarsdóttir was employed in Iceland for approximately six months prior to giving birth. Although it is for the referring court to determine, the Court observes that the income received during that period is *prima facie* likely to constitute a reference point pro rata for comparable income for the purposes of applying Article 21(2) and (3) of the Regulation.

36 In the light of the above, the answer to the question referred must be that Articles 6 and 21(2) and (3) of the Regulation do not oblige the competent institution of an EEA State to calculate the amount of a benefit, such as that at issue in the main proceedings, on the basis of income received in another EEA State. However, Article 21(2) and (3) of the Regulation, interpreted in accordance with the objective set out in Article 29 EEA, requires that the amount of a benefit, such as that at issue in the main proceedings, granted to a migrant worker who, during the reference period set out in national law had only had income in another EEA State, must be calculated by taking into account the income of a person who has comparable experience and qualifications and who is similarly employed in the EEA State in which that benefit is sought.

## IV Costs

37 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. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds,

THE COURT

in answer to the question referred to it by Reykjavík District Court gives the following Advisory Opinion:

**Articles 6 and 21(2) and (3) of Regulation (EC) No 883/2004 on the coordination of social security systems do not oblige the competent institution of an EEA State to calculate the amount of a benefit, such as that at issue in the main proceedings, on the basis of income received in another EEA State. However, Article 21(2) and (3) of Regulation (EC) No 883/2004, interpreted in accordance with the objective set out in Article 29 of the EEA Agreement, requires that the amount of a benefit, such as that at issue in the main proceedings, granted to a migrant worker who, during the reference period set out in national law had only had income in another EEA State, must be calculated by taking into account the income of a person who has comparable experience and qualifications and who is similarly employed in the EEA State in which that benefit is sought.**

Páll Hreinsson Per Christiansen Bernd Hammermann

Delivered in open court in Luxembourg on 29 July 2022.

Ólafur Jóhannes Einarsson
Registrar

Páll Hreinsson
President