



E-5/21-15

## REPORT FOR THE HEARING

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 Article 6 of that regulation.

### **I Introduction**

1. By letter of 8 December 2021, registered at the Court on 13 December 2021, Reykjavík District Court requested an Advisory Opinion in the case pending before it between Anna Bryndís Einarsdóttir and the Icelandic Treasury.

2. The case before the District Court concerns a claim for the annulment of the ruling of 2 September 2020 by the Welfare Appeals Committee (*úrskurðarnefnd velferðarmála*) by which it upheld the decision of 3 March 2020 of the Maternity/Paternity Leave Fund (“the Leave Fund”) (*Fæðingarorlofssjóður*). In the latter decision, Ms Einarsdóttir’s application for payments from the Leave Fund during her maternity leave was approved with the monthly payments amounting to ISK 184 119 for 100 per cent maternity leave. This payment amount meant that the Leave Fund did not agree with Ms Einarsdóttir that her income in Denmark has to be taken into account in the calculation of the maternity

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

payments. Ms Einarsdóttir claims that the decision is based on an incorrect interpretation of Article 6 of Regulation (EC) No 883/2004.

## II Legal background

### *EEA law*

3. Article 3 of the Agreement on the European Economic Area (“the EEA Agreement” or “EEA”) reads:

*The Contracting Parties shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Agreement.*

*They shall abstain from any measure which could jeopardize the attainment of the objectives of this Agreement.*

*Moreover, they shall facilitate cooperation within the framework of this Agreement.*

4. Article 28(1) EEA reads:

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

5. 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.*

6. 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 the decision entered into force on 1 June 2012.

7. Recital 4 of the Regulation reads:

*It is necessary to respect the special characteristics of national social security legislation and to draw up only a system of coordination.*

8. Recital 5 of the Regulation reads:

*It is necessary, within the framework of such coordination, to guarantee within the Community equality of treatment under the different national legislation for the persons concerned.*

9. Recital 10 of the Regulation reads:

*However, the principle of treating certain facts or events occurring in the territory of another Member State as if they had taken place in the territory of the Member State whose legislation is applicable should not interfere with the principle of aggregating periods of insurance, employment, self-employment or residence completed under the legislation of another Member State with those completed under the legislation of the competent Member State. Periods completed under the legislation of another Member State should therefore be taken into account solely by applying the principle of aggregation of periods.*

10. Recital 13 of the Regulation reads:

*The coordination rules must guarantee that persons moving within the Community and their dependants and survivors retain the rights and the advantages acquired and in the course of being acquired.*

11. Recital 14 of the Regulation reads:

*These objectives must be attained in particular by aggregating all the periods taken into account under the various national legislation for the purpose of acquiring and retaining the right to benefits and of calculating the amount of benefits, and by providing benefits for the various categories of persons covered by this Regulation.*

12. Article 2(1) of the Regulation, entitled “Persons covered”, reads:

*This Regulation shall apply to nationals of a Member State, stateless persons and refugees residing in a Member State who are or have been subject to the legislation of one or more Member States, as well as to the members of their families and to their survivors.*

13. Article 4 of the Regulation, entitled “Equality of treatment”, reads:

*Unless otherwise provided for by this Regulation, persons to whom this Regulation applies shall enjoy the same benefits and be subject to the same obligations under the legislation of any Member State as the nationals thereof.*

14. 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.*

15. 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.*

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

*1. An insured person and members of his 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*

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

18. 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:

*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 a 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.*

19. 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:

*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.*

20. 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, and 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 two], she/he shall acquire the right to minimum payments under the [seventh paragraph].*

21. 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.

22. 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, and reads:

*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, providing 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, providing 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.*

23. Article 15(3) and (4) of the Leave Act reads:

*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.*

### **III Facts and procedure**

24. Ms Einarsdóttir pursued postgraduate studies in medicine in Denmark and she was employed full-time from 1 September 2015. She moved to Iceland on 17 September 2019 and 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.

25. On 15 January 2020, Ms Einarsdóttir notified her employer about the proposed structure of her maternity leave. She submitted her application for payments from the Leave Fund on 22 January 2020. 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. Her baby was born on 26 March 2020.

26. 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 meant that the Leave Fund had not taken into account her income earned in Denmark for the calculation of the maternity payments and that 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 the Leave Fund's conclusion in a ruling of 2 September 2020.

27. 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 after she stopped working in Denmark. It is further not disputed that Ms Einarsdóttir had worked full-time in Denmark before moving to Iceland and that the work she had done had conferred entitlement to maternity leave under Danish law. It further follows from the request that it is established that Ms Einarsdóttir received wages throughout the entire period designated in Article 13 of the Leave Act as the reference period for wages.

28. On 25 January 2021, Ms Einarsdóttir brought an action to have quashed the decision by the Welfare Appeals Committee on her application for payments during her maternity leave. She submits that the decision is in violation of 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 through her work in Denmark must be taken into account when payments from the Leave Fund are calculated.

29. Against this background, the District Court decided to stay the proceedings and refer the following questions 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?**

#### **IV Written observations**

30. Pursuant to Article 20 of the Statute of the Court and Article 90(1) of the Rules of Procedure, written observations have been received from:

- 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;



- the EFTA Surveillance Authority (“ESA”), represented by Ewa Gromnicka, Ingibjörg Ólöf Vilhjálmssdóttir, 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.

## **V Proposed answers submitted**

### *Anna Bryndís Einarsdóttir*

31. Anna Bryndís Einarsdóttir does not propose specific answers to the questions referred but submits that the provision must be interpreted as to oblige 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. Ms Einarsdóttir argues that each individual must be in the same position no matter where he or she is located in the area covered by the Regulation.

32. Ms Einarsdóttir submits that the instructions found in the second paragraph of Article 13 of the Leave Act are in direct contradiction with and in violation of EEA law.

### *The Icelandic Government*

33. The Icelandic Government proposes that the questions referred be answered as follows:

*Article 6 of Regulation (EC) No 883/2004, on the coordination of social security systems (cf. also Article 21 of the Regulation), does not oblige an EEA State when calculating maternity/paternity leave payments, to calculate reference income on the basis of a person's aggregate wages in the labour market across the entire Economic Area.*

*It does not infringe Article 29 EEA or Article 6 (cf. also Article 21 of Regulation No (EC) No 883/2004) if only a person's aggregate wages in the domestic labour market during a reference period between six to eighteen months prior to the month of birth, are taken into account.*

### *The Czech Government*

34. The Czech Government proposes that the questions referred be answered as follows:

*Art. 21(3) in conjunction with Art. 21(4) of Regulation No. 883/2004 does not oblige an EEA State, to calculate payments in connection with maternity or paternity leave based on wages acquired throughout the entire EEA.*

*However, in the present case, the competent institution should take into account the wages acquired on the domestic labour market even though they were not acquired during the relevant reference period.*

ESA

35. ESA proposes that the questions referred be answered as follows:

*(1) Articles 6 and 21 of Regulation 883/2004 should be interpreted as requiring the competent institution of an EEA State to take into account periods of employment in another EEA State when determining whether the conditions for entitlement to maternity benefit are met and to take into account only average income received during periods of employment undertaken under its national legislation during the relevant calculation reference period.*

*(2) In order for Articles 6 and 21 of Regulation 883/2004 to be effective and to satisfy the equal treatment requirement of Article 4 of the Regulation, where the reference period for calculation of the benefit is in its entirety completed under the legislation of another EEA State, the competent institution of the EEA State should ensure that the amount of the benefit is calculated by reference to the income of a person who has comparable experience and qualifications and who is similarly employed in the EEA State in which the benefit is claimed.*

*In the alternative:*

*(1) Articles 28 and 29 EEA must be interpreted as precluding legislation of an EEA State such as that at issue in the main proceedings that, for the purposes of determining the average wage/contribution basis when calculating the amount of maternity benefit excludes wages/contributions in another EEA State, has the effect of substantially reducing the amount of maternity benefit granted to that person in comparison with the amount to which she would have been entitled had she been gainfully employed in that EEA State alone.*

The Commission

36. The Commission proposes that the questions referred be answered as follows:

*1. Article 6 of Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 should be interpreted as requiring a competent institution to take into account periods of employment carried out in another EEA State in order to determine whether the conditions for entitlement to a maternity benefit under its national legislation are met.*

*As regards the calculation of that benefit, Article 21(2) of Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 should be interpreted as requiring the competent institution to take into account only average income received during periods of employment undertaken under its national legislation during the relevant reference period.*

*However, when employment during the reference period fixed for the calculation of the maternity benefit was completed under the legislation of another EEA State, the national judge should ensure that the amount of that benefit is 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 the benefit is claimed.*

Per Christiansen  
Judge-Rapporteur