# JUDGMENT OF THE COURT

16 December 2015*

*(Coordination of social security systems – Article 87(2) of Regulation (EC) No 987/2009 – Binding effect of medical findings of institution of place of stay or residence – Right to challenge those findings – Principle of equal treatment)*

In Case E-13/15,

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

**Abuelo Insua Juan Bautista**

and

**Liechtensteinische Invalidenversicherung,**

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

THE COURT,

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

Registrar: Gunnar Selvik,

having considered the written observations submitted on behalf of:

- the appellant, represented by Dr Hugo Vogt, Rechtsanwalt;

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* Language of the request: German

- the Government of Belgium, represented by Liesbet Van der Broek and Marie Jacobs, Legal Advisers, Ministry of Foreign Affairs, acting as Agents;

- the Government of the Czech Republic, represented by Martin Smolek and Jiří Vláčil, Ministry of Foreign Affairs, acting as Agents;

- the Government of Liechtenstein, represented by Thomas Bischof, Deputy Director, EEA Coordination Unit, acting as Agent;

- the Government of Norway, represented by Dag Sørlie Lund, Adviser, Ministry of Foreign Affairs and Tonje Skjeie, Advocate, Office of the Attorney General (Civil Affairs), acting as Agents;

- the EFTA Surveillance Authority ("ESA"), represented by Maria Moustakali, Officer, and Íris Ísberg, Temporary Officer, Department of Legal Affairs, acting as Agents; and

- the European Commission ("the Commission"), represented by Denis Martin and Nicola Yerrell, members of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

having heard oral argument of the Government of Belgium, represented by Marie Jacobs; the Government of Liechtenstein, represented by Thomas Bischof; the Government of Norway, represented by Tonje Skjeie; ESA, represented by Íris Ísberg; and the Commission, represented by Denis Martin, at the hearing on 17 November 2015,

gives the following

## Judgment

## I Introduction

1 Mr Abuelo Insua Juan Bautista ("the appellant"), a resident of Spain, is in receipt of a Liechtenstein invalidity pension. On the basis of a medical examination conducted by a Spanish doctor, concluding that the appellant is able to perform light work, the Liechtenstein Invalidity Insurance Fund (*Liechtensteinische Invalidenversicherung*) ("the respondent" or "the Insurance Fund") decided to suspend his pension. The national court reviewing that decision has requested an advisory opinion on the nature and scope of the binding effect on the debtor institution of medical findings provided for in Article 87(2) of Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems (OJ 2009 L 284, p. 1) ("the implementing

Regulation"). The Regulation has been made part of the EEA Agreement by Joint Committee Decision No 76/2011 of 1 July 2011 (OJ 2011 L 262, p. 33) ("Decision 76/2011"), and is referred to at point 2 of Annex VI to the Agreement.

## II Legal background

*EEA law*

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

> *1. Freedom of movement for workers shall be secured among EC Member States and EFTA States.*
>
> *2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of EC Member States and EFTA States as regards employment, remuneration and other conditions of work and employment.*

*The basic Regulation*

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 200, p. 1) ("the basic Regulation") has been made part of the EEA Agreement by Decision 76/2011, and is referred to at point 1 of Annex VI to the Agreement. The preamble to the basic Regulation includes the following recitals:

> *(1) The rules for coordination of national social security systems fall within the framework of free movement of persons and should contribute towards improving their standard of living and conditions of employment.*
>
> *...*
>
> *(4) It is necessary to respect the special characteristics of national social security legislation and to draw up only a system of coordination.*
>
> *(5) 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.*
>
> *...*
>
> *(13) 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.*
>
> *...*

*(26) For invalidity benefits, a system of coordination should be drawn up which respects the specific characteristics of national legislation, in particular as regards recognition of invalidity and aggravation thereof.*

…

*(29) To protect migrant workers and their survivors against excessively stringent application of the national rules concerning reduction, suspension or withdrawal, it is necessary to include provisions strictly governing the application of such rules.*

4 Article 4 of the basic Regulation 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.*

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

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

6 Article 82 of the basic Regulation reads:

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

*The implementing Regulation*

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

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

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

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

9 Article 87 of the implementing Regulation reads:

> *1. Without prejudice to other provisions, where a recipient or a claimant of benefits, or a member of his family, is staying or residing within the territory of a Member State other than that in which the debtor institution is located, the medical examination shall be carried out, at the request of that institution, by the institution of the beneficiary's place of stay or residence in accordance with the procedures laid down by the legislation applied by that institution.*
>
> *The debtor institution shall inform the institution of the place of stay or residence of any special requirements, if necessary, to be followed and points to be covered by the medical examination.*
>
> *2. The institution of the place of stay or residence shall forward a report to the debtor institution that requested the medical examination. This institution shall be bound by the findings of the institution of the place of stay or residence.*
>
> *The debtor institution shall reserve the right to have the beneficiary examined by a doctor of its choice. However, the beneficiary may be asked to return to the Member State of the debtor institution only if he or she is able to make the journey without prejudice to his health and the cost of travel and accommodation is paid for by the debtor institution.*

10 The basic Regulation repeals Council Regulation (EEC) No 1408/81, whereas the implementing Regulation repeals Council Regulation (EEC) No 574/72. Article 82 of the basic Regulation is in substance identical to Article 87(1) of Regulation (EEC) No 1408/71. Article 87(2) of that regulation established that medical examinations carried out according to Article 87(1) should be considered as having been carried out in the territory of the competent State. It now follows from Article 87(2) of the implementing Regulation that the findings of the institution of the place of stay or residence bind the debtor institution.

*National law*

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

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

13 Pursuant to Article 90(1) and (2) of the Regulation on the Invalidity Insurance Act (*Verordnung zum Gesetz über die Invalidenversicherung; LR 831.201*), the Insurance Fund may review of its own motion a person's continued entitlement to benefits, in particular whether there are circumstances indicating a possible significant change in the degree of invalidity.

14 The procedure before the Insurance Fund is governed by a principle of "unfettered evaluation of evidence". This entails that the Insurance Fund will also determine the factual circumstances of the case. The same principle applies to the judicial review before the Princely Court of Appeal, if an appeal has been made against the factual findings of the Insurance Fund.

## III Facts and procedure

15 The appellant was employed as a construction worker in Liechtenstein in 1990 and 1991 and from 1995 to 2006. From 2005 the respondent granted a quarter invalidity pension to the appellant, and from 2008 he was granted a full invalidity pension. In 2010, the appellant moved from Liechtenstein to Spain.

16 In 2013, the respondent conducted a review of the appellant's entitlement to an invalidity pension. In the context of that review, the respondent requested the Spanish Social Security Institute (*Instituto Nacional de la Seguridad Social*) to perform a medical examination of the appellant. In September of that year, the Spanish Social Security Institute forwarded the findings to the Insurance Fund in a report based on the medical examination. According to that document, and in the opinion of the examining doctor, the appellant was still capable of regularly performing light work. He was not able to work full time in his last occupation as a construction worker, but adapted work could be performed full time.

17 In November 2013, the respondent notified the appellant that it intended to terminate his invalidity pension. The appellant objected and submitted medical documents allegedly contradicting the findings of the Spanish doctor.

18 In March 2014, the respondent decided that the appellant would have his invalidity pension terminated with effect from 30 April 2014. The appellant objected to the Insurance Fund's decision and submitted further medical documents. However, in October 2014, the respondent rejected Mr Bautista's objections.

19 The appellant brought that decision before the referring court. He argues, in essence, that the respondent has based the termination of the invalidity pension solely on the Spanish doctor's report and its internal medical service's interpretation of that report. Inadequate regard was given to various medical opinions suggesting that his health has not improved. He also argues that the Spanish doctor acting on the Insurance Fund's request did not carry out a professional examination. Rather, the report was based merely on a brief, ten-minute conversation. Given the conflicting medical reports, the appellant also argues that the respondent should have obtained a third and decisive medical expert opinion.

20 The respondent contends that there are no contradictory medical reports. The reports referred to by the appellant were written by the doctors treating him, whereas the report on the medical examination it obtained from Spain was written by an officially appointed expert. A differentiated appraisal of medical findings is possible and sometimes even necessary, depending on whether those findings originate from the doctor treating a claimant or from an officially or court appointed expert. Consequently, it acted correctly in relying on the report on the medical examination when it decided to terminate Mr Bautista's invalidity pension.

21 On 19 May 2015, the referring court decided to stay the proceedings and to refer the following questions to the Court:

1. *Is a recipient of benefits (claimant) prohibited, because the debtor institution is bound by the findings of the institution of the place of stay or residence under the second sentence of Article 87(2) of Regulation No 987/2009, from challenging those findings in the procedure before the debtor institution?*

2. *If the first question is answered in the affirmative: does that binding effect also apply in court proceedings, which under national procedural rules, follow on from the proceedings before a debtor institution?*

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

## IV Answers of the Court

*The first question*

Observations submitted to the Court

23 The appellant, the Governments of Belgium, the Czech Republic, Liechtenstein and Norway, as well as the Commission, argue that a recipient or claimant of benefits is not prohibited under Article 87(2) of the implementing Regulation from challenging the findings of the institution of the place of stay or residence, in the proceedings before the debtor institution. ESA adopts a different position, arguing that the claimant should challenge those findings in the State of stay or residence.

24 The Czech and Liechtenstein Governments submit that Article 49(2) of the implementing Regulation constitutes a *lex specialis* in the context of the determination of the degree of invalidity. Pursuant to Article 49(2), a medical report from the institution of the place of stay or residence cannot be ignored. On the other hand, the debtor institution is not bound to follow it. ESA and the Commission reject the applicability of Article 49(2), claiming that Article 87(2) is the relevant provision.

25 As regards the binding effect on the debtor institution of the findings of the institution of the place of stay or residence under Article 87(2) of the implementing Regulation, the appellant and the Governments of Liechtenstein and Norway submit that an absolute binding effect would entail harmonisation and go beyond the mere coordinating purpose of both the basic and the implementing regulations.

26 The Belgian Government, ESA and the Commission submit that, in line with case law interpreting Article 18 of Council Regulation (EEC) No 574/72, the medical findings by the institution of the place of stay or residence bind the debtor institution unless the latter makes use of its possibility to have the beneficiary examined by a doctor of its own choice.

27 The Norwegian Government submits that the binding effect specified in Article 87(2) of the implementing Regulation is limited to the medical findings of the institution of the place of stay or residence. The binding effect does therefore not apply to legal findings in the debtor institution's subsequent assessment. This view is supported by the Belgian Government, which asserts that the debtor institution is exclusively competent to assess whether a claimant can be considered as having an incapacity under national legislation. However, the debtor institution must make this evaluation in light of the findings of the medical expert of the institution of the place of stay or residence.

28 On the question of whether the binding effect in Article 87(2) applies to the recipient or claimant of benefits, the Government of Belgium and the Commission observe that the objective of Article 87(2) is to avoid potential discrimination to the detriment of migrant workers, which could occur if the debtor institution could question the findings of the institution of the place of stay or residence. On the

other hand, Article 87(2) does not prohibit a debtor institution of an EEA State from taking account of other medical reports provided by the claimant himself that contradict the findings of the institution of the place of stay or residence.

29 According to the Commission, the principle of non-discrimination requires that the claimant is entitled to challenge the decision taken by the debtor institution on the basis of medical findings by a doctor in the State of stay or residence if a claimant residing in the State of the debtor institution enjoys such a right. The appellant and the Governments of Belgium, Liechtenstein and Norway essentially support this view. Reference is also made to the principle of equal treatment enshrined *inter alia* in Article 4 of the basic Regulation.

30 ESA submits that the claimant is bound by the findings of the institution of the place of stay or residence unless he challenges those findings according to the relevant procedures in that State. If he is successful, the medical report will lose its binding effect pursuant to Article 5(1) of the implementing Regulation. Alternatively, the claimant could raise objections before the debtor institution seeking to prompt the latter to have him examined by a doctor of its choice.

31 In ESA's view, the possibility for a claimant to challenge the medical findings in the State of stay or residence removes any concerns as to the possibility of discrimination against foreign beneficiaries. This solution also eliminates the risk of contradictory judgments from courts in different EEA States.

Findings of the Court

32 By its first question, the national court asks whether a recipient or claimant of benefits is prohibited from challenging the findings of the institution of the place of stay or residence in proceedings before the debtor institution, considering that the debtor institution is bound by those findings pursuant to the second sentence of Article 87(2) of the implementing Regulation.

33 The observations submitted to the Court disclose different views on whether the basis for the assessment is Article 87 or Article 49(2) of the implementing Regulation, even though the question of the national court refers to Article 87.

34 Article 49 of the implementing Regulation concerns a determination of the degree of invalidity. Pursuant to Article 46(3) of the basic Regulation, such a decision taken by an institution of an EEA State shall be binding on the institution of any other EEA State concerned. However, this applies only if a system of concordance between the legislation of these EEA States on conditions relating to the degree of invalidity is acknowledged in Annex VII of the basic Regulation. Annex VII does not contain any acknowledgement of concordance between the relevant Liechtenstein and Spanish legislation. Accordingly, Article 46(3) of the basic Regulation will not apply to the situation at hand.

35 Where Article 46(3) of the basic Regulation is not applicable, it follows from Article 49(2) of the implementing Regulation that each institution shall, in accordance with its legislation, have the possibility of having the claimant examined by a medical doctor or other expert of its choice to determine the degree of invalidity. In that determination documents, medical reports and administrative information collected by the institution of any other EEA State shall be taken into consideration as if they had been drawn up in the debtor institution's State. Article 49(2) leaves it up to national legislation to establish whether such information is binding.

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

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

38 The Government of Liechtenstein has referred to the judgment of the Court of Justice of the European Union in Case C-114/13 *Bouman* (judgment of 12 February 2015, published electronically, paragraph 27). However, that judgment concerned an administrative document specifying the periods of insurance completed under Dutch legislation, for the purposes of determining the applicability of Belgian rules with regard to overlapping. However, such a statement includes a legal assessment and cannot be compared to a medical report issued under Article 87(2) of the implementing Regulation.

39 According to the second paragraph of Article 87(2), the debtor institution shall nevertheless reserve the right to have the beneficiary examined by a doctor of its choice. The binding effect therefore applies only insofar as the debtor institution does not invoke its independent right to obtain an opinion from a doctor of its own choice (compare Case C-45/90 *Paletta* [1992] ECR I-3423, paragraph 28, concerning a similar provision of Regulation (EEC) 574/72). If so, the recipient or claimant may be asked to return to the EEA State of the debtor institution, provided that the journey can be made without any health risks and that the debtor institution pays for travel and accommodation. However, in the present case the Invalidity Fund has not requested any additional medical examination.

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

41 However, the question of the referring court is whether the binding effect on the debtor institution prohibits the recipient or claimant of benefits from challenging the medical findings of the report of the institution of stay or residence. There is nothing in the wording of Article 87 to prevent the recipient or claimant from making such a step in an administrative procedure before the debtor institution.

42 Moreover, if the debtor institution were bound by the medical findings, even when the recipient or claimant of benefits challenges those findings, a review of the findings would become futile. It has been argued before the Court that it follows from Liechtenstein administrative and procedural law that a recipient or claimant of invalidity benefits staying or residing in Liechtenstein has the right to challenge a decision by the Insurance Fund, including its medical findings. Provided that is the situation, the principle of equal treatment, expressed *inter alia* in Article 4 of the basic Regulation, would require that recipients or claimants of Liechtenstein invalidity benefits staying or residing in another EEA State must also be entitled to challenge the findings of the institution of the place of stay or residence in the proceedings before the Insurance Fund.

43 On the basis of these considerations, the answer to the first question referred must be that Article 87(2) of Regulation (EC) No 987/2009 does not prevent a recipient or claimant of benefits from challenging the findings of an institution of the place of stay or residence made under the said provision in an administrative procedure before a debtor institution.

*The second question*

44 In light of the answer given to the first question, there is no need to address the second question referred to the Court.

## V Costs

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

On those grounds,

THE COURT

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

**Article 87(2) of Regulation (EC) No 987/2009 does not prevent a recipient or claimant of benefits from challenging the findings of an institution of the place of stay or residence made under the said provision in an administrative procedure before a debtor institution.**

Carl Baudenbacher Per Christiansen Páll Hreinsson

Delivered in open court in Luxembourg on 16 December 2015.

Gunnar Selvik
Registrar

Carl Baudenbacher
President