ICELANDIC LAW AND PRACTICE IN THE FIELD OF EEA SOCIAL SECURITY LAW: A CALL FOR IMPROVEMENT

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So far, only two cases in the field of EEA social security law have been referred by Icelandic courts to the EFTA Court. However, this area of law has been more extensively addressed by the Icelandic Welfare Appeals Committee and the Althingi Ombudsman. Analysing these cases reveals that there are several and to some extent systematic problems in Iceland in this field. In particular, the legislature appears to struggle with the important principle of aggregation. This is evident in both the judgments of the EFTA Court in this field, i.e. E-4/07 Þorkelsson and E-5/21 Einarsdóttir. Furthermore, in the wake of the Welfare Appeals Committee's decision, in the re-opening of Case No. 115/2020, Althingi appears to have deliberately chosen to violate the provisions of Social Security Regulation 883/2004. This was achieved by classifying the rehabilitation pension as social assistance, thereby excluding it from the Regulation's scope. Finally, the article highlights the administration's improper practices, as outlined in the Althingi Ombudsman's Opinion in Case 8955/2016. In this case, the administration was compelled to re-open approximately 1,400 cases for further review due to its prior unlawful practice of reducing invalidity benefits based on periods spent abroad.

1 INTRODUCTION

So far, only two cases in the field of EEA social security law have been referred by Icelandic courts to the EFTA Court for an Advisory Opinion. However, this area of law has been more extensively addressed by the Icelandic Welfare Appeals Committee and the Althingi Ombudsman. As will be discussed further below, these cases indicate that Icelandic legislation and legal practice are not entirely in line with the obligations stemming from the EEA Agreement in this field. In particular, the legislature appears to struggle with the important principle of aggregating all periods under the laws of the EU Member States and the EEA/EFTA States to establish and maintain entitlement to benefits, as well as to calculate the amount of such benefits. As will be further discussed in Section 3, this is reflected in the beforementioned two cases. Numerous rulings related to EEA social security law have also been issued by the Welfare Appeals Committee. This article will not address all these rulings. Instead, Section 4 will focus exclusively on the Committee's rulings related to *rehabilitation pensions*, where notable developments are currently unfolding. Thereafter, Section 5 focuses on the Opinion of the

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Althingi Ombudsman in Case 8955/2016, where the Ombudsman concluded that the practice of the Icelandic administration in reducing the payment rate of the complainant's invalidity pension in proportion to periods spent abroad was incompatible with EEA law. Interestingly, the Ombudsman instructed the administration not only to re-open the complainant's case upon request thereof, but also other previous cases where similar mistakes were made. Ultimately, this resulted in approximately 1,400 cases to be reopened in Iceland for further scrutiny. Finally, Section 6 offers our concluding remarks.

2 GENERAL OVERVIEW

The coordination of social security in the European Economic Area ('EEA') is based on Article 29 of the EEA Agreement (equivalent to Article 48 of the Treaty on the Functioning of the European Union). These obligations are further detailed in the Social Security Regulation 883/2004,[1] which has been incorporated into the EEA Agreement,[2] and subsequently implemented into the Icelandic legal system, i.e. with Regulation on the Entry into Force of European Union Regulations on Social Security No. 442/2012.[3]

When discussing the relationship between EEA law and Icelandic social security law, it is somewhat important to consider some specificities in Icelandic legislation and practice. For instance, it appears that most cases in Iceland which concern EEA social security law are solved at the administrative level, i.e. by the Social Insurance Administration, or by the Welfare Appeals Committee on appeal. Of course, this does not mean that no cases within the field of EEA social security law are brought before the courts in Iceland. Recently, for example, the District Court of Reykjavik dealt with two cases concerning issues related to Regulation 883/2004, medical treatment abroad and travel restrictions imposed under the COVID-19 pandemic.[4] In one of these judgments, the District Court even cited the EFTA Court's ruling in Case E-8/20 *NAV*.[5] Overall, however, it seems that only a fraction of these cases are brought before Icelandic courts. In comparison, there is no specialised national insurance court in Iceland, like for example the Norwegian National Insurance Court *(Trygderetten)*.

The fact that Icelandic courts to date have not dealt with many cases concerning EEA

[1] Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems [2004] OJ L166/1.

[2] The Social Security Regulation was incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 76/2011 of 1 July 2011 amending Annex VI (Social Security) and Protocol 37 to the EEA Agreement [2011] OJ L262/33, which entered into force on 1 June 2012 and is referred to at point 1 of Annex VI to the Agreement.

[3] For further reading on the relevant legal framework in Iceland concerning EEA social security law see e.g. Ciarán Burke and Ólafur Ísberg Hannesson, 'Free Movement Rights in Iceland' in Katarina Hyltén-Cavallius and Jaan Paju (eds), *Free Movement of Persons in the Nordic States: EU Law, EEA Law and Regional Cooperation* (Hart 2023) 210-212.

[4] Judgment of 17 December 2022 in Case E-1852/2021 *A v the Social Insurance Administration and the Icelandic State* and judgment of 26 November 2021 in Case E-7988/2020 *A v the Icelandic State*.

[5] Case E-8/20 *Criminal Proceedings against N* [2021] EFTA Court Judgment of 5 May 2021. For further reading on the NAV-case, see e.g. Christian NK Franklin, 'Free Movement Rights in Norway' in Katarina Hyltén-Cavallius and Jaan Paju (eds), *Free Movement of Persons in the Nordic States: EU Law, EEA Law and Regional Cooperation* (Hart 2023) 188-189.

social security law explains why, over a period of more than 30 years, they only referred two cases to the EFTA Court in this field, i.e. in the cases of *Þorkelsson* (E-4/07) and most recently *Einarsdóttir* (E-5/21).[6] In comparison, Norwegian courts have (at the time of writing) referred about ten cases to the EFTA Court in the field of social security (or patients' rights), and Liechtenstein courts have referred five.[7] This modest number of two Icelandic references to the EFTA Court could perhaps also be explained by the fact that under Icelandic legislation there remains some uncertainty whether administrative bodies such as the Welfare Appeals Committee may refer questions to the EFTA Court, although they would arguably constitute a 'court or a tribunal' within the meaning of Article 34 of the Surveillance and Court Agreement ('SCA').[8] And as a matter of fact, the Committee has never referred a question to the EFTA Court. It has, however, cited several judgments of the Court of Justice of the European Union ('CJEU') and the EFTA Court.[9]

The Althingi Ombudsman has also played a role in the field of EEA social security law in Iceland. Although the opinions of the Ombudsman are not legally binding, they are normally followed by the relevant authorities in Iceland. Already in 1996, very shortly after the EEA Agreement entered into force (1 January 1994), the Ombudsman started to receive its first complaint cases on EEA social security law, e.g. Case 1724/1996 (Regulation 1408/71,[10]

[6] Case E-4/07 *Jón Gunnar Þorkelsson and Gildi-lífeyrissjóður* [2008] EFTA Ct. Rep. 3, and Case E-5/21 *Anna Bryndís Einarsdóttir v the Icelandic Treasury* [2021] EFTA Court Judgment of 29 July 2022.

[7] Norwegian courts: Case E-3/04 *Tsomakas Athanasios and Others with Odfjell ASA as an accessory intervener v The Norwegian State* [2004] EFTA Ct. Rep. 95; Joined Cases E-11/07 and E-1/08 *Olga Rindal and Therese Slinning v Staten v/Dispensasjons- og klagenemda for bidrag til behandling I utlandet* [2008] EFTA Ct. Rep. 320; Case E-3/12 *Staten v/Arbeidsdepartementet v Stig Arne Jonsson* [2013] EFTA Ct. Rep. 136; Case E-11/16 *Mobil Betriebskrankenkasse v Tryg Forsikring* [2017] EFTA Ct. Rep. 384; Case E-8/20 *Criminal Proceedings against N* (n 5); Case E-13/20 *O v Arbeids- og velferdsdirektoratet* [2021] EFTA Court Judgment of 30 June 2021; Case E-15/20 *Criminal Proceedings against P* [2021] EFTA Court Judgment of 30 June 2021; Case E-2/22 *A v Arbeids- og velferdsdirektoratet* [2022] EFTA Court Judgment of 29 July 2022; Case E-3/23 *A v Arbeids- og velferdsdirektoratet* [2024] EFTA Court Judgment of 18 April 2024; and Case E-15/23 *K v Nasjonalt klageorgan for helsetjenesten* [2024] EFTA Court Judgment of 5 December 2024. Liechtenstein courts: Case E-13/15 *Abuelo Insua Juan Bautista v Liechtensteinische Invalidenvericherung* [2015] EFTA Ct. Rep. 720; Case E-24/15 *Walter Waller v Liechtensteinische Invalidenvericherung* [2016] EFTA Ct. Rep. 527; Case E-2/18 *Concordia Schweizerische Kranke- und Unfallversicherung AG, Landesvertretung Liechtenstein* [2019] EFTA Court Judgment of 14 May 2019; Case E-1/21 *ISTM International Shipping & Trucking Management GmbH v AHV-IV-FAK* [2021] EFTA Court Judgment of 14 December 2021; and Case E-5/22 *Christian Maitz v AHV-IV-FAK* [2023] EFTA Court Judgment of 24 January 2023.

[8] Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice [2016] OJ L344/3, signed in Oporto on 2 May 1992. For further reading, see e.g. Kjartan Bjarni Björgvinsson, 'Samvinna EFTA-dómstólsins og íslenskra dómstóla' (2015) 68 Úlfljótur 73, 73-108.

[9] See e.g. the ruling of the Welfare Appeals Committee No 115/2020 of 19 May 2021 *A v the Social Insurance Administration,* where references are made to the following judgments of the EFTA Court and the CJEU: Case E-4/07 *Jón Gunnar Þorkelsson and Gildi-lífeyrissjóður* (n 6), Case E-8/20 *Criminal Proceedings against N* (n 5), Case C-135/19 *Pensionsversicherungsanstalt v CW* EU:C:2020:177, Case 14/72 *Helmut Heinze v Landesversicherungsanstalt Rheinprovinz* EU:C:1972:98, and Case C-769/18 *Caisse d'assurance retraite et de la santé au travail d'Alsace-Moselle v SJ and Ministre chargé de la Sécurité sociale* EU:C:2020:203. Moreover, in its ruling No 20/2019 of 16 October 2019 *A v the Social Insurance Administration*, the Committee referred to the judgment of the CJEU in Case C-107/00 *Caterina Insalaca v Office national des pensions* (ONP) EU:C:2002:147.

[10] Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community [1971] OJ L149/2.

unemployment benefits) and Case 2037/1997 (Regulation 1408/71, maternity benefits).[11] Most recently, the Ombudsman has issued opinions in Case 10077/2019 (Regulation 883/2004, benefits of the same kind) and Case 12104/2023 (Regulation 883/2004, Directive 2011/24,[12] Article 36 EEA, and medical treatment abroad).[13] In its opinions concerning EEA social security law (or patients' rights), the Ombudsman has cited several judgments of the CJEU.[14]

3 ICELANDIC CASES IN THE FIELD OF EEA SOCIAL SECURITY LAW THAT HAVE BEEN REFERRED TO THE EFTA COURT

3.1 CASE E-4/07 *ÞORKELSSON*

The first Icelandic case referred to the EFTA Court in the field of EEA social security law was Case E-4/07 *Þorkelsson*.[15] Mr. Þorkelsson was an Icelandic mariner who had lived and worked in Iceland for approximately 20 years when he decided to move to Denmark in September 1995. There he also worked as a mariner, and paid contributions to a Danish pension fund. In September 1996, he suffered a serious accident while at work, causing his invalidity. Þorkelsson had accrued rights to pension payments from several Icelandic pension funds at the time of the accident and he received invalidity pensions from them in accordance with his accrued points. However, on the grounds of failing to meet a condition of having paid contributions to the Icelandic funds for at least 6 of the 12 months preceding the accident, he was not 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 Gildi Pension Fund, had he remained a member of that pension fund and continued working until reaching the age of retirement.

Þorkelsson brought an action before the District Court of Reykjavík, and the case was referred to the EFTA Court. The EFTA Court was asked to provide an Advisory Opinion on whether it is compatible with the EEA Agreement to make the right to the specific benefit subject to the condition that the individual involved has paid premiums to an Icelandic pension fund at least 6 of the 12 months preceding the date of an accident, when the reason why the individual is unable to meet this condition is that he has moved to another EEA state in order

[11] Opinions of the Althingi Ombudsman of 24 June 1997 in Case 1724/1996 and of 6 December 2000 in Case 2037/1997.
[12] Directive 2011/24/EU of the European Parliament and of the Council of 9 March 2011 on the application of patients' rights in cross-border healthcare [2011] OJ L88/45. The Directive was incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 153/2014 of 9 July 2014 amending Annex X (Services in general) to the EEA Agreement [2015/88] [2015] OJ L15/78 and is referred to at point 2 of Annex X (Services in general) to the EEA Agreement.
[13] Opinions of the Althingi Ombudsman of 30 April 2021 in Case 10077/2019 and of 13 May 2021 in Case 12104/2023.
[14] See e.g. the opinions in Case 2037/1997 (n 11), Case 10077/2019 (n 13) and Case 12104/2023 (n 13), where references are made to the following CJEU judgments: Case C-275/96 *Anne Kuusijärvi v Riksförsäkringsverket* EU:C:1998:279, Case 143/79 *Margaret Walsh v National Insurance Officer* EU:C:1980:134, Case C-777/18 *WO v Vas Megyei Kormányhivatal* EU:C:2020:745, and Case C-453/14 *Vorarlberger Gebietskrankenkasse and Alfred Knauer v Landeshauptmann von Vorarlberg and Rudolf Mathis* EU:C:2016:37.
[15] Case E-4/07 *Jón Gunnar Þorkelsson and Gildi-lífeyrissjóður* (n 6).

to pursue comparable employment.[16]

In its answer, the EFTA Court referred to the aggregation principle in Article 10 of Regulation 1408/71 (now Article 6 of Regulation 883/2004). The Court also referred to the adaptation in Annex VI to the EEA Agreement which states the same principle. Based on this, the answer of the EFTA Court was that it was not compatible with Regulation 1408/71 to subject the entitlement to invalidity benefits based on projected rights to the condition that a member of a pension fund must have paid contributions 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.

Despite this, Gildi Pension fund was acquitted before the Supreme Court of Iceland.[17] This was done on the basis of the 'Agreement on Relations between the Icelandic Pension Funds' and had nothing to do with EEA law. Furthermore, Icelandic law was not amended after the judgment of the EFTA Court. Thus, Article 15(2) of Act No. 129/1997 on Mandatory Pension Rights Insurance and the Operation of Pension Funds still requires payment into the pension fund for at least three of the four previous years, including at least six months in the last twelve-month period, in order to get projected rights. This legal situation does not seem to be in accordance with EEA law and represents a clear obstacle for employees in Iceland moving to other countries within the EEA.

3.2 CASE E-5/21 *EINARSDÓTTIR*

The EFTA Court's judgment in Case E-5/21 *Einarsdóttir* reveals that the Icelandic Parental Leave Act No. 95/2000 is not in accordance with EEA law.[18] The facts of the case are the following. Ms Einarsdóttir pursued postgraduate studies in medicine in Denmark from 2015-2019. She was employed there on a full-time basis until 2019, when she moved back home to Iceland and started working for the National University Hospital. She was pregnant at the time, so she applied for a maternity leave from the Icelandic Treasury.

When deciding her monthly payments, her income in Denmark was not taken into consideration. The basis for this decision was that according to the Parental Leave Act, the calculation of such a benefit was to be based only on income earned on the domestic labour market. By a decision of the Icelandic Leave Fund, she therefore only received the basic minimum payments. She brought a case before the District Court of Reykjavík, which referred

[16] The EFTA Court was also asked whether invalidity pension based on projected rights fall under Regulation 1408/71. The answer of the Court confirmed 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. See also Ingvar Sverrisson, 'Overlapping of benefits under Regulation (EC) No 883/2004 on the Coordination of Social Security Systems' (2021) 71 Tímarit lögfræðinga 478, 490, where it is stated that according to the declaration of the Icelandic authorities to the EFTA Surveillance Authority (ESA), cf. Article 9 of the Social Security Regulation, the rights to old-age pension and disability pension that are accrued in the Icelandic pension fund system fall under the scope of the Regulation.

[17] Judgment of the Supreme Court of Iceland of 26 November 2009 in Case No 95/2009 *Guðmundur Vikar Þorkelsson v. Gildi pension fund* (Jón Gunnar Þorkelsson changed his name to Guðmundur Vikar Þorkelsson).

[18] Case E-5/21 *Anna Bryndís Einarsdóttir v the Icelandic Treasury* (n 6).

the following questions to the EFTA Court:

> Does Article 6 of Regulation (EC) No 883/2004, (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?

Based on Article 21(2) and (3) of Regulation 883/2004, as interpreted in light of Article 29 EEA, the answer given by the EFTA Court was that Ms Einarsdóttir should have received the same payment in her maternity leave from the Icelandic Treasury as a doctor with comparable experience and qualifications who had been working in Iceland for the whole reference period.[19] The Parental Leave Act is therefore not compatible with EEA law.[20]

Ms Einarsdóttir nevertheless lost her case before the Supreme Court of Iceland, because the Parental Leave Act clearly requires that a person needs to have been working on the *Icelandic labour market* for his/her salary to be considered when deciding the payment. Due to unsatisfactory implementation of Protocol 35 to the EEA Agreement into the Icelandic legal system, implemented EEA law does not take precedence over other Icelandic law.[21] As the Supreme Court of Iceland considered it impossible to interpret the relevant provision of the Parental Leave Act in accordance with Regulation 883/2004, the Icelandic state was acquitted. Despite the beforementioned judgment of the EFTA Court, revealing that the Parental Leave Act is not in accordance with the Social Security Regulation, the law has not yet been amended. However, on 27 February 2025, the Ministry of Social Affairs and Labour submitted a draft bill for consultation with the aim of meeting Iceland's obligations under the EEA Agreement on the matter. It remains to be seen whether the draft will be passed into law by Althingi.

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[19] Articles 6 and 21(2) and (3) of the Social Security Regulation do however 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. See Case E-5/21 *Einarsdóttir* (n 6) para 36.

[20] For further reading on this case see Védís Eva Guðmundsdóttir, 'Restrictions by Icelandic law on the free movement of future parents in the EEA with regard to calculation on parental leave payments' (2022) 72(2) Tímarit lögfræðinga 277, 277-314.

[21] See the following Icelandic Supreme Court's judgments: *A v the Icelandic State,* judgment of 28 February 2024 in Case No 24/2023, *Criminal proceedings against X,* judgment of 5 May 2015 in Case No 291/2015, *Criminal proceedings against X and Others,* judgment of 15 July 2014 in Case No 429/2014, *Commerzbank AG v Kaupthing,* judgment of 28 October 2013 in Case No 552/2013, and *Landesbank Baden-Württemberg against Glitni*, judgment of 10 May 2013 in Case No 306/2013. See also the judgment of the Court of Appeal in *Icelandic State and the Central Bank of Iceland against Coldrock Investments*, judgment of 9 January 2019 Case No 830/2018*,* and further reading in Ólafur Jóhannes Einarsson, 'Protocol 35 and the Status of the EEA Agreement in Icelandic Law' (2007) 57 Tímarit lögfræðinga 371, 371-411; Margrét Einarsdóttir og Stefán Már Stefánsson, 'Application of implemented EEA rules in the light of Protocol 35' in Þorgeir Örlygsson et al (eds), *Hæstiréttur í hundrað ár: ritgerðir* (Hið íslenska bókmenntafélag 2020) 341-357; Gunnar Þór Pétursson, 'Forgangur EES-reglna. Hvað er að frétta af bókun 35?' in Svala Ísfeld Ólafsdóttir et al (eds), *Fullveldi í 99 ár. Safn ritgerða til heiðurs dr. Davíð Þór Björgvinssyni sextugum* (Hið íslenska bókmenntafélag 2017) 201-223; Margrét Einarsdóttir, 'Obligations and Remedies of the Courts to Ensure Legal Protection on the Basis of the EEA Agreement' in Benedikt Bogason et al (eds), *Afmælisrit: Markús Sigurbjörnsson sjötugur 25. september 2024* (Fons Juris 2024) 441-471.

4 DECISIONS FROM THE WELFARE APPEALS COMMITTEE REGARDING REHABILITATION PENSION

The Welfare Appeals Committee rules on appeals lodged in connection with administrative decisions regarding for example rehabilitation pension, child allowance and care allowances from the Social Insurance Administration. Many cases in the field of EEA social security law are brought before the Welfare Appeals Committee, with only a small number proceeding to the national courts. This underscores the importance of the Committee's correct understanding and application of EEA law in this area. This article will not cover all the rulings of the Committee in this field, but rather focus on rehabilitation pensions, where an interesting development is taking place.

4.1 CASE NO. 115/2020 (AND ITS RE-OPENING)

In Case No. 115/2020 *A v. Social Insurance Administration* from July 8 2020, the Social Insurance Administration had denied the appellant (A) a rehabilitation pension. A appealed the decision to the Welfare Appeals Committee. According to Article 7(1) of the Social Assistance Act, rehabilitation pensions may be made out for up to 36 months when it cannot be determined whether the individual's inability to work will be permanent following illness or injury. A was denied on the grounds that the residency requirement in Iceland was not met, as she had lived in Iceland for less than three years before applying for the rehabilitation pension. It was revealed in the case that she lived in Sweden during the reference period.

Regarding the reference period for entitlement to payments in the Social Assistance Act, reference was made to Article 18 of the Social Security Act No. 100/2007. According to that provision, as it was when the events of the case took place, an individual must have resided in Iceland for at least three years preceding submission of the application, or for six months if their working capacity was unimpaired when they took up residence here. Since A did not meet these conditions, the Welfare Appeals Committee upheld the decision of the Social Insurance Administration. A subsequently filed a complaint with the Althingi Ombudsman. In a detailed letter to the Welfare Appeals Committee, the Ombudsman explained how Icelandic legislation should be interpreted in accordance with principle of aggregation set out in Article 6 of Regulation 883/2004. In light of the Ombudsman's letter, Case No. 115/2020 was re-opened, and a new ruling was issued on May 19 2021.

In its new ruling, the Welfare Appeals Committee considered that residence in other EEA States might be taken into account when assessing whether the residency requirement of Article 18 of the Social Security Act was met. To justify this, reference was made to Article 6 of Regulation 883/2004. The decision further states that the condition for this is that the benefits in question fall within the scope of the Regulation.

According to Article 3(1)(a) of Regulation 883/2004, it applies, amongst other things, to sickness benefits. However, the Regulation does not apply to social assistance, as per Article 3(5). Provisions for rehabilitation pension are found in the Social Assistance Act. It thus appears that the Icelandic legislature views the rehabilitation pension as social assistance rather than social

security, i.e. sickness benefits. However, the decision of the Welfare Appeals Committee goes on to explain that both the CJEU and the EFTA Court have emphasized that whether benefits fall under the material scope of Regulation 883/2004, or its predecessor Regulation 1408/71, fundamentally depends on the substantive nature of the benefits, particularly their purpose and the conditions under which they are granted, rather than on whether the benefits are classified as social security benefits under national law.[22]

The decision further states that a fundamental characteristic of sickness benefits under Article 3(1)(a) of Regulation 883/2004 is that they are paid due to temporary absence from the labor market caused by illness.[23] Additionally, it can be inferred from preliminary rulings of the CJEU and Advisory Opinions of the EFTA Court that sickness benefits are not limited to those linked to health insurance, but also include pension insurance benefits.[24] In light of the above, the Welfare Appeals Committee concluded that rehabilitation pension falls under the concept of sickness benefits within the meaning of Regulation 883/2004. According to Article 18 of the Social Security Act and Article 6 of Regulation 883/2004, the Social Insurance Administration was thus required to consider A's residence in Sweden when evaluating whether she met the residency requirements. As a result, the Social Insurance Administration's rejection of A's application for a rehabilitation pension was overturned.

It may be added that, according to the CJEU, a benefit falls under the concept of social security benefits if it is granted automatically to persons who meet certain objective criteria relating in particular to the size of their family, income and capital resources, without any individual and discretionary assessment of personal needs. Social assistance on the other hand comprises benefits which are needs-based and means-tested, and financed through general taxation.[25] In our view, rehabilitation pension under Article 7(1) of the Social Assistance Act falls without a doubt under the concept of sickness benefit.

4.2 CASE NO. 567/2023 – FOLLOWING LEGISLATIVE CHANGES

The ruling in Case No. 115/2020 was important, and it is clear that following the crucial letter from the Althingi Ombudsman, the Welfare Appeals Committee finally understood the core issue – that under Article 6 of Regulation 883/2004, residence in other EEA States should be treated as equivalent to residency in Iceland. Subsequent rulings of the Welfare Appeals Committee aligned with this understanding, making it obligatory to consider residence in other EEA States when assessing the qualifying insurance periods for rehabilitation pension payments.

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[22] Case C-769/18 *Caisse d'assurance retraite et de la santé au travail d'Alsace-Moselle v SJ and Ministre chargé de la Sécurité sociale* (n 9) para 26; Case E-4/07 *Jón Gunnar Þorkelsson and Gildi-lífeyrissjóður* (n 6) para 36.

[23] Case C-135/19 *Pensionsversicherungsanstalt v CW* (n 9) para 32, and Case E-8/20 *Criminal Proceeding against N* (n 5) para 54.

[24] Case C-14/72 *Helmut Heinze v Landesversicherungsanstalt Rheinprovinz* (n 9) and Case E-8/20 *Criminal Proceeding against N* (n 5).

[25] Case C-308/14 *European Commission v United Kingdom of Great Britain and Northern Ireland* EU:C:2016:436 para 60; Case C-535/19 *A v Latvijas Republikas Veselibas ministrija* EU:C:2021:595 paras 29 and 30; Case C-411/20 *S v Familienkasse Niedersachsen-Bremen der Bundesagentur für Arbeit* EU:C:2022:602 para 35. See also Sandra Mantu and Paul Minderhoud, 'Struggles over social rights: Restricting access to social assistance for EU citizens' (2023) 25 The European Journal of Social Security 3, 6.

However, following this ruling Althingi appears to have deliberately decided to violate the provisions of Regulation 883/2004 by defining rehabilitation pension as social assistance, thereby excluding it from the material scope of the Regulation. This becomes very clear when reading the explanatory notes with the amendment to the Social Security Act, which state as follows:

> It is also deemed necessary to respond to the recent ruling of the Welfare Appeals Committee in case No. 115/2020 and its underlying reasoning by continuing to stipulate that rehabilitation pension is provided for in the Social Assistance Act. This will confirm the legislature's intent that the provisions of reciprocal international agreements will not apply to rehabilitation pension under the Social Assistance Act.[26]

As already explained, social assistance comprises benefits which are needs-based and means-tested,[27] and financed through general taxation.[28] In our view, rehabilitation pension under Article 7(1) of the Social Assistance Act does not fall under this concept.

The first case involving the payment of rehabilitation pension after the beforementioned legal amendment was Case No. 567/2023 *A v. Social Insurance Administration* from 10 April 2024. The appellant (A) argued that the Social Insurance Administration's decision not to consider her residence in Sweden when assessing whether she met the residency requirements of Article 7(1) of the Social Assistance Act violated Articles 28 and 29 of the EEA Agreement. In its ruling, the Welfare Appeals Committee noted that EEA States are required to take into account insurance or residency periods that an applicant has completed in other member states when determining if they meet the requirement period in the state where the rights are being claimed. However, this only applies if the payments in question fall within the scope of Regulation 883/2004.

The ruling further states that the Welfare Appeals Committee had concluded, in its revised decision in Case No. 115/2020 from May 19 2021, that the rehabilitation pension under the Social Assistance Act fell under the definition of sickness benefits as per Article 3(1)(a) of Regulation 883/2004. However, with the beforementioned legislative amendment to the Social Security Act, it was made explicitly clear that rehabilitation pension is classified as social assistance. The Welfare Appeals Committee fundamentally disagrees with the legislature on this matter, and is of the opinion that, according to judgments from the CJEU and the EFTA Court, rehabilitation pension indeed qualifies as sickness benefits under the Regulation. Despite this, the Committee is forced to rule in accordance with Icelandic law. As seen in the following reasoning in the decision, they are not happy about it:

> Given the legislature's beforementioned position, where it responded to the Welfare Appeals Committee's decision in case No. 115/2020, the committee is bound by it and cannot disregard clear and unequivocal legal instructions, even if they may conflict with Iceland's obligations under the EEA Agreement, cf. the Supreme Court ruling in case

[26] Unofficial translation by the authors.
[27] Means-tested refers to a process used to determine eligibility for a particular benefit or service based on an individual's or household's financial situation.
[28] Cf, Mantu and Minderhoud (n 25) 6.

> No. 24/2023. The Welfare Appeals Committee must, therefore, interpret the 12-month residency requirement in Iceland in the third sentence of Article 7(1) of the Social Assistance Act according to its plain meaning.[29]

As a result, the Social Insurance Administration's decision to deny A's application for a rehabilitation pension was upheld, as she had not been living in Iceland for the relevant period. In our view, this constitutes a clear violation of Regulation 883/2004, and it is particularly concerning that Althingi appears to be acting with deliberate intent.

5 THE ALTHINGI OMBUDSMAN'S OPINION 8955/2016

5.1 THE BACKGROUND TO THE DISPUTE

The Ombudsman has dealt with several cases concerning EEA social security law, and the opinion in Case 8955/2016 is especially noteworthy. The background to the case is that in 2005 the complainant, at the age of 16, moved from Iceland to Denmark with her family, where she later became ill and unable to work. Apparently, she did not fulfil the relevant conditions to receive Danish invalidity benefits. She moved back to Iceland in 2010, and upon contacting the Social Insurance Administration was informed that according to the Icelandic Social Security Act, she was not yet entitled to invalidity pension because she had not been resident in Iceland for the three preceding years. She therefore waited until 2013 before submitting her application for invalidity benefits, which was granted with a degree of full invalidity. The payment rate of her invalidity pension was nevertheless based on residence rate between Iceland and Denmark, from the age of 16 until the approval of the first invalidity assessment. As the applicant had spent approximately 5 years in Denmark and 1 year in Iceland during that period, her total residence rate was determined to be 21,79%. The administration then allocated her projected residence time in Iceland until the age of 67, according to the same proportion. As a result, she was only entitled to receive 21,79% of full invalidity pension until the age of 67.

Before the Ombudsman, the complainant argued amongst other things that the ruling of the Welfare Appeals Committee was unlawful since it lacked legal basis and was incompatible with EEA law. In contrast, the Welfare Appeals Committee submitted that the ruling was correct, as it was based on the relevant provisions of the Icelandic Social Security Act, i.e. Article 18 in conjunction with Article 17. At the material time, Article 18(1) of the Act stipulated that entitlement to an invalidity pension was subject to the condition that the applicant had lived in Iceland and was between the age of 18-67. Moreover, it seemingly followed from Article 18(4) of the Social Security Act that to determine periods of residence in the context of invalidity benefits, account should be taken of the rules concerning old-age pension in Article 17(1). The latter provision stipulated the following: 'Those who have reached the age of 67 and have lived in Iceland are entitled to an old-age pension […]. Full rights are acquired by living in Iceland for at least 40 calendar years from the age of 16 to 67. In case of a shorter period, entitlement to

[29] Unofficial translation by the authors.

old-age pension is calculated in proportion to the period of residence'.[30]

In its correspondence with the Ombudsman, the Welfare Appeals Committee acknowledged that the abovementioned provisions of the Icelandic Social Security Act were not entirely clear on how to calculate projected residence rates in the context of invalidity benefits where applicants have normally not yet reached the age of 67. And therefore, that the calculation is not based on actual or real residence in the past (unlike the situation with applicants for old-age pension who have reached retirement age). However, the Committee also submitted that the contested calculation was based on Article 52(1) of Regulation 883/2004, which provides instructions on how the competent institution shall calculate the amount of the benefits that would be due. First, by calculating the so-called independent benefit, i.e. where the conditions for entitlement to benefits have been satisfied exclusively under national law. Second, by calculating the pro-rata benefit, i.e. the theoretical amount and subsequently the actual amount.

5.2 THE REASONING AND CONCLUSION OF THE OMBUDSMAN

As regards Article 18 of the Social Security Act, the Ombudsman noted that that provision did not provide clear instructions on how to calculate the payment rate of invalidity benefits, by considering the proportion of residence in Iceland and abroad until the age of 67. In fact, the Ombudsman suggested that a different reading of the provision could also mean that until the age of 67, all of the relevant years should be counted as if they had been spent in Iceland. The Ombudsman then scrutinised the provisions of Regulation 883/2004 and noted the following: First, that the calculation of the pro-rata benefit in Article 52(1)(b) was only applicable to periods completed *before the risk had materialised*. The provision could therefore only cover periods which had already lapsed in time, and there were no instructions to be found on how to calculate projected residence rates.

Next, the Ombudsman held that since the complainant had not fulfilled the relevant conditions to receive invalidity benefits in Denmark, periods spent abroad should not be considered when performing the calculation in Article 52 of the Regulation, cf. Article 50(2). In any event, pursuant to Article 52(3), the complainant should have been entitled to receive the higher amount between the independent benefit or the pro-rata benefit. Finally, citing the judgment of the CJEU in *Petroni*,[31] the Ombudsman stated that the rule on aggregation and apportionment should not be applied if the effects were to diminish the benefits which the person concerned could claim by virtue of the laws of a single EEA State, i.e. solely on the basis of the insurance periods completed under those laws. Consequently, the Ombudsman concluded that the ruling of the Welfare Appeals Committee lacked sufficient legal basis.

Considering the above, the Ombudsman recommended that the Welfare Appeals Committee should re-open the complainant's case upon request thereof (which the Committee did in its ruling No. 44/2015 of 27 March 2019). Moreover, the Ombudsman also recommended that the administration should re-open other previous cases where similar mistakes were

[30] Unofficial translation by the authors.
[31] Case 24/75 *Teresa and Silvana Petroni v Office national des pensions pour travailleurs salariés (ONPTS), Bruxelles* EU:C:1975:129.

made – subject, however, to the relevant rules that might limit how far back in time cases could be changed. Up to April 2022, the Social Insurance Administration had re-opened approximately 1,400 cases, subject to a four-year time limit. Furthermore, following a recommendation from the Ombudsman, the relevant provisions in the Social Security Act were subsequently amended by the Althingi in 2023, i.e. with the Act No. 18/2023 on Amendments to the Social Security Act and the Act on Social Assistance.

6 CONCLUDING REMARKS

It follows from the above analysis that there are several and to some extent systematic problems in Iceland in the field of EEA social security law. In particular, the legislature appears to struggle with the important principle of aggregation. This is evident in both of the judgments of the EFTA Court in this field, i.e. E-4/07 *Þorkelsson* and E-5/21 *Einarsdóttir*. Furthermore, in the wake of the Welfare Appeals Committee's decision in the re-opening of Case No. 115/2020 – where residence in other EEA States was considered when assessing compliance with the residency requirement under Article 18 of the Social Security Act – Althingi appears to have deliberately chosen to violate the provisions of Regulation 883/2004. This was achieved by classifying the rehabilitation pension as social assistance, thereby excluding it from the Regulation's scope.

The only way to rectify the above-mentioned violations of EEA law is for the Althingi to amend provisions of national law (i.e., the Parental Leave Act, Act No. 129/1997 on Mandatory Pension Rights Insurance and the Social Assistance Act) to align with Iceland's commitments under EEA social security law. The EFTA Surveillance Authority plays a key role in exerting pressure to ensure this is done by initiating infringement proceedings against the Icelandic state for the aforementioned breaches under Article 31 SCA. The Authority has paid close attention to the case of *Einarsdóttir*, and on 11 December 2024 sent a letter of formal notice concerning Iceland's breach of Article 21(2) and (3) of Regulation 883/2004, as interpreted in light of Article 29 EEA by the EFTA Court in Case E-5/21 *Einarsdóttir*.[32] Interestingly, a few days before the submission of the present article, the Ministry of Social Affairs and Labour submitted a draft bill for consultation with the aim of rectifying this situation.

It is also worth mentioning, that individuals who have suffered damages due to such violations of EEA law may file compensation claims against the Icelandic state.[33] Ms Einarsdóttir has already initiated such a case, although no ruling has been issued at the time of writing. It may, however, prove more complex to rectify the harm caused to individuals by the administration's incorrect practices over several years, as described in the Opinion of the Althingi Ombudsman in Case 8955/2016. The administration had to re-open about 1,400 cases for further scrutiny because of its previous unlawful practice of reducing invalidity benefits due to periods spent abroad. As noted in the 2020 report by the Icelandic National Audit Office

[32] EFTA Surveillance Authority (ESA), 'Letter of formal notice to Iceland concerning the basis for calculation of a maternity benefit' Case No. 90271, Doc No 1485935.
[33] See joined Cases C-6/90 and C-9/90 *Andrea Francovich and Danila Bonifaci and others v Italian Republic* EU:C:1991:428, and Case E-9/97 *Erla María Sveinbjörnsdóttir v. Iceland* [1998] EFTA Ct. Rep. 95.

(Ríkisendurskoðun), the unlawful practice of the administration appears to have started at least in 2009.[34] Yet since the decision to correct previous unlawful reductions was subject to a four-year time limit,[35] a significant number of potentially affected individuals were seemingly excluded. The four-year time limit corresponds however to the main rule concerning the limitation period of claims according to the Icelandic Limitation Act No. 150/2007. It follows that even though these individuals would be entitled to damages based on the principle of state liability, pursuing the claims might prove difficult due to the four-year limitation period. On the face of it, however, a time limit of four years appears to be reasonable and in compliance with the EEA principles of effectiveness and equivalence.[36]

Moreover, it is to a certain degree worrying how few cases in the field of EEA social security law have been brought before Icelandic courts, which in turn explains the low number of Icelandic references to the EFTA Court in this field. Given that there appears to be no shortage of cases before either the Social Insurance Administration or the Welfare Appeals Committee, more guidance from the EFTA Court on these complex issues would probably be welcomed. In this context, the Ombudsman has perhaps stepped in so to speak and filled the gap, with important opinions in cases such as 8955/2016. It should also be noted that at the time of writing, a legislative bill which aims to provide administrative bodies in Iceland with a clear authorisation to seek Advisory Opinions of the EFTA Court is pending before Althingi.[37] Provided that the legislative bill is passed, and the conditions in Article 34 SCA deemed to be fulfilled, the Welfare Appeals Committee could submit questions to the EFTA Court. This could provide the Committee with important guidance on the correct interpretation of EEA social security law. It is also crucial that the EFTA Surveillance Authority take decisive action and pressure the Icelandic government to rectify its violations of individual rights in this sensitive area, including the threat of initiating infringement proceedings if no other measures prove effective.

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[34] Ríkisendurskoðun, 'Tryggingastofnun ríkisins og staða almannatrygginga' (2020) 47 <https://www.rikisend.is/reskjol/files/Skyrslur/2020-Tryggingastofnun.pdf> accessed 7 January 2025.

[35] ibid 49.

[36] See to some extent the judgment of the EFTA Court in Case E-10/17 *Nye Kystlink AS v Color Group AS and Color Line AS* [2018] EFTA Ct. Rep. 292, para 112. In a similar domestic action, the Icelandic Supreme Court held in its judgment of 14 October 2024 in Case No 10/2014 *Social Insurance Administration v A and ÖBÍ,* that the four years' time limit was applicable to claims based on the unlawful practice of the administration to reduce supplementary pension due to periods spent abroad, although the practice had existed over a longer period.

[37] At the time of writing, see the legislative proposal on 'amendments to the Administration Act No 37/1993 (advisory opinions of the EFTA Court)' [2024] Doc 235, Case 234, Legislative assembly 155 <https://www.althingi.is/thingstorf/thingmalalistar-eftir-thingum/ferill/155/234/?ltg=155&mnr=234> accessed 15 November 2024.

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