JUDGMENT OF THE COURT (Fourth Chamber)

26 January 2006 *

In Case C-2/05,

REFERENCE for a preliminary ruling under Article 234 EC from the Arbeidshof te Brussel (Belgium), made by decision of 23 December 2004, received at the Court on 5 January 2005, in the proceedings

Rijksdienst voor Sociale Zekerheid

v

Herbosch Kiere NV,

THE COURT (Fourth Chamber),

composed of N. Colneric (Rapporteur), acting for the President of the Fourth Chamber, J.N. Cunha Rodrigues and K. Lenaerts, Judges,

* Language of the case: Dutch.

Advocate General: D. Ruiz-Jarabo Colomer,
Registrar: R. Grass,

having regard to the written procedure,

after considering the observations submitted on behalf of:

— the Rijksdienst voor Sociale Zekerheid, by P. Derveaux, advocaat,

— Herbosch Kiere NV, by B. Mergits, advocaat,

— Ireland, by D. O'Hagan, acting as Agent,

— the Slovenian Government, by M. Remic, acting as Agent,

— the Swedish Government, by K. Norman, acting as Agent,

— the United Kingdom Government, by M. Bethell, acting as Agent, and T. Ward, Barrister,

— the Commission of the European Communities, by P. van Nuffel and D. Martin, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 The reference for a preliminary ruling concerns the interpretation of Article 14(1)(a) of Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons, self-employed persons and members of their families moving within the Community, and of Article 11(1)(a) of Regulation (EEC) No 574/72 of the Council of 21 March 1972 laying down the procedure for implementing Regulation No 1408/71, in the versions amended and updated by Council Regulation (EEC) No 2001/83 of 2 June 1983 (OJ 1983 L 230, p. 6), as amended by Council Regulation (EEC) No 2195/91 of 25 June 1991 (OJ 1991 L 206, p. 2, hereinafter, respectively, 'Regulation No 1408/71' and 'Regulation No 574/72').

2 That reference was made in the course of proceedings between the Rijksdienst voor Sociale Zekerheid (National Social Security Service, hereinafter 'the Rijksdienst') and the Belgian company Herbosch Kiere NV (hereinafter 'Herbosch Kiere') concerning the repayment of social security contributions it paid for certain posted Irish workers.

Legal framework

Community legislation

Regulation No 1408/71

3 Title II of Regulation No 1408/71, which comprises Articles 13 to 17a, contains rules determining the legislation applicable in respect of social security.

4 Article 13(2) of the regulation provides:

'Subject to the provisions of Articles 14 to 17:

(a) a person employed in the territory of one Member State shall be subject to the legislation of that State even if he resides in the territory of another Member State or if the registered office or place of business of the undertaking or individual employing him is situated in the territory of another Member State;

...'

5 Article 14 of the regulation provides:

'Article 13(2)(a) shall apply subject to the following exceptions and circumstances:

(1) (a) A person employed in the territory of a Member State by an undertaking to which he is normally attached who is posted by that undertaking to the territory of another Member State to perform work there for that undertaking shall continue to be subject to the legislation of the first Member State, provided that the anticipated duration of that work does not exceed 12 months and that he is not sent to replace another person who has completed his term of posting.

...'

Decision No 128 of the Administrative Commission on Social Security for Migrant Workers

6 Under Article 81(a) of Regulation No 1408/71, the Administrative Commission on Social Security for Migrant Workers (hereinafter 'the Administrative Commission'), established under Title IV of that regulation, which is responsible, in particular, for dealing with all matters of administration or interpretation arising from the provisions of the regulation, adopted for those purposes Decision No 128 of 17 October 1985 concerning the application of Articles 14(1)(a) and 14b(1) of

Regulation No 1408/71 (OJ 1986 C 141, p. 6), which was in force at the time of the facts of the main proceedings. That decision was replaced by Decision No 162 of 31 May 1996 (OJ 1996 L 241, p. 28), which entered into force after those events and was itself replaced by Decision No 181 of 13 December 2000 (OJ 2001 L 329, p. 73).

7 According to paragraph 1 of Decision No 128, the provisions of Article 14(1)(a) of Regulation No 1408/71 are also to apply to 'a worker subject to the legislation of a Member State who is engaged in that Member State in which the undertaking has its registered office or place of business with a view to his posting ... to another Member State ... provided that:

(a) there exists a direct relationship between that undertaking and the worker during his period of posting;

(b) the undertaking normally carries out its activities in the first Member State, that is to say, in the case of an undertaking whose activity consists in making staff temporarily available to other undertakings, that it normally makes staff available to hirers established in that State for employment in that State'.

Regulation No 574/72

8 Article 11(1) of Regulation No 574/72, which forms part of Title III thereof entitled 'Implementation of the provisions of the regulation for determining the legislation applicable', provides:

'The institution designated by the competent authority of the Member State whose legislation is to remain applicable shall issue a certificate stating that an employed person should remain subject to that legislation up to a specific date:

(a) at the request of the employed person or his employer in cases referred to in Article 14(1) ... of the Regulation;

...'

The certificate mentioned in the provision set out above is known as a 'posting certificate' or an 'E 101 certificate'.

Belgian legislation

9 Article 31(1) of the Law of 24 July 1987 on temporary employment, provisional employment and the making of workers available to hirers (*Moniteur belge* of 20 August 1987, p. 12405) provides:

'A natural or legal person may not, otherwise than in accordance with the rules laid down in Chapters I and II, carry on any activity which consists in making workers recruited by that person available to third parties who hire those workers and exercise in relation to them any part of the authority normally vested in an employer, except for certain non-profit-making associations designated by Royal Decree decided upon in the Council of Ministers.'

The main proceedings and the questions referred for a preliminary ruling

10 During the period from April to September 1991, Herbosch Kiere was responsible for carrying out shuttering and concreting work and the installation of reinforced concrete frames on two construction sites in Belgium. To do so, it had recourse to the Irish undertaking ICDS Constructors Ltd (hereinafter 'ICDS Constructors'). Two subcontracts were concluded for the sites in question.

11 Herbosch Kiere checked, among other things, that ICDS Constructors' workers employed in Belgium had a valid posting certificate, issued in accordance with Article 11 of Regulation No 574/72 by the competent Irish authorities, and that the social security contributions due in respect of those workers had been paid in Ireland. According to the Court of First Instance, all the workers concerned, with a single exception, were in possession of E 101 certificates.

12 On 12 October 1992, the Social Legislation Inspectorate of the Belgian Ministry of Employment and Labour drew up a report stating that Herbosch Kiere had been hiring the Irish workers who had been made available by ICDS Constructors and that the real employer of those workers was therefore not the latter company but Herbosch Kiere.

13 In the light of the conclusions of that report, the Rijksdienst found that Herbosch Kiere exercised a part of the authority vested in an employer with the result that the workers must be regarded as being bound by a contract of employment with Herbosch Kiere. Consequently, the Rijksdienst required Herbosch Kiere to pay the contributions due under the Belgian social security regime.

14 Herbosch Kiere paid, conditionally, the sum claimed by the Rijksdienst in respect of those contributions, BEF 3 647 567 (EUR 90 420.82), and claimed repayment thereof in an action brought before the Arbeidsrechtbank te Brussel (Brussels Labour Court), which in large measure upheld that claim.

15 The Arbeidshof te Brussel (Brussels Higher Labour Court), to which the Rijksdienst appealed, harbours some doubts concerning the interpretation to be given to the relevant provisions of Regulation No 1408/71. In the light of the judgments in Case C-202/97 *FTS* [2000] ECR I-883 and Case C-178/97 *Banks and Others* [2000] ECR I-2005, the national court is uncertain as to the legal value to be accorded to an E 101 certificate, by the competent institution and the national courts of the host Member State of the workers concerned. Having regard to the Rijksdienst's submissions before the national court, according to which such certificates are merely a statement of the position as it stands or is supposed to stand at the time of the posting, the national court is unsure as to the circumstances in which the maintenance of a direct relationship, during the period of posting, between the worker and the undertaking which posted him can be scrutinised.

16 It was in those circumstances that the Arbeidshof te Brussel decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) May a court of the host State examine and/or determine whether a direct relationship exists between the undertaking which has posted a worker and the posted worker himself, in view of the fact that the term "undertaking to which he is normally attached" in Article 14(1)(a) of Regulation (EEC) No 1408/71 requires (pursuant to Decision No 128) that there be a direct relationship throughout the period of posting?

(2) May a court of a Member State other than that which issued the above-mentioned certificate (E 101 certificate) disregard and/or annul that certificate if it appears from the factual circumstances presented for its consideration that the direct relationship between the undertaking which posted the worker and the posted worker himself did not exist during the period of posting?

(3) Is the competent institution of the State of origin bound by a decision of a court of the host State which, in circumstances such as those set out above, disregards and/or annuls the abovementioned certificate (E 101 certificate)?'

The questions referred

17 The questions referred concern only the interpretation of Articles 14(1)(a) of Regulation No 1408/71 and 11(1)(a) of Regulation No 574/72. There is therefore no need to take into account Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services (OJ 1997 L 18, p. 1), the 19th recital in the preamble to which states that, 'without prejudice to other provisions of Community law, this Directive does not entail the obligation to give legal recognition to the existence of temporary employment undertakings, nor does it prejudice the application by Member States of their laws concerning the hiring-out of workers and temporary employment undertakings to undertakings not established in their territory but operating therein in the framework of the provision of services'.

The first and second questions

18 By its first and second questions, the national court asks in essence whether, and to what extent, an E 101 certificate issued under Article 11(1)(a) of Regulation No 574/72 is binding in the internal legal order of the host State as regards the existence, during the period of posting, of a direct relationship between the undertaking which has posted the worker and the posted worker himself.

19 In that regard, it must be noted that, according to the Court's settled case-law, referred to in Decision No 128 of the Administrative Commission, the maintenance during the period of posting of those workers of a direct link between the undertaking established in a Member State and the workers which it has posted to another Member State is one of the requirements for the application of Article 14(1)(a) of Regulation No 1408/71 (see to that effect *FTS*, paragraph 24). The declaration contained in an E 101 certificate is based upon the existence of such a link.

20 That certificate is — like the substantive rules in Article 14(1)(a) of Regulation No 1408/71 — aimed at facilitating freedom of movement for workers and freedom to provide services (see to that effect *FTS*, paragraph 48).

21 In an E 101 certificate, the competent institution of the Member State in which an undertaking providing temporary personnel is established declares that its own social security system will remain applicable to the posted workers for the duration

of their posting. By virtue of the principle that workers must be covered by only one social security system, the certificate thus necessarily implies that the other Member State's social security system cannot apply (*FTS*, paragraph 49).

22 The principle of cooperation in good faith, laid down in Article 10 EC, requires the issuing institution to carry out a proper assessment of the facts relevant for the application of the rules relating to the determination of the legislation applicable in the matter of social security and, consequently, to guarantee the correctness of the information contained in an E 101 certificate (*FTS*, paragraph 51).

23 As regards the competent institutions of the Member State to which workers are posted, it is clear from the obligations to cooperate arising from Article 10 EC that those obligations would not be fulfilled — and the aims of Article 14(1)(a) of Regulation No 1408/71 and Article 11(1)(a) of Regulation No 574/72 would be thwarted — if the institutions of that Member State were to consider that they were not bound by the certificate and also made those workers subject to their own social security system (*FTS*, paragraph 52).

24 Consequently, in so far as an E 101 certificate establishes a presumption that posted workers are properly affiliated to the social security system of the Member State in which the undertaking which posted those workers is established, such a certificate is binding on the competent institution of the Member State to which those workers are posted (see to that effect *FTS*, paragraph 53).

25 The opposite result would undermine the principle that workers are to be covered by only one social security system, would make it difficult to know which system is applicable and would consequently impair legal certainty. In cases in which it was difficult to determine the system applicable, each of the competent institutions of the two Member States concerned would be inclined to take the view, to the detriment of the workers concerned, that their own social security system was applicable to them (*FTS*, paragraph 54).

26 Consequently, as long as an E 101 certificate is not withdrawn or declared invalid, the competent institution of a Member State to which workers are posted must take account of the fact that those workers are already subject to the social security legislation of the State in which the undertaking employing them is established and that that institution cannot therefore make the workers in question subject to its own social security system (*FTS*, paragraph 55).

27 However, it is incumbent on the competent institution of the Member State which issued that certificate to reconsider the grounds for its issue and, if necessary, withdraw the certificate if the competent institution of the Member State to which the workers are posted expresses doubts as to the correctness of the facts on which the certificate is based and, consequently, of the information contained therein, in particular because the information does not correspond to the requirements of Article 14(1)(a) of Regulation No 1408/71 (*FTS*, paragraph 56).

28 Should the institutions concerned not reach agreement on, in particular, the question how the particular facts of a specific case are to be assessed, and consequently on the question whether it is covered by Article 14(1)(a) of Regulation No 1408/71, it is open to them to refer the matter to the Administrative Commission (*FTS*, paragraph 57).

29 If the Administrative Commission does not succeed in reconciling the points of view of the competent institutions on the question of the legislation applicable, the Member State to which the workers concerned are posted may, without prejudice to any legal remedies existing in the Member State to which the issuing institution belongs, at least bring infringement proceedings under Article 227 EC in order to enable the Court to examine in those proceedings the question of the legislation applicable to those workers and, consequently, the correctness of the information contained in the E 101 certificate (*FTS*, paragraph 58).

30 If it were accepted that a competent national institution could, by bringing proceedings before a court of the posted worker's host Member State to which that institution belongs, have an E 101 certificate declared invalid, there would be a risk that the system based on the duty of cooperation in good faith between the competent institutions of the Member States would be undermined.

31 As long as it has not been withdrawn or declared invalid, an E 101 certificate takes effect in the internal legal order of the Member State in which the workers concerned are posted and, therefore, binds its institutions.

32 It follows that a court of the host Member State is not entitled to scrutinise the validity of an E 101 certificate as regards the certification of the matters on the basis of which such a certificate was issued, in particular the existence of a direct relationship between the undertaking which posted the worker and the posted worker himself.

33 Having regard to all the foregoing considerations, the reply to the first and second questions must be that, as long as it has not been withdrawn or declared invalid by the authorities of the Member State which issued it, an E 101 certificate issued under Article 11(1)(a) of Regulation No 574/72 binds the competent institution and the courts of the Member State in which the workers are posted. Consequently, a court of the host Member State of such workers is not entitled to scrutinise the validity of an E 101 certificate as regards the certification of the matters on the basis of which such a certificate was issued, in particular the existence of a direct relationship, within the meaning of Article 14(1)(a) of Regulation No 1408/71, read in conjunction with paragraph 1 of Decision No 128, between the undertaking established in a Member State and the workers which it has posted to another Member State, during the period of their posting.

The third question

34 In the light of the reply given to the first and second questions, it is unnecessary to reply to the third question.

Costs

35 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fourth Chamber) hereby rules:

As long as it has not been withdrawn or declared invalid by the authorities of the Member State which issued it, an E 101 certificate issued under Article 11(1)(a) of Regulation (EEC) No 574/72 of the Council of 21 March 1972 laying down the procedure for implementing Regulation No 1408/71, in the version amended and updated by Council Regulation (EEC) No 2001/83 of 2 June 1983, as amended by Council Regulation (EEC) No 2195/91 of 25 June 1991, binds the competent institution and the courts of the Member State in which the workers are posted. Consequently, a court of the host Member State of such workers is not entitled to scrutinise the validity of an E 101 certificate as regards the certification of the matters on the basis of which such a certificate was issued, in particular the existence of a direct relationship, within the meaning of Article 14(1)(a) of Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons, self-employed persons and members of their families moving within the Community, in the version amended and updated by Regulation No 2001/83, as amended by Regulation No 2195/91, read in conjunction with paragraph 1 of Decision No 128 of the Administrative Commission on Social Security for Migrant Workers of 17 October 1985 concerning the application of Articles 14(1)(a) and 14b(1) of Regulation No 1408/71, between the undertaking established in a Member State and the workers which it has posted to another Member State, during the period of their posting.

[Signatures]