Reports of Cases

OPINION OF ADVOCATE GENERAL
WAHL
delivered on 27 September 2018[1]

Case C-477/17

Raad van bestuur van de Sociale Verzekeringsbank
v
D. Balandin,
I. Lukashenko,
Holiday on Ice Services BV

(Request for a preliminary ruling from the Centrale Raad van Beroep (Higher Social Security and Civil Service Court, Netherlands))

(Preliminary ruling — Social security — Regulation No 1231/2010 — Extension of coordination of social security systems to citizens of third countries legally resident in the territory of a Member State — Right to move and reside in the European Union — Abuse)

1. It has been a few years, but I remember well visiting a Holiday on Ice show as a young boy. At the time, I was fascinated by the fantastic performance that resulted from the coming together of many different protagonists: ice skaters, lighting engineers, musicians and many more. What many spectators of Holiday on Ice do not consider, however, is that behind the scenes just as many things, if not more, have to come together in order to put on such a show. The present request for a preliminary ruling from the Centrale Raad van Beroep (Higher Social Security and Civil Service Court, Netherlands) illustrates just how many legal issues alone are involved in bringing the show to people across Europe.

2. Specifically at issue is the question whether ice skaters working for Holiday on Ice, who are nationals of third countries, are entitled to coordinated social security coverage while touring in various Member States of the European Union.

1 Original language: English.

3. While Regulation Nos 1231/2010[2] and 883/2004[3] are the soloists in this production of EU law, there is also a mighty ensemble of other legislative instruments, such as the Schengen Visa Code,[4] the Residence Permit Regulation[5] and the Single Permit Directive,[6] which are all relevant for the resolution of the question referred by the Centrale Raad van Beroep.

I. Legal Framework

A. EU law

1. Regulation No 1231/2010

4. Regulation No 1231/2010 replaced Regulation No 859/2003[7] and its wording is almost identical to that of the earlier regulation. Both regulations aim to ensure that the rules for coordinating social security schemes applied to nationals of third countries are the same as those which apply to European citizens by extending the provisions of Regulation Nos 883/2004 and 987/2009[8] and, respectively, Regulation Nos 1408/71[9] and 574/72[10] to nationals of third countries.

5. The preamble to Regulation No 1231/2010 states, inter alia:

'(1) The European Parliament, the Council and the European Economic and Social Committee have called for the better integration of nationals of third countries who are legally resident in the territory of the Member States by giving them a set of uniform rights which match as closely as possible those enjoyed by citizens of the Union.

…

(8) In order to avoid a situation where employers and national social security bodies have to manage complex legal and administrative situations concerning only a limited group of persons, it is important to enjoy the full benefits of modernisation and simplification in the field of social security by making use of a single legal coordination instrument combining Regulation (EC) No 883/2004 and Regulation (EC) No 987/2009.

…

2 Regulation (EU) No 1231/2010 of the European Parliament and of the Council of 24 November 2010 extending Regulation (EC) No 883/2004 and Regulation (EC) No 987/2009 to nationals of third countries who are not already covered by these Regulations solely on the ground of their nationality (OJ 2010 L 344, p. 1).

3 Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (OJ 2004 L 166, p. 1).

4 Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code) (OJ 2009 L 243, p. 1)

5 Council Regulation (EC) No 1030/2002 of 13 June 2002 laying down a uniform format for residence permits for third-country nationals (OJ 2002 L 157, p. 1).

6 Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State (OJ 2011 L 343, p. 1).

7 Council Regulation (EC) No 859/2003 of 14 May 2003 extending the provisions of Regulation (EEC) No 1408/71 and Regulation (EEC) No 574/72 to nationals of third countries who are not already covered by those provisions solely on the ground of their nationality (OJ 2003 L 124, p. 1).

8 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).

9 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 (OJ 1971 L 149, p. 2).

10 Regulation (EEC) No 574/72 of the Council of 21 March 1972 fixing the procedure for implementing Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons and their families moving within the Community (OJ 1972 L 74, p. 1).

(10) The application of Regulation (EC) No 883/2004 and Regulation (EC) No 987/2009 to nationals of third countries who are not already covered by those Regulations solely on the ground of their nationality must not give them any entitlement to enter, to stay or to reside in a Member State or to have access to its labour market. …

(11) Regulation (EC) No 883/2004 and Regulation (EC) No 987/2009 should, by virtue of this Regulation, be applicable only in so far as the person concerned is already legally resident in the territory of a Member State. Legal residence should therefore be a prerequisite for the application of those Regulations.'

6. Article 1 of Regulation No 1231/2010 reads:

'Regulation (EC) No 883/2004 and Regulation (EC) No 987/2009 shall apply to nationals of third countries who are not already covered by those Regulations solely on the ground of their nationality, as well as to members of their families and to their survivors, provided that they are legally resident in the territory of a Member State and are in a situation which is not confined in all respects within a single Member State.'

2. Regulation No 883/2004

7. Article 1 of Regulation No 883/2004 ('Definitions') provides, inter alia:

'(j) "residence" means the place where a person habitually resides;

(k) "stay" means temporary residence;'

8. Article 13(1) of that regulation, as amended by Regulation (EU) No 465/2012[11], reads:

'A person who normally pursues an activity as an employed person in two or more Member States shall be subject:

(a) to the legislation of the Member State of residence if he/she pursues a substantial part of his/her activity in that Member State; or

(b) if he/she does not pursue a substantial part of his/her activity in the Member State of residence:

(i) to the legislation of the Member State in which the registered office or place of business of the undertaking or employer is situated if he/she is employed by one undertaking or employer; …'

9. The provisions of Regulation No 883/2004 are supplemented by Regulation No 987/2009, its implementing regulation.

11 Regulation of the European Parliament and of the Council of 22 May 2012 amending Regulation (EC) No 883/2004 on the coordination of social security systems and Regulation (EC) No 987/2009 laying down the procedure for implementing Regulation (EC) No 883/2004 (OJ 2012 L 149, p. 4).

B. National law

10. Referring to Regulation No 1231/2010, the Policy Guidelines of the Raad van bestuur van de Sociale Verzekeringsbank (Board of Management of the Social Insurance Bank; 'SvB') provide, in relation to nationals of countries outside the European Union, that Regulation No 883/2004 is to apply to nationals of third countries who are not already covered by that regulation solely on the ground of their nationality, if such nationals are legally resident in the territory of a Member State and move legitimately within the European Union.

11. With regard to the term 'legal residence', which is not defined in Regulation No 1231/2010, those guidelines further provide that legal residence in the Netherlands is assumed if such residence is lawful within the meaning of Article 8 of the Vreemdelingenwet 2000 (Law on Foreign Nationals 2000; 'Vw 2000'), with the proviso that the SvB will not assume legal residence if a foreign national resides in the Netherlands pending an application for first admission.

12. In addition, third-country nationals must satisfy the mobility criterion of Regulation No 883/2004 in the same way as EU nationals.

13. Regarding the territorial scope of Regulation No 883/2004, the Policy Guidelines of the SvB state that the application of Regulation No 883/2004 is 'in principle only at issue if a person lives and works in the territory of the European Union', save for certain exceptions found in the case-law of the Court of Justice.

II. Facts, procedure and the question referred

14. D. Balandin, a Russian national, and I. Lukashenko, a national of Ukraine, are employed by Holiday on Ice Services BV ('HOI'), a company with its registered office in Amsterdam and its principal place of business in Utrecht. During the winter season, HOI organises ice-skating shows in various Member States.

15. The employees of HOI spend a couple of weeks every year in the Netherlands in order to prepare for upcoming events. A number of the employees then perform in the Netherlands while other employees perform in other Member States, mostly France and Germany.

16. During the period of training and, where applicable, performing, all the third-country nationals appear to be legally present in the Netherlands. Thereafter, some third-country nationals remain in the Netherlands for the entire season, with the necessary permits obtained for them on the basis of national law. Some third-country nationals, however, stay in other Member States where they perform in shows, often on the basis of a 'Schengen-visa'.

17. For a number of years, the SvB has issued the third-country nationals employed by HOI with 'A1-statements' for the duration of the performance season, most recently on the basis of Article 19(2) of Regulation No 987/2009. Those statements attested that the Netherlands legislation in the field of social security would apply to the employees and that the corresponding social security contributions would be paid in the Netherlands. Nonetheless, from the 2015/16 season, the SvB refused to grant the A1-statements to the third-country nationals employed by HOI, arguing that it had incorrectly issued such statements in the past.

18. After consultation, partly following interim relief granted by the judge hearing applications for interim measures at the Rechtbank Amsterdam (District Court, Amsterdam, Netherlands), the SvB finally issued A1-statements that were valid until 1 May 2016. However, the season only ended on 22 May 2016, so that a dispute still exists in respect of those final weeks.

19. In a judgment of 28 April 2016, the Rechtbank Amsterdam decided that the SvB should have issued A1-statements valid for the full season, that is, until 22 May 2016.

20. The SvB subsequently brought an appeal against that judgment before the referring court.

21. In the view of the referring court, Balandin and Lukashenko do not fall within the scope of Article 2 of Regulation No 883/2004, since they are not nationals of a Member State, stateless persons or refugees. They can benefit from the provisions of that regulation only if they should fall within the scope of Regulation No 1231/2010, whose purpose is to extend, under certain conditions, the scope of Regulation No 883/2004 and its implementing regulation to third-country nationals.

22. According to the referring court, it is not disputed that Balandin and Lukashenko did not reside in the Netherlands or in another Member State, but stayed and worked temporarily within the EU, within the meaning of Article 1(k) of Regulation No 883/2004. In the view of the referring court, there exists, against that background, some uncertainty as to whether only third-country nationals residing in the European Union within the meaning of Article 1(j) of Regulation No 883/2004, or also third-country nationals in the situation of Balandin and Lukashenko, may rely on Article 1 of Regulation No 1231/2010.

23. Entertaining doubts as to the correct interpretation of EU law, the Centrale Raad van Beroep decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Must Article 1 of Regulation No 1231/2010 be interpreted as meaning that third-country nationals, who reside outside the European Union, but who work in various Member States on a temporary basis for an employer who is established in the Netherlands, may invoke (Title II of) Regulation No 883/2004 and Regulation No 987/2009?'

24. Written observations in the present proceedings have been submitted by Balandin, Lukashenko and HOI (jointly referred to as 'Balandin and Others'), the SvB, the Netherlands, Czech and French Governments, and by the Commission. Balandin and Others, the SvB, the Netherlands Government and the Commission also presented oral argument at the hearing on 4 July 2018.

III. Analysis

25. By its question, the referring court essentially asks whether third-country nationals in the situation of Balandin and Lukashenko fall within the scope of Article 1 of Regulation No 1231/2010 and, by extension, Regulation No 883/2004 and its implementing regulation.

26. The proceedings before the referring court were prompted because the SvB maintained in the national proceedings that Balandin and Lukashenko do not fall within the scope of Regulation No 1231/2010. However, the SvB in fact reversed their position in the course of the oral procedure before the Court. Given the circumstances, one might wonder if a real dispute, as required by Article 267 TFEU, still exists.

27. Questions concerning EU law enjoy a presumption of relevance and the threshold for refusing to give a ruling on a question referred by a national court is high: only where it is quite obvious that the interpretation sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material

necessary to give a useful answer to the questions submitted to it.[12] It is my view that, unless the request for a preliminary ruling is withdrawn, this Court must therefore reply to the question put before it.

28. Article 1 of Regulation No 1231/2010 contains two prerequisites for its application. First, the third-country nationals wishing to benefit from that regulation must be legally resident in the territory of a Member State; and, second, they must be in a situation which is not confined in all respects within a single Member State.

29. It is not disputed in the present case that Balandin and Lukashenko fulfil the second prerequisite. The contentious issue in the main proceedings is whether Balandin and Lukashenko can actually be considered to be 'legally resident in the territory of a Member State' for the purposes of Regulation No 1231/2010.

30. Regulation No 1231/2010 does not provide a definition for the words 'are legally resident in the territory of a Member State', nor can such a definition be found in other EU legal instruments. To my knowledge, the Court has never provided such a definition for the purposes of the application of that regulation (or its almost identically worded predecessor for that matter).

31. Thus far, the Court has only indirectly addressed the criterion that third-country nationals must be legally resident in a Member State in Article 1 of Regulation No 1231/2010 in its case-law on the second criterion in the same article. It is clear from that case-law that third-country nationals holding a residence permit in a Member State fulfil the criterion.[13]

32. However, Balandin and Lukashenko do not hold a residence permit. They enter the European Union on the basis of a Schengen visa that allows them to legally remain in the Schengen area for up to 90 days within any 180-day period.[14] While it could not definitively be confirmed at the hearing, it also seems that those Schengen visas are complemented by national visas so as to cover the entire performance season from October until the end of May.

33. Accordingly, it must be determined whether third-country nationals who pursue gainful employment can be considered to be 'legally resident in the territory of a Member State' where they are not in possession of a residence permit but stay in the European Union on the basis of short-stay visa.

34. In line with consistent case-law, the need for a uniform application of EU law and the principle of equality require that the terms of a provision of EU law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the European Union.[15]

12 See judgment of 16 June 2015, *Gauweiler and Others*, C-62/14, EU:C:2015:400, paragraph 25 and the case-law cited. See also, concerning contrived cases, judgment of 11 March 1980, *Foglia*, 104/79, EU:C:1980:73, and judgment of 16 December 1981, *Foglia*, 244/80, EU:C:1981:302. Furthermore, see judgment of 9 February 1995, *Leclerc-Siplec*, C-412/93, EU:C:1995:26, paragraph 14, where the Court held that the fact that the parties to the main proceedings are in agreement as to the result to be obtained is not sufficient to render the dispute any less real.

13 See judgment of 21 June 2017, *Martinez Silva*, C-449/16, EU:C:2017:485, paragraph 27; judgment of 13 June 2013, *Hadj Ahmed*, C-45/12, EU:C:2013:390, paragraphs 12 and 31; and judgment of 18 November 2010, *Xhymshiti*, C-247/09, EU:C:2010:698, paragraph 29.

14 See Article 1(1) of the Schengen Visa Code.

15 See judgment of 19 September 2013, *Brey*, C-140/12, EU:C:2013:565, paragraph 49 and the case-law cited.

35. Regulation No 1231/2010 does not contain any reference to national laws as regards the meaning of the words 'are legally resident in the territory of a Member State'. It follows that those words must be regarded, for the purposes of application of Regulation No 1231/2010, as designating an autonomous concept of EU law which must be interpreted in a uniform manner throughout the Member States. [16]

36. The same is true, *mutatis mutandis*, for the notions of 'residence' in Article 1(j) of Regulation No 883/2004 and 'stay' in Article 1(k) of the same regulation.

37. That is also why the fact that various language versions of Regulation No 1231/2010 are somewhat differently worded, as mentioned by the referring court, is of no consequence for the present assessment. The need for an autonomous and uniform interpretation does not permit the consideration of one version of the text in isolation, but rather requires the text to be interpreted on the basis of the purpose of the measure in question. [17]

38. Given that EU law has not fully harmonised the conditions of entry, stay and residence of third-country nationals, criteria established under national immigration law nevertheless do play into the question of whether or not the prerequisites for residing legally in a Member State are fulfilled. It should be emphasised though that the legal qualification of a third-country national's stay under national law is not relevant for an assessment within the framework of Regulation No 1231/2010.

39. It follows that the situation of, on the one hand, Balandin and Lukashenko and, on the other hand, that of the third-country nationals remaining in the Netherlands for the entire winter season who are covered by Netherlands social security, are not comparable for the purposes of the present assessment. As the Court has consistently held, in circumstances where only one EU Member State and a third State are concerned, EU law does not apply and the third-country nationals do not fall within the scope of Regulation No 1231/2010. [18] The situation of those third-country nationals is, therefore, a matter of national law alone.

40. In the absence of a definition in the relevant legal instrument, it follows from the Court's settled case-law that, in interpreting a provision of EU law, it is necessary to consider not only its wording but also the context in which it occurs and the objectives pursued by the body of rules of which it forms part. [19]

41. In the following, first the context of Regulation No 1231/2010 and the objectives pursued by the body of rules of which it forms part will be considered. Based on that analysis, in a second step, an interpretation of the words 'legally resident in the territory of a Member State' will be elaborated on in order to determine whether or not Balandin and Lukashenko fulfil the preconditions for residing legally in a Member State.

16 See judgment of 21 December 2011, *Ziolkowski and Szeja*, C-424/10 and C-425/10, EU:C:2011:866, paragraphs 32 and 33 and the case-law cited.

17 See also, to that effect, judgment of 12 December 2013, *X*, C-486/12, EU:C:2013:836, paragraph 19 and the case-law cited.

18 See, for example, judgment of 13 June 2013, *Hadj Ahmed*, C-45/12, EU:C:2013:390, paragraph 32, and judgment of 18 November 2010, *Xhymshiti*, C-247/09, EU:C:2010:698, paragraph 37.

19 See, to that effect, judgment of 6 October 1982, *Cilfit and Others*, 283/81, EU:C:1982:335, paragraph 20. See also judgment of 2 September 2010, *Kirin Amgen*, C-66/09, EU:C:2010:484, paragraph 41 and the case-law cited, and judgment of 21 December 2011, *Ziolkowski and Szeja*, C-424/10 and C-425/10, EU:C:2011:866, paragraph 34 and the case-law cited.

A. The context of Regulation No 1231/2010 and the objectives pursued by the body of rules of which it forms part

42. Regulation No 1231/2010 was adopted as part of a comprehensive legislative package seeking to simplify and streamline the legal framework for coordinating social security systems in the European Union for both EU citizens and third-country nationals.

43. The regulation is worded in near identical terms to its predecessor regulation, Regulation No 859/2003. However, while the older regulation allowed for special provisions whereby Member States could limit the scope of application of the regulation to a certain extent by using specific national criteria as a prerequisite,[20] Regulation No 1231/2010 did away with such exceptions.

44. Regulation No 1231/2010, as the title to the regulation states, extends the provisions on the coordination of social security systems in the Member States, i.e. Regulation No 883/2004 and its implementing regulation, to third-country nationals who are not already covered by those provisions solely on the ground of their nationality.

45. In order properly to understand the context and objectives of Regulation No 1231/2010, therefore, the regulation must be considered in light of Regulation No 883/2004.

46. By extending the application of Regulation No 883/2004 and its implementing regulation to certain third-country nationals, Regulation No 1231/2010 seeks to confer on those third-country nationals, as far as possible, the *same* rights as EU nationals enjoy in terms of coordination of social security systems under Regulation No 883/2004.[21]

47. Both regulations thus ensure that persons making use of their right to move freely within the European Union do not suffer any disadvantages in their social security rights. It should be noted, however, that the regulations do not seek to harmonise national social security systems. Rather, the regulations provide conflict rules that determine the regime applicable for social security coverage.[22] This is not only to ensure that persons moving within the European Union are not left without social security cover because there is no legislation which is applicable to them, but also to ensure that they are subject to the social security scheme of only one Member State at any given time.[23]

48. The regulations thus do not create a right to social security protection as such, but rather determine which regime is to be applied. The coordination rules only come into play once someone is already affiliated to the social security scheme of a Member State. However, it is national law that determines the conditions for such an affiliation.

49. While essentially providing the same substantive rules, the two regulations, however, differ significantly so far as their personal scope is concerned. Regulation No 883/2004 applies to all EU citizens, stateless persons and refugees, as well as to the members of their families and to their survivors, who reside in a Member State.[24] Regulation No 1231/2010, on the other hand, applies to third-country nationals, as well as to members of their families and to their survivors.[25]

20 See the Annex to Regulation No 859/2003.

21 See Proposal for a Council Regulation extending the provisions of Regulation (EC) No 883/2004 and Regulation (EC) No […] to nationals of third countries who are not already covered by these provisions solely on the ground of their nationality (COM(2007) 439 final), p. 2 of the Explanatory Memorandum – Context of the proposal). See also Council Document No 14762/01 ('2392nd Council meeting – Employment and Social Policy – Brussels, 3 December 2001'), pp. 7 and 8, as well as the Presidency conclusions of the Tampere European Council of 15 and 16 October 1999, conclusion 21.

22 See Proposal for a Council Regulation (EC) on coordination of social security systems (COM(1998) 779 final), p. 1.

23 See judgment of 11 September 2014, *B.*, C-394/13, EU:C:2014:2199, paragraph 23 and the case-law cited, and judgment of 5 June 2014, *I*, C-255/13, EU:C:2014:1291, paragraph 40 and the case-law cited.

24 See Article 2 of Regulation No 883/2004.

25 See Article 1 of Regulation No 1231/2010.

50. So, why have two separate legal instruments that pursue the same objective?

51. A first proposal for Regulation No 883/2004 envisaged that the regulation would also be applicable to third-country nationals, as long as they were residing in a Member State.[26] Applying the same rules to third-country nationals as to EU citizens was to avoid Member State authorities having to manage complex legal and administrative situations concerning only a limited group of persons.[27] In addition, it was considered 'fundamentally unjust' that third-country nationals who were legally working and insured in one of the Member States would be treated differently from EU citizens from the moment they crossed one of the borders within the European Union.[28]

52. However, Regulation No 883/2004 is based on the right to free movement of EU citizens. Already in the 1950s the EU legislature realised that free movement of workers in the European Union would be hindered significantly if those workers could not take their social security rights with them.[29] As third-country nationals do not enjoy the same right to free movement, a different legal basis had to be used to extend the coordination of social security systems to third-country nationals.[30] Unlike Regulation No 883/2004, Regulation No 1231/2010 was therefore based on Article 79(2)(b) TFEU.

53. Article 79(2) TFEU empowers the European Union to adopt measures defining the rights of third-country nationals residing legally in a Member State, including the conditions governing freedom of movement and of residence in other Member States. However, as made clear in Article 79(2) TFEU, it is for the purposes of Article 79(1) TFEU that such measures may be adopted, that is to say, for the purposes of the common immigration policy aimed at ensuring the efficient management of migration flows, fair treatment of third-country nationals residing legally in Member States, and the prevention of, and enhanced measures to combat, illegal immigration and trafficking in human beings.[31]

54. The European Union's migration policy, of which Regulation No 1231/2010 forms part, is also based on Article 79 TFEU. That policy has the aim of attracting and integrating workers from third countries into the workforce of EU Member States to meet the existing and future needs of the EU labour market and to ensure the sustainable development of all countries. At the same time, the EU migration policy seeks to ensure that third-country nationals legally working in the European Union do so under fair conditions and with a high level of social protection. The policy does not, however, seek a general harmonisation of the conditions on entry, stay and residence of third-country nationals.[32]

26 See Proposal for a Council Regulation (EC) on coordination of social security systems (COM(1998) 779 final), p. 2.

27 See, to that effect, recital 8 to Regulation No 1231/2010.

28 See Council document No. 12296/01, Addendum 2 ('Proposal for a Regulation of the European Parliament and of the Council on the coordination of social security systems – Parameters with a view to modernising Regulation (EEC) No 1408/71 = Explanatory note), p. 11.

29 See Regulation No 3 of 1958 concerning social security of migrant workers (*OJ 1958, 30, p. 561*), and Council document No 12296/01, Addendum 1 ('Proposal for a Regulation of the European Parliament and of the Council on the coordination of social security systems – Parameters with a view to modernising Regulation (EEC) No 1408/71 = Text of the parameters'), p. 3.

30 See Council document No 12296/01 ('Proposal for a Regulation of the European Parliament and of the Council on the coordination of social security systems – Parameters with a view to modernising Regulation (EEC) No 1408/71'), p. 4, referring to judgment of 11 October 2001, *Khalil and Others*, C-95/99 to C-98/99 and C-180/99, EU:C:2001:532.

31 See judgment of 18 December 2014, *United Kingdom* v *Council*, C-81/13, EU:C:2014:2449, paragraphs 41 and 42.

32 See, to that effect, Council document No 16879/1/06 ('Brussels European Council 14/15 December 2006 – Presidency Conclusions'), pp. 6-12 and the documents mentioned therein, as well as the Proposal for a Council Regulation extending the provisions of Regulation (EC) No 883/2004 and Regulation (EC) No […] to nationals of third countries who are not already covered by these provisions solely on the ground of their nationality (COM(2007) 439 final).

55. In the context of Regulation No 1231/2010 this means that, while third-country nationals have the same right to coordination of social security systems, application of the coordination legislation does not give them any entitlement to enter, to stay or to reside in a Member State or to have access to its labour market.[33] The person concerned must already be legally resident in the territory of a Member State.[34]

56. However, that criterion must be fulfilled only in the first Member State. To benefit from social security coordination in a second Member State, the conditions for residing legally do not have to be satisfied again for temporary stays. Once third-country nationals have obtained the status of legal resident in a first Member State, they may simply move to the second country, in compliance with that country's national legislation on entry and stay.[35] The status of legal resident, in a manner of speaking, is thus 'exported' to the second Member State.

57. It should be noted, however, that that status can only be exported as long as it persists in the first Member State.

58. It is in light of the above considerations that the words 'are legally resident in the territory of a Member State' in Regulation No 1231/2010 must be interpreted.

B. The meaning of 'legally resident in the territory of a Member State' in Regulation No 1231/2010

59. In their written observations, the participants in the present proceedings have focused their discussions on whether or not 'legally resident' for the purposes of Regulation No 1231/2010 should be interpreted on the basis of 'residence' as defined in Regulation No 883/2004. All the participants and the referring court have deemed it established that the presence of the third-country nationals concerned in the Member States was legal in any case.

60. In accordance with Article 1(j) of Regulation No 883/2004, 'residence' means 'the place where a person habitually resides'.

61. Article 11 of the implementing regulation to Regulation No 883/2004, which consolidated previous case-law of the Court, further provides that residence for the purposes of Regulation No 883/2004 is where the 'centre of interests' of the person concerned is situated. The determination of that centre of interests comprises a circumstantial assessment taking into account factors such as duration of presence, any activities pursued, family status and family ties, any non-remunerated activity, housing situation or tax residence.[36] Moreover, where consideration of those criteria does not lead to a definitive result, the person's intention, as it appears from the relevant facts and circumstances, is to be decisive for establishing that person's residence.

62. 'Residence' in Regulation No 883/2004 is hence a factual concept.

63. That is because EU citizens, as a matter of EU law, enjoy a general right to reside and move freely within all Member States. From a legal point of view, no distinction can be made in the relationship between an EU citizen and a specific Member State without considering the nationality of that person. An EU citizen in general has the legal right to reside in any Member State of the European Union. The purpose of Regulation No 883/2004 is thus not to determine whether or not EU citizens are entitled to

33 See recital 10 to Regulation No 1231/2010.

34 See recital 11 to Regulation No 1231/2010.

35 See Proposal for a Council Regulation extending the provisions of Regulation (EC) No 883/2004 and Regulation (EC) No […] to nationals of third countries who are not already covered by these provisions solely on the ground of their nationality (COM(2007) 439 final), p. 6 of the Explanatory Memorandum).

36 See Regulation No 987/2009, Article 11(1).

coordination of their social security rights, but rather to determine the Member State that they are *in fact* most closely connected with. Similarly, stateless persons and refugees enjoy such a legal right on the basis of international obligations of the Member States and have therefore been included in the scope of Regulation No 883/2004. [37]

64. In contrast, third-country nationals do not enjoy a general right to reside and move freely within the Member States. Accordingly, they also do not have a general entitlement to 'exportable' social security.

65. Regulation No 1231/2010 thus seeks to determine as a preliminary step whether or not a third-country national has the right, as a matter of EU law, to coordination of his social security rights. As the term suggests, 'legally resident in a Member State' is a legal concept. The definition of the factual concept of 'residence' in Regulation No 883/2004 therefore cannot be of any consequence for the interpretation of 'legally resident in a Member State' for the purposes of Regulation No 1231/2010. It is the legal qualification of the third-country nationals' presence in the Member States, as a matter of EU law, which must be determined.

66. It also follows that the notions of 'legally resident in a Member State' for the purposes of Article 1 of Regulation No 1231/2010, 'residence' as defined in Article 1(j) of Regulation No 883/2004 and 'stay', which is defined in Article 1(k) of Regulation No 883/2004 as 'temporary residence', are three distinct legal concepts in EU law. [38]

67. In the absence of a definition of 'legally resident' in Regulation No 1231/2010, it follows from the Court's settled case-law that, in interpreting a provision of EU law, it is necessary to consider not only its wording but also the context in which it occurs and the objectives pursued by the rules of which it is part. [39]

68. As alluded to in point 52 above, Regulation No 883/2004 seeks to coordinate the social security rights for those persons making use of their freedom to move within the European Union. However, third-country nationals do not generally benefit from the freedom to move and reside in the European Union. Rather, their right to move and reside in the European Union is always based on express legal provisions creating such a right. In the absence of full harmonisation, such provisions can be derived either from EU or from national law.

69. In terms of EU law, there are a number of instruments on which the right to move and reside for third-country nationals can be based. For the purposes of the present case it will suffice to focus on the instruments dealing with third-country workers as Balandin and Lukashenko are in gainful employment. [40]

37 See, to that effect, judgment of 11 October 2001, *Khalil and Others*, C-95/99 to C-98/99 and C-180/99, EU:C:2001:532, paragraphs 39 to 58.

38 Even though in some languages, such as Dutch, the same or deceptively similar terminology might be used for the three concepts.

39 Judgment of 2 September 2010, *Kirin Amgen*, C-66/09, EU:C:2010:484, paragraph 41 and the case-law cited.

40 Other examples are Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 77), Council Directive 2003/109/EC of 25 November 2003 on the status of third-country nationals who are long-term residents (OJ 2004 L 16, p. 44), or Directive (EU) 2016/801 of the European Parliament and of the Council of 11 May 2016 on the conditions of entry and residence of third country nationals for the purposes of research, studies, training, voluntary service, pupil exchange schemes or educational projects and au pairing (OJ 2016 L 132, p. 21).

70. The Blue Card Directive [41] and the Intra-corporate Transfer Directive [42] both expressly provide for the right to move and reside in the European Union for third-country workers on the basis of EU law. Any third-country nationals residing in the European Union based on those EU law instruments therefore should be considered 'legally resident' for the purposes of Regulation No 1231/2010. The same is true for any association agreements that contain provisions on the right to move and reside in the European Union. The Seasonal Workers Directive, while allowing third-country nationals to work within the European Union on a temporary basis, does not provide for such a right and expressly excludes that the third-country nationals concerned reside in the European Union. [43] Therefore, third-country nationals staying in the European Union based on that EU law instrument will certainly not be considered 'legally resident' for the purposes of Regulation No 1231/2010. [44]

71. On the other hand, the right to move and reside can also be derived from a legal status based on national law. However, as Member States are solely competent to regulate the admission, including the volumes of admission, of third-country nationals for the purpose of work, and as the conditions of entry, stay and residence of third-country nationals are not fully harmonised, the criteria for such a status can vary considerably among the Member States. [45] Therefore, in my view it necessarily follows from the overall structure and the context of the legislation at issue, and in order to facilitate control of the legal status of third-country nationals, that such a status must be attested by a residence permit. Pursuant to the Residence Permit Regulation, for the purposes of EU law, a 'residence permit' is 'any authorisation issued by the authorities of a Member State allowing a third-country national to stay legally on its territory, with the exception of [amongst others] visas'. [46]

72. Beyond the situations described in points 69 to 71 above, I cannot envisage any situation where a third-country worker would be considered to be legally resident in the territory of a Member State for the purposes of Regulation No 1231/2010, given that third-country nationals do not enjoy a general right to move and reside within the European Union.

73. Balandin and Lukashenko have been admitted to the Netherlands in accordance with the Schengen Visa Code and, as far as it can be inferred from the national file made available to the Court, national visa rules. They also have an employment contract with HOI which lasts from October until May.

74. Can they be considered to be 'legally resident in the territory of a Member State' for the purposes of Regulation No 1231/2010?

75. I believe they cannot.

76. First, Balandin and Lukashenko do not hold any of the residence permits issued on the basis of the specialised EU law instruments referred to in point 70 or footnote 40 of this Opinion.

77. Second, they cannot be considered to hold a residence permit issued on the basis of national law criteria as visas are not considered 'residence permits' for the purposes of EU law. [47]

41 Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment (OJ 2009 L 155, p. 17), Article 18.

42 Directive 2014/66/EU of the European Parliament and of the Council of 15 May 2014 on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer (OJ 2014 L 157, p. 1), Article 20.

43 See Directive 2014/36/EU of the European Parliament and of the Council of 26 February 2014 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers (OJ 2014 L 95, p. 375), Article 2.

44 Even though they are not considered to be legally resident, seasonal workers may nevertheless benefit from social security coverage. However, their right to social security is based, by way of exception, specifically on Article 5(1)(b) of the Seasonal Workers Directive. Similarly, there are other EU law instruments or even national provisions that specifically provide for social security coverage where the third-country nationals concerned cannot be considered to be 'legally resident in the territory of a Member State' for the purposes of Regulation No 1231/2010.

45 See, to that effect, recitals 3 and 6 to the Single Permit Directive.

46 See Article 1(2)(a) of the Residence Permit Regulation. This also includes a permit issued in accordance with the Single Permit Directive.

47 See Article 1(2)(a)(i) of the Residence Permit Regulation.

78. Third, Balandin and Lukashenko's presence in the Netherlands can, in any event, only be legal for the period during which they are allowed to remain there. As it is one of the basic principles of Regulation No 1231/2010 that legal residence is 'exported' from the first Member State to other Member States,[48] the third-country nationals must be considered to be legally resident in the first Member State for the entire period during which coverage is sought. Even if a more liberal interpretation of 'legally resident' were adopted, the latter could only last for a maximum of 90 days on the basis of their Schengen visa. It does not suffice in that respect that Balandin and Lukashenko might be legally staying in the other Member States. In circumstances where legal residence cannot be exported, the prerequisites for legal residence have to be fulfilled in the next Member State.

79. It follows that Balandin and Lukashenko cannot be considered to be legally resident in the territory of a Member State and therefore do not fall within the scope of Regulation No 1231/2010.

80. Contrary to what was argued by the SvB and the Netherlands Government at the hearing, nor can Balandin and Lukashenko be considered to be 'legally resident' in the Netherlands for the purposes of Regulation No 1231/2010 on the basis of HOI's seat in the Netherlands. While that would be sufficient to establish residence under Regulation No 883/2004, the two ice skaters first have to fulfil the prerequisites of Regulation No 1231/2010 in order for the provisions of the former regulation to extend to them at all.

81. I would also add that reliance on the place of work for the purposes of Regulation No 883/2004 in order to establish the legal status of a third-country national would require that the person concerned is actually permitted to work in the Member State concerned. Balandin and Lukashenko, as far as it could be established at the hearing, work in the Netherlands without a work permit as they rely on an exception that allows artists to work in the Netherlands for up to 6 weeks within any 13-week period. Leaving aside for the moment the issue of whether such an exception can actually apply to artists who are in gainful employment, even in circumstances where Balandin and Lukashenko could rely on their place of work in order to establish their legal residence in a Member State, they could only be considered to work in the Netherlands for a maximum of 6 weeks.

82. Contrary to what was argued by the French Government, Balandin and Lukashenko cannot be considered to fall within the scope of Regulation No 1231/2010 if a parallel is drawn with the Seasonal Workers Directive. Not only does that directive specifically exclude residence in the European Union, but it also excludes third-country nationals who are carrying out activities on behalf of undertakings established in another Member State in the framework of the provision of services.[49]

83. Last, the finding that Balandin and Lukashenko do not fall within the scope of Regulation No 1231/2010 is supported by the conditions and procedures applicable to the Schengen visa. Article 15 of the Schengen Visa Code requires applicants for a multiple-entries Schengen visa to prove that they are in possession of adequate and valid travel medical insurance.[50] In principle, applicants are to take out such insurance in their country of residence.[51] Moreover, applicants declare in the course of their visa application that they do not intend to take up residence in the European Union and that they are sufficiently rooted in their country of origin to ensure their return.

84. Therefore I conclude that Article 1 of Regulation No 1231/2010 is to be interpreted as meaning that third-country nationals, who work in various Member States of the European Union for an employer established in the Netherlands but who do not hold a residence permit on the basis of EU or national law, may not invoke (Title II of) Regulation No 883/2004 and Regulation No 987/2009.

48 See points 56 and 57 above.

49 See Article 2, paragraphs 1 and 3(a) of the Seasonal Workers Directive.

50 See Article 15(2) of the Schengen Visa Code.

51 See Article 15(4) of the Schengen Visa Code.

85. Balandin and Others argue that the application of Regulation No 1231/2010 to the situation of Balandin and Lukashenko is essential for HOI to be able to provide its services in other Member States. Therefore, as a last step, I shall consider whether HOI's freedom to provide services has any effect on the interpretation of Article 1 of Regulation No 1231/2010.

C. Does HOI's freedom to provide services have any effect on the interpretation of Article 1 of Regulation No 1231/2010?

86. At the hearing, the SvB supported Balandin and Others in their argument that Balandin and Lukashenko must be considered to fall within the scope of Regulation No 1231/2010 as otherwise HOI would be hindered in its freedom to provide services within the European Union. The SvB in that respect relied specifically on the Court's case-law in *Vander Elst*.

87. In that judgment the Court held that the freedom to provide services, as guaranteed by what is now Article 56 TFEU, requires the abolition of any restriction when it is liable to prohibit or otherwise impede the activities of a provider of services established in another Member State where the provider lawfully provides similar services. [52]

88. A few remarks are in order here.

89. First, the *Vander Elst* case-law is irrelevant in the present case. The Court's judgment in *Vander Elst* and the line of authority devolving from that case dealt with workers posted to another Member State. All the workers concerned fulfilled the legal requirements for residence and employment in the sending State to begin with. [53] The legal issue before the Court was rather whether, by posting the workers to the receiving State, they gained access to the latter's labour market and, if so, whether the receiving State could, on that account, impose additional requirements. [54]

90. Second, HOI has the option of obtaining residence permits for Balandin and Lukashenko on the basis of the Single Permit Directive. [55] As soon as Balandin and Lukashenko hold residence permits, they will fall within the scope of Regulation No 1231/2010. On the basis of such a permit, they could then be posted from the Netherlands to the other Member States where they perform and could accordingly benefit from the provisions of Regulation No 883/2004 and its implementing regulation.

91. Third, a consequence of HOI using a combination of exceptions found in EU law and national laws is that Balandin and Lukashenko cannot rely on certain rights they would otherwise enjoy under EU law (for example, the Single Permit Directive) –– most notably, the right to equal treatment in terms of working conditions, including pay and dismissal as well as health and safety at the workplace. [56] It would be absurd if reliance on one of the fundamental freedoms of EU law could be used to circumvent one of the main objectives sought by the EU policy on labour migration as well as by Regulation No 1231/2010, namely to grant third-country nationals rights and obligations comparable to those of EU citizens. [57] In addition, an instrument of EU law should not be interpreted in such a way as to make it possible for rights guaranteed under EU law to be abused. [58]

52 See judgment of 9 August 1994, *Vander Elst*, C-43/93, EU:C:1994:310, paragraph 14 and the case-law cited.

53 See, for example, judgment of 9 August 1994, *Vander Elst*, C-43/93, EU:C:1994:310, paragraph 3.

54 Judgment of 9 August 1994, *Vander Elst*, C-43/93, EU:C:1994:310, paragraph 11. See also judgment of 11 September 2014, *Essent Energie Productie*, C-91/13, EU:C:2014:2206, paragraphs 51 to 57 and the case-law cited. See also, to that effect, my Opinion in *Danieli & C. Officine Meccaniche and Others*, C-18/17, EU:C:2018:288, points 85 to 95.

55 See Article 3(1) of the Single Permit Directive.

56 See Article 12(1)(a) of the Single Permit Directive.

57 See recital 2 to Regulation No 1231/2010.

58 See, to that effect, the Opinion of Advocate General Poiares Maduro in *Halifax and Others*, C-255/02, EU:C:2005:200, point 69.

92. Therefore it must be concluded that HOI's freedom to provide services within the European Union does not affect the interpretation of Article 1 of Regulation No 1231/2010.

IV. Conclusion

93. In the light of the foregoing, I propose that the Court answer the question referred by the Centrale Raad van Beroep (Higher Social Security and Civil Service Court, Netherlands) as follows:

Article 1 of Regulation (EU) No 1231/2010 of the European Parliament and of the Council of 24 November 2010 extending Regulation (EC) No 883/2004 and Regulation (EC) No 987/2009 to nationals of third countries who are not already covered by these Regulations solely on the ground of their nationality is to be interpreted as meaning that third-country nationals, who work in various Member States of the European Union for an employer established in the Netherlands but who do not hold a residence permit on the basis of EU or national law, may not invoke (Title II of) Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems and 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.