

JUDGMENT OF THE COURT (Sixth Chamber)

25 October 2018(*)

(Reference for a preliminary ruling — Social security — Regulation (EC) No 883/2004 — Article 12(1) — Regulation (EC) No 987/2009 — Article 14(1) — Posted workers — Legislation applicable — A1 certificate — Whether the employee is subject to the legislation of the Member State in which his employer is established — Conditions)

In Case C-451/17,

REQUEST for a preliminary ruling under Article 267 TFEU from the Administrativen sad Veliko Tarnovo (Administrative Court, Veliko Tarnovo, Bulgaria), made by decision of 19 July 2017, received at the Court on 27 July 2017, in the proceedings

‘Walltopia’ AD

v

Direktor na Teritorialna direktsia na Natsionalnata agentsia za prihodite — Veliko Tarnovo,

THE COURT (Sixth Chamber),

composed of J.-C. Bonichot, President of the First Chamber, acting as President of the Sixth Chamber, E. Regan (Rapporteur) and C.G. Fernlund, Judges,

Advocate General: P. Mengozzi,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- the Direktor na Teritorialna direktsia na Natsionalnata agentsia za prihodite — Veliko Tarnovo, by D. Boneva, acting as Agent,
- the European Commission, by D. Martin and N. Nikolova, acting as Agents,

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

gives the following

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Article 1(j) and (l) and Article 12(1) 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 (OJ 2004 L 166, p. 1, and corrigendum OJ 2004 L 200, p. 1), as amended by Regulation (EU) No 465/2012 of the European Parliament and of the Council of 22 May 2012 (OJ 2012 L 149, p. 4) ('Regulation No 883/2004') and Article 14(1) of Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation No 883/2004 on the coordination of social security systems (OJ 2009 L 284, p. 1).
- 2 The request has been made in proceedings between 'Walltopia' AD and the Direktor na Teritorialna direktsia na Natsionalnata agentsia za prihodite — Veliko Tarnovo (Director of the Regional Directorate of the National Agency for Revenues in Veliko Tarnovo, Bulgaria) concerning the legality of a decision refusing to issue a certificate indicating the legislation applicable to an employee of Walltopia.

Legal context

European Union law

Regulation No 883/2004

- 3 Article 1 of Regulation No 883/2004, headed 'Definitions', in Chapter I of that regulation, headed 'General provisions', provides:

'For the purposes of this Regulation:

...

(c) "insured person", in relation to the social security branches covered by Title III, Chapters 1 and 3, means any person satisfying the conditions required under the legislation of the Member State competent under Title II to have the right to benefits, taking into account the provisions of this Regulation;

...

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

...

(l) "legislation" means, in respect of each Member State, laws, regulations and other statutory provisions and all other implementing measures relating to the social security branches covered by Article 3(1);

...'

4 Under Article 2, entitled 'Persons covered', also in Title I of that regulation:

'1. This Regulation shall apply to nationals of a Member State, stateless persons and refugees residing in a Member State who are or have been subject to the legislation of

one or more Member States, as well as to the members of their families and to their survivors.

2. It shall also apply to the survivors of persons who have been subject to the legislation of one or more Member States, irrespective of the nationality of such persons, where their survivors are nationals of a Member State or stateless persons or refugees residing in one of the Member States.’

5 Article 11 of that regulation, entitled ‘General rules’, in Title II thereof, itself headed ‘Determination of the legislation applicable’, provides:

‘1. Persons to whom this Regulation applies shall be subject to the legislation of a single Member State only. Such legislation shall be determined in accordance with this Title.

2. For the purposes of this Title, persons receiving cash benefits because or as a consequence of their activity as an employed or self-employed person shall be considered to be pursuing the said activity. This shall not apply to invalidity, old-age or survivors’ pensions or to pensions in respect of accidents at work or occupational diseases or to sickness benefits in cash covering treatment for an unlimited period.

3. Subject to Articles 12 to 16:

- (a) a person pursuing an activity as an employed or self-employed person in a Member State shall be subject to the legislation of that Member State;
- (b) a civil servant shall be subject to the legislation of the Member State to which the administration employing him is subject;
- (c) a person receiving unemployment benefits in accordance with Article 65 under the legislation of the Member State of residence shall be subject to the legislation of that Member State;
- (d) a person called up or recalled for service in the armed forces or for civilian service in a Member State shall be subject to the legislation of that Member State;
- (e) any other person to whom subparagraphs (a) to (d) do not apply shall be subject to the legislation of the Member State of residence, without prejudice to other provisions of this Regulation guaranteeing him benefits under the legislation of one or more other Member States.

...’

6 Article 12 of that regulation, entitled ‘Special rules’, in Title II thereof, states in paragraph 1:

‘A person who pursues an activity as an employed person in a Member State on behalf of an employer which normally carries out its activities there and who is posted by that employer to another Member State to perform work on that employer’s behalf shall continue to be subject to the legislation of the first Member State, provided that the anticipated duration of such work does not exceed 24 months and that he/she is not sent to replace another posted person.’

Regulation No 987/2009

- 7 Article 14 of Regulation No 987/2009 entitled ‘Details relating to Articles 12 and 13 of [Regulation No 883/2004]’, in Title II thereof, itself entitled ‘Determination of the legislation applicable’, provides in paragraph 1:

‘For the purposes of the application of Article 12(1) of [Regulation No 883/2004], a “person who pursues an activity as an employed person in a Member State on behalf of an employer which normally carries out its activities there and who is posted by that employer to another Member State” shall include a person who is recruited with a view to being posted to another Member State, provided that, immediately before the start of his employment, the person concerned is already subject to the legislation of the Member State in which his employer is established.’

Bulgarian law

Constitution of the Republic of Bulgaria

- 8 According to Article 51(1) of the Constitution of the Republic of Bulgaria ‘citizens have the right to social security and social assistance’.

- 9 According to Article 51(2) of the Constitution:

‘Persons who are temporarily without employment shall be covered by social security in accordance with the conditions and procedures established by law.’

- 10 Under Article 52(1) of the Constitution:

‘Citizens shall have the right to medical insurance guaranteeing them affordable medical care, and to free medical care in accordance with conditions and procedures established by law.’

Labour Code

- 11 Article 121(1) of the Kodeks na truda (Labour Code) is worded as follows:

‘If the needs of the undertaking so require, the employer may send the worker or employee, in order to perform his employment obligations, away from his workplace for a period not exceeding 30 successive calendar days.’

Social Security Code

- 12 Article 4(1)(1) of the Kodeks za sotsialno osiguriavane (Social Security Code) provides:

‘Persons in employment or employment shall be insured under this Law for sickness, maternity, disability due to illness, old age or death, industrial accident, occupational disease and unemployment, irrespective of the nature of the work, remuneration and source of income, with the exception of persons referred to in section 4a, subsection 1: persons covered by special maternity and employment aid do not fall under the scope of general unemployment insurance, if the relevant programme so provides.’

13 Article 9(2)(4) of that code provides:

‘The period of insurance is the period during which a person is entitled to unemployment benefit without payment of social security contributions.’

Law on health insurance

14 It is clear from Article 33(1) of the Zakon za zdravnto osiguriavane (Law on health insurance) that any Bulgarian national who is not also the national of another country is compulsorily covered by the national sickness insurance scheme.

15 Under Article 40(1) of that law:

‘The health insurance contributions of the insured person, calculated in accordance with Article 29(3), shall be determined by taking into account the following income and shall be charged as follows:

...

8. for persons receiving unemployment benefits — the amount of benefits paid; contributions shall be paid from the State budget and shall be paid at the latest on the 10th day of the month following the month to which those contributions refer.

...’

16 Article 40(5) of that law provides, inter alia, that persons who are not affiliated to the health insurance scheme under paragraphs 1, 2 and 3 shall be required to pay social security contributions.

Regulation on business trips and specialisations abroad

17 Article 2(1) of the Naredba za sluzhebnite komandirovki i spetsializatsii v chuzhbina (Decree on posting of workers and internships abroad) is worded as follows:

‘Posting abroad means sending a person to a foreign country in order to perform specific work on the instructions of the body posting him.’

The facts in the main proceedings and the questions referred for a preliminary ruling

18 On 15 September 2016, Walltopia, which is established in Bulgaria, concluded a contract of employment with Mr Petyo Stefanov Punchev, a Bulgarian national, the work being performed in Sofia (Bulgaria) from 16 September 2016. That contract provided for a trial period of six months.

19 Previously, Mr Punchev had worked for several employers, the last employment relationship having ended on 1 March 2015.

20 Mr Punchev was posted by Walltopia to the United Kingdom between 26 September and 6 October 2016.

- 21 On 25 October 2016 Walltopia dismissed Mr Punchev.
- 22 On 13 January 2017, Walltopia requested the Teritorialna direktsia na Natsionalnata agentsia za prihodite — Velko Tarnovo (Regional Directorate of the National Agency for Revenues in Veliko Tarnovo) to issue an A1 certificate attesting that Bulgarian legislation was applicable to Mr Punchev during his posting. In its request, Walltopia gave, in particular, the details of the undertaking to which Mr Punchev was posted and the duration of the posting. It also mentioned that the person concerned had been recruited with a view to being posted abroad and that, during that period, he continued to be an employee of Walltopia, that he was paid by the latter and that he had been covered by social insurance covering medical expenses.
- 23 By decision of 27 January 2017, the Chief Inspector of Public Revenue of the national authority concerned refused to issue the certificate requested on the ground that the requirement that the employee was subject to Bulgarian legislation for at least one month before the posting had not been satisfied. Since he had not received unemployment benefit during that period, Mr Punchev could not be regarded as being an insured person.
- 24 Following an administrative appeal brought against that decision, that decision was confirmed on 27 February 2017 by a decision of the director of that authority.
- 25 The referring court, hearing an action against the refusal to issue the A1 certificate, observes that, according to Article 12(1) of Regulation No 883/2004, a posted worker continues to be subject to the legislation of the Member State in which his employer normally carries out its activities only if certain conditions are satisfied, namely, that the posting does not exceed 24 months and that he/she is not sent to replace another posted person. According to that court, it is common ground that those conditions are satisfied in the dispute in the main proceedings.
- 26 However, the referring court is unsure whether the position of the national authority concerned, according to which Mr Punchev was not subject to Bulgarian legislation prior to the start of his employment with Walltopia, is consistent with the objective and meaning of Article 14(1) of Regulation No 987/2009, in conjunction with Article 12(1) of Regulation No 883/2004.
- 27 In that connection, the referring court observes that, in accordance with the provisions of the Law on health insurance, a person is required to pay compulsory social security contributions whether or not he pursues an activity. The non-payment of those contributions would deprive him of the right to social security cover.
- 28 The referring court is also unsure as to whether it must take into account the nationality of the person concerned where that person is a national of a Member State, or of the habitual residence of that person, within the meaning of Article 1(j) of Regulation No 883/2004. If neither the nationality nor the habitual residence are relevant elements for interpretation, that court wishes to know which elements to take into consideration for the interpretation of the expression ‘subject to the legislation’ in Article 14(1) of Regulation No 987/2009, in conjunction with the expression ‘subject to the legislation’ referred to in Article 12(1) of Regulation No 883/2004.

29 In those circumstances, the Administrativen sad Veliko Tarnovo (Administrative Court, Veliko Tarnovo) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

- ‘(1) Is Article 14(1) of [Regulation No 987/2009], in conjunction with Article 12(1) of [Regulation No 883/2004], to be interpreted as meaning that the employee referred to therein is not subject to the legislation of the Member State where his employer is established having regard to the fact that he was not an insured person in this Member State in accordance with the national legislation referred to in Article 1(1) of [Regulation No 883/2004] immediately before the start of his employment?
- (2) If the answer to the first question is in the negative, is it permissible for a national court, when interpreting the content and meaning of the term “is subject to” in Article 14(1) of Regulation No 987/2009 and in Article 12(1) of Regulation No 883/2004, to take the nationality of a Member State of the person into account when the employee is in any case subject to the national legislation only on account of his nationality?
- (3) May — if the answer to the second question is also in the negative — the national court, when applying the terms referred to in the second question, take into account the habitual and permanent residence of the person employed, within the meaning of Article 1(j) of Regulation No 883/2004?
- (4) If the answer to the third question is also in the negative, what elements must be taken into account by the national court in determining the meaning of “is subject to ... the legislation” in Article 12(1) of [Regulation No 883/2004] and Article 14(1) of Regulation [No 987/2009] in order to apply these provisions in accordance with their precise sense?’

Consideration of the questions referred

30 By its four questions, which it is appropriate to examine together, the referring court asks essentially, whether Article 14(1) of Regulation No 987/2009, read together with Article 12(1) of Regulation No 883/2004, must be interpreted as meaning that an employee recruited with a view to being posted to another Member State must be regarded as having been ‘immediately before the start of his employment ... already subject to the legislation of the Member State in which his employer is established’, within the meaning of Article 14(1) of Regulation No 987/2009, if just before the start of his employment, and even though he did not have the status of an insured person under that legislation, he was a national of that Member State and his residence, within the meaning of Article 1(j) of Regulation No 883/2004, was in that Member State.

31 In the present case, it is clear from the referring court that Mr Punchev, a Bulgarian national, was hired by Walltopia with a view to being posted to the United Kingdom. Subsequently, the national authority concerned refused to issue Walltopia an A1 certificate attesting that Bulgarian legislation was applicable to Mr Punchev, on the ground that the latter had not been subject to that legislation for at least one month before his posting.

- 32 It must be stated from the outset that, according to Article 12(1) of Regulation No 883/2004, a person who pursues an activity as an employed person in a Member State on behalf of an employer which normally carries out its activities there and who is posted by that employer to another Member State to carry out work on that employer's behalf continues to be subject to the legislation of the first Member State, provided that the anticipated duration of such work does not exceed 24 months and that he is not sent to replace another person.
- 33 Article 14(1) of Regulation No 987/2009 states that a person who pursues an activity as an employed person in a Member State on behalf of an employer which normally carries out its activities there and who is posted by that employer to another Member State, within the meaning of Article 12(1) of Regulation No 883/2004, 'shall include a person who is recruited with a view to being posted to another Member State, provided that, immediately before the start of his employment, the person concerned is already subject to the legislation of the Member State in which his employer is established'.
- 34 Thus, it follows from the very wording of Article 14(1) of Regulation No 987/2009 that the fact that a person is recruited with a view to being posted to another Member State does not preclude that person being regarded as a 'person who pursues an activity as an employed person in a Member State on behalf of an employer which normally carries out its activities there and who is posted by that employer to another Member State', within the meaning of Article 12(1) of Regulation No 883/2004, so that, where that is the case, subject to compliance with the other conditions laid down in the latter provision (which are not the subject of the present request for a preliminary ruling), that person remains subject to the legislation of the Member State in which his employer normally carries out its activities, pursuant to the latter provision.
- 35 Therefore, although, for the application of Article 12(1) of Regulation No 883/2004, there is no requirement that a person recruited with a view to being posted to another Member State pursued an activity as an employed person in the Member State in which his employer normally carries out its activities on behalf of that employer before being posted, it is clear, however, from the wording of Article 14(1) of Regulation No 987/2009, that, just before being posted, that person must have been already subject to the legislation of the Member State in which his employer is established.
- 36 That reading of Article 14(1) of Regulation No 987/2009 is consistent with Article 12(1) of Regulation No 883/2004, which provides, as stated in paragraph 32 of the present judgment, that if all the conditions laid down by the latter provision are satisfied, the person concerned 'continues to be subject' to the legislation of the Member State in which the employer which posts him is established, which confirms that that person must already be subject to that legislation before being posted.
- 37 Similarly, the interpretation according to which a person recruited with a view to being posted to another Member State must already have been subject to the legislation of the Member State of the employer which posted him in order for him to be covered by Article 12(1) of Regulation No 883/2004, which derogates from the general rule laid down in Article 11(3)(a) of that regulation, is also confirmed by the objectives pursued by Article 12(1) thereof.

- 38 The purpose of the latter provision is, in particular, to promote freedom to provide services for the benefit of undertakings which avail themselves of it by sending workers to Member States other than that in which they are established. It is aimed at overcoming obstacles likely to impede freedom of movement for workers and also at encouraging economic interpenetration whilst avoiding administrative complications, in particular for workers and undertakings (see, by analogy, judgment of 10 February 2000, *FTS*, C-202/97, EU:C:2000:75, paragraph 28 and the case-law cited).
- 39 In particular, in order to prevent an undertaking established in a Member State from being obliged to register its workers, normally subject to the social security legislation of that State, with the social security system of another Member State where they are sent to perform work of short duration — which would complicate exercise of freedom to provide services — Article 12(1) of Regulation No 883/2004 allows the undertaking to keep its workers registered under the social security system of the first Member State if the undertaking observes the conditions governing that freedom to provide services (see, by analogy, judgment of 10 February 2000, *FTS*, C-202/97, EU:C:2000:75, paragraph 29 and the case-law cited).
- 40 Therefore, it must be examined whether a person recruited with a view to being posted to another Member State and who is in a situation like that of Mr Punchev must be regarded as having been immediately before the start of his employment ... already subject to the legislation of the Member State in which his employer is established' within the meaning of Article 14(1) of Regulation No 987/2009.
- 41 In that connection it should be pointed out that the provisions of Title II of Regulation No 883/2004, of which Articles 11 to 16 form part, constitute a complete and uniform system of conflict rules. Those provisions are intended not only to prevent the simultaneous application of a number of national legislative systems and the complications which might ensue, but also to ensure that persons covered by that regulation are not left without social security cover because there is no legislation which is applicable to them (see, by analogy, judgment of 1 February 2017, *Tolley*, C-430/15, EU:C:2017:74, paragraph 58 and the case-law cited).
- 42 Thus, where a person falls within the scope *ratione personae* of Regulation No 883/2004, as defined in Article 2 thereof, the rule in Article 11(1) of the regulation that the legislation of a single Member State is to apply is in principle applicable and the national legislation applicable is determined in accordance with the provisions of Title II of the regulation (see, by analogy, judgment of 1 February 2017, *Tolley*, C-430/15, EU:C:2017:74, paragraph 59 and the case-law cited).
- 43 As regards Article 11(3) of Regulation No 883/2004, its sole purpose is to determine the national legislation applicable to persons who are in one of the situations referred to in subparagraphs (a) to (e) thereof (see, by analogy, judgment of 1 February 2017, *Tolley*, C-430/15, EU:C:2017:74, paragraph 60 and the case-law cited).
- 44 In the present case, the referring court appears to consider that Mr Punchev's situation immediately before the start of his employment with Walltopia did not fall within any of the situations mentioned in Article 11(3)(a) to (d) of Regulation No 883/2004, which is for that court to ascertain.

- 45 If that were the case, it is clear from Article 11(3)(e) of Regulation No 883/2004 that Bulgarian legislation was, in any event, applicable to Mr Punchev immediately before the start of his employment with Walltopia. According to the latter provision, persons other than those referred to in Article 11(3)(a) to (d) thereof are subject to the legislation of the Member State of residence, without prejudice to other provisions of that regulation guaranteeing them benefits under the legislation of one or more other Member States. It is clear from the file before the Court that Mr Punchev's residence, within the meaning of Article 1(j) of Regulation No 883/2004, was in Bulgaria immediately before the start of that employment.
- 46 Next, although the nationality of a person may, where appropriate, be relevant for the purposes of determining whether that person falls within the scope *ratione personae* of Regulation No 883/2004, as defined in Article 2 thereof, it is not itself among the criteria laid down by the conflict rules in Title II of that regulation, so that, in the present case, the fact that Mr Punchev has Bulgarian nationality cannot, in any case, by itself be decisive for the purpose of applying those rules.
- 47 Finally, as regards the fact that the national authority at issue in the main proceedings considered that, since Mr Punchev was no longer entitled to health insurance and was not an 'insured person' under Bulgarian law that Bulgarian legislation was not applicable to him, it must be recalled that it is true that the provisions of Title II of Regulation No 883/2004 are solely intended to determine the national legislation applicable to persons falling within the scope of that regulation. As such, they are not intended to lay down the conditions creating the right or the obligation to become affiliated to a social security scheme or to a particular branch of such a scheme. As the Court has pointed out several times, it is for the legislature of each Member State to lay down those conditions (see, to that effect, judgment of 3 May 1990, *Kits van Heijningen*, C-2/89, EU:C:1990:183, paragraph 19 and the case-law cited).
- 48 However, when the Member States lay down the conditions creating the right or the obligation to become affiliated to a social security scheme, they are under an obligation to comply with the provisions of the EU law in force (see to that effect, judgment of 3 May 1990, *Kits van Heijningen*, C-2/89, EU:C:1990:183, paragraph 20 and the case-law cited). In particular, the conflict rules laid down by Regulation No 883/2004 are mandatory for the Member States and the latter do not have the option to determine to what extent their own legislation or that of another Member State is applicable (see, to that effect, judgments of 23 September 1982, *Kuijpers*, 276/81, Eu:C:1982:317, paragraph 14; of 12 June 1986, *Ten Holder*, 302/84, EU:C:1986:242, paragraph 21; of 14 October 2010, *van Delf and Others*, C-345/09, EU:C:2010:610, paragraphs 51 and 52; and of 13 July 2017, *Szoja*, C-89/16, EU:C:2017:538, paragraph 42).
- 49 Therefore, the conditions establishing the right to affiliate to a social security scheme cannot have the effect of excluding from the scope of the legislation at issue persons to whom, pursuant to Regulation No 883/2004, that legislation is applicable (see to that effect, judgment of 3 May 1990, *Kits van Heijningen*, C-2/89, EU:C:1990:183, paragraph 20 and the case-law cited). As stated in paragraph 41 above, the provisions of Title II of that regulation are intended, inter alia, to prevent persons falling within the scope of that regulation from being deprived of social security cover because there is no legislation which is applicable to them.

- 50 In the present case, it does not appear from the file before the Court that the legislation of a Member State other than the Republic of Bulgaria was applicable to Mr Punchev immediately before the start of his employment with Walltopia, which is however for the referring court to ascertain.
- 51 Having regard to the foregoing, the answer to the questions referred is that Article 14(1) of Regulation No 987/2009, read together with Article 12(1) of Regulation No 883/2004, must be interpreted as meaning that an employee recruited with a view to being posted to another Member State must be regarded as having been ‘just before the start of his employment ... already subject to the legislation of the Member State in which his employer is established’, within the meaning of Article 14(1) of Regulation No 987/2009, even if that employee was not an insured person under the legislation of that Member State immediately before the start of his employment, if, at that time, that employee had his residence in that Member State, which is for the referring court to ascertain.

Costs

- 52 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 (Sixth Chamber) hereby rules:

Article 14(1) of Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems, read together with Article 12(1) 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, as amended by Regulation (EU) No 465/2012 of the European Parliament and of the Council of 22 May 2012, must be interpreted as meaning that an employee recruited with a view to being posted to another Member State must be regarded as having been ‘just before the start of his employment ... already subject to the legislation of the Member State in which his employer is established’, within the meaning of Article 14(1) of Regulation No 987/2009, even if that employee was not an insured person under the legislation of that Member State immediately before the start of his employment, if, at that time, that employee had his residence in that Member State, which is for the referring court to ascertain.

[Signatures]

* Language of the case: Bulgarian.