Anonymised version

Case C-879/19

Request for a preliminary ruling

Date lodged:

2 December 2019

Referring court:

Sąd Najwyższy (Poland)

Date of the decision to refer:

19 September 2019

Applicant:

FORMAT Urządzenia i Montaże Przemysłowe

Defendant:

Zakład Ubezpieczeń Społecznych I Oddział w Warszawie

[...] **ORDER**

On 19 September 2019

the Sąd Najwyższy (Supreme Court) [...]

[...] [composition of the chamber]

in the proceedings brought by FORMAT Urządzenia i Montaże Przemysłowe Spółka z o.o., having its registered office in Warsaw, against Zakład Ubezpieczeń Społecznych I Oddział in Warsaw (Social Security Institution, Warsaw I Office), with the person concerned, UA, as intervener,

concerning the question whether UA is subject to Polish legislation with regard to the application of social security schemes to employed persons and their families moving within the Community,

[...] [references to procedure]

I. The following question is hereby referred to the Court of Justice of the European Union, pursuant to Article 267 TFEU:

Is the expression 'a person normally employed in the territory of two or more Member States' used in the first sentence of Article 14(2) of Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community, in the version resulting from Council Regulation (EC) No 118/97 of 2 December 1996 (OJ 1997 L 28, p. 1), as amended by Regulation (EC) No 1992/2006 of the European Parliament and of the Council of 18 December 2006 (OJ 2006 L 392, p. 1), [Or. 2] **to be interpreted as also applying to a person who, during the period covered by and within the framework of one and the same contract of employment concluded with a single employer, performs work in the territory of each of at least two Member States not simultaneously or concurrently, but during directly consecutive, successive periods of several months?**

II. The proceedings are stayed

GROUNDS

Subject matter of the question

The question referred to the Court of Justice of the European Union for a preliminary question concerns the interpretation of the expression 'a person normally employed in the territory of two or more Member States' used in Article 14(2) of Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community, as amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996 (OJ 1997 L 28, p. 1), as amended by Regulation (EC) No 1992/2006 of the European Parliament and of the Council of 18 December 2006 (OJ 2006 L 392, p. 1) and Regulation (EC) No 592/2008 of the European Parliament and of the Council of 17 June 2008 (OJ 2008 L 177, p. 1) ('Regulation No 1408/71').

That question has been raised in proceedings between Format Urządzenia i Montaże Przemysłowe sp. z o.o. ('Format'), with the person concerned, UA ('the person concerned'), as intervener, and the Zakład Ubezpieczeń Społecznych ('the ZUS' or 'the social security institution'), concerning the question whether UA is subject to Polish legislation with regard to the application of social security schemes to employed persons and their families moving within the Community. **[Or. 3]**

Legal context

Article 1(h) of Regulation No 1408/71 provides that, for the purposes of its application, 'residence' means habitual residence.

Article 13 of Regulation No 1408/71 (entitled 'General rules'), contained in Title II thereof ('Determination of the legislation applicable'), stipulates:

'1. Subject to Articles 14c and 14f, persons to whom this Regulation applies shall be subject to the legislation of a single Member State only. That legislation shall be determined in accordance with the provisions of this Title.

2. Subject to 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;

…

(f) a person to whom the legislation of a Member State ceases to be applicable, without the legislation of another Member State becoming applicable to him in accordance with one of the rules laid down in the aforegoing subparagraphs or in accordance with one of the exceptions or special provisions laid down in Articles 14 to 17, shall be subject to the legislation of the Member State in whose territory he resides in accordance with the provisions of that legislation alone'.

Article 14 of Regulation No 1408/71 (entitled 'Special rules applicable to persons, other than mariners, engaged in paid employment') 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 **[Or. 4]** exceed 12 months and that he is not sent to replace another person who has completed his term of posting;

…

(2) A person normally employed in the territory of two or more Member States shall be subject to the legislation determined as follows:

(a) A person who is a member of the travelling or flying personnel of an undertaking which, for hire or reward or on its own account, operates international

transport services for passengers or goods by rail, road, air or inland waterway and has its registered office or place of business in the territory of a Member State shall be subject to the legislation of the latter State, with the following restrictions …

(b) A person other than that referred to in (a) shall be subject:

(i) to the legislation of the Member State in whose territory he resides, if he pursues his activity partly in that territory or if he is attached to several undertakings or several employers who have their registered offices or places of business in the territory of different Member States;

(ii) to the legislation of the Member State in whose territory is situated the registered office or place of business of the undertaking or individual employing him, if he does not reside in the territory of any of the Member States where he is pursuing his activity'.

Paragraph 4 of Article 12a(5) 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 (EC) No 118/97 of 2 December 1996 (OJ 1997 L 28, p. 1), as amended by Commission Regulation (EC) No 311/2007 (OJ 2007 L 82, p. 6) and Commission Regulation (EC) No 120/2009 of 9 February 2009 (OJ 2009 L 39, p. 29) ('Regulation No 574/72'), (entitled 'Rules applicable in respect of the persons referred to in Article 14(2) and (3), Article 14a(2) to (4) and Article 14c of the Regulation who normally carry out an employed or self-employed activity in the territory of two or more Member States'), provides **[Or. 5]**

'For the application of the provisions of Article 14(2) and (3), Article 14a(2) to (4) and Article 14c of the Regulation, the following rules shall apply:

…

4. (a) Where, in accordance with Article 14(2)(b)(ii) of the Regulation, an employed person who does not reside in the territory of any of the Member States in which he is pursuing his activity is subject to the legislation of the Member State in whose territory is situated the registered office or place of business of the undertaking or individual employing him, the institution designated by the competent authority of the latter Member State shall issue to the employed person a certificate stating that he is subject to its legislation and shall send a copy thereof to the institution designated by the competent authority of any other Member State:

(i) in the territory of which the employed person pursues a part of his activity;

(ii) in the territory of which the employed person resides.

(b) Paragraph 2(b) above shall apply by analogy.

Circumstances and subject matter of the dispute and proceedings

1. By decision of 13 February 2008, the ZUS refused to issue, pursuant to Articles 14(1)(a) and 14(2)(b) of Regulation No 1408/71, a certificate on an E 101 form in respect of UA, an employee of Format, confirming that he was subject, from 23 December 2007 to 31 December 2009, to the Polish social security system by virtue of work performed in the territory of Member States of the European Union other than Poland.

2. By judgment of 11 April 2011 [...], the Sąd Okręgowy w Warszawie (Regional Court, Warsaw) dismissed the appeal brought by Format and the appeal brought by the person concerned against the above decision of the pensions office.

3. The Sąd Okręgowy determined that the employer of the person concerned is Format, which has its registered office in Poland, that the person concerned is resident in Poland, and that from 5 November 2007 to 6 January 2008 he worked in [the United Kingdom] and then from 7 January 2008 continued to work in France; UA **[Or. 6]** worked in both those Member States under a single contract of 20 October 2006 for a fixed period up until 31 December 2009.

4. The Sąd Okręgowy takes the view that Article 14(2)(b) of Regulation No 1408/71 is not applicable in the present case because it relates solely to persons who are working simultaneously for one employer in several Member States; the person concerned is not a person normally employed in the territory of two or more Member States within the meaning of Article 14(2)(b) of the regulation. That provision concerns workers not referred in Article 14(2)(a) and who are engaged in frequent movement between the territories of the Member States in order to perform employment obligations. The person concerned, however, worked continually, initially in Britain and then in France.

5. The Sąd Okręgowy found that the person concerned was not ‘normally employed’ in the territory of two or more Member States under the employment contract concluded with [Format], but worked for several months in the territory of a single Member State and was therefore subject to Article 13(2a) of Regulation No 1408/71.

6. By judgment of 23 January 2018, the Sąd Apelacyjny w Warszawie (Court of Appeal, Warsaw) dismissed the appeal brought by [Format] against the abovementioned judgment of the court of first instance.

7. As regards the interpretation of the term ‘a person normally employed in the territory of two or more Member States’, the Sąd Apelacyjny found, with reference to the judgment of the Sąd Najwyższy of 5 November 2009, II UK 99/09, that Article 14(2)(b)(ii) of the regulation concerns a person employed by a single employer who pursues an activity in the territory of more than one Member State and the work is performed in those States, provided that the worker’s place of residence does not coincide with his place of work. The Sąd Apelacyjny concluded that that provision concerns employment in connection with multiple

short-term stays in several Member States. The term ‘person normally employed in the territory of two or more Member States’ therefore means a person who works at the same time in several Member States for a single employer operating in several Member States; ‘therefore **[Or. 7]** the performance of work in various Member States at the same time (and thus simultaneously) is relevant’[.]

8. With reference to the judgment of the Court of Justice of 4 October 2012 in Case C-115/11, *Format Urządzenia i Montaże Przemysłowe Sp. z o.o.* v *Zakład Ubezpieczeń Społecznych*, EU:C:2012:606, the Sąd Apelacyjny went on to hold that ‘the scope *ratione materiae* defined by Article 14(2) of the regulation excludes a finding that employment in the territory of a single Member State constitutes the normal arrangement for the person concerned, which entails a finding in the particular context of the case.’ According to the Sąd Apelacyjny, that concept does not cover a situation where employment in the territory of a single Member State constitutes the normal arrangement for the person concerned.

9. In the view of the Sąd Apelacyjny, it was normal for UA to work in the territory of a single Member State. In view of the length of time spent working in a single Member State (several months in [the United Kingdom] and in France), related to the nature of his work (construction work) and the business of [Format] (construction work in several Member States), it is not difficult to determine the applicable legislation in accordance with the general rule.

10. Format brought an appeal on a point of law before the Sąd Najwyższy against the above judgment of the Sąd Apelacyjny, claiming that Article 14(2)(b)(ii) of Regulation No 1408/71 and Article 12a(4) of Regulation No 574/72 had been infringed and requesting that the following question be referred to the Court of Justice for a preliminary ruling:

    Are the conditions laid down in Article 14(2)(b) of Regulation No 1408/71 fulfilled where an employee of an undertaking with its registered office in a Member State, who works under a single contract of employment with that employer/undertaking alternatively (sequentially, subsequently) on construction sites (in establishments, posts, branches) in the territories of at least two other Member States, in whose territory he is not resident, is subject to the legislation of that first State during the term of that contract?

The question referred for a preliminary ruling [Or. 8]

11. In considering the appeal on a point of law lodged by Format, the Sąd Najwyższy has encountered uncertainty as to the interpretation of Article 14(2) of Council Regulation (EEC) No 1408/71 in so far as the definition of ‘a person normally employed in the territory of two or more Member States’ used in that provision is concerned. The Sąd Najwyższy is referring the present question to the Court of Justice in order to ascertain whether Article 14(2) of Regulation No 1408/71 is to be interpreted as meaning that, in circumstances such as those at issue in the case before the Sąd Najwyższy, a person who, under the same employment contract

stating the place of employment to be the territory of several Member States, works during the term of that contract in the territory of each of those Member States not simultaneously or concurrently, but during two successive, directly consecutive periods of several months, can come within the concept of 'a person normally employed in the territory of two or more Member States', within the meaning of that provision.

12. In its judgment of 4 October 2012 in Case C-115/11, *Format Urządzenia i Montaże Przemysłowe Sp. z o.o.* v *Zakład Ubezpieczeń Społecznych*, EU:C:2012:606, the Court of Justice ruled that Article 14(2)(b) of Regulation (EEC) No 1408/71 must be interpreted as meaning that, in circumstances such as those at issue in the main proceedings, a person who, under successive employment contracts stating the place of employment to be the territory of several Member States, in fact works during the term of each of those contracts only in the territory of one of those States at a time, cannot come within the concept of 'a person normally employed in the territory of two or more Member States', within the meaning of that provision.

13. In the view of the Sąd Najwyższy, the circumstances of the present case differ from those of the case in which the Sąd Apelacyjny w Warszawie referred the question for a preliminary ruling on which the Court of Justice ruled in Case C-115/11. Firstly, the person concerned worked in the territory of two Member States under a single employment contract, whereas W. Kita worked in several Member **[Or. 9]** States under successive employment contracts; secondly, the person concerned worked in the territory of several Member States during the term of a single contract during two directly consecutive, successive periods, whereas W. Kita worked in actual fact during the term of each of those contracts only in the territory of one of those States at a time

14. As a result, the judgment of the Court of Justice of 4 October 2012 [in Case C-115/11] does not remove the uncertainties referred to in paragraph 11 above concerning the interpretation of Article 14(2) of Council Regulation (EEC) No 1408/71 in the light of the circumstances of the present case. It remains unclear whether the concept of 'a person normally employed in the territory of two or more Member States', within the meaning of Article 14(2) of Regulation No 1408/71, 'refers not only to employees who work concurrently in the territory of more than one Member State, but also to those who … are required to perform their work in several Member States, without that work having to be carried out in several Member States at the same time or almost simultaneously' (see judgment of 4 October 2012, C-115/11, paragraph 35).

15. In the circumstances of the present case, it is disputed in particular whether the concept of a person normally employed in the territory of two or more Member States covers only persons who, under and during the term of a single employment contract work 'at the same time or almost simultaneously' and 'concurrently' in the territory of more than one Member State, or also persons who, under and

during the term of a single employment contract work during consecutive, successive (alternate, sequential) periods in several Member States.

16. In this regard, it should be noted that it would appear from paragraph 19 of the judgment of the Court of Justice of 12 July 1973 in Case 13/73, *Anciens Etablissements D. Angenieux fils aîné and Caisse primaire centrale d'assurance maladie de la région parisienne* v *Willy Hakenberg*, [EU:C:1973:92] [1973] ECR 935, that the concept of a normally employed person relates to a person in an employment relationship of a consistent and continuous nature which covers either simultaneously or during successive periods the territory of several Member States, but does not cover a person who, during a given period and under an employment contract, is in actual fact employed in a single Member State and then in the subsequent year, under a different **[Or. 10]** employment contract, works in another Member State. In the light of that judgment, normal employment is to be understood broadly as meaning the performance of work 'either simultaneously or during successive periods' in several Member States.

17. Consistent with this position is the view of the Sąd Najwyższy, which ruled in its judgment of 3 April 2019 in Case II UK 576/17, brought by Format against the ZUS, with the party concerned, T. K., as intervener, for the issue of a certificate on an E 101 form, that 'it is does not follow from the interpretation in the judgment of the Court of Justice of the European Union of 4 October 2012, in Case C-115/11, … that Article 14(2) of Regulation … No 1408/71 does not (also) cover a person who, in the context of a single employment contract, is obliged to perform work permanently in several Member States (work which is characterised by the successive or alternate carrying out of work assignments in more than one Member State)'[.]

[18]. On the interpretation of the concept of normally employed person within the meaning of Article 14(2) of Regulation No 1408/71 as set out in paragraphs 16 and 17 above, the Sąd Najwyższy should allow the appeal on a point of law lodged by Format, which is founded on a similar basis, namely that that concept must be understood as also covering persons who work 'under a single contract of employment with that employer/undertaking alternatively (sequentially, successively) on construction sites (in establishments, posts, branches) in the territories of at least two other Member States'[.]

[19]. A different interpretation of the concept of a person normally employed in the territory of two or more Member States from that set out in paragraphs 16 and 17 above was put forward by the Sąd Najwyższy in its judgment of 17 October 2018 in Case Il UK 305/17, brought by Format against the ZUS, with the party concerned, J. O., as intervener, concerning the application of Polish legislation on the application of social security schemes to employed persons and their families moving within the Community, in which it ruled that Article 14(2) of Regulation No 1408/71 can apply 'only to employees for whom the "normal" arrangement is the performance of work in the territory of two or more Member States and therefore that work must be performed simultaneously and not successively, for a

long period, in the territory of individual Member States, because in that case the employee only works ‘normally’ in **[Or. 11]** the territory of a single Member States even if that State changes from time to time’[.]

[20]. On the interpretation as set out in paragraph [19], the appeal on a point of law lodged by Format should be dismissed.

[21]. In referring this question to the Court of Justice, and also in order to ensure that case-law at variance with the principles of EU law does not become established in Poland (see judgments of 15 September 2005 in Case C-495/03 *Intermodal Transports*, [EU:C:2005:552] [2005] ECR 1-8151, paragraph 38; and of 12 June 2008 in Case C-458/06 *Gourmet Classic*, [EU:C:2008:338] [2008] ECR I-4207, paragraph 32), the Sąd Najwyższy supports the interpretation of Article 14(2) of Regulation No 1408/71 proposed in the judgment of 17 October 2018 in Case II UK 305/17.

[...]