ECLI:EU:C:2018:63

Provisional text

JUDGMENT OF THE COURT (Grand Chamber)

6 February 2018 (*)

(Reference for a preliminary ruling — Migrant workers — Social security — Applicable legislation — Regulation (EEC) No 1408/71 — Article 14(1)(a) — Posted workers — Regulation (EEC) No 574/72 — Article 11(1)(a) — E 101 certificate — Probative value — Certificate fraudulently obtained or relied on)

In Case C-359/16,

REQUEST for a preliminary ruling under Article 267 TFEU from the Hof van Cassatie (Court of Cassation, Belgium), made by decision of 7 June 2016, received at the Court on 24 June 2016, in the criminal proceedings against

Ömer Altun,

Abubekir Altun,

Sedrettin Maksutogullari,

Yunus Altun,

Absa NV,

M. Sedat BVBA,

Alnur BVBA,

the other party to the proceedings being:

Openbaar Ministerie

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, A. Tizzano, Vice-President, R. Silva de Lapuerta, M. Ilešič, J.L. da Cruz Vilaça, A. Rosas and C. Vajda, Presidents of Chambers, C. Toader, M. Safjan, D. Šváby, M. Berger, A. Prechal and E. Regan (Rapporteur), Judges,

Advocate General: H. Saugmandsgaard Øe,

Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 20 June 2017,

after considering the observations submitted on behalf of:

– Ö. Altun, A. Altun, S. Maksutogullari, Y. Altun, Absa NV, M. Sedat BVBA and Alnur BVBA, by H. Van Bavel, D. Demuynck, E. Matthys, N. Alkis, S. Renette, P. Wytinck and E. Baeyens, advocaten,

– the Belgian Government, by M. Jacobs, L. Van den Broeck, acting as Agents and by P. Paepe, advocaat,

– Ireland, by A. Joyce and G. Hodge, acting as Agents, and by C. Toland, Senior Counsel,

– the French Government, by D. Colas and C. David, acting as Agents,

– the Hungarian Government, by M.Z. Fehér, G. Koós and E.E. Sebestyén, acting as Agents,

– the Polish Government, by B. Majczyna, A. Siwek and D. Lutostańska, acting as Agents,

– the European Commission, by D. Martin and M. van Beek, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 9 November 2017,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 14(1)(a) of Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, 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 Regulation (EC) No 631/2004 of the European Parliament and of the Council of 31 March 2004 (OJ 2004 L 100, p. 1) (‘Regulation No 1408/71’), and of Article 11(1)(a) of Council Regulation (EEC) No 574/72 of 21 March 1972 laying down rules for the application of Regulation No 1408/71, in the version amended and updated by Regulation No 118/97 (‘Regulation No 574/72’).

2 The request has been made in criminal proceedings brought against Mr Ömer Altun, Mr Abubekir Altun, Mr Sedrettin Maksutogullari and Mr Yunus Altun, as well as Absa NV, M. Sedat BVBA and Alnur BVBA, regarding the posting of Bulgarian workers to Belgium.

Legal context

Regulation No 1408/71

3 Articles 13 and 14 of Regulation No 1408/71 were set out in Title II thereof, entitled 'Determination of the legislation applicable'.

4 Article 13 of that regulation provided:

'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;

...'

5 Article 14 of that regulation, entitled 'Special rules applicable to persons, other than mariners, engaged in paid employment', provided:

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

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

...'

6 According to Article 80(1) of that regulation:

'There shall be attached to the Commission an Administrative Commission on Social Security for Migrant Workers (hereinafter called "the Administrative Commission") made up of a government representative of each of the Member States, assisted, where necessary, by expert advisers ...'

7 Under Article 81(a) of Regulation No 1408/71, the Administrative Commission was to be responsible for dealing with, inter alia, all administrative questions and questions of interpretation arising from the provisions of that regulation.

8 Article 84a(3) of that regulation provided:

'In the event of difficulties in the interpretation or application of this Regulation which could jeopardise the rights of a person covered by it, the institution of the competent State or of the State of residence of the person involved shall contact the institution(s) of the Member State(s) concerned. If a solution cannot be found within a reasonable period, the authorities concerned may call on the Administrative Commission to intervene.'

9 Regulation No 1408/71 was repealed and replaced with effect from 1 May 2010 by 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).

10 Article 13(2)(a) of Regulation No 1408/71 was replaced, in essence, by Article 11(3)(a) of Regulation No 883/2004, which provides that 'subject to Articles 12 to 16 … 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'.

11 Article 14(1)(a) of Regulation No 1408/71 was replaced, in essence, by Article 12(1) of Regulation No 883/2004, which provides 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 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 twenty-four months and that he is not sent to replace another person.'

Regulation No 574/72

12 Title III of Regulation No 574/72, headed 'Implementation of the provisions of the regulation for determining the legislation applicable', laid down, inter alia, rules for the application of Articles 13 and 14 of Regulation No 1408/71.

13 In particular, Article 11 of Regulation No 574/72, concerning the formalities in the case of posting of a worker elsewhere, provided in paragraph 1(a) that, in the cases referred to, inter alia, in Article 14(1) of Regulation No 1408/71, the institution designated by the competent authority of the Member State whose legislation remains applicable was required to issue a certificate, known as an 'E 101 certificate', showing that the worker concerned continued to be subject to the legislation of that Member State, and until which date.

14 Regulation No 574/72 was repealed and replaced with effect from 1 May 2010 by 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 (OJ 2009 L 284, p. 1).

15 Article 5 of Regulation No 987/2009 provides as follows:

'1. Documents issued by the institution of a Member State and showing the position of a person for the purposes of the application of the basic Regulation and of the implementing Regulation, and supporting evidence on the basis of which the documents have been issued, shall be accepted by the institutions of the other Member States for as long as they have not been withdrawn or declared invalid by the Member State in which they were issued.

2. Where there is doubt about the validity of a document or the accuracy of the facts on which the particulars contained therein are based, the institution of the Member State that receives the document shall ask the issuing institution for the necessary clarification and, where appropriate, the withdrawal of that document. The issuing institution shall reconsider the grounds for issuing the document and, if necessary, withdraw it.

3. Pursuant to paragraph 2, where there is doubt about the information provided by the persons concerned, the validity of a document or supporting evidence or the accuracy of the facts on which the particulars contained therein are based, the institution of the place of stay or residence shall,

insofar as this is possible, at the request of the competent institution, proceed to the necessary verification of this information or document.

4. Where no agreement is reached between the institutions concerned, the matter may be brought before the Administrative Commission by the competent authorities no earlier than one month following the date on which the institution that received the document submitted its request. The Administrative Commission shall endeavour to reconcile the points of view within six months of the date on which the matter was brought before it.'

16 Article 19(2) of Regulation No 987/2009 which, in essence replaced Article 11(1) of Regulation No 574/72, provides that, 'at the request of the person concerned or of the employer, the competent institution of the Member State whose legislation is applicable pursuant to Title II of … Regulation [No 883/2004] shall provide an attestation that such legislation is applicable and shall indicate, where appropriate, until what date and under what conditions'. That attestation is issued by means of a certificate known as an 'A 1 certificate'.

The dispute in the main proceedings and the question referred for a preliminary ruling

17 The Sociale Inspectie (Social Security Inspectorate, Belgium) conducted an investigation into the employment of the staff of Absa, a company incorporated under Belgian law that is active in the construction sector in Belgium.

18 That investigation found that since 2008 Absa had employed practically no staff and subcontracted the work at all its sites to Bulgarian undertakings posting workers to Belgium. It also revealed that the use of such posted workers was not declared to the institution responsible for the collection of social security contributions in Belgium, those workers having E 101 or A 1 certificates issued by the institution designated by the competent Bulgarian authority in accordance with Article 11(1) of Regulation No 574/72.

19 A judicial investigation conducted in Bulgaria through letters rogatory, ordered by a Belgian investigating magistrate, found that those Bulgarian undertakings carried out no significant activity in Bulgaria.

20 On the basis of the results of that investigation, on 12 November 2012 the Belgian Social Inspectorate sent to the institution designated by the competent Bulgarian authority a reasoned request for review or withdrawal of the E 101 or A 1 certificates issued to the posted workers concerned in the main proceedings.

21 According to the Belgian Government's observations, on 9 April 2013, after a letter of reminder had been sent by the Belgian social security inspectorate, the competent Bulgarian institution replied to that request by sending a summary of the E 101 and A 1 certificates issued, indicating their period of validity, and stating that the conditions of posting were, at the time those certificates were issued, met for administrative purposes by the various Bulgarian undertakings in question. The facts established by the Belgian authorities were not, however, taken into account in that reply.

22 The Belgian authorities began legal proceedings against the defendants in the main proceedings, in their capacity as employers, servants or agents: first, for having caused or allowed work to be carried out by foreign nationals who were not permitted or authorised to stay in Belgium for more than three months or to settle there without a work permit; second, for failing, when those workers commenced employment, to make the declaration required by law to the institution

responsible for collecting social security contributions and, third, for failing to register those workers with the Rijksdienst voor Sociale Zekerheid (National Social Security Office, Belgium).

23 By judgment of 27 June 2014, the correctionele rechtbank Limburg, afdeling Hasselt (Criminal Court, Limburg, Hasselt Division, Belgium) acquitted the defendants of the charges brought against them by the Openbaar Ministerie (Public Prosecution Service, Belgium) on the ground that 'the employment of the Bulgarian workers was fully covered by the E 101/A1 forms, which to date are properly and lawfully issued'.

24 The Public Prosecution Service lodged an appeal against that judgment.

25 By judgment of 10 September 2015, the Hof van beroep Antwerpen (Court of Appeal, Antwerp, Belgium) convicted the defendants in the main proceedings. While that court found that an E 101 or A 1 certificate had been issued for each of the posted workers in question and that the Belgian authorities had not exhausted the procedure laid down for cases of dispute over the validity of the certificates, it nevertheless considered that it was not bound by those circumstances since those certificates had been obtained fraudulently.

26 On 10 September 2015, the defendants in the main proceedings brought an appeal on a point of law against that judgment.

27 Being uncertain as to the correct interpretation of Article 11(1) of Regulation No 574/72, the Hof van Cassatie (Court of Cassation, Belgium) decided to stay the proceedings and refer the following question to the Court for a preliminary ruling:

'Can an E 101 certificate issued under Article 11(1) of Regulation [No 574/72], as applicable before its repeal by Article 96(1) of Regulation [No 987/2009], be annulled or disregarded by a court other than that of the sending Member State if the facts which are submitted for assessment by it support the conclusion that the certificate was fraudulently obtained or relied on?'

Consideration of the question referred

28 By its question, the referring court asks, in essence, whether Article 14(1)(a) of Regulation No 1408/71 and Article 11(1)(a) of Regulation No 574/72 should be interpreted as meaning that, when a worker employed by an undertaking established in the territory of a Member State is posted to the territory of another Member State, a court of the latter Member State may disregard an E 101 certificate issued under the latter provision, when the facts submitted for assessment by it support the conclusion that the certificate was fraudulently obtained or relied on.

29 In that regard, it should be noted that the provisions of Title II of Regulation No 1408/71, which includes Article 14, constitute, according to the Court's settled case-law, a complete and uniform system of conflict of laws rules, the aim of which is to ensure that workers moving within the European Union are subject to the social security scheme of only one Member State, in order to prevent the national legislation of more than one Member State from being applicable and to avoid the attendant complications of such a situation (judgments of 10 February 2000, *FTS*, C-202/97, EU:C:2000:75, paragraph 20 and the case-law cited, and of 4 October 2012, *Format Urządzenia i Montaże Przemysłowe*, C-115/11, EU:C:2012:606, paragraph 29 and the case-law cited).

30 In order to achieve that aim, Article 13(2)(a) of Regulation No 1408/71 lays down the principle that an employed person is to be subject, with regard to social security matters, to the legislation of the Member State in which he works (judgment of 4 October 2012, *Format*

Urządzenia i Montaże Przemysłowe, C-115/11, EU:C:2012:606, paragraph 30 and the case-law cited).

31 Nevertheless, that principle is stated to be 'subject to Articles 14 to 17' of Regulation No 1408/71. In certain specific situations, the unrestricted application of the general rule set out in Article 13(2)(a) of that regulation might in fact create, rather than prevent, administrative complications for workers as well as for employers and social security authorities, which could impede the freedom of movement of the persons covered by that regulation (judgment of 4 October 2012, *Format Urządzenia i Montaże Przemysłowe*, C-115/11, EU:C:2012:606, paragraph 31 and the case-law cited). Special rules governing such situations are set out, in particular, in Article 14 of Regulation No 1408/71.

32 The purpose of Article 14(1)(a) of Regulation No 1408/71 is, in particular, to promote the 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. The aim of that provision is to overcome obstacles likely to impede freedom of movement of workers and also to encourage economic interpenetration whilst avoiding administrative complications, in particular for workers and undertakings (see, to that effect, judgment of 10 February 2000, *FTS*, C-202/97, EU:C:2000:75, paragraph 28 and the case-law cited).

33 In order to prevent an undertaking established in a Member State from being obliged to register its workers, who will usually be 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, Article 14(1)(a) of Regulation No 1408/71 allows the undertaking to maintain its workers' registration under the social security system of the first Member State (see, to that effect, judgment of 10 February 2000, *FTS*, C-202/97, EU:C:2000:75, paragraph 29 and the case-law cited).

34 The application of that provision is, however, subject to two conditions. The first condition, which concerns the necessary link between the undertaking posting the worker to a Member State other than that in which it is established and the worker so posted, requires the maintenance of a direct link between that undertaking and that worker during the period of the worker's posting. The second condition, which relates to the relationship between the undertaking and the Member State in which it is established, requires that the latter habitually carries out significant activities in the territory of that Member State (see, to that effect, judgment of 10 February 2000, *FTS*, C-202/97, EU:C:2000:75, paragraphs 21 to 24, 30, 33 and 40 to 45).

35 In that context, the purpose of the E 101 certificate is, like the substantive rules laid down in Article 14(1)(a) of Regulation No 1408/71, to facilitate freedom of movement for workers and freedom to provide services (judgment of 26 January 2006, *Herbosch Kiere*, C-2/05, EU:C:2006:69, paragraph 20 and the case-law cited).

36 In that certificate, the competent institution of the Member State in which an undertaking employing the workers concerned is established declares that its own social security system will remain applicable to those workers. By virtue of the principle that workers must be registered with only one social security system, the certificate thus necessarily implies that the other Member State's social security system cannot apply (see, to that effect, judgments of 26 January 2006, *Herbosch Kiere*, C-2/05, EU:C:2006:69, paragraph 21, and of 27 April 2017, *A-Rosa Flussschiff*, C-620/15, EU:C:2017:309, paragraph 38).

37 In that regard, the principle of sincere cooperation, laid down in Article 4(3) TEU, requires the issuing institution to carry out a proper assessment of the facts relevant for the application of the

rules relating to the determination of the legislation applicable to social security and, consequently, to ensure that the information contained in an E 101 certificate is accurate (judgment of 27 April 2017, *A-Rosa Flussschiff*, C-620/15, EU:C:2017:309, paragraph 39 and the case-law cited).

38 It is also clear from the obligations to cooperate arising from Article 4(3) TEU that those obligations would not be fulfilled — and the aims of Article 14(1)(a) of Regulation No 1408/71 and Article 11(1)(a) of Regulation No 574/72 would be thwarted — if the competent institution of the Member State in which the work is carried out were to consider that it was not bound by the E 101 certificate and made such workers subject to its own social security system (see, by analogy, judgments of 30 March 2000, *Banks and Others*, C-178/97, EU:C:2000:169, paragraph 39 and the case-law cited, and of 27 April 2017, *A-Rosa Flussschiff*, C-620/15, EU:C:2017:309, paragraph 40).

39 Consequently, in so far as an E 101 certificate establishes a presumption that the worker concerned is properly registered with the social security system of the Member State in which the undertaking employing him is established, it is binding on the competent institution of the Member State in which that person actually works (see, to that effect, judgment of 27 April 2017, *A-Rosa Flussschiff*, C-620/15, EU:C:2017:309, paragraph 41 and the case-law cited).

40 Indeed, the principle of sincere cooperation also implies that of mutual trust.

41 Therefore, for as long as an E 101 certificate is not withdrawn or declared invalid, the competent institution of the Member State in which an employee actually works must take account of the fact that that person is already subject to the social security legislation of the Member State in which the undertaking employing him is established, and that institution cannot therefore subject the worker in question to its own social security system (judgment of 27 April 2017, *A-Rosa Flussschiff*, C-620/15, EU:C:2017:309, paragraph 43 and the case-law cited).

42 It should, however, be noted that it follows from the principle of sincere cooperation that any institution of a Member State must carry out a diligent examination of the application of its own social security system. It also follows from that principle that the institutions of the other Member States are entitled to expect the institution of the Member State concerned to fulfil that obligation (see, by analogy, judgment of 3 March 2016, *Commission* v *Malta*, C-12/14, EU:C:2016:135, paragraph 37).

43 As a result, it is incumbent on the competent institution of the Member State which issued the E 101 certificate to reconsider the grounds for its issue and, if appropriate, to withdraw the certificate if the competent institution of the Member State in which the employee actually works expresses doubts as to the accuracy of the facts on which the certificate is based and, consequently, of the information contained therein, in particular because that information does not meet the requirements of Article 14(1)(a) of Regulation No 1408/71 (see, to that effect, judgment of 27 April 2017, *A-Rosa Flussschiff*, C-620/15, EU:C:2017:309, paragraph 44 and the case-law cited).

44 Under Article 84a(3) of Regulation No 1408/71, in the event that the institutions concerned do not reach an agreement on, in particular, the question how the particular facts of a specific case are to be assessed, and consequently on the question whether it is covered by Article 14(1)(a) of Regulation No 1408/71, it is open to them to refer the matter to the Administrative Commission referred to in Article 80 of that regulation (see, by analogy, judgment of 27 April 2017, *A-Rosa Flussschiff*, C-620/15, EU:C:2017:309, paragraph 45 and the case-law cited).

45 If the Administrative Commission does not succeed in reconciling the points of view of the competent institutions on the question of the legislation applicable, it is at the least open to the

Member State in which the employee concerned actually works, without prejudice to any legal remedies existing in the Member State to which the issuing institution belongs, to bring infringement proceedings under Article 259 TFEU, in order to enable the Court to examine in those proceedings the question of which legislation applies to such an employee and, consequently, whether the information contained in the E 101 certificate is accurate (judgment of 27 April 2017, *A-Rosa Flussschiff*, C-620/15, EU:C:2017:309, paragraph 46 and the case-law cited).

46 Thus, even in the case of a manifest error of assessment of the conditions governing the application of Regulations No 1408/71 and No 574/72, and even if it were established that the conditions under which the workers concerned carry out their activities clearly do not fall within the material scope of the provision on the basis of which the E 101 certificate was issued, the procedure to be followed in order to resolve any dispute between the institutions of the Member States concerned as regards the validity or the accuracy of an E 101 certificate must be complied with (see, to that effect, judgment of 27 April 2017, *A-Rosa Flussschiff*, C-620/15, EU:C:2017:309, paragraphs 52 and 53).

47 Regulation No 987/2009, currently in force, codified the Court's case-law, affirming the binding nature of the E 101 certificate and the exclusive competence of the issuing institution to assess the validity of that certificate, and expressly retaining that procedure as a means of resolving disputes concerning both the accuracy of documents drawn up by the competent institution of a Member State and the determination of the legislation applicable to the worker concerned (see, to that effect, judgment of 27 April 2017, *A-Rosa Flussschiff*, C-620/15, EU:C:2017:309, paragraph 59).

48 According to the Court's settled case-law, such considerations must not, however, result in individuals being able to rely on EU law for abusive or fraudulent ends (see, to that effect, judgments of 2 May 1996, *Paletta*, C-206/94, EU:C:1996:182, paragraph 24; of 21 February 2006, *Halifax and Others*, C-255/02, EU:C:2006:121, paragraph 68; of 12 September 2006, *Cadbury Schweppes and Cadbury Schweppes Overseas*, C-196/04, EU:C:2006:544, paragraph 35; and of 28 July 2016, *Kratzer*, C-423/15, EU:C:2016:604, paragraph 37).

49 The principle of prohibition of fraud and abuse of rights, expressed by that case-law, is a general principle of EU law which individuals must comply with. The application of EU legislation cannot be extended to cover transactions carried out for the purpose of fraudulently or wrongfully obtaining advantages provided for by EU law (see, to that effect judgments of 5 July 2007, *Kofoed*, C-321/05, EU:C:2007:408, paragraph 38, and of 22 November 2017, *Cussens and Others*, C-251/16, EU:C:2017:881, paragraph 27).

50 In particular, findings of fraud are to be based on a consistent body of evidence that satisfies both an objective and a subjective factor.

51 The objective factor consists in the fact that the conditions for obtaining and relying on an E 101 certificate, laid down in Title II of Regulation No 1408/71 and referred to in paragraph 34 of the present judgment, are not met.

52 The subjective factor corresponds to the intention of the parties concerned to evade or circumvent the conditions for the issue of that certificate, with a view to obtaining the advantage attached to it.

53 The fraudulent procurement of an E 101 certificate may thus result from a deliberate action, such as the misrepresentation of the real situation of the posted worker or of the undertaking posting

that worker, or from a deliberate omission, such as the concealment of relevant information, with the intention of evading the conditions governing the application of Article 14(1)(a) of Regulation No 1408/71.

54 In that context, when, in the dialogue provided for in Article 84a(3) of Regulation No 1408/71, the institution of the Member State to which the workers have been posted puts before the institution that issued the E 101 certificates concrete evidence that suggests that those certificates were obtained fraudulently, it is the duty of the latter institution, by virtue of the principle of sincere cooperation, to review, in the light of that evidence, the grounds for the issue of those certificates and, where appropriate, to withdraw them, as is clear from the case-law referred to in paragraph 43 of the present judgment.

55 If the latter institution fails to carry out such a review within a reasonable period of time, it must be possible for that evidence to be relied on in judicial proceedings, in order to satisfy the court of the Member State to which the workers have been posted that the certificates should be disregarded.

56 The persons who are alleged, in such proceedings, to have used posted workers ostensibly covered by fraudulently obtained certificates must, however, be given the opportunity to rebut the evidence on which those proceedings are based, with due regard to the safeguards associated with the right to a fair trial, before the national court decides, if appropriate, that the certificates should be disregarded and gives a ruling on the liability of those persons under the applicable national law.

57 In the present case, it is clear from the information provided by the referring court that the investigation undertaken in Bulgaria by the Belgian Social Security Inspectorate made it possible to establish that the Bulgarian undertakings which posted the workers in question in the main proceedings carried out no significant activity in Bulgaria.

58 It is also clear from the information provided by the referring court that the certificates at issue in the main proceedings were obtained fraudulently by means of a representation of facts which did not reflect the reality of the situation, with the intention of evading the conditions laid down in EU legislation in respect of the posting of workers.

59 Moreover, as was noted in paragraph 21 of the present judgment, it is stated in the observations of the Belgian Government — which must be verified by the referring court in the light of the facts established during the legal proceedings — that the competent Bulgarian institution, when called upon to review and withdraw the certificates at issue in the main proceedings, in the light of the results of the investigation referred to in paragraph 57 of the present judgment, failed to take those results into consideration for the purpose of reviewing the grounds for the issue of those certificates.

60 In circumstances such as those in the main proceedings, a national court may disregard the E 101 certificates and must determine whether the persons suspected of having used posted workers ostensibly covered by certificates obtained fraudulently may be held liable under the applicable national law.

61 In the light of all the foregoing, the answer to the question referred is that Article 14(1)(a) of Regulation No 1408/17 and Article 11(1)(a) of Regulation No 574/72 must be interpreted as meaning that, when an institution of a Member State to which workers have been posted makes an application to the institution that issued E 101 certificates for the review and withdrawal of those certificates in the light of evidence, collected in the course of a judicial investigation, that supports

the conclusion that those certificates were fraudulently obtained or relied on, and the issuing institution fails to take that evidence into consideration for the purpose of reviewing the grounds for the issue of those certificates, a national court may, in the context of proceedings brought against persons suspected of having used posted workers ostensibly covered by such certificates, disregard those certificates if, on the basis of that evidence and with due regard to the safeguards inherent in the right to a fair trial which must be granted to those persons, it finds the existence of such fraud.

Costs

62 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 (Grand Chamber) hereby rules:

Article 14(1)(a) of Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, in the version amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996, as amended by Regulation (EC) No 631/2004 of the European Parliament and of the Council of 31 March 2004, and Article 11(1)(a) of Council Regulation (EEC) No 574/72 of 21 March 1972 laying down rules for the application of Regulation No 1408/71, as amended and updated by Regulation No 118/97, must be interpreted as meaning that, when an institution of a Member State to which workers have been posted makes an application to the institution that issued E 101 certificates for the review and withdrawal of those certificates in the light of evidence, collected in the course of a judicial investigation, which supports the conclusion that those certificates were fraudulently obtained or relied on, and the issuing institution fails to take that evidence into consideration for the purpose of reviewing the grounds for the issue of those certificates, a national court may, in the context of proceedings brought against persons suspected of having used posted workers ostensibly covered by such certificates, disregard those certificates if, on the basis of that evidence and with due regard to the safeguards inherent in the right to a fair trial which must be granted to those persons, it finds the existence of such fraud.

[Signatures]

* Language of the case: Dutch.