In Case C-243/19,

Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

20 March 2019

Referring court:

Augstākā tiesa (Senāts) (Supreme Court, Latvia)

Date of the decision to refer:

8 March 2019

Applicant:

A

Defendant:

Veselības ministrija

Subject matter of the action in the main proceedings

Action brought against the refusal to grant a favourable administrative decision (authorisation) in respect of receiving planned healthcare in a different Member State of the European Union.

Subject-matter and legal basis of the request for a preliminary ruling

In accordance with Article 267 TFEU, the referring court seeks a ruling on the interpretation of Article 20(2) of Regulation (EC) No 883/2004, Article 56 TFEU and Article 8(5) of Directive 2011/24/EU, in order to ascertain whether, for the purposes of determining the availability of healthcare, factors which are unrelated to medical issues, such as the freedom of religion, must also be taken into account.

Questions referred for a preliminary ruling

Must Article 20(2) 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, in conjunction with Article 21(1) of the Charter of Fundamental Rights of the European Union, be interpreted as meaning that a Member State may refuse to grant the authorisation referred to in Article 20(1) of that regulation where hospital care, the medical effectiveness of which is not contested, is available in the person's Member State of residence, even though the method of treatment used is contrary to that person's religious beliefs?

Must Article 56 of the Treaty on the Functioning of the European Union and Article 8(5) of Directive 2011/24/EU of the European Parliament and of the Council of 9 March 2011 on the application of patients' rights in cross-border healthcare, in conjunction with Article 21(1) of the Charter of Fundamental Rights of the European Union, be interpreted as meaning that a Member State may refuse to grant the authorisation referred to in Article 8(1) of that directive where hospital care, the medical effectiveness of which is not contested, is available in the person's Member State of affiliation, even though the method of treatment used is contrary to that person's religious beliefs?

Provisions of EU law relied on

Articles 56 and 57 TFEU,

Article 20 Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems,

Articles 7 and 8 of Directive 2011/24/EU of the European Parliament and of the Council of 9 March 2011 on the application of patients' rights in cross-border healthcare,

Article 10(1) and Article 21(1) of the Charter of Fundamental Rights of the European Union.

Case-law cited

Court of Justice of the European Union

Judgments of 5 October 2010, *Elchinov*, C-173/09, EU:C:2010:581, paragraphs 43, 65 and 66; of 23 October 2003, *Inizan*, C-56/01, EU:C:2003:578, paragraphs 45, 46, 59 and 60; of 9 October 2014, *Petru*, C-268/13, EU:C:2014:2271; of 14 March 2017, *Achbita*, C-157/15, EU:C:2017:203, paragraph 28, and *Bougnaoui and ADDH*, C-188/15, EU:C:2017:204, paragraph 30; of 9 March 2017, *Milkova*, C-406/15, EU:C:2017:198, paragraph 55; of 3 October 2000, *Ferlini*, C-411/98, EU:C:2000:530, paragraphs 57 to 59; of 12 July 2001, *Smits and Peerbooms*, C-157/99, EU:C:2001:404, paragraph 105; of 13 May 2003, *Müller-Fauré and van Riet*, C-385/99, EU:C:2003:270, paragraphs 73 and 74; of 12 November 1996, *United Kingdom* v *Council*, C-84/94, [EU:C:1996:431], paragraph 58; of 13 June 2017,

Florescu and Others, C-258/14, EU:C:2017:448, paragraph 57; of 19 April 2007, *Stamatelaki*, C-444/05, EU:C:2007:231, paragraph 34, and of 11 June 2015, *Berlington Hungary and Others*, C-98/14, EU:C:2015:386, paragraph 34.

European Court of Human Rights

Judgments of 1 July 2014, *S.A.S. v. France*, No 43835/11, paragraphs 124 and 161; of 15 January 2013, *Eweida and Others v. The United Kingdom*, No 48420/10, paragraph 79; of 20 May 2014, *McDonald v. The United Kingdom*, No 4241/12, paragraph 54; of 16 March 2010, *Carson and Others v. The United Kingdom*, No 42184/05, paragraph 61; decision of 4 January 2005, *Pentiacova and Others v. Moldova*, No 14462/03; judgments of 7 December 2010, *Jakóbski v. Poland*, No 18429/06, paragraphs 47 and 50, and of 17 December 2013, *Vartic v. Romania (No 2)*, No 14150/08, paragraphs 45 and 48.

Provisions of national law relied on

Articles 91 and 111 of the Latvijas Republikas Satversme (Constitution of the Republic of Latvia),

Point 293(2), Point 310 (corresponds in substance to Article 20(2) of Regulation No 883/2004), Point 323(2), Point 324(2) and Point 328 of the Ministru kabineta 2013. gada 17. decembra noteikumi Nr. 1529 ‘Veselības aprūpes organizēšanas un finansēšanas kārtība’ (Cabinet Regulation No 1529 of 17 December 2013 ‘Regulations on organising and funding the healthcare system’:

Point 328 of Regulation No 1529:

‘328. The [National Health] Service shall reimburse the expenses incurred by persons who are entitled to receive publicly funded healthcare in Latvia where those persons received healthcare in another European Union Member State, a State which is part of the European Economic Area or in the Swiss Confederation, and paid for that care out of their own funds;

328.1. In accordance with the provisions of Regulation No 883/2004 and Regulation No 987/2009, as well as the conditions governing the expenses relating to the healthcare provided by the State in which those persons received the healthcare, and having regard to the information provided by the competent authority of the European Union Member State or the State which is part of the European Economic Area or the Swiss Confederation, in respect of the amount which is to be reimbursed to those persons, where:

…

328.1.2. The [National Health] Service has adopted a decision to issue an S2 form to those persons, however those persons have paid for that healthcare out of their own funds,

328.2. Having regard to the scale of fees for healthcare treatments, which was established at the time those persons received such treatments, or having regard to the extent of compensation for expenses in accordance with the legal framework relating to the purchase of medicine and medical equipment intended for hospital care, at the time that that medicine and medical equipment was acquired, where:

328.2.1. Those persons have received planned healthcare (including that which requires prior authorisation), without prejudice to the situation referred to in Point 328.1.2. of the present regulation and having regard to the procedure laid down in the present regulation, and that treatment is among those paid for out of public funds in the Republic of Latvia.

…’

Succinct presentation of the facts and procedure in the main proceedings

1 The applicant’s son suffers from a congenital cardiovascular disease for which he was required to undergo a medical procedure that involves having a blood transfusion. The applicant refused to consent to that procedure because it was contrary to his religious beliefs as a Jehovah’s Witness.

2 Given that a version of this procedure which does not involve having a blood transfusion is not available in Latvia, the applicant requested the National Health Service to grant him an S2 form (‘Certificate confirming the right to receive healthcare’), which ensures that a person has the right to receive some planned healthcare treatments in another European Union Member State, a State of the European Economic Area or in Switzerland.

3 By decision of 29 March 2016, the National Health Service refused to grant that authorisation. By decision of 15 July 2016 of the Veselības ministrija (Ministry of Health, Latvia), that decision was upheld.

4 The applicant brought an action seeking a favourable administrative decision in respect of the right for his son to receive some planned healthcare treatments. By judgment of 9 November 2016, the Administratīvā rajona tiesa (District Administrative Court) dismissed the applicant’s action.

5 On appeal, the Administratīvā apgabaltiesa (Regional Administrative Court) agreed with the reasoning of the court at first instance and, by judgment of 10 February 2017, dismissed the appeal.

6 In the first place, it found that one of the cumulative requirements for the submission of the S2 form had not been satisfied, namely, it had not been shown that the healthcare treatment in question is not available in Latvia. In the second place, it pointed out that, because the method of treatment must be based on medical criteria, the National Health Service, by refusing to grant authorisation for treatment which is available in Latvia, has not restricted the applicant's right to choose in relation to receiving a healthcare treatment, and that the decision of the National Health Service is not related to the applicant's religious beliefs. That is to say, the patient has the right to refuse a specific type of treatment and to choose an alternative, but in that case, the State is not required to pay for that alternative treatment. In the third place, in order for a person to be reimbursed in accordance with the fees fixed in Latvia, it is necessary for the National Health Service to issue prior authorisation, which the applicant did not apply for. In the fourth place, freedom of religion is not an absolute right and thus, in certain circumstances, may be restricted. On the other hand, the present case concerns the freedom of religion of the applicant and not that of his son; meanwhile the freedom of the parents to make important decisions on behalf of the child can be limited in order to protect the best interests of the child.

7 The applicant lodged an appeal in cassation before the referring court.

8 The applicant pointed out in his application that, in order to avoid damaging the child's health, the operation was performed in Poland on 22 April 2017.

Main arguments of the parties in the main proceedings

9 The applicant claims that the Administratīvā apgabaltiesa erred in finding that a person who requests that healthcare be adapted to their personal circumstances loses their right for that care to be paid for out of public funds. That is to say, the State must create a healthcare system which can be adapted to the personal circumstances of the patient, which includes taking into account the religious beliefs of the parents or guardians of a patient who is a minor.

10 The treatment of patients must be ensured while taking into account the dignity of the patient in its entirety, which includes his moral values and religious beliefs. However, the Administratīvā apgabaltiesa only analysed those beliefs in respect of the parents' right to choose the type of healthcare that their child receives. It did not consider whether, as a result, the parents are being implicitly forced by the authorities to renounce their religious beliefs.

11 In the applicant's view, the prohibition on discrimination has been infringed, because the State has treated the applicant and other patients — who are in different circumstances and who do not need their method of treatment to be adapted — in the same way.

12 The applicant points out that neither the Ministry of Health, nor any other authority has argued that the rights of the applicant's child have been infringed.

Consequently, the applicant argues that there was no basis for applying the provisions of international conventions in the present case. On the other hand, EU treaties and the case-law of the Court of Justice were not applied, thus a request for a preliminary ruling should be made.

13 The Ministry of Health agrees with the view of the National Health Service that in order for a S2 form to be issued the interested party must fulfil a set of cumulative requirements: (i) there is a requirement that the healthcare treatment in question be paid for out of public funds; (ii) that care is necessary in order to prevent an irreversible deterioration in vital functions and; (iii) that healthcare treatment is not available in Latvia. That provision, contained in both national legislation and Regulation No 883/2004, is mandatory and leaves no discretion to the authorities with regard to adopting an administrative act. Therefore, the final requirement has not been satisfied, because, in the present circumstances, the necessary treatment can be provided in Latvia, although the applicant is opposed to a transfusion of blood components due to his religious beliefs.

14 The Ministry of Health points out that, within the legal framework, there are certain reasonable limits placed on adapting healthcare treatments in order to ensure, as far as possible, a rational allocation of financial resources and to protect the interests of society as a whole in relation to the availability of quality healthcare in Latvia.

15 Furthermore, the Ministry of Health points out that there is no basis for applying the provisions of Directive 2011/24/EU, because the applicant did not apply for prior authorisation in order to be reimbursed according to the fees fixed in Latvia.

16 Finally, the Ministry of Health notes that the considerations of the Court of Justice on cross-border healthcare have been summarised in Directive 2011/24, which, nevertheless, provides for the reimbursement of the costs of that treatment according to the fees fixed in Latvia and not those of the State in which that treatment was received.

Succinct presentation of the reasoning in the reference for a preliminary ruling

17 Given that the applicant's son has already received treatment, the applicant could apply for the reimbursement of the healthcare expenses paid out of his own funds, if it is found that the authority erred in refusing to issue an S2 form.

18 Given that the S2 form is issued where the aforementioned cumulative requirements are fulfilled, in the present case it is necessary to clarify the scope of Article 20(2) of Regulation 883/2004 and to assess whether, in the present case, the requirements of that provision have been met.

19 In the present case, the dispute concerns the second criterion and whether it has been fulfilled, namely, whether such healthcare can be provided in Latvia, within

a time limit which is medically justifiable, taking into account the medical condition of the applicant's son at that time and the probable course of his illness.

20 According to the settled case-law of the Court of Justice, that authorisation cannot be refused where the first criterion listed in that provision has been fulfilled and where the same or equally effective treatment cannot be obtained without undue delay in the Member State of residence of the person concerned.

21 The referring court expresses doubts about the wording 'treatment which is equally effective for the patient can be obtained without undue delay in the patient's Member State of residence' and whether 'all the circumstances' — which, according to the settled case-law of the Court, must be taken into account for the purposes of examining each specific case — include religious beliefs.

22 Freedom of religion does not, in itself, require a Member State to adapt and pay for healthcare while taking into account the religious beliefs of each person. However, the Member State does have the obligation to provide culturally acceptable healthcare treatments. In turn, where religious beliefs are not taken into account in that assessment, the person in question, in choosing treatment which corresponds with his religious beliefs, is required to cover the resulting costs himself, which amounts to unfavourable treatment of him. Thus, that raises the question of whether such circumstances lead to discrimination on the grounds of religion.

23 According to the settled case-law of both the European Court of Human Rights and the Court of Justice of the European Union, application of the same rules to different situations is prohibited, since this is tantamount to indirect discrimination, except where that application is necessary to achieve a legitimate aim and if the measure is proportionate to the aim pursued.

24 In the present circumstances, the aim of applying equal treatment or apparently neutral criteria may be to protect public health and the rights of others, that is to say, the necessity to maintain an adequate, balanced and permanent supply of quality hospital care in the national territory and the necessity to protect the financial stability of the social security system. According to the referring court, given that adapting treatment to religious beliefs may create an additional burden on the overall healthcare budget, this could constitute a legitimate aim in accordance with the case-law of the Court of Justice of the European Union.

25 With regard to the assessment of proportionality the referring court points out that, on the one hand, hospital care of patients is linked to significant costs and, according to the settled case-law of the European Court of Human Rights and the Court of Justice of the European Union, the State has wide discretion, particularly with regard to the allocation of resources, but that, on the other hand, in examining the principle of proportionality in the context of the freedom of religion it is necessary to assess whether the right balance has been struck between the interests of the individual and society, even if that would result in additional costs

for the State. Therefore, the referring court raises the possibility that a Member State may refuse to issue the authorisation in question where the hospital care, the medical effectiveness of which is not contested, which is available in the Member State of residence of the person concerned, is contrary to the religious beliefs of that person.

26 At the same time, the referring court expresses doubts as to whether the requirement of proportionality is reasonably met where no costs linked to the healthcare received by the person in a different Member State of the European Union are reimbursed at all, where that person was unable to receive the necessary hospital care in his Member State of residence on account of his religious beliefs.

27 That is to say, taking into account that under the provisions of national legislation prior authorisation is needed for the provision of planned hospital care in the form of cardiovascular surgery and that, in that respect, Article 7(1) of Directive 2011/24 provides that, without prejudice to Regulation No 883/2004 and subject to the provisions of Articles 8 and 9 of that directive, the Member State of affiliation is to ensure that the healthcare costs are reimbursed according to the fees of that Member State, the referring court has doubts about whether it must be held that that amounts to the person being able to receive the necessary treatment in the territory of the Member State of affiliation within a time limit which is medically justifiable even if the method of treatment available in that Member State is contrary to the religious beliefs of that person.