Case C-538/19

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:

10 July 2019

Referring court:

Curtea de Apel Constanța (Romania)

Date of the decision to refer:

4 July 2019

Applicants/appellants:

TS

UT

VU

Defendants/respondents:

Casa Națională de Asigurări de Sănătate

Casa de Asigurări de Sănătate Constanța

Subject-matter of the main proceedings

Appeal lodged by the applicants TS, UT and VU, heirs at law of ZY, against the civil judgment of 24 October 2018 of the Tribunalul Constanța (Regional Court, Constanța, Romania), which dismissed as unfounded their application for a declaration that the Casa Națională de Asigurări de Sănătate (National health insurance agency; a national-level public institution, having legal personality, for the health insurance scheme) and the Casa de Asigurări de Sănătate Constanța (Health insurance agency of Constanța, Romania) are required to pay jointly and severally EUR 85 000, which constitutes the value of the medical treatment given to ZY abroad

Subject-matter and legal basis of the reference

An interpretation of Article 56 TFEU and Article 20(1) and (2) of Regulation No 883/2004 is requested pursuant to Article 267 TFEU

Questions referred

1. May the situation be treated as an emergency, as described in paragraph 45 of the judgment in Case C-173/09 (*Elchinov*), or does it constitute a case in which it is objectively impossible to seek the authorisation required under Article 20(1) and (2) of Regulation (EC) No 883/2004, which may justify a claim for full reimbursement of the expenses incurred in obtaining appropriate medical treatment (hospital treatment) in a Member State other than that in which the insured person resides, where the therapeutic treatment to which the latter consented was prescribed only by a doctor of a Member State other than the State in which the insured person resides, given that the diagnosis and the need to administer the treatment as a matter of urgency were confirmed by a doctor belonging to the health insurance scheme of the Member State of residence but who recommended a different therapeutic treatment from that to which the insured person consented, for reasons which may be deemed appropriate on the part of the latter, and which has at least the same degree of effectiveness but the advantage of not creating a disability?

2. If the answer to the first question is in the affirmative, where the insured person, having been given a diagnosis and recommended a therapeutic treatment by a doctor within the health insurance scheme of the Member State of residence, which, for reasons which may be deemed appropriate, that person does not accept, goes to another Member State to seek a second medical opinion, that opinion being that a different therapeutic treatment should be administered, which has at least the same degree of effectiveness but the advantage of not creating a disability, and the insured person accepts that treatment, which satisfies the requirements laid down in the second sentence of Article 20(2) of Regulation (EC) No 883/2004, is that person also required, in order to be eligible for reimbursement of the costs incurred as a result of the latter therapeutic treatment, to seek the authorisation referred to in Article 20(1) of that regulation?

3. Do Articles 56 TFEU and 20(1) and (2) of Regulation (EC) No 883/2004 preclude national legislation which, first, makes authorisation by the competent institution to receive appropriate medical treatment (hospital treatment) in a Member State other than that of residence conditional on the drawing up of a medical report only by a doctor who practices within the health insurance scheme of the Member State of residence, on the recommendation of the head physician of the competent institution of that State, also where the therapeutic treatment to which the insured person consented, for reasons which may be deemed appropriate, given that it has the advantage of not creating a disability, is prescribed only by a doctor of another Member State, by way of a second medical

opinion, and, second, does not guarantee, under accessible and predictable procedure, actual analysis, from a medical perspective, within the health insurance scheme of the Member State of residence, of the possibility of applying the second medical opinion given in another Member State?

4. If the answer to the first and third question is in the affirmative, is the insured person, or his heirs respectively, entitled, subject to fulfilment of the two requirements laid down in the second sentence of Article 20(2) of Regulation (EC) 883/2004, to obtain from the competent institution of the State in which the insured person resides full reimbursement of the expenses incurred as a result of therapeutic treatment received in another Member State?

Provisions of EU law relied on

Article 56 TFEU

Article 20(1) and (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

Article 26(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

Judgment of 5 October 2010, *Elchinov* (C-173/09, EU:C:2010:581), paragraphs 45, 51, 73 and 66

Provisions of national law relied on

Article 276 of Legea nr. 95/2006 privind reforma în domeniul sănătății (Law No 95 of 2006 on reform of the healthcare sector), under which the Casa Națională de Asigurări de Sănătate is a public institution charged with administering and managing the social health insurance scheme and the 'case de asigurări' (health insurance agencies) are public institutions subordinated to the Casa Naționale de Asigurări de Sănătate.

Articles 39 to 46 of the Norme metodologice privind utilizarea în cadrul sistemului de asigurări sociale de sănătate din România a formularelor emise în aplicarea Regulamentului (CEE) nr. 1408/71 al Consiliului, precum și a Regulamentului (CEE) nr. 574/72 (implementing provisions relating to the use in Romania's social health insurance scheme of the forms issued pursuant to Council Regulation (EEC) No 1408/71 and Regulation (EEC) No 574/72), approved by Ordinul Președintelui Casei Naționale de Asigurări de Sănătate nr. 592/2008 (order No 592/2008 of the President of Casa Națională de Asigurări de Sănătate), which provide, in essence, that for the issue of an E 112 form it is necessary to draw up a medical file including, inter alia, a *medical report* showing the diagnosis and the *medical recommendation* in order to receive treatment. In this

regard, Article 45(4) of the above implementing provisions provides that 'the medical report shall be drawn up by a doctor in a university teaching hospital or, where appropriate, a provincial (județean) hospital which has a contractual relationship with a Romanian health insurance agency (casa de asigurări de sănătate)'.

Article 8 of the Normele metodologice privind rambursarea și recuperarea cheltuielilor reprezentând asistența medicală acordată în baza documentelor internaționale cu prevederi în domeniul sănătății la care România este parte (implementing provisions relating to the reimbursement and recovery of expenses covering medical assistance provided under international agreements containing health-related provisions, to which Romania is party), approved by Ordinul Președintelui Casei Naționale de Asigurări de Sănătate nr. 729/2009 (order No 729/2009 of the President of the Casa Naționale de Asigurări de Sănătate) ('the provisions on reimbursement'), which provides, in essence, that medical expenses incurred abroad without the prior approval of the health insurance agency are to be reimbursed at the tariff rates applied under the Romanian social health insurance scheme.

Succinct presentation of the facts and the main proceedings

1 The applicants TS, UT and VU, are the lawful heirs (the surviving wife and two children respectively) of the late ZY, who died on 12 July 2014. The latter resided in Romania and was insured under the Romanian public health insurance scheme, which is managed by the two defendants.

2 Following admission to the Spital Clinic Județean de Urgență Constanța (Provincial emergency hospital, Constanța) from 22 to 27 March 2013, ZY was diagnosed, on 28 March 2013, with invasive squamous cell carcinoma of the tongue dorsum.

3 The treating physician in the Romanian public health insurance scheme recommended that the patient undergo emergency surgical treatment consisting in the surgical removal of two thirds of the tongue. Wishing to have a second medical opinion, ZY went to Austria, where, following admission to a clinic in Vienna from 10 to 14 April 2013, he had his diagnosis of 'locally advanced cancer of the tongue' confirmed and was advised that 'given the advanced state of the tumour, surgery will not be effective, so chemotherapy is recommended, for which admission is necessary'.

4 Opting for the treatment prescribed by that second medical opinion, ZY went to an interview with the defendant Casa de Asigurări de Sănătate Constanța to obtain an E 112 form so that that institution would cover the monetary value of the treatment to be received in Vienna. The Casa de Asigurări de Sănătate Constanța pointed out to ZY that if it agreed to cover the cost of the medical services, it would apply Article 8 of the implementing provisions relating to reimbursement, and more specifically, that it would guarantee reimbursement of the medical

expenses at the tariff rates applied under the Romanian social health insurance scheme since the patient was to go to another Member State to avail himself of medical services for which he had not obtained prior approval from the health insurance agency (casa de asigurări de sănătate). According to the applicants, on that occasion ZY was requested to submit a medical opinion to the effect that the insured person could not receive treatment in Romania.

5 After undergoing examinations/analyses and medical treatment consisting of radiotherapy, chemotherapy and immunotherapy in Austria, ZY requested, under administrative proceedings, by applications of 24 September 2013 and 4 June 2014, that the Casa de Asigurări de Sănătate Constanța reimburse his medical expenses, submitting invoices and proof of payment, which have not been challenged by the defendants/respondents.

6 On 21 September 2016, the applicants brought an action before the Tribunalul Constanța against the defendants, seeking a declaration that the latter are required to pay jointly and severally EUR 85 000, which constitutes the value of the medical treatment received by ZY abroad. The defendants claimed that the action should be dismissed, arguing that, although the time limit for issuing an E 112 is short, namely five working days, ZY decided to obtain medical services abroad and ZY went to Austria for therapeutic purposes, as requested and planned by him, which justifies the application of Article 8 of the implementing provisions relating to reimbursement.

7 In the proceedings at first instance, proof was provided in the form of a medical expert's report and the expert's report drawn up by the Serviciu Județean de Medicină Legală Constanța (provincial medical experts' service, Constanța) set out the following conclusions: '1. On the basis of the medical documents submitted in the case file, the severity [of] ZY's illness … can be regarded as serious; 2. In view of the advanced stage of the tumour and the invasion of the adjacent areas, a medical decision, confirmed by the patient's acceptance, was absolutely necessary in order to respect his autonomy, as a basic principle of the doctor-patient relationship. The choice of therapeutic treatment must also be supported in accordance with the surgical and oncological propaedeutics of each individual country, as they do not take a uniform approach; 3. The therapeutic method to which the patient consented and which he received (radiotherapy, chemotherapy, and immunotherapy), whilst rejecting the surgical treatment recommended by the Romanian doctors, and which was administered by the medical establishments in (…) Vienna, is therapeutic in nature, with the advantage of preserving both the normal anatomy of the area concerned and the physiological function of the tongue, and can be deemed 'appropriate and effective', since, in the present case, the results of the treatments are not predictable. According to data in specialist publications, the survival rate in cases of neoplasms of the tongue with locoregional disseminations is less than 30% over a period of five years or less'.

8 In the course of the proceedings at first instance, the Casa de Asigurări de Sănătate Constanța, applying Article 8 of the implementing provisions relating to reimbursement, paid the applicant TS, on 14 November 2016, [RON] 38 370.70 (equivalent, on the date of payment, to EUR 8 235.82), which constitutes the amount of the expenditure relating to the examinations/analyses and medical treatment which the applicants' predecessor in title, ZY, received in Austria, calculated in accordance with the tariff rates applied under the Romanian public social health insurance scheme. From the point of view of the appellants/applicants, who are seeking full reimbursement of the expenses incurred as a result of the medical treatment provided in August and whose claims are not based on Article 8 of the implementing provisions relating to reimbursement, payment of the abovementioned amount constituted only part payment of the amount claimed in the proceedings.

9 On 24 October 2018, the Tribunalul Constanța dismissed the action as unfounded, ruling that the applicants are entitled to reimbursement, not in full but in the amount established in accordance with national legislation.

10 The applicants/appellants lodged an appeal against the decision of the Tribunalul Constanța with the referring court, the Curtea de Apel Constanța (Court of Appeal, Constanța, Romania), claiming that it was not possible to apply for and obtain prior authorisation for medical treatment in Austria since that treatment was prescribed only by Austrian doctors, given that that treatment, unlike the treatment prescribed by the treating physician belonging to the Romanian public social health insurance scheme, has the advantage of not creating a disability.

The essential arguments of the parties to the main proceedings

11 In the grounds of appeal, TS, UT and VU argued that the judgment at first instance is contrary to the decisions of the Court of Justice of the European Union in the cases of *Elchinov* and *Luca*. In the view of the appellants, the E 112 form could have been obtained only on the basis of a recommendation of the Romanian social health insurance scheme, for surgical treatment, and not on the basis of a different medical recommendation from another Member State. Thus, in respect of the same diagnosis, the patient underwent abroad a treatment different from that prescribed by the Romanian doctors, which was the diametric opposite of the latter as a medical approach and deemed appropriate and effective by medical experts.

12 Taking the view that in this case the issue as to the applicability of Article 20 of Regulation (EC) No 883/2004, as interpreted by the Court of Justice in its judgment of 5 October 2010, *Elchinov* (C-173/09), constitutes the essence of the substance of the applicants' claims, the referring court suggested to the parties, of its own motion, that it is necessary to make a reference to the Court of Justice for a preliminary ruling. The applicants/appellants expressed their agreement to such a reference. The defendants/respondents, however, consider that it is not necessary

to refer the matter to the Court of Justice since Article 20 of Regulation (EC) No 883/2004 is not, in their view, applicable in this case.

Succinct presentation of the reasons for the reference

13 With reference to the judgment of the Court of Justice in *Elchinov*, which was invoked by the applicants/appellants in support of their position, according to which the insured person is entitled to reimbursement of costs in full if the two requirements laid down in the second sentence of Article 20(2) of Regulation No 883/2004 are satisfied and if it was not possible, for objective reasons, to request prior authorisation from the competent institution, the referring court notes that it is common ground between the parties that the first requirement is satisfied and thus the treatment at issue is among the benefits provided for in the legislation of the Member State in which the person concerned resides.

14 However, it is disputed as to whether the second requirement is satisfied, that is to say whether the person in question could not have received that treatment within a medically justified time limit, given his current state of health and the probable course of his disease, and in this regard the defendants/respondents maintain that the medical treatment which ZY received in Austria could also have been provided in Romania in good time.

15 In analysing that second requirement, the referring court notes that at paragraph 45 of its judgment in *Elchinov* the Court of Justice acknowledged, as regards the objective reasons which prevented prior authorisation being applied for and obtained, circumstances relating to a person's state of health and the *need to receive urgent treatment* in hospital. In the present dispute, it is clear from the medical expert's report submitted to the court of first instance that the diagnosis was serious and medical treatment was urgently needed at the time of the diagnosis.

16 However, the reason why ZY did not obtain prior authorisation was neither because it was impossible to take the necessary administrative steps required by the Casa de Asigurări de Sănătate Constanța, nor the fact that the latter had delayed the authorisation procedure. ZY was unable to obtain prior authorisation because the treatment at issue, consisting of radiotherapy, chemotherapy and immunotherapy, which he wanted to receive, was not prescribed by the treating physician belonging to the Romanian public social health insurance scheme who made the initial diagnosis, but by Austrian doctors, by way of a second medical opinion given in the light of that diagnosis.

17 ZY was entitled to make that choice, and thus reject the treatment recommended by the Romanian treating physician, given that the latter would give rise to a disability resulting from the removal of a considerable part of the tongue, whilst the treatment prescribed in Austria maintained both the normal anatomy of the area concerned and the physiological functioning of the tongue. That right to choose is also confirmed in paragraph 66 of the judgment in *Elchinov*.

18 The referring court draws attention to a statement in the medical expert's report that 'the choice of therapeutic treatment must also be supported in accordance with the surgical and oncological propaedeutics of each individual country as they do not take a uniform approach'.

19 Thus, there may be differences in the understanding of medical science between the Member States which lead to different treatments being administered for the same diagnoses. The reasons for these medical differences between the Member States may be cultural (at scientific level), but also economic.

20 According the medical expert's report submitted in the proceedings at first instance, both treatments were appropriate and effective. The difference in medical approach is not, however, the result of a mere difference of medical opinion but, as was noted in the medical expert's report, follows from the nature of surgical and oncological propaedeutics, which are not uniform and vary from country to country.

21 Although ZY was entitled to choose the treatment prescribed in Austria, national legislation did not allow him to obtain prior authorisation for that treatment because the treatment in question had not been prescribed by a doctor belonging to the Romanian public social health insurance scheme.

22 Consequently, the insured person would appear to be, in those circumstances, a prisoner of his country's propaedeutic approach, since medical science differs depending on the Member State in which it is applied. The referring court doubts that this factual premiss, which presupposes that medical science recognises internal borders within the European Union, genuinely forms the basis for coordination of the Member States' social security schemes and, respectively, freedom to provide services.

23 The Curtea de Apel Constanța therefore doubts whether the differences in medical opinion can operate as a form of restriction on freedom to provide services, given that this fundamental freedom has been recognised precisely so that those enjoyed that freedom can have access to better quality services.

24 Consequently, in this case it is necessary for the Court of Justice to interpret EU law to ascertain the compatibility with that law of national legislation under which a medical report is to be drawn up by a doctor in an university teaching hospital or, where appropriate, a provincial hospital which has a contractual relationship with a Romanian health insurance agency, without there being any provision for the possibility of relying, in the prior authorisation procedure, on a second medical opinion given to the Romanian insured person in another Member State.