Case C-636/19

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:

26 August 2019

Referring court:

Centrale Raad van Beroep (Netherlands)

Date of the decision to refer:

22 August 2019

Applicant:

Y

Defendant:

CAK

Subject of the action in the main proceedings

The action in the main proceedings concerns a claim for reimbursement of the costs of medical treatment which a pensioner from the Netherlands, but who lives in Belgium, has undergone in Germany.

Subject and legal basis of the request for a preliminary ruling

At issue in the present request under Article 267 TFEU is whether pensioners established outside the Netherlands who, under Article 24 of Regulation No 883/2004, are entitled to benefits in kind at the expense of the Netherlands, may rely on Directive 2011/24.

Questions referred

1. Must Directive 2011/24/EU be interpreted as meaning that persons referred to in Article 24 of Regulation (EC) No 883/2004, who receive benefits in their country of residence at the expense of the Netherlands but who are not insured in

the Netherlands under the statutory health insurance scheme can rely directly on that directive for the reimbursement of costs of care provided?

If not,

2. Does it follow from Article 56 TFEU that, in a case such as the present one, not granting reimbursement for care provided in a Member State other than the country of residence or the country providing the pension is an unjustified obstacle to the free movement of services?

Provisions of EU law cited

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), in particular, Article 1(c), Article 19(1), Article 20(1) and (2), Article 27(1), Article 27(3) to (5).

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 (OJ 2009 L 284, p. 42), in particular, Article 25(1) to (3), Article 26(1) and (2).

Decision No S1 of 12 June 2009 concerning the European Health Insurance Card (OJ 2010 C 106, p. 23).

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 (OJ 2011 L 88, p. 45), in particular, Article 3(b)(i), Article 3(c)(i), Article 7(1), Article 8(1) and (2).

Treaty on the Functioning of the European Union, Article 56.

Provisions of national law cited

None

Brief summary of the facts and the procedure in the main proceedings

1 In 2015, when the facts relating to the main proceedings occurred, the applicant was resident in Belgium and in receipt of an old-age pension from the Netherlands. Under Article 24 of Regulation No 883/2004, she was entitled to medical care in Belgium at the expense of the Netherlands. To that end, she paid health insurance contributions in the Netherlands.

2 Following a consultation with a general practitioner in Belgium and a medical examination in the Netherlands, the applicant wished to have a second opinion carried out in a German hospital.

3 The applicant's husband contacted the defendant CAK in relation to that medical treatment in Germany. CAK is a Netherlands administrative body that implements many arrangements in the medical field, including the reimbursement of medical expenses incurred by 'contractually insured persons'. That term refers to persons not insured in the Netherlands who 1) live in a country with which the Netherlands has a medical care agreement (EU/EEA countries and certain other countries) and 2) receive a pension or benefit from the Netherlands. Those people pay health insurance contributions to CAK and can then register with a health insurance company in their country of residence.

4 CAK pointed out to the applicant in the present case that, for medical care outside Belgium or the Netherlands, CAK's consent must first be sought by the Belgian health insurance company with which she has registered. CAK will only reimburse the costs of treatment after prior authorisation has been sought.

5 Meanwhile, it was determined in the Netherlands that the applicant was suffering from breast cancer. Without the consent having been given, the second opinion took place in Germany. That second opinion showed that the applicant's illness was even more serious than had been determined in the Netherlands. On 20 March 2015, the applicant underwent breast surgery in Germany, followed by further treatment, including radiotherapy, in the months from April to June.

6 In the meantime, on 19 March 2015, CAK had received a request for authorisation for the second opinion from the applicant's Belgian health insurance company. That was refused because authorisation could not be given retroactively. Authorisation was never sought for the remainder of the treatment. CAK therefore refused to reimburse the total costs of the treatment of EUR 16 853.13. The applicant's objection to that decision was rejected, as was the applicant's appeal to the rechtbank Amsterdam (District Court, Amsterdam; 'the Rechtbank'). The applicant then appealed to the Centrale Raad van Beroep (Higher Social Security and Civil Service Court).

Main submissions of the parties to the main proceedings

7 According to the applicant, apart from the second opinion, the treatment in Germany constituted 'benefits in kind which become necessary on medical grounds during their stay' within the meaning of Article 19(1) of Regulation No 883/2004. It concerned an unplanned emergency operation that had to be performed once it had become clear how serious her form of breast cancer was. The medical situation was so urgent that she could not reasonably be expected to return to the Netherlands or Belgium for treatment. She could similarly not be expected to seek prior authorisation in that stressful situation. As she was already

in Germany for the second opinion, she was entitled, under the aforementioned article, to the provision of that care.

8 In addition, she relied on Directive 2011/24 ('the Patients' Directive'). Under Article 8(2)(a)(ii) thereof, in the case of treatments which do not involve overnight hospital accommodation of the patient for at least one night, prior authorisation may be required only if it concerns care which 'requires use of highly specialised and cost-intensive medical infrastructure or medical equipment'. The post-operative treatments, such as the radiotherapy that took place between 14 April and 24 June 2015, are not covered by that provision, with the result that no prior authorisation could be required.

9 According to CAK, there was no question of benefits in kind which became necessary on medical grounds during the stay in Germany. Following the second opinion, the applicant still had the opportunity to seek prior authorisation for the treatment in Germany that took place only a week later. The fact that the applicant found herself in a stressful situation in no way changes that. Moreover, she knew that prior authorisation was required.

10 According to CAK, the Patients' Directive does not apply to the applicant. She is not an insured person for the purposes of Article 3(b) of that directive, because she does not meet the conditions which, according to the Netherlands legislation, are required for entitlement to benefits. Apart from that, the radiotherapy must be regarded as healthcare that is subject to planning requirements as referred to in Article 8(2)(a)(ii) of the Patients' Directive. That means that prior authorisation may also be required for the radiotherapy.

Brief summary of the reasons for the referral

11 The referring court considers that two interrelated issues are involved in the case in the main proceedings. First, the question is whether, under Regulation No 883/2004, prior authorisation may be required for medical treatment in Germany. It is important in that respect whether the care was planned or unplanned. Second, the applicant relied on the Patients' Directive. Under that directive, some of the applicant's treatments may not be covered by the authorisation requirement at all. The question, however, is whether that Patients' Directive applies to the applicant. The latter point lies at the heart of the reference for a preliminary ruling.

12 Like CAK and the Rechtbank, the referring court takes the view that there was no question of unplanned care which required reimbursement by CAK without prior authorisation under Article 19(1) of Regulation No 883/2004. The applicant initially stayed in Germany only in connection with the second opinion. She therefore did not have to terminate her stay in Germany prematurely in order to receive treatment in Belgium or the Netherlands. Moreover, the lapse of a week between the second opinion and the first operation is not indicative of a very urgent situation. The medical treatments for which reimbursement has been

sought in this case are therefore covered by planned care as referred to in Article 20 of Regulation No 883/2004 for which the permission referred to therein may be required.

13 Under Article 8(2)(a) of the Patients' Directive, however, in the case of cross-border care, prior authorisation may be required only in a limited number of cases for care subject to planning requirements. That applies only to care which involves overnight hospital accommodation of the patient for at least one night or care which requires use of highly specialised and cost-intensive medical infrastructure or equipment.

14 CAK argues that the Patients' Directive does not apply to contractually insured persons who receive care outside the State of residence and/or the State providing the pension. It is apparent from Article 3(b)(i) of the Patients' Directive that that directive applies only to 'insured persons' as defined in Article 1(c) of Regulation No 883/2004. According to CAK, those are persons who are insured under a national statutory health insurance system. Contractually insured persons who are entitled to benefits under Regulation No 883/2004 are not covered by it.

15 According to the referring court, the question whether the applicant falls within the personal scope of the Patients' Directive cannot be answered without reasonable doubt. It is unclear how the term 'insured person' as defined in Article 1(c) of Regulation No 883/2004 must be interpreted. In the case of medical benefits such as those at issue here, the term 'insured person' in the latter provision means 'any person satisfying the conditions required under the legislation of the Member State competent under Title II to have the right to benefits, taking into account the provisions of this Regulation'.

16 As the Court of Justice of the European Union ('the Court of Justice') has repeatedly confirmed in its case-law, special rules of jurisdiction are laid down in Chapter 1 of Title III of Regulation No 883/2004 which, in certain cases, deviate from the general allocation rules in Title II, for the purpose of determining which institution must provide the services referred to in the relevant articles and which legislation applies (for example, the judgment of 14 October 2010, *Van Delft and Others*, C-345/09, EU:C:2010:610, paragraphs 38 and 48). The starting point is that insured persons, pensioners and their family members can receive medical care in their Member State of residence. That Member State provides the care in accordance with its own legislation. The costs of that medical care are borne by the competent Member State.

17 Chapter 1 of Title III of Regulation No 883/2004 contains provisions relating to insured persons in Section 1 and provisions relating to pensioners in Section 2. A distinction has therefore been made in that regulation between insured persons and pensioners, albeit that certain articles relating to insured persons have been declared to apply mutatis mutandis to pensioners. In that regard, reference can be made to Article 27(3) thereof, which stipulates that Article 20 of that regulation, which contains the authorisation requirement at issue here, applies mutatis

mutandis to a pensioner and his family members. It is not entirely clear to the referring court whether the intention of that analogous application is to equate pensioners with insured persons as is at issue here. If so, the term 'insured person' in Article 1(c) of Regulation No 883/2004 should also include a pensioner as referred to in Title III, Chapter 1, Section 2.

18 The referring court also doubts, in another respect, the correctness of CAK's assertion that the term 'insured person' can apply only to persons who are insured for medical expenses under Netherlands law. To that end, it refers to the case-law of the Court of Justice (for example, the aforementioned judgment in *Van Delft and Others* and the judgment of 4 June 2015, *Fischer-Lintjens*, EU:C:2015:359, C-543/13) in which a contractually insured person such as the applicant is designated an 'insured person' (Dutch: 'sociaal verzekerde'). On that basis, it could be assumed that the term 'insured person' in Regulation No 883/2004 has a broader meaning than just a person who is insured under national law.

19 The definition of 'Member State of affiliation' in Article 3(c)(i) of the Patients' Directive also supports a broader interpretation than that advocated by CAK. It stipulates that the Member State of affiliation for persons referred to in Article 3(b)(i) is the Member State that, in accordance with Regulation No 883/2004 and Regulation No 987/2009, is competent to grant to the insured person a prior authorisation to receive appropriate treatment outside the Member State of residence. Article 7 of the Patients' Directive also seems to indicate that the directive applies also to pensioners who are contractually insured persons.

20 More generally, the referring court, unlike CAK, sees no clear justification for the exclusion of contractually insured persons from the Patients' Directive. The aim of the directive is, after all, to remove obstacles to the provision of cross-border healthcare as much as possible and thus to facilitate the free movement of patients within the European Union. To that end, a system has been set up in the directive for the reimbursement of medical expenses based on the principles of freedom of movement and building on the principles derived from the judgments of the Court of Justice. In various judgments, the Court of Justice has recognised the right to reimbursement, by the statutory social security system under which patients are insured, of the costs of healthcare provided in another Member State. Moreover, the freedom to provide services implies the freedom of recipients of services, including those in need of medical treatment, to go to another Member State for that purpose.

21 It is apparent from recital 29 of the Patients' Directive that it is the intention also for patients who seek healthcare in another Member State in circumstances other than those provided for in Regulation No 883/2004 to be able to benefit from the principles of free movement of patients, services and goods in accordance with the TFEU and with that directive. Recital 30 thereof states that the two systems should be 'coherent' for patients. Either the directive should apply, or Regulations No 883/2004 and No 987/2009 should apply. According to the referring court, the

directive cannot have been intended to deprive retired contractually insured persons of protection for cross-border healthcare.

22 Moreover, as far as the referring court is aware, the case-law of the Court of Justice, in the context of the free movement of cross-border healthcare services, relates to persons who were actually insured in the Member State of affiliation, but it is not convinced that that case-law must remain inapplicable to retired contractually insured persons.

23 According to the referring court, if the Court of Justice recognises the correctness of that assessment, and the Patients' Directive therefore does apply, the radiotherapy and subsequent treatment are then not subject to the authorisation requirement. It takes the view that Article 8(2)(a) of the Patients' Directive does not apply to such care.

24 To the extent that the Court of Justice considers the applicant not to fall within the personal scope of the Patients' Directive, the question arises whether Article 56 TFEU, inter alia in the light of the principle of proportionality, precludes the obstacle that a contractually insured person may encounter when receiving cross-border healthcare outside the State of residence and the State providing the pension. The question also arises as to whether that article precludes the obstacle that service providers may encounter when providing cross-border care to contractually insured persons. The obstacle encountered by the applicant is a direct consequence of the fact that she settled outside the Netherlands with a Netherlands pension and that the Netherlands, as the country providing the pension, does not grant reimbursement to contractually insured persons for cross-border healthcare outside the State of residence and the State providing the pension in the case of care for which no admission to the hospital is required, unless authorisation has been granted. Persons who are insured for medical expenses under national law in the Netherlands do often receive reimbursement for such cross-border care, depending on the specific policy conditions of the various insurers.

25 According to the referring court, there is no justification for the obstacle described. It has been neither argued nor proved that the obstacle is necessary to guarantee the financial equilibrium of the Netherlands healthcare system. The applicant pays a contribution to the Netherlands for the care that she is entitled to receive as a contractually insured person. Had the care been received in the Netherlands, it would also have been reimbursed. Furthermore, there would have been costs related to her treatment for the Netherlands State had she received the same care in Belgium.