JUDGMENT OF THE COURT (Second Chamber)

19 April 2007 *

In Case C-444/05,

REFERENCE for a preliminary ruling under Article 234 EC from the Diikitiko Protodikio Athinon (Greece), made by decision of 30 December 2004, received at the Court on 14 December 2005, in the proceedings

Aikaterini Stamatelaki

v

NPDD Organismos Asfaliseos Eleftheron Epangelmation (OAEE),

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, P. Kūris (Rapporteur), K. Schiemann, J. Makarczyk and J.-C. Bonichot, Judges,

* Language of the case: Greek.

Advocate General: D. Ruiz-Jarabo Colomer,
Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 29 November 2006,

after considering the observations submitted on behalf of:

— the Greek Government, by K. Georgiadis, S. Vodina, M. Papida and S. Spiropoulos, acting as Agents,

— the Belgian Government, by L. Van den Broeck, acting as Agent,

— the Netherlands Government, by P. van Ginneken, acting as Agent,

— the Commission of the European Communities, by G. Zavvos and N. Yerrell, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 11 January 2007,

gives the following

Judgment

1 This reference for a preliminary ruling relates to the interpretation of Article 49 EC, in particular to whether that provision precludes national legislation which excludes reimbursement by a national social security institution of the costs incurred when a person insured with it who is over 14 years of age is admitted to a private hospital abroad.

2 The reference was made in the context of proceedings brought by Mr Stamatelakis, a resident of Greece who was insured with the Organismos Asfaliseos Eleftheron Epangelmation (Insurance Institution for the Liberal Professions; 'the OAEE'), the successor of the Tamio Asfalisesos Emboron (Merchants' Insurance Fund), in order to obtain the reimbursement of costs incurred when he was admitted to a private hospital in the United Kingdom.

National law

Statutory provisons

3 Article 40 of Law No 1316/1983 (concerning the creation, organisation and powers of the National Body for Pharmaceutical Products ('EOF'), the National Pharmaceutical Industry ('EF') and the State Pharmaceutical Store ('KF'), amending and supplementing pharmaceutical legislation and containing other provisions) (FEK A 3), as replaced by Article 39 of Law No 1759/1988 on insurance cover for uninsured groups and improvement of social security protection, and containing other provisions (FEK A 50), provides:

'1. In the case of exceptionally serious illnesses, hospital treatment abroad shall be permitted for:

(a) ...

(b) ...

(c) persons insured with social security institutions or services falling within the competence of the Ministry of Health, Welfare and Social Security ...

2. Hospital treatment abroad shall be authorised by decision of the relevant body after the opinion of the competent medical board as provided for in paragraph 3 has been obtained.

3. Opinions on the necessity of hospital treatment abroad for the persons indicated in paragraph 1 shall be delivered by medical boards set up by decree of the Minister for Health, Welfare and Social Security, which shall be published in the Official Gazette ...

4. The cases in which hospital treatment abroad is permitted, the manner of, and procedure for, authorising the hospital treatment of the patient and any donor, the use of a person to accompany the patient, the nature and extent of the services, the amount of the expenditure, the possibility of a contribution from the insured person towards the cost of hospital treatment and the amount of that contribution, and all other details necessary for application of this Article shall be determined by decree of the Minister of Health, Welfare and Social Security, which shall be published in the Official Gazette.'

Provisions of secondary legislation

4 Article 1 of Decree F7/ik. 15 of the Minister for Labour and Social Security of 7 January 1997 on hospital treatment abroad of patients insured with social security institutions falling within the competence of the General Secretariat for Social Security (FEK B 22) provides as follows:

'The hospital treatment abroad of persons insured under all sickness bodies and branches, irrespective of their name and legal form, which fall within the

competence of the General Secretariat for Social Security shall be authorised by decision of the relevant insurance body following the issue of a reasoned opinion by one of the Special Medical Boards provided for in Article 3 of this Decree. Hospital treatment as referred to above shall be provided in cases where the insured person:

(a) is suffering from a serious illness which cannot be treated in Greece, either because the appropriate scientific resources do not exist or because the particular method of medical diagnosis and treatment that is required is not applied;

(b) is suffering from a serious illness which cannot be treated sufficiently promptly in Greece and any delay in treatment places his life in danger;

(c) goes abroad as a matter of urgency, without observing the prescribed procedure for prior authorisation from the insurance body concerned, because his case necessitates immediate treatment;

(d) is for any reason temporarily in a foreign country and owing to a violent, unexpected and unavoidable event is suddenly taken ill and treated in a hospital.

In cases (c) and (d) a posteriori authorisation of his hospital treatment shall be possible.'

5 Article 3 of this decree provides:

'Special Medical Boards shall have the power to deliver opinions on hospital treatment abroad for patients insured with insurance institutions falling within the competence of the General Secretariat for Social Security.'

6 Article 4 of the decree states:

'...

2. The competent board shall issue an opinion on the nature of the illness, the particular reasons as enumerated in Article 1 which necessitate going abroad, the probable duration of hospital treatment, the country and/or the particular hospital establishment in which the insured person will be treated ...

3. Opinions issued by Medical Boards which reject hospital treatment shall be binding on insurance institutions.

...

6. The cost of treatment in private hospitals abroad shall not be paid for, except in situations concerning children.

7. The procedure, the method of payment and, generally, all matters relating to the sending and repayment of bills shall be governed by the statutes of each body ...'

7 Article 13 of Decree 35/1385/1999 of the Minister for Labour and Social Security on the Health Branch of the Insurance Institution for the Liberal Professions (Approval of the Rules of the Health Branch of the Insurance Institution for the Liberal Professions) (FEK B 1814) provides:

'1. The hospital care provided shall include treatment of the patient in public hospitals and clinics, and also in private hospitals with which the OAEE enters into an agreement ...'

8 Article 15 of this decree states:

'1. Persons insured with the OAEE shall be entitled to hospital treatment abroad, following a decision by the Administrator and authorisation by the Special Medical Board, in so far as they satisfy the conditions laid down in each particular case by the ministerial decrees on hospital treatment abroad.

2. The costs reimbursed for hospital treatment abroad shall comprise the following:

(a) the whole of the cost of hospital treatment in public hospitals abroad ...

The concept of "hospital treatment" shall include: hospital charges, doctors' fees, all necessary medical interventions, medicines, laboratory tests, physiotherapy, any additional article necessary for surgical intervention and also extra-hospital costs incurred for diagnosis of the illness or completion of the treatment provided that they have been deemed necessary on the recommendation of the hospital concerned. The costs of treatment in private hospitals abroad shall not be paid, except where they relate to children under 14 years of age.

(b) the cost of the outward and return journey of the patient and of any necessary person accompanying him or donor;

(c) expenditure on board and lodging incurred by the patient and by any necessary person accompanying him or donor, in the case of the patient or donor for the time that is spent outside hospital and, in that of the person accompanying the patient, throughout the necessary duration of his stay abroad ...'

The main proceedings and the questions referred for a preliminary ruling

9 Mr Stamatelakis was treated from 18 May to 12 June 1998 and from 16 to 18 June 1998 in London Bridge Hospital, a private hospital in the United Kingdom. He paid the sum of GBP 13 600 for his treatment.

10 By an action brought before the Polimeles Protodikio Athinon (Court of First Instance, Athens) (Greece), Mr Stamatelakis sought reimbursement of that sum from the OAEE. This application was dismissed on 26 April 2000, on the ground that the dispute fell within the jurisdiction of the administrative courts.

11 A fresh request for reimbursement, sent to the OAEE on 8 September 2000, gave rise to a refusal on the grounds, first, that Mr Stamatelakis's claim had been defeated

by the one-year limitation period prescribed in Article 21 of the Rules of the Health Branch of the OAEE and, second, that the cost of treatment in private hospitals abroad is not paid for, except where it relates to children under 14 years of age.

12 Following the death of her husband on 29 August 2000, Mrs Stamatelaki, his sole heir, lodged a complaint challenging that refusal, which was dismissed, on the same grounds, by decision of 18 September 2001.

13 An action challenging that decision was brought before the Diikitiko Protodikio Athinon (Administrative Court of First Instance, Athens), which decided to stay proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Does a national rule which excludes in all circumstances reimbursement by a domestic insurance body of the cost of treatment of a person insured with it in a private hospital abroad except in cases concerning children under 14 years of age, while on the other hand providing for the possibility of reimbursement of the relevant cost if the treatment in question takes place in a public hospital abroad, following authorisation which is granted provided that the insured person cannot obtain appropriate treatment without undue delay from a hospital that has entered into an agreement with his insurance body, constitute a restriction on the principle of freedom to provide services within the Community which is enshrined in Article 49 et seq. of the EC Treaty?

(2) If the answer to the first question is in the affirmative, can that restriction be regarded as dictated by overriding reasons in the general interest, such as in particular the need to avoid the risk of seriously undermining the financial balance of the Greek social security system, or the maintenance of a balanced hospital and medical service open to all?

(3) If the answer to the second question is in the affirmative, can a restriction of this nature be regarded as permissible in the sense that it is not contrary to the principle of proportionality, that is to say that it does not go beyond what is objectively necessary in order to attain the objective at which it is aimed and that the same result cannot be achieved by less restrictive rules?'

Consideration of the questions

14 It is appropriate to reject at the outset the proposition advanced by the Belgian Government that the questions referred for a preliminary ruling should be considered in the light of Article 22 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, as amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996 (OJ 1997 L 28, p. 1) ('Regulation No 1408/71').

15 First, the order for reference does not mention Regulation No 1408/71 at all and, second, it is not apparent from any document before the Court that Mr Stamatelakis requested any prior authorisation in accordance with Article 22 of that regulation.

16 The questions asked by the national court relate solely to the failure on the part of a Greek social security institution to reimburse the cost of medical treatment provided in a private establishment abroad.

17 Consequently, those questions should be considered in the light of Article 49 EC alone.

18 By its three questions, which it is appropriate to examine together, the national court essentially asks whether Article 49 EC must be interpreted as precluding legislation of a Member State, such as the legislation at issue in the main proceedings, which excludes reimbursement of the cost of treatment provided in a private hospital in another Member State except in the case of treatment provided to children under 14 years of age.

19 According to settled case-law, medical services supplied for consideration fall within the scope of the provisions on the freedom to provide services, there being no need

to distinguish between care provided in a hospital environment and care provided outside such an environment (Case C-372/04 *Watts* [2006] ECR I-4325, paragraph 86 and the case-law cited).

20 It has also been held that the freedom to provide services includes the freedom for the recipients of services, including persons in need of medical treatment, to go to another Member State in order to receive those services there (*Watts*, paragraph 87).

21 Furthermore, the Court has held that a supply of medical services does not cease to be a supply of services within the meaning of Article 49 EC on the ground that the patient, after paying the foreign supplier for the treatment received, subsequently seeks reimbursement of the cost of that treatment through a social security system (see, to this effect, Case C-385/99 *Müller-Fauré and van Riet* [2003] ECR I-4509, paragraph 103).

22 It follows that Article 49 EC applies to the situation of a patient who, like Mr Stamatelakis, receives, in a Member State other than his Member State of residence, medical services in a hospital environment which are provided for consideration, and it is immaterial whether the establishment in question is public or private.

23 Whilst it is settled case-law that Community law does not detract from the power of the Member States to organise their social security systems and that, in the absence of harmonisation at Community level, it is for the legislation of each Member State

to determine the conditions in which social security benefits are granted, when exercising that power Member States must comply with Community law, in particular the provisions on the freedom to provide services. Those provisions prohibit the Member States from introducing or maintaining unjustified restrictions on the exercise of that freedom in the healthcare sector (see, in particular, Case C-157/99 *Smits and Peerbooms* [2001] ECR I-5473, paragraphs 44 to 46, and *Watts*, paragraph 92).

24 It must therefore be determined whether, in enacting the legislation at issue in the main proceedings, the Hellenic Republic observed that prohibition.

25 The Court has repeatedly held that Article 49 EC precludes the application of any national rules which have the effect of making the provision of services between Member States more difficult than the provision of services purely within a Member State (Case C-381/93 *Commission* v *France* [1994] ECR I-5145, paragraph 17, and *Smits and Peerbooms*, paragraph 61).

26 In the main proceedings, it is apparent from the Greek legislation that if a patient insured in Greece with a social body receives treatment in a public establishment, or in a private establishment which is located in that Member State and with which an agreement has been entered into, he does not have to pay out any sum. The situation is different where that patient is admitted to a private hospital in another Member State, since he must pay the costs of treatment and does not have the possibility of being reimbursed. The sole exception concerns children under 14 years of age.

27 Furthermore, while the existence of an emergency constitutes an exception to the rule of no reimbursement, where a patient is admitted to a private hospital in Greece with which no agreement has been entered into, it does not constitute an exception in any case upon admission to a private hospital in another Member State.

28 Consequently, such legislation deters, or even prevents, persons with social security cover from seeking treatment from providers of hospital services who are established in Member States other than the Member State where they are insured and constitutes, both for them and for those providers, a restriction on the freedom to provide services.

29 However, before the Court gives a ruling on whether Article 49 EC precludes legislation such as that at issue in the main proceedings, it must be examined whether that legislation can be objectively justified.

30 The Court has held on a number of occasions that it is possible for the risk of seriously undermining the financial balance of a social security system to constitute per se an overriding reason in the general interest capable of justifying an obstacle to the freedom to provide services (Case C-158/96 *Kohll* [1998] ECR I-1931, paragraph 41; *Smits and Peerbooms*, paragraph 72; and *Müller-Fauré and van Riet*, paragraph 73).

31 The Court has likewise acknowledged that the objective of maintaining on grounds of public health a balanced medical and hospital service open to all may also fall within one of the derogations, on grounds of public health, provided for in Article 46 EC in so far as it contributes to the attainment of a high level of health protection (*Kohll*, paragraph 50; *Smits and Peerbooms*, paragraph 73; and *Müller-Fauré and van Riet*, paragraph 67).

32 The Court has also held that that provision of the EC Treaty permits Member States to restrict the freedom to provide medical and hospital services in so far as the maintenance of treatment capacity or medical competence on national territory is essential for public health, or even the survival of the population (*Kohll*, paragraph 51; *Smits and Peerbooms*, paragraph 74; and *Müller-Fauré and van Riet*, paragraph 67).

33 The Greek Government submits in this regard that the balance of the national social security system could be upset if insured persons had the option of recourse to private hospitals in other Member States without an agreement having been entered into with those hospitals, given the high cost of hospital treatment of this type, which exceeds, in any event, considerably that of treatment in a public hospital in Greece.

34 While the restriction found in paragraph 28 of the present judgment is capable of being justified by the overriding reasons in the general interest noted in paragraphs 30 to 32 of the judgment, the restriction must also not be disproportionate in the light of the objective pursued.

35 As the Advocate General has observed in point 70 of his Opinion, the absolute terms, with the exception of the case of children under 14 years of age, of the prohibition laid down by the Greek legislation are not appropriate to the objective pursued, since measures which are less restrictive and more in keeping with the freedom to provide services could be adopted, such as a prior authorisation scheme which complies with the requirements imposed by Community law (*Müller-Fauré and van Riet*, paragraphs 81 and 85) and, if appropriate, the determination of scales for reimbursement of the costs of treatment.

36 It is also necessary to reject the Greek Government's argument relating to the fact that Greek social security institutions do not check the quality of treatment provided in private hospitals in another Member State and to the lack of verification as to whether hospitals with which an agreement has been entered into are able to provide appropriate — identical or equivalent — medical treatment.

37 The fact remains that private hospitals located in other Member States are also subject, in those Member States, to quality controls and that doctors established in those States who operate in those establishments provide professional guarantees equivalent to those of doctors established in Greece, in particular since the adoption and implementation of Council Directive 93/16/EEC of 5 April 1993 to facilitate the free movement of doctors and the mutual recognition of their diplomas, certificates and other evidence of formal qualifications (OJ 1993 L 165, p. 1).

38 In the light of all the foregoing considerations, the answer to the questions asked must be that Article 49 EC precludes legislation of a Member State, such as that at

issue in the main proceedings, which excludes all reimbursement by a national social security institution of the costs occasioned by treatment of persons insured with it in private hospitals in another Member State, except those relating to treatment provided to children under 14 years of age.

Costs

39 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 (Second Chamber) hereby rules:

Article 49 EC precludes legislation of a Member State, such as that at issue in the main proceedings, which excludes all reimbursement by a national social security institution of the costs occasioned by treatment of persons insured with it in private hospitals in another Member State, except those relating to treatment provided to children under 14 years of age.

[Signatures]