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SÚDNY DVOR EURÓPSKEJ ÚNIE
SODIŠČE EVROPSKE UNIJE
EUROOPAN UNIONIN TUOMIOISTUIN
EUROPEISKA UNIONENS DOMSTOL

LUXEMBOURG

JUDGMENT OF THE COURT (Third Chamber)

9 October 2014 *

(Reference for a preliminary ruling — Social security — Article 22(2), second subparagraph, of Regulation (EEC) No 1408/71 — Health insurance — Hospital treatment provided in another Member State — Prior authorisation refused — Lack of medication and basic medical supplies and infrastructure)

In Case C-268/13,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunalul Sibiu (Romania), made by decision of 7 May 2013, received at the Court on 16 May 2013, in the proceedings

Elena Petru

v

Casa Județeană de Asigurări de Sănătate Sibiu,

Casa Națională de Asigurări de Sănătate,

THE COURT (Third Chamber),

composed of M. Ilešič, President of the Chamber, A. Ó Caoimh, C. Toader, E. Jarašiūnas (Rapporteur) and C.G. Fernlund, Judges,

Advocate General: P. Cruz Villalón,

Registrar: L. Carrasco Marco, Administrator,

having regard to the written procedure and further to the hearing on 26 March 2014,

after considering the observations submitted on behalf of:

* Language of the case: Romanian.

– E. Petru, by R. Giura, avocat,

– the Casa Județeană de Asigurări de Sănătate Sibiu and the Casa Națională de Asigurări de Sănătate, by F. Cioloboc, C. Fechete and L. Bogdan, acting as Agents,

– the Romanian Government, by R.-I. Hațieganu, A.-L. Crișan and R.-H. Radu, acting as Agents,

– the United Kingdom Government, by J. Beeko, acting as Agent, assisted by M. Gray, Barrister,

– the European Commission, by C. Gheorghiu and D. Martin, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 19 June 2014,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of the second subparagraph of Article 22(2) of Regulation (EEC) No 1408/71 of the Council 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), as amended by Regulation (EC) No 592/2008 of the European Parliament and of the Council of 17 June 2008 (OJ 2008 L 177, p. 1) ('Regulation No 1408/71').

2 The request has been made in proceedings between, on the one hand, Ms Petru and, on the other, the Casa Județeană de Asigurări de Sănătate Sibiu (Health Insurance Agency, Sibiu District) and the Casa Națională de Asigurări de Sănătate (National Health Insurance Agency) concerning hospital treatment provided in Germany in respect of which Ms Petru claims reimbursement by way of damages.

Legal context

EU law

3 Article 22 of Regulation No 1408/71, entitled 'Stay outside the competent State — Return to or transfer of residence to another Member State during sickness or maternity — Need to go to another Member State in order to receive appropriate treatment', provides:

‘1. An employed or self-employed person who satisfies the conditions of the legislation of the competent State for entitlement to benefits, taking account where appropriate of the provisions of Article 18, and:

...

(c) who is authorised by the competent institution to go to the territory of another Member State to receive there the treatment appropriate to his condition,

shall be entitled:

(i) to benefits in kind provided on behalf of the competent institution by the institution of the place of stay … in accordance with the provisions of the legislation which it administers, as though he were insured with it; the length of the period during which benefits are provided shall be governed, however, by the legislation of the competent State;

…

2. …

The authorisation required under paragraph 1(c) may not be refused where the treatment in question is among the benefits provided for by the legislation of the Member State on whose territory the person concerned resided and where he cannot be given such treatment within the time normally necessary for obtaining the treatment in question in the Member State of residence taking account of his current state of health and the probable course of the disease.

3. Paragraphs 1 … and 2 shall apply by analogy to members of the family of an employed or self-employed person.

…’

4 On the basis of Article 2(1) of Council Regulation (EEC) No 574/72 of 21 March 1972 laying down the procedure for implementing Regulation No 1408/71 (OJ, English Special Edition, 1972 (I), p. 159), the Administrative Commission on Social Security for Migrant Workers, referred to in Article 80 of Regulation No 1408/71, adopted a model for the certificate necessary for the application of Article 22(1)(c)(i) of Regulation No 1408/71, namely, Form E 112.

Romanian Law

5 Article 208(3) of Law No 95/2006 on reform of the healthcare sector (Legea nr. 95/2006 privind reforma în domeniul sănătății, *Monitorul Oficial al României*, Part I, No 372, of 28 April 2006) provides:

‘Health insurance shall be compulsory and shall operate as a harmonised system. The objectives set out in paragraph 2 shall be achieved in accordance with the following principles:

(a) the freedom of insured parties to choose between insurance bodies;

(b) solidarity and subsidiarity in the creation and use of the funds;

(c) the freedom of insured parties to choose between providers of healthcare services, medicines and medical devices in accordance with this law and the framework contract;

(d) decentralised, autonomous management and administration;

(e) the compulsory payment of health insurance contributions for the purposes of creating a single national health insurance fund;

(f) the participation of insured parties, the State and employers in managing the single national health insurance fund;

(g) the provision of basic healthcare services to all insured parties in a fair and non-discriminatory manner;

(h) transparency in all activities relating to the health insurance system;

(i) free competition between healthcare providers entering into contracts with health insurance bodies.’

6 Under Article 40(1)(b) of the Annex to Decree No 592/2008 of the President of the National Health Insurance Agency (Ordinul președintelui Casei Naționale de Asigurări de Sănătate nr. 592/2008) of 26 August 2008 approving the detailed rules for use, within the framework of the Romanian health insurance scheme, of the forms provided pursuant to Regulation No 1408/71 and Regulation No 574/72 (*Monitorul Oficial al României*, Part I, No 648, of 11 September 2008), as amended by Decree No 575/2009 (*Monitorul Oficial al României*, Part I, No 312, of 12 May 2009, and the corrigendum published in the *Monitorul Oficial al României*, Part I, No 461/3 July 2009):

‘The E112 form is intended for employed or self-employed persons and members of their family authorised by the competent body to travel to another Member State in order to receive medical treatment.’

7 Article 40(3) of that Decree provides:

‘The provision of Form E 112 in the situation contemplated in Paragraph 1(b) may not be refused by the competent body where the treatment in question is among the benefits provided for by the legislation of the Member State on whose territory the person concerned resides and where he cannot be given such treatment within

the time normally necessary for obtaining the treatment in question in the Member State of residence, regard being had to his current state of health and the probable course of his disease.'

8 Article 8(1) of the Annex to Decree No 729/2009 of the National Health Insurance Agency, approving the detailed rules for reimbursement and recovery of the costs of healthcare provided on the basis on international measures in the field of healthcare to which Romania is a party (Ordinul nr. 729/2009 al Casei Naționale a Asigurărilor de Sănătate pentru aprobarea Normelor metodologice privind rambursarea şi recuperarea cheltuielilor reprezentând asistența medicală acordată în baza documentelor internaționale cu prevederi în domeniul sănătății la care România este parte), of 17 July 2009 (*Monitorul Oficial al României*, Part I, No 545, of 5 August 2009), provides:

'If a person insured under the Romanian health insurance scheme travels to another Member State of the European Union to receive medical treatment there without the prior authorisation of the Health Insurance Agency with which he is registered as an insured person, he must bear the costs of the medical services provided.'

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

9 The order for reference states that Ms Petru had been suffering for some years from a serious cardiovascular disease. In 2007, she had suffered a myocardial infarction, following which she underwent a surgical operation. In 2009, the state of her health having deteriorated, Ms Petru was admitted to the Institutul de Boli Cardiovasculare (Institute for Cardiovascular Disease) in Timișoara (Romania). The medical examinations that she underwent there led to the decision to proceed with open heart surgery in order to replace the mitral valve and insert two stents.

10 In the belief that the infrastructure in that hospital establishment was inadequate for such a surgical procedure, Ms Petru decided to travel to a clinic in Germany, where the surgery was carried out. The cost of the surgery and the post-operative hospital expenses amounted in total to EUR 17 714.70.

11 Before going to Germany, Ms Petru had asked the Casa Județeană de Asigurări de Sănătate Sibiu to cover the costs of the operation on the basis of Form E 112. Her request, registered on 2 March 2009, was refused on the grounds that there was no indication in the general practitioner's report that the healthcare service sought, which qualified as basic healthcare, could not be provided in a medical establishment in Romania within a reasonable length of time in the light of Ms Petru's current state of health and the course of the disease.

12 On 2 November 2011, Ms Petru lodged a civil action against the Casa Județeană de Asigurări de Sănătate Sibiu and the Casa Națională de Asigurări de Sănătate

claiming that they should be ordered to pay her the equivalent of EUR 17 714.70 in Romanian lei by way of damages. In support of her action, Ms Petru submitted that the hospital conditions at the Institutul de Boli Cardiovasculare in Timișoara were particularly inadequate; medication and basic medical commodities were lacking; the number of beds was insufficient; and it was because of the complexity of the surgical procedure to be carried out and the poor conditions that she had decided to leave that institution and travel to a clinic in Germany.

13 Ms Petru's action was dismissed at first instance by judgment of 5 October 2012, whereupon Ms Petru brought an appeal against that judgment before the Tribunalul Sibiu (Regional Court, Sibiu; or 'the referring court').

14 In support of her appeal, Ms Petru relies on Article 208(3) of Law No 95/2006; Article 22(1)(c) and the second subparagraph of Article 22(2) of Regulation No 1408/71; and the Charter of Fundamental Rights of the European Union.

15 The respondents in the main proceedings contend that the appeal should be dismissed, submitting that Ms Petru did not fulfil the necessary conditions for the issue of Form E 112 since she had not shown that it would have been impossible for her to receive the necessary healthcare services in Romania within a reasonable length of time. The respondents rely on Regulations No 1408/71 and No 574/72, Law No 95/2006 and Decree No 592/2008, as amended by Decree No 575/2009, and Article 8 of Decree No 729/2009.

16 The referring court explains that the parties to the main proceedings disagree as to the interpretation of the provisions of national and EU law applicable to the dispute before it, and that the outcome of the case depends upon the interpretation to be given to Article 22 of Regulation No 1408/71.

17 In those circumstances, the Tribunalul Sibiu decided to stay proceedings and to refer the following question to the Court:

'In the light of the second subparagraph of Article 22(2) of Regulation … No 1408/71, is the requirement that the person concerned be unable to obtain treatment in the country of residence to be construed as categorical or as reasonable; that is to say, where, although the required surgery could, in technical terms, be carried out in due time in the country of residence — in that the necessary specialists are present there and have the same level of specialist skills as those abroad — the lack of medicines and basic medical supplies and infrastructure means that such a situation can, for the purposes of that provision, be equated with a situation in which the necessary medical treatment cannot be provided?'

Consideration of the question referred for a preliminary ruling

Admissibility

18 The Romanian Government, observing that it is for the national court to set out, in its request for a preliminary ruling, the factual background within which the questions put to the Court arise, states that, in the present case, the referring court has not set out the facts in the case before it that have been established by the evidence adduced, but has simply adopted the statements made by the parties. However, according to the Casa Județeană de Asigurări de Sănătate Sibiu and the Casa Națională de Asigurări de Sănătate, the facts alleged by Ms Petru regarding the lack of medication and basic medical supplies and infrastructure, which underpin the question referred, are contradicted by that evidence and, accordingly, the question serves no purpose in relation to the outcome of the dispute.

19 The Romanian Government also states that the referring court has not explained the reasons why it considers that an answer to its question is necessary in order to determine the outcome of the case before it.

20 In that regard, it must be noted that, according to the settled case-law of the Court, the procedure provided for in Article 267 TFEU is an instrument for cooperation between the Court of Justice and the national courts, by means of which the Court provides the national courts with the points of interpretation of EU law which they need in order to decide the disputes before them (*Geistbeck*, C-509/10, EU:C:2012:416, paragraph 47, and *Impacto Azul*, C-186/12, EU:C:2013:412, paragraph 26).

21 In the context of that cooperation, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court (see, inter alia, *Bosman*, C-415/93, EU:C:1995:463, paragraph 59, and *Confederación Española de Empresarios de Estaciones de Servicio*, C-217/05, EU:C:2006:784, paragraph 16).

22 In order for the Court to be able to give an interpretation of EU law that is useful to the national court, Article 94 of the Rules of Procedure of the Court of Justice provides that the request for a preliminary ruling must contain, inter alia, a summary of the subject-matter of the dispute and the relevant findings of fact as determined by the referring court or tribunal, or, at least, an account of the facts on which the questions are based; and also a statement of the reasons which have prompted the referring court or tribunal to inquire about the interpretation or validity of certain provisions of EU law, and the relationship between those provisions and the national legislation applicable to the main proceedings.

23 Since questions concerning EU law enjoy a presumption of relevance, the Court may refuse to rule on a question referred by a national court only where it is quite obvious that the interpretation of EU law that is sought is unrelated to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see, inter alia, *Cipolla and Others*, C-94/04 and C-202/04, EU:C:2006:75, paragraph 25 and *The Chartered Institute of Patent Attorneys*, C-307/10, EU:C:2012:361, paragraph 32).

24 That is not the position in the present case.

25 First, as regards the facts of the main action, the order for reference sets out, under the heading 'Application initiating proceedings', Ms Petru's allegations and, under the heading 'Facts', the factual matters summarised in paragraphs 9 to 11 above. Thus, although the referring court does not, in that order, rule on the evidence adduced by the parties to establish or to refute those allegations and, accordingly, does not make a finding, at this stage of the proceedings, as to the lack of medication and basic medical supplies and infrastructure underpinning the question referred, it explains, at the very least, the facts upon which that question is based.

26 Second, as regards the reasons that have led the referring court to inquire about the interpretation of the second subparagraph of Article 22(2) of Regulation No 1408/71, it is clear from the order for reference that, since the parties to the main proceedings disagree as to the interpretation of that provision, the referring court inquires whether the second subparagraph of Article 22(2) of Regulation No 1408/71 applies where it is because of a lack of medication and basic medical supplies and infrastructure that the requisite treatment cannot be provided in the Member State of residence; and also that the referring court considers that the judgment to be given in the main proceedings depends on the answer to be given to that question.

27 Consequently, the interpretation sought is not obviously unrelated to the facts of the main action or its purpose and the question raised is not hypothetical, but relates to the facts in dispute between the parties to the main proceedings, which it is for the referring court to determine. Furthermore, the Court has before it the material necessary to give a useful answer to the question submitted to it.

28 It follows that the request for a preliminary ruling is admissible.

Substance

29 By its question, the referring court asks, in essence, whether the second subparagraph of Article 22(2) of Regulation No 1408/71 must be interpreted as meaning that the authorisation necessary under Article 22(1)(c)(i) of that regulation cannot be refused where it is because of a lack of medication and basic

medical supplies and infrastructure that the hospital treatment concerned cannot be provided in good time in the insured person's Member State of residence.

30 It must be observed that the second subparagraph of Article 22(2) of Regulation No 1408/71 lays down two conditions which, if both are satisfied, render mandatory the grant by the competent institution of the prior authorisation applied for on the basis of Article 22(1)(c)(i). The first condition requires the treatment in question to be among the benefits provided for by the legislation of the Member State on whose territory the insured person resides. The second condition requires that the treatment which the latter plans to receive in a Member State other than that of residence cannot be given within the time normally necessary for obtaining the treatment in question in the Member State of residence, account being taken of his current state of health and the probable course of his disease (see, to that effect, *Elchinov*, C-173/09, EU:C:2010:581, paragraphs 53 and 54, and case-law cited).

31 As regards the second condition, with which the question in the present case is concerned, the Court has held that the authorisation required cannot be refused if the same or equally effective treatment cannot be given in good time in the Member State of residence of the person concerned (see, to that effect, *Inizan*, C 56/01, EU:C:2003:578, paragraphs 45 and 60; *Watts*, C-372/04, EU:C:2006:325, paragraph 61, and *Elchinov*, EU:C:2010:581, paragraph 65).

32 In that regard, the Court has pointed out that, in order to determine whether treatment which is equally effective for the patient can be obtained in due time in the Member State of residence, the competent institution is required to have regard to all the circumstances of each specific case and to take due account not only of the patient's medical condition at the time when authorisation is sought and, where appropriate, of the degree of pain or the nature of the patient's disability which might, for example, make it impossible or extremely difficult for him to carry out a professional activity, but also of his medical history (*Inizan*, EU:C:2003:578, paragraph 46; *Watts*, EU:C:2006:325, paragraph 62, and *Elchinov*, EU:C:2010:581, paragraph 66).

33 One of the circumstances that the competent institution is required to take into account may, in a specific case, be the lack of medication and basic medical supplies and infrastructure, such as that alleged in the main proceedings. As the Advocate General observes in point 25 of his Opinion, the second subparagraph of Article 22(2) of Regulation No 1408/71 does not distinguish between the different reasons for which a particular treatment cannot be provided in good time. Clearly, however, such a lack of medication and of medical supplies and infrastructure can, in the same way as the lack of specific equipment or particular expertise, make it impossible for the same or equally effective treatment to be provided in good time in the Member State of residence.

34 However, as the Romanian and United Kingdom Governments and the European Commission have argued, it follows from the case-law cited in paragraph 31 above that the question whether that is indeed impossible must be determined, first, by reference to all the hospital establishments in the Member State of residence that are capable of providing the treatment in question and, second, by reference to the period within which the treatment could be obtained in good time.

35 As regards the main proceedings, the Romanian Government observes that Ms Petru had the right to approach any other medical establishment in Romania with the equipment necessary to carry out the treatment that she needed. That government also points out — as do the respondents in the main proceedings — that the general practitioner's report indicates that the treatment needed to be carried out within a period of three months. Accordingly, if the facts alleged by Ms Petru concerning the lack of medication and basic medical supplies and infrastructure at the Institutul de Boli Cardiovasculare in Timişoara are established, it will be for the referring court to determine whether that treatment could have been carried out within three months in another hospital establishment in Romania.

36 In the light of the foregoing considerations, the answer to the question referred is that the second subparagraph of Article 22(2) of Regulation No 1408/71 must be interpreted as meaning that the authorisation necessary under Article 22(1)(c)(i) of that regulation cannot be refused where it is because of a lack of medication and basic medical supplies and infrastructure that the hospital treatment concerned cannot be provided in good time in the insured person's Member State of residence. The question whether that is impossible must be determined by reference to all the hospital establishments in that Member State that are capable of providing the treatment in question and by reference to the period within which the treatment could be obtained in good time.

Costs

37 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 (Third Chamber) hereby rules:

The second subparagraph of Article 22(2) 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, as amended by Regulation (EC) No 592/2008 of the European Parliament and of the Council of 17 June

2008, must be interpreted as meaning that the authorisation necessary under Article 22(1)(c)(i) of that regulation cannot be refused where it is because of a lack of medication and basic medical supplies and infrastructure that the hospital care concerned cannot be provided in good time in the insured person's Member State of residence. The question whether that is impossible must be determined by reference to all the hospital establishments in that Member State that are capable of providing the treatment in question and by reference to the period within which the treatment could be obtained in good time.

[Signatures]