Reports of Cases

OPINION OF ADVOCATE GENERAL
CRUZ VILLALÓN
delivered on 19 June 2014[1]

Case C-268/13

Elena Petru
v
Casa Județeană de Asigurări de Sănătate Sibiu
and
Casa Națională de Asigurări de Sănătate

(Request for a preliminary ruling from the Tribunalul Sibiu (Romania))

(Freedom of movement for persons — Social security — Reimbursement of medical expenses incurred in another Member State — Prior authorisation — Scope of the expression 'equally effective treatment' — Shortage of material resources in a hospital — Entitlement to prior authorisation dependent upon the extent of the shortage within the national territory)

1. By this request for a preliminary ruling, the Tribunalul Sibiu (Regional Court, Sibiu; or 'the referring court') brings to the attention of the Court its uncertainties concerning the interpretation of the second subparagraph of Article 22(2) of Regulation No 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community[2] in a case involving a Romanian national who is seeking reimbursement from the Romanian authorities for surgery that she underwent in Germany, claiming before the referring court that she had ascertained that the Romania hospital where the operation would otherwise have been performed lacked medicines and basic medical supplies.

2. In essence, the question before the Court of Justice is whether a widespread shortage of basic healthcare resources in the State of residence should be regarded as a situation in which it is not possible to provide the treatment. If so, then, under the second subparagraph of Article 22(2) of Regulation No 1408/71, the patient would be entitled to authorisation to receive the service in another Member State at the expense of the health insurance scheme of the State of residence.

3. Although the Court of Justice has ruled many times on the scope of the second subparagraph of Article 22(2) of Regulation No 1408/71 and on the question of medical services in the light of the various forms of freedom of movement, this is the first time that the situation has arisen where the need to receive the service in another Member State would be based on a lack of resources in the State of residence.

1 — Original language: Spanish.

2 — Regulation (EEC) No 1408/71 of the Council of 14 June 1971, as amended and consolidated by Regulation (EC) No 118/97 of 2 December 1996 (OJ 1997 L 28, p. 1). It should be noted that the events in the case before the referring court took place before the entry into force of the amendment to the regulation in question as effected by Regulation (EC) No 592/2008 of the European Parliament and of the Council of 17 June 2008 (OJ 2008 L 177, p. 1).

I – **Legal framework**

4. 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.'

II – **Facts**

5. Ms Petru suffers from a serious cardiovascular disease which required her to undergo surgery in 2007. Two years later, her condition deteriorated and she was admitted to the Institutul de Boli Cardiovasculare (Institute for Cardiovascular Disease) in Timișoara. The medical report states that Ms Petru was suffering from a serious condition that required, as a matter of urgency, an operation involving open heart surgery to replace the mitral valve and insert two stents.

6. According to Ms Petru, while she was in the Institutul de Boli Cardiovasculare in Timișoara she became aware that there was a substantial shortage of material resources. She claims that the hospital did not have basic medical supplies such as painkillers, antiseptic/disinfectant, absorbent cotton wool or sterile dressings. Furthermore, the hospital had a high volume of patients, with, on average, three times as many patients as beds.

7. In view of the seriousness of the surgery required and the lack of material resources available at the Institutul de Boli Cardiovasculare, Ms Petru applied to the Casa Județeană de Asigurări de Sănătate Sibiu (Health Insurance Agency, Sibiu District) for authorisation to have the operation in Germany rather than in the aforementioned hospital in her Member State of residence. The Casa Județeană de

Asigurări de Sănătate Sibiu issued a decision refusing Ms Petru's application, citing as justification the state of health of the insured person, the probable course of the disease over time, the timescale within which the surgery could be performed and the reason given for the application (shortage of material resources).

8. After her application had been refused, Ms Petru approached a clinic in Germany, where the surgery was performed for a total cost — including her stay in hospital following the operation — of EUR 17 714.70.

9. Immediately following her operation, Ms Petru brought a civil action before the Tribunalul Sibiu against the the Casa Județeană de Asigurări de Sănătate Sibiu, under Article 22(1)(c) and the second subparagraph of Article 22(2) of Regulation No 1408/71, for reimbursement of the expenses incurred in Germany.

III – **The reference for a preliminary ruling and the procedure before the Court of Justice**

10. On 16 May 2013, the Court Registry received a request from the Tribunalul Sibiu for a preliminary ruling on the following question:

'In the light of the second subparagraph of Article 22(2) of Regulation (EEC) 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?'

11. Written observations have been submitted by Ms Petru, the Romanian Government and the Commission. At the hearing on 26 March 2014, Ms Petru's representatives presented oral argument, as did the agents of the United Kingdom Government, the Romanian Government and the Commission.

IV – **Arguments of the parties**

12. Ms Petru submits that she is entitled to authorisation under Article 22 of Regulation No 1408/71. The second subparagraph of that provision lists exhaustively the circumstances in which authorisation may not be refused in the State of residence and, in Ms Petru's view, it follows that a lack of material resources in a hospital constitutes grounds for granting the authorisation. It is argued that support for this interpretation is to be found in Article 35 of the Charter of Fundamental Rights of the European Union, which enshrines the right to health care.

13. The Romanian Government and the UK Government, on the other hand, contend that Article 22 of Regulation No 1408/71, interpreted in the light of Article 56 TFEU, gives no entitlement to an authorisation where there is a lack of material resources in the State of residence. That situation is not covered by Article 22; nor can it be inferred from the expression 'equally effective', which is used in the case-law of the Court of Justice. Moreover, it would be difficult to prove that such a situation existed, particularly if there were no independent opinion, certified by a doctor, testifying to such a shortage. Both governments argue, therefore, that EU law does not preclude the refusal of

authorisation under Article 22 of Regulation No 1408/71, such as the refusal issued by the Casa Județeană de Asigurări de Sănătate Sibiu. Even if, hypothetically, a shortage of resources would lead to authorisation, the Romanian Government maintains that it was never proved in the course of the main proceedings that such a situation existed.

14. The Commission has taken an intermediate stance, accepting that a structural shortage of medical resources is something that would justify an authorisation under Article 22 of Regulation No 1408/71, interpreted in the light of Article 56 and of Article 35 of the Charter. However, the Commission also accepts that such an authorisation could be granted only following an appraisal that takes into consideration all the circumstances of the particular case, which is a matter for the referring court.

V – **Assessment**

15. This request for a preliminary ruling raises two separate questions, of widely differing degrees of difficulty when it comes to providing a response. The first question is whether a deficiency or shortage of resources in a hospital may, in certain circumstances, amount to a situation in which it is not possible to provide a particular healthcare service within an appropriate time-frame in that Member State, even though it is included among the benefits covered by that Member State's health system. The second question is whether the same would also hold true in circumstances where such shortages or deficiencies affecting the healthcare facilities in the Member State are not of an occasional or localised nature, but, on the contrary, are the result of a situation which affects the entire system and therefore extends over a long period of time, owing to a range of different factors, whether natural, technological, economic, political or social.

16. In addressing both those issues, I think it is helpful to rehearse briefly the main legislation and case-law of relevance, which will make it possible to undertake a detailed analysis of Ms Petru's case.

17. Clearly, it is necessary to start with Article 22 of Regulation No 1408/71, since that provision expressly recognises the right of any patient to seek authorisation from the competent national authority to go to the territory of another Member State to receive the treatment appropriate to his condition. Article 22(2) of Regulation No 1408/71 adds that the authorisation must be given where the treatment in question is among the benefits provided for by the legislation of the patient's State of residence, and where the benefit cannot be provided to the patient within the necessary time in each particular case. [3]

18. Aside from this, Member States are free to provide that residents who are insured may receive healthcare services in other Member States in circumstances other than those contemplated in Article 22 of Regulation No 1408/71. In these cases, as I will now go on to explain, the conduct of such Member States will be governed by the Treaty provisions on free movement. [4]

19. The Court of Justice has interpreted those provisions on the basis of the freedom to provide services but also takes into consideration the particular and very diverse circumstances that characterise the healthcare sector in Europe.

3 — See, inter alia, Rodière, P., *Droit social de l'Union Européenne*, second edition, LGDJ, Paris, 2014, p. 725 et seq.; De la Rosa, S., 'The Directive on cross-border healthcare or the art of codifying complex case law', *Common Market Law Review*, 49, 2012; Van der Mei, A.P., 'Cross-border access to medical care within the European Union: Some reflections on the judgments in Decker and Kohll', *Maastricht Journal of European and Comparative Law*, Vol. 5, No 3, 1998; and Lewalle, H., and Palm, W., 'Quel est l'impact de la jurisprudence européenne sur l'accès aux soins à l'intérieur de l'Union européenne?', *Revue Belge de la Sécurité Sociale*, No 4, 2001.

4 — See *Decker*, C-120/95, EU:C:1998:167, paragraph 34 et seq.; *Kohll*, C-158/96, EU:C:1998:171, paragraph 35; and *Vanbraekel and Others*, C-368/98, EU:C:2001:400, paragraph 40 et seq.

20. In *Decker* and *Kohll*,[5] the Court of Justice confirmed that healthcare services, including those provided under national health systems, were services of an economic nature and, as such, were subject to the Treaty rules on free movement. This meant that EU law protection can extend to situations other than those specifically mentioned in Article 22 of Regulation No 1408/71.

21. In the case of medical services entailing admittance to hospital, *Smits and Peerbooms*[6] clarified several important points, starting with the acknowledgment that Member States do have a general power to require those receiving medical services in another Member State at the expense of the State of residence to obtain authorisation, whether the health insurance scheme is one involving benefits in kind or is based on reimbursement.[7] That judgment also provided important guidance for assessing the 'necessity' of the treatment sought by the patient in another Member State.[8] In this regard, the Court of Justice stated that Member States may withhold authorisation on the grounds that the treatment is unnecessary only if the same or equally effective treatment can be obtained in good time in the Member State of residence.[9]

22. The case-law has established that, in order to determine whether treatment which is equally effective for the patient can be obtained in good time in the Member State of residence, the competent authority 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, but also of his medical history.[10] Needless to say, these matters must be properly confirmed by medical staff, in order to enable the court to assess all the circumstances on the basis of adequate evidence rather than the subjective views of each individual patient.

23. Accordingly, it can be seen from this case-law, taken as a whole, that a resident of a Member State who is insured under a national health system is entitled to travel to another Member State, at the expense of the welfare system of the State of residence, if the same or equally effective treatment can be obtained in good time in that other Member State but not in the State of residence. In those circumstances, the system under which the patient is insured is to cover all the costs incurred abroad. If, on the other hand, those conditions are not met, it will still be open to the patient to go abroad to receive the service to which he was entitled in the State of insurance, but he will be able to reclaim the cost of the treatment at the price applicable in the State of insurance rather than in the place where the service was provided.[11]

24. I shall now address the two questions raised in the present case.

25. The first question to be considered relates to *occasional* shortages of the resources needed to provide a medical service and it does not, of itself, present any particular difficulty. It is clear that Regulation No 1408/71 does not distinguish between the various reasons why a particular service cannot be provided in good time. Whether the reason is that the standard of the physical infrastructure is too low for the required surgery (in this case) to be carried out, or whether the deficiency lies in a shortage of staff — that is to say, of medical professionals able to carry out the necessary operation — the result must be the same.

5 — *Decker and Kohll*, cited in footnote 4 above.

6 — *Smits and Peerbooms*, C-157/99, EU:C:2001:404.

7 — Ibid., paragraphs 55 to 59.

8 — Ibid., paragraph 99 et seq.

9 — Ibid., paragraph 103.

10 — See *Watts*, C-372/04, EU:C:2006:325, paragraphs 46 to 62, and *Elchinov*, C-173/09, EU:C:2010:581, paragraph 66.

11 — See, inter alia, *Müller-Fauré and van Riet*, C-385/99, EU:C:2003:270, paragraphs 98 and 106, and *Elchinov*, cited in footnote 10 above, paragraph 80.

26. There is always the possibility, especially in smaller Member States, that a particular accident or the occurrence of a particular event in a medical establishment, which may be the only establishment in that Member State able to provide the medical service required, leads to a situation where that service cannot be provided, at least not in good time, for reasons of material shortages alone.

27. Broadly speaking, therefore, the question should be answered in the positive, in other words, to the effect that, just as in the case of a shortage of staff, shortages relating to medical facilities can also place the Member State under a duty, by virtue of the second subparagraph of Article 22(2) of Regulation No 1408/71, to grant authorisation in relation to provision of the medical service in question.

28. I shall now move on to the second question. This brings me to the real problem raised by this reference for a preliminary ruling, which is not, however, one of principle but one of scale, so to speak. To be more specific, the real problem arises where the shortage of material resources for carrying out the medical treatment in question occurs on a scale which goes beyond the occasional, localised and essentially incidental and becomes the manifestation of a structural, generalised and prolonged deficiency, or what we might call a 'systemic' deficiency.

29. I should start by saying that the Court is not asked to determine whether this is the case in Romania. As the Court has stated on numerous occasions, in the context of preliminary ruling proceedings, it has jurisdiction to rule on the interpretation or validity of Community provisions only on the basis of the facts that the national court puts before it. [12]

30. The point is that, by conveying the applicant's description of the health service in that country, the national court has presented the Court with a scenario that definitely goes beyond an occasional and localised situation. The referring court gives a picture of a healthcare crisis which does not appear to be short-term, but, on the contrary, indefinite, and which relates to the whole State in a generalised way.

31. Confronted, then, with that unfortunate scenario, which the Court is not required to confirm, it is clear that a solution is not to be looked for in the second subparagraph of Article 22(2) of Regulation No 1408/71. By definition, a Member State finding itself in such circumstances would be unable to meet the costs engendered by a mass health-related exodus of those covered by its national health system towards other Member States.

32. Moreover, strict application of that provision in a situation such as that described here would not sit easily with the case-law of the Court. As we know, one of the limits imposed on the freedom to provide services in the healthcare sector is where the healthcare services in the patient's State of residence are 'put at risk'. As the Court had occasion to remark in *Müller-Fauré and Van Riet* and in *Watts*, it is necessary to avoid 'patient migration [which might] … put at risk the competent Member State's planning and rationalisation efforts in the vital healthcare sector so as to avoid the problems of hospital overcapacity, imbalance in the supply of hospital medical care and logistical and financial wastage'. [13]

33. It must therefore be concluded that in a situation of the kind described, in which there are structural and prolonged deficiencies in hospital facilities, the second subparagraph of Article 22(2) of Regulation No 1408/71 does not require Member States to authorise a service that is among the benefits covered, even if this may effectively mean that certain healthcare services cannot be provided. That does not, of course, apply to situations where the viability of the welfare system in that Member State would not be put at risk by such authorisation.

12 — See, inter alia, *AC-ATEL*, C-30/93, EU:C:1994:224, paragraph 16; *Phytheron International*, C-352/95, EU:C:1997:170, paragraph 11; *Dumon and Froment*, C-235/95, EU:C:1998:365, paragraph 25; *WWF and Others*, C-435/97, EU:C:1999:418, paragraph 31; and *Stadt Papenburg*, C-226/08, EU:C:2010:10, paragraph 23.

13 — See, inter alia, *Müller-Fauré and van Riet*, cited in footnote 11 above, paragraph 91, and *Watts*, cited in footnote 10 above, paragraph 71.

34. In the light of the above, I shall now give a response to the question raised by the Tribunalul Sibiu in the specific case of Ms Petru.

35. According to the documents before the Court, Ms Petru decided to undergo surgery in Germany after observing for herself the resources available at the Institutul de Boli Cardiovasculare in Timișoara at the time of her sojourn there. The referring court must establish whether there are any expert opinions that confirm the lack of resources in that hospital or whether, on the contrary, that assessment is simply Ms Petru's personal view.

36. The referring court must assess, in the light of the facts recorded in the case file, whether one of those two situations is the case here and whether there was an occasional shortage of material resources or a situation characterised by structural and prolonged deficiencies in hospital facilities of the kind described in points 28 to 32 above.

37. In the light of the foregoing considerations, I therefore take the view that the second subparagraph of Article 22(2) of Regulation No 1408/71 requires Member States to authorise the provision of a service that is among the benefits covered, where an occasional and temporary deficiency in a particular hospital in that Member State means that it is effectively impossible to provide a service of that kind.

38. On the other hand, a Member State is not required to authorise the provision of a service that is among the benefits covered in a situation where there are structural and prolonged deficiencies in hospital facilities — even if this may effectively mean that certain healthcare services cannot be provided — except where such authorisation would not put at risk the viability of the welfare system in that Member State.

39. Those considerations must be applied to the individual case by the referring court, which alone has jurisdiction to assess the facts in the main proceedings, having regard to the reports of independent experts duly produced before it.

VI – **Conclusion**

40. In the light of the foregoing, I propose that the Court give the following answer to the question referred by the Tribunalul Sibiu:

The second subparagraph of Article 22(2) of Regulation No 1408/71 must be interpreted as meaning that a Member State is required to authorise the provision of a service that is among the benefits covered, where an occasional and temporary deficiency in a particular hospital in that Member State means that it is effectively impossible to provide a service of that kind.

On the other hand, the second subparagraph of Article 22(2) of Regulation No 1408/71 must be interpreted as meaning that a Member State is not required to authorise the provision of a service that is among the benefits covered in a situation where there are structural and prolonged deficiencies in hospital facilities — even if this may effectively mean that certain healthcare services cannot be provided — except where such authorisation would not put at risk the viability of the welfare system in that Member State.

The referring court must, having regard to the reports of independent experts duly produced before it, establish whether this was the case at the time when the applicant in the main proceedings sought authorisation under the second subparagraph of Article 22(2) of Regulation No 1408/71.