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Patient's religious beliefs and the cross-board healthcare (case C-243/19)

Przekonania religijne pacjenta a transgraniczna opieka zdrowotna (sprawa C-243/19)

Abstract
The subject of this paper is the judgment of the Court of Justice of the European Union from 29 October 2020 in case C-243/19. There are two important issues discussed: 1) if the patient's religious beliefs might be a reason for granting the prior authorization according to articles: 20(2) of Regulation No. 883/2004 and 8(5) and (6)(d) of Directive 2011/24, 2) the difference between the rules of the reimbursement of costs of cross-board healthcare set in the Regulation No. 883/2004 and in the Directive 2011/24.

Keywords
cross-board healthcare, prior authorization, patient's religious beliefs

Streszczenie
Przedmiotem opracowania jest wyrok TSUE z 29 października 2020 r. w sprawie C-243/19. Zostały w nim omówione dwa istotne zagadnienia: 1) czy przekonania religijne pacjenta mogą stanowić przesłankę wydania uprzedniej zgody, o której mowa w art. 20 ust. 2 rozporządzenia nr 883/2004 i w art. 8 ust. 5 i 6d dyrektywy nr 2011/24, 2) różnica pomiędzy zasadami zwrotu kosztów transgranicznej opieki zdrowotnej określonymi w rozporządzeniu 883/2004 i w dyrektywie nr 2011/24.

Słowa kluczowe
transgraniczna opieka zdrowotna, uprzednia zgoda, przekonania religijne pacjenta

JEL: K32

Introduction

The issues concerning cross-board healthcare, among other questions of granting/refusing the prior authorization, were the subject of many judgments of the Court of Justice of the European Union (CJEU). Those judgments were many times discussed and analyzed in the Polish Literature (Lach, 2006, 2007, 2009, 2011a, 2011b, 2012, 2015, 2016a, 2016b).

Nonetheless, there still occur new questions according to cross-board healthcare that need to be solved by the Court. The subject of this paper is the judgment from 29 October 2020 in case C-243/19, based on the refusal of prior authorization concerning the hospital treatment which could be provided effectively in the Member State of affiliation, but the method of the treatment is contrary to the patient's religious beliefs. There are two important issues signalized:

1) if the patient's religious beliefs might be a reason for granting the prior authorization according to articles: 20(2) of Regulation No. 883/2004 and 8(5) and (6)(d) of Directive 2011/24,

2) the difference between the rules of the reimbursement of costs of cross-board healthcare set in the Regulation 883/2004 and in the Directive 2011/24.

The facts of the case and questions on CJEU

The applicant's son, a minor who suffers from a congenital heart defect, had to have open-heart surgery. The applicant, who is affiliated to the healthcare system in Latvia, refused to consent to the use of a blood transfusion during the operation, on the grounds that he was a Jehovah's Witness. As the operation in question is not available in Latvia without the use of a blood transfusion, the applicant requested in order for his son to have the operation in Poland.

By the decision of 29 March 2016, the Nacionalais veselibas dienests (National Health Service, Latvia) refused to issue the form S2, which authorizes a person to receive certain types of scheduled healthcare, in particular, in a Member State of the European Union other than the State of affiliation. By the decision of 15 July 2016, the Ministry of Health upheld the health

service's decision, on the grounds that the operation at issue could be carried out in Latvia and that a person's medical situation and physical limitations alone must be taken into consideration for issuing the form S2 (prior authorization).

In the administrative proceeding the applicant argued, in particular, that he is a victim of discrimination since the vast majority of those affiliated to the healthcare system were able to receive the healthcare at issue without having to give up their religious beliefs.

The referring court is uncertain whether the Latvian health authorities were entitled to refuse to issue the S2 form permitting that treatment on the basis of solely medical criteria or whether they were also required in that regard to take account of the applicant's religious beliefs.

In those circumstances the Augstaka tiesa (Senats) (Supreme Court, Latvia) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

1. Must Article 20(2) of Regulation No. 883/2004, in conjunction with Article 21(1) of the Charter of Fundamental Rights of the European Union (in following: Charter), be interpreted as meaning that a Member State may refuse to grant the authorization referred to in Article 20(1) of that regulation where hospital care, the medical effectiveness of which is not contested, is available in the person's Member State of residence, even though the method of treatment used is contrary to that person's religious beliefs?

2. Must Article 56 TFEU and Article 8(5) of Directive 2011/24, in conjunction with Article 21(1) of the Charter, be interpreted as meaning that a Member State may refuse to grant the authorization referred to in Article 8(1) of that directive where hospital care, the medical effectiveness of which is not contested, is available in the person's Member State of affiliation, even though the method of treatment used is contrary to that person's religious beliefs?

Issues of the case

Patient's religious beliefs as a reason for granting the prior authorization

The CJEU stated that there was no medical justification for the applicant's son not being able to receive the treatment available in Latvia, and the applicant opposed it on the sole ground that it conflicted with his religious beliefs and expressed a wish for the operation at issue to be carried out without a transfusion, which was not possible in Latvia. Such a wish must not to be taking into account as a condition for the prior authorization referred to Article 20(1) of Regulation No. 883/2004.

Nonetheless, when the insured person's Member State of residence refuses to grant the prior authorization, that Member State implements the EU law, within the meaning of Article 51(1) of the Charter, and it is, therefore, required to respect the fundamental rights guaranteed by the Charter, including in particular those enshrined in Article 21 (judgment of 11 June 2020, Prokuratura Rejonowa w Słupsku, C-634/18, paragraph 42 and the case-law cited). The principle of equal treatment is a general principle of the EU law enshrined in Article 20 of the Charter, of which the principle of non-discrimination laid down in Article 21(1) of the Charter is a particular expression (judgments of 22 May 2014, Glatzel, C-356/12, paragraph 43, and of 5 July 2017, Fries, C-190/16, paragraph 29). The prohibition of all discrimination based on religion or belief is mandatory as a general principle of the EU law. It is sufficient in itself to confer on individuals a right which they may rely on as such in disputes between them in a field covered by the EU law (judgments of 17 April 2018, Egenberger, C-414/16, paragraph 76 and of 22 January 2019, Cresco Investigation, C-193/17, paragraph 76).

The refusal to grant the applicant the prior authorization provided for in Article 20(1) of Regulation No. 883/2004 establishes a difference in treatment indirectly based on religion. According to the settled case-law of the Court, it was noted that it is necessary to examine whether that difference in treatment is based on an objective and reasonable criterion (judgment of 9 March 2017, Milkova, C-406/15, paragraph 55). It is clear that the objective of the national legislation could be to protect public health and the rights of others by maintaining an adequate, balanced, and permanent supply of quality hospital care on the national territory and by protecting the financial stability of the social security system by controlling its costs and preventing, as far as possible, any wastage of financial, technical, and human resources (judgments of 12 July 2001, Smits and Peerbooms, C-157/99, paragraphs 76 to 79; of 16 May 2006, Watts, C-372/04, paragraphs 108 and 109; and of 5 October 2010, Elchinov, C-173/09, paragraph 43). Consequently, it cannot be excluded that the possible risk of seriously undermining the financial balance of a social security system may constitute a legitimate objective capable of justifying a difference in treatment based on religion.

In the described judgment it was in this context pointed out that in order to avoid a difference in treatment based on religion, the competent institution would be obliged to take account of the insured person's religious beliefs when implementing Article 20 of Regulation No. 883/2004. It is a very complicated issue, as such beliefs fall within the *forum internum* of that person and are, by their very nature, subjective (see, to that effect, judgment of 22 Janu-ary 2019, Cresco Investigation, C-193/17, paragraph 58 and the case-law cited). Furthermore, if the competent institution were obliged to take account of the insured person's religious beliefs, the potential additional costs, following from the refund of the costs of the benefits in kind provided by the institution of another Member State on behalf of the competent institution, could, given their unpredictability

and potential scale, be capable of entailing a risk in relation to the need to protect the financial stability of the health insurance system, which is a legitimate objective recognized by the EU law. Accordingly, a prior authorization system which does not take account of the insured person's religious beliefs but which is based exclusively on medical criteria may reduce such a risk and, therefore, appears to be appropriate for the purpose of achieving that objective. The Member State of affiliation would, in the absence of a prior authorization system based exclusively on medical criteria, face an additional financial burden which would be difficult to foresee and likely to entail a risk to the financial stability of its health insurance system.

In those circumstances not taking into account the insured person's religious beliefs, in examining a request for prior authorization for the purposes of the competent institution's assumption of the financial costs of healthcare scheduled in another Member State, appears to be a justified measure in the light of the objective mentioned above, which does not exceed what is objectively necessary for that purpose and satisfies the requirement of proportionality.

Having regard to the foregoing, the answer of the CJEU to the first question was that Article 20(2) of Regulation No. 883/2004, read in the light of Article 21(1) of the Charter, must be interpreted as not precluding the insured person's Member State of residence from refusing to grant that person the authorization provided for in Article 20(1) of that regulation, where hospital care, the medical effectiveness of which is not contested, is available in that Member State, although the method of treatment used is contrary to that person's religious beliefs.

Reimbursement of costs of cross-board healthcare — Regulation No. 883/2004 vs. Directive 2011/24

Regarding the second question, the Court has stated that Article 8(5) and (6)(d) of Directive 2011/24, read in the light of Article 21(1) of the Charter, must be interpreted as precluding a patient's Member State of affiliation from refusing to grant that patient the authorization provided for in Article 8(1) of that directive, where hospital care, the medical effectiveness of which is not contested, is available in that Member State, although the method of treatment used is contrary to that patient's religious beliefs, unless that refusal is objectively justified by a legitimate aim relating to maintaining treatment capacity or medical competence, and is an appropriate and necessary means of achieving that aim, which it is for the referring court to determine.

It should be noted that, in justifying its position, the CJEU drew attention to the creation of the directive 2011/24 and its purpose. The Court pointed out that the directive 2011/24 had codified the Court's case-law relating to the freedom to provide services guaranteed by Article 56 TFEU in the field of healthcare, while intending to achieve a more general, and also effective, application of principles developed on a case-by-case basis in that case-law. Therefore, in contrast to Article 20(2) of Regulation No. 883/2004, the first subparagraph of Article 7(4) of Directive 2011/24 provides that the costs of cross-border healthcare are to be reimbursed or paid directly by the Member State of affiliation up to the level of costs that would have been assumed by that Member State, had that healthcare been provided in its territory, without exceeding the actual costs of healthcare received. The reimbursement provided for by Article 7 of Directive 2011/24 may then be subject to a twofold limit. First, it is calculated on the basis of the fees for healthcare in the Member State of affiliation. Secondly, if the cost of the healthcare provided in the host Member State is lower than that of the healthcare provided in the Member State of affiliation, that reimbursement does not exceed the actual costs of the treatment received. Since the reimbursement of these costs under Directive 2011/24 is subject to that twofold limit, and by contrast with situations governed by Regulation No. 883/2004, the healthcare system of the Member State of affiliation is not liable to be faced with a risk of additional costs linked to the assumption of the cross-border healthcare costs.

In place of summary — Looking forwards: doctor's religious beliefs as a reason for the application of the prior authorization

Against the background of the judgment in case C-243/19 the possibility of another problem should also be seen: could the doctor's religious beliefs be a reason for the application of the prior authorization referred to Article 20(1) of Regulation No. 883/2004? The question is not only an academic and theoretical one, but it is related to the judgment of the Polish Constitutional Court from 7 October 2015 in Case K 12/14 regarding the so called "medical conscience clause". The issue of instruments ensuring patients the possibility of exercising their right to statutorily guaranteed healthcare services financed from public funds in a situation where, due to the submission by doctors of notifications about the exercise of the right to refuse to provide health services inconsistent with their conscience, the National Health Fund will be in practice deprived of concluding a contract for the provision of specific services, was discussed in another paper (Lach, 2016b). But there is no doubt that the prior authorization referred to Article 20(1) of Regulation No. 883/2004 may be requested as long as the conditions set in Article 20(2) of Regulation No. 883/2004 are met. In this context it needs to be highlighted that refusing to provide specified health services by a doctor always leads to postponing the moment of granting the guaranteed service.

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