ECLI:EU:C:2020:872

Provisional text

JUDGMENT OF THE COURT (Second Chamber)

29 October 2020 (*)

(Reference for a preliminary ruling – Social security – Regulation (EC) No 883/2004 – Article 20(2) – Directive 2011/24/EU – Article 8(1), (5) and (6)(d) – Health insurance – Hospital care provided in a Member State other than the Member State of affiliation – Refusal of prior authorisation – Hospital treatment which can be provided effectively in the Member State of affiliation – Article 21 of the Charter of Fundamental Rights of the European Union – Difference in treatment based on religion)

In Case C-243/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Augstākā tiesa (Senāts) (Supreme Court, Latvia), made by decision of 8 March 2019, received at the Court on 20 March 2019, in the proceedings

A

v

Veselības ministrija,

THE COURT (Second Chamber),

composed of A. Arabadjiev (Rapporteur), President of the Chamber, K. Lenaerts, President of the Court, acting as a Judge of the Second Chamber, A. Kumin, T. von Danwitz and P.G. Xuereb, Judges,

Advocate General: G. Hogan,

Registrar: M. Aleksejev, Head of Unit,

having regard to the written procedure and further to the hearing on 13 February 2020,

after considering the observations submitted on behalf of:

– A, by S. Brady, Barrister, P. Muzny, avocat, and E. Endzelis, advokāts,

– the Veselības ministrija, by I. Viņķele and R. Osis,

– the Latvian Government, initially by I. Kucina and L. Juškeviča, and subsequently by L. Juškeviča and V. Soņeca, acting as Agents,

– the Italian Government, by G. Palmieri, acting as Agent, and by M. Russo, avvocato dello Stato,

– the Polish Government, by B. Majczyna, M. Horoszko and M. Malczewska, acting as Agents,

– the European Commission, by B.-R. Killmann, A. Szmytkowska and I. Rubene, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 30 April 2020,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 20(2) of 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, and corrigendum OJ 2004 L 200, p. 1), Article 8(5) of 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), Article 56 TFEU and Article 21(1) of the Charter of Fundamental Rights of the European Union ('the Charter').

2 The request has been made in proceedings between A and the Veselības ministrija (Ministry of Health, Latvia) concerning the refusal to grant an authorisation for A's son to receive healthcare in another Member State, which is publicly funded in Latvia.

Legal context

EU law

Regulation No 883/2004

3 Recitals 4 and 45 of Regulation No 883/2004 state:

'(4) It is necessary to respect the special characteristics of national social security legislation and to draw up only a system of coordination.

…

(45) Since the objective of the proposed action, namely the coordination measures to guarantee that the right to free movement of persons can be exercised effectively, cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale and effects of that action, be better achieved at Community level, the Community may adopt measures in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of

proportionality as set out in that article, this Regulation does not go beyond what is necessary, in order to achieve that objective.'

4 Article 20(1) to (3) of that regulation, entitled 'Travel with the purpose of receiving benefits in kind – Authorisation to receive appropriate treatment outside the Member State of residence', is worded as follows:

'1. Unless otherwise provided for by this Regulation, an insured person travelling to another Member State with the purpose of receiving benefits in kind during the stay shall seek authorisation from the competent institution.

2. An insured person who is authorised by the competent institution to go to another Member State with the purpose of receiving the treatment appropriate to his/her condition shall receive the 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 it applies, as though he/she were insured under the said legislation. The authorisation shall be accorded where the treatment in question is among the benefits provided for by the legislation in the Member State where the person concerned resides and where he/she cannot be given such treatment within a time limit which is medically justifiable, taking into account his/her current state of health and the probable course of his/her illness.

3. Paragraphs 1 and 2 shall apply *mutatis mutandis* to the members of the family of an insured person.'

Directive 2011/24

5 Recitals 1, 4, 6, 7, 8, 29 and 43 of Directive 2011/24 state:

'(1) According to Article 168(1) of the [FEU Treaty], a high level of human health protection is to be ensured in the definition and implementation of all Union policies and activities. This implies that a high level of human health protection is to be ensured also when the Union adopts acts under other Treaty provisions.

…

(4) Notwithstanding the possibility for patients to receive cross-border healthcare under this Directive, Member States retain responsibility for providing safe, high quality, efficient and quantitatively adequate healthcare to citizens on their territory. Furthermore, the transposition of this Directive into national legislation and its application should not result in patients being encouraged to receive treatment outside their Member State of affiliation.

…

(6) As confirmed by the Court of Justice … on several occasions, while recognising their specific nature, all types of medical care fall within the scope of the [FEU Treaty].

(7) This Directive respects and is without prejudice to the freedom of each Member State to decide what type of healthcare it considers appropriate. No provision of this Directive should be interpreted in such a way as to undermine the fundamental ethical choices of Member States.

(8) Some issues relating to cross-border healthcare, in particular reimbursement of healthcare provided in a Member State other than that in which the recipient of the care is resident, have already been addressed by the Court … This Directive is intended to achieve a more general, and also effective, application of principles developed by the Court … on a case-by-case basis.

…

(29) It is appropriate to require that also patients who seek healthcare in another Member State in other circumstances than those provided for in Regulation [No 883/2004] should be able to benefit from the principles of free movement of patients, services and goods in accordance with the [FEU Treaty] and with this Directive. Patients should enjoy a guarantee of assumption of the costs of that healthcare at least at the level as would be provided for the same healthcare, had it been provided in the Member State of affiliation. This should fully respect the responsibility of the Member States to determine the extent of the sickness cover available to their citizens and prevent any significant effect on the financing of the national healthcare systems.

…

(43) The criteria attached to the grant of prior authorisation should be justified in the light of the overriding reasons of general interest capable of justifying obstacles to the free movement of healthcare, such as planning requirements relating to the aim of ensuring sufficient and permanent access to a balanced range of high-quality treatment in the Member State concerned or to the wish to control costs and avoid, as far as possible, any waste of financial, technical and human resources. The Court … has identified several potential considerations: the risk of seriously undermining the financial balance of a social security system, the objective of maintaining on grounds of public health a balanced medical and hospital service open to all and the objective of maintaining treatment capacity or medical competence on national territory, essential for the public health, and even the survival of the population. …'

6 Article 7 of Directive 2011/24, entitled 'General principles for reimbursement of costs', provides:

'1. Without prejudice to Regulation [No 883/2004] and subject to the provisions of Articles 8 and 9, the Member State of affiliation shall ensure the costs incurred by an insured person who receives cross-border healthcare are reimbursed, if the healthcare in question is among the benefits to which the insured person is entitled in the Member State of affiliation.

…

3. It is for the Member State of affiliation to determine, whether at a local, regional or national level, the healthcare for which an insured person is entitled to assumption of costs and the level of assumption of those costs, regardless of where the healthcare is provided.

4. The costs of cross-border healthcare shall be reimbursed or paid directly by the Member State of affiliation up to the level of costs that would have been assumed by the Member State of affiliation, had this healthcare been provided in its territory without exceeding the actual costs of healthcare received.

Where the full cost of cross-border healthcare exceeds the level of costs that would have been assumed had the healthcare been provided in its territory the Member State of affiliation may nevertheless decide to reimburse the full cost.

…

8. The Member State of affiliation shall not make the reimbursement of costs of cross-border healthcare subject to prior authorisation except in the cases set out in Article 8.

9. The Member State of affiliation may limit the application of the rules on reimbursement for cross-border healthcare based on overriding reasons of general interest, such as planning requirements relating to the aim of ensuring sufficient and permanent access to a balanced range of high-quality treatment in the Member State concerned or to the wish to control costs and avoid, as far as possible, any waste of financial, technical and human resources.

…'

7 As set out in Article 8 of that directive, entitled 'Healthcare that may be subject to prior authorisation':

'1. The Member State of affiliation may provide for a system of prior authorisation for reimbursement of costs of cross-border healthcare, in accordance with this Article and Article 9. The system of prior authorisation, including the criteria and the application of those criteria, and individual decisions of refusal to grant prior authorisation, shall be restricted to what is necessary and proportionate to the objective to be achieved, and may not constitute a means of arbitrary discrimination or an unjustified obstacle to the free movement of patients.

2. Healthcare that may be subject to prior authorisation shall be limited to healthcare which:

(a) is made subject to planning requirements relating to the object of ensuring sufficient and permanent access to a balanced range of high-quality treatment in the Member State concerned or to the wish to control costs and avoid, as far as possible, any waste of financial, technical and human resources and:

(i) involves overnight hospital accommodation of the patient in question for at least one night; or

(ii) requires use of highly specialised and cost-intensive medical infrastructure or medical equipment;

…

5. Without prejudice to points (a) to (c) of paragraph 6, the Member State of affiliation may not refuse to grant prior authorisation when the patient is entitled to the healthcare in question in accordance with Article 7, and when this healthcare cannot be provided on its territory within a time limit which is medically justifiable, based on an objective medical assessment of the patient's medical condition, the history and probable course of the patient's illness, the degree of the patient's pain and/or the nature of the patient's disability at the time when the request for authorisation was made or renewed.

6. The Member State of affiliation may refuse to grant prior authorisation for the following reasons:

…

(d) this healthcare can be provided on its territory within a time limit which is medically justifiable, taking into account the current state of health and the probable course of the illness of each patient concerned.

…'

Latvian law

8 Point 293 of Ministru kabineta noteikumi Nr. 1529 'Veselības aprūpes organizēšanas un finansēšanas kārtība' (Cabinet Regulation No 1529 on organising and funding the healthcare system) of 17 December 2013 (*Latvijas Vēstnesis*, 2013, No 253), in the version applicable to the main proceedings ('Regulation No 1529'), provided:

'Pursuant to [Regulation No 883/2004] and to Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing [Regulation No 883/2004 (OJ 2009 L 284, p. 1)], the [health service] shall issue the following documents certifying a person's right to receive publicly funded healthcare in another Member State of the [European Union] or the [European Economic Area (EEA)] or in Switzerland:

…

293.2. the S2 form, called "Certificate of entitlement to scheduled treatment" ("the S2 form"), which allows the holder to receive the scheduled healthcare noted in the form, in the country and within the deadline given in it …'

9 Under point 310 of Regulation No 1529:

'The [health service] shall issue the S2 form to a person who is entitled to receive publicly funded healthcare and who wishes to receive scheduled healthcare in another Member State of the European Union, the EEA, or in Switzerland, if the following cumulative conditions are met:

310.1. the healthcare is publicly funded in accordance with the rules applicable to such care;

310.2. at the date of examination of the request, none of the healthcare providers mentioned in point 7 of this regulation can provide the healthcare and a reasoned opinion issued by the provider in question to that effect has been obtained;

310.3. the person needs the healthcare in question to avoid an irreversible deterioration in his or her vital functions or state of health, taking into account the person's state of health at the time he or she is examined and the foreseeable course of the illness.'

10 Point 323.2 of Regulation No 1529 provided that it was for the competent health service to decide on granting a prior authorisation for scheduled heart surgery in the hospital of a Member State of the European Union, in a Member State of the EEA or in Switzerland.

11 Point 324 of that regulation provided that the health service could refuse to grant the prior authorisation under the following conditions:

'324.2. if the healthcare treatment can be provided in Latvia within the following period (except where waiting is precluded by the person's state of health and the foreseeable course of the illness

and in so far as that is stated in the medical document referred to in point 325.2 or 325.3 of this regulation):

…

324.2.2. in the case of the hospital treatment referred to in points 323.2 and 323.3: 12 months;

…’

12 Point 328 of that regulation provided:

‘The [health service] shall reimburse the expenses incurred by persons who are entitled to receive publicly funded healthcare in Latvia where those persons received healthcare in another Member State [of the European Union] or of the EEA or in Switzerland, and paid for that care out of their own funds:

328.1. in accordance with the provisions of Regulation No 883/2004 and Regulation No 987/2009, as well as the conditions governing the expenses relating to the healthcare provided by the State in which those persons received the healthcare, and having regard to the information provided by the competent authority of the Member State of the European Union or the EEA, or of the Swiss Confederation, in respect of the amount which is to be reimbursed to those persons, where:

…

328.1.2. the [health service] has adopted a decision to issue an S2 form to those persons, yet those persons have paid for that healthcare out of their own funds;

328.2 having regard to the scale of fees for healthcare treatments, which was established at the time those persons received such treatments, or having regard to the extent of compensation for expenses in accordance with the legal framework relating to the procedure for the reimbursement of medicine and medical equipment intended for hospital care, at the time that that medicine and medical equipment was acquired, where:

328.2.1 those persons have received scheduled healthcare (including that which requires prior authorisation), without prejudice to the situation referred to in Point 328.1.2. of the present regulation and that treatment is among those paid for, according to the procedure laid down in the present regulation, out of public funds in [Latvia].

…’

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

13 The applicant’s son, a minor who suffers from a congenital heart defect, had to have open-heart surgery.

14 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 ground 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, that the Nacionālais veselības dienests (National Health Service, Latvia) (‘the health service’) issue an S2 form for his

son; that form authorises 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 decision of 29 March 2016, the health service refused to issue that form. By 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.

15 The applicant in the main proceedings brought an action before the administratīvā rajona tiesa (District Administrative Court, Latvia) in order to obtain a favourable administrative measure for his son recognising the right to receive scheduled healthcare. By judgment of 9 November 2016, that court dismissed the action.

16 On appeal, the Administratīvā apgabaltiesa (Regional Administrative Court, Latvia) upheld that judgment, by judgment of 10 February 2017, on the ground that the cumulative conditions laid down in point 310 of Regulation No 1529 had to be fulfilled in order for the S2 form to be issued. That court found that the medical procedure at issue in the main proceedings, treatment which is publicly funded in Latvia, was indeed necessary to avoid the irreversible deterioration of the vital functions or health of the applicant's son. However, at the time the request to issue the S2 form was under consideration, the hospital had confirmed that that procedure could be carried out in Latvia. Furthermore, that court found that it was not possible to infer from the applicant's refusal of such a transfusion that the hospital concerned was unable to provide the medical procedure in question and it concluded that one of the conditions required for the issue of the S2 form was not fulfilled.

17 The applicant in the main proceedings brought an appeal on a point of law before the referring court, arguing, 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 Ministry of Health argues that that appeal is unfounded on the ground that the rule set out in point 310 of Regulation No 1529 is mandatory and does not provide for a discretionary power for the competent authority when it adopts an administrative act. That rule has to be read in conjunction with point 312.2 of that regulation, from which it is apparent that only clear medical justifications are decisive. The Ministry of Health argues that the applicant, in essence, asks for criteria to be taken into account which the legislature did not provide for. It states that the national regulations provide for reasonable limitations, which ensure, as far as possible, a rational allocation of financial resources and which protect the interests of society as a whole in relation to the availability of quality healthcare in Latvia.

18 The applicant's son had heart surgery in Poland on 22 April 2017.

19 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 A's religious beliefs.

20 In those circumstances the Augstākā tiesa (Senāts) (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], be interpreted as meaning that a Member State may refuse to grant the authorisation 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 authorisation 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?'

Consideration of the questions referred

The first question

21 By its first question, the referring court asks, in essence, whether Article 20(2) of Regulation No 883/2004, read in conjunction with Article 21(1) of the Charter, must be interpreted as precluding the insured person's Member State of residence from refusing that person the authorisation 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.

22 At the outset, it must be borne in mind that, according to recitals 4 and 45 of Regulation No 883/2004, the purpose of that regulation is to coordinate Member States' social security systems in order to guarantee that the right to free movement of persons can be exercised effectively. That regulation modernised and simplified the rules contained in 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), while retaining the same objective as the latter (judgment of 6 June 2019, *V*, C-33/18, EU:C:2019:470, paragraph 41).

23 In accordance with Article 20(1) of Regulation No 883/2004, an insured person travelling to another Member State for medical treatment must, as a rule, seek authorisation from the competent institution.

24 The purpose of the first sentence of Article 20(2) of Regulation No 883/2004 is to confer a right to the 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 of the Member State in which the benefits are provided as if the person concerned was covered by that latter institution. Insured persons are thus granted rights which they would not otherwise have since, as they involve reimbursement by the institution of the place of stay in accordance with the legislation administered by it, those rights cannot by definition be guaranteed to those persons under the legislation of the competent Member State alone (see, to that effect, judgment of 23 October 2003, *Inizan*, C-56/01, EU:C:2003:578, paragraph 22). In accordance with that regulation, insured persons thus benefit from rights which are not conferred on them by the free movement of services, as enshrined in Article 56 TFEU and given specific expression to by Directive 2011/24 in the area of healthcare.

25 The sole purpose of the second sentence of Article 20(2) of Regulation No 883/2004 is to identify the circumstances in which the competent institution is precluded from refusing the authorisation sought on the basis of Article 20(1) (see, to that effect, judgment of 5 October 2010, *Elchinov*, C-173/09, EU:C:2010:581, paragraph 39 and the case-law cited). That second sentence of Article 20(2) 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 20(1). The first condition requires that the treatment in question must 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 or her current state of health and the probable course of his or her illness (see, to that effect, judgment of 9 October 2014, *Petru*, C-268/13, EU:C:2014:2271, paragraph 30).

26 In the present case, it is not denied that the treatment at issue in the main proceedings is provided for by Latvian law and that the first condition of the second sentence of Article 20(2) of Regulation No 883/2004 has been fulfilled in the main action.

27 By contrast, the referring court states that the matter at issue in the main proceedings is the determination of whether the second condition laid down in that provision has been fulfilled.

28 In that regard, 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 (judgment of 9 October 2014, *Petru*, C-268/13, EU:C:2014:2271, paragraph 31 and the case-law cited).

29 In order to assess whether such a treatment exists, the Court has stated that the competent institution is required to have regard to all the circumstances of each specific case, taking due account not only of the patient's medical condition at the time when authorisation is sought and, where appropriate, the degree of pain or the nature of the patient's disability, but also of his or her medical history (see, to that effect, judgments of 16 May 2006, *Watts*, C-372/04, EU:C:2006:325, paragraph 62; of 5 October 2010, *Elchinov*, C-173/09, EU:C:2010:581, paragraph 66; and of 9 October 2014, *Petru*, C-268/13, EU:C:2014:2271, paragraph 32).

30 It follows from that case-law that the examination of all the circumstances of each specific case which must be taken into consideration in the light of Article 20(2) of Regulation No 883/2004, in order to determine whether the same or equally effective treatment can be given in the insured person's Member State of residence, constitutes an objective medical assessment. Accordingly, it must be held that the prior authorisation system provided for in Article 20 of Regulation No 883/2004 takes into account exclusively the patient's medical condition, not his or her personal choices as regards medical care.

31 In the present case, it is common ground that the operation at issue in the main proceedings was necessary in order to avoid an irreversible deterioration in the vital functions or state of health of the applicant's son, taking into account the examination of his condition and the foreseeable course of his illness. Furthermore, that operation could be carried out in Latvia using a blood transfusion and there was no medical justification to employ another method of treatment. The applicant opposed such a transfusion on the sole ground that it conflicted with his religious beliefs and expressed a wish for the operation at issue in the main proceedings to be carried out without a transfusion, which was not possible in Latvia.

32 It is, therefore, clear from the documents before the Court that there was no medical justification for the applicant's son not being able to receive the treatment available in Latvia.

33 Consequently, to the extent that the second condition in the second sentence of Article 20(2) of Regulation No 883/2004 consists exclusively in examining the patient's medical condition and medical history, the probable course of his or her illness, the degree of his or her pain and/or the nature of his or her disability, and does not, therefore, involve taking into account the patient's

personal choice as regards treatment, the decision by the Latvian authorities to refuse to issue the S2 form cannot be considered incompatible with that provision.

34 That being so, when the insured person's Member State of residence refuses to grant the prior authorisation provided for in Article 20(1) of Regulation No 883/2004, that Member State implements 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, EU:C:2020:455, paragraph 42 and the case-law cited).

35 In that regard, it should be borne in mind that the principle of equal treatment is a general principle of 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, EU:C:2014:350, paragraph 43, and of 5 July 2017, *Fries*, C-190/16, EU:C:2017:513, paragraph 29).

36 Furthermore, the prohibition of all discrimination based on religion or belief is mandatory as a general principle of EU law. That prohibition, which is laid down in Article 21(1) of the Charter, 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 EU law (judgments of 17 April 2018, *Egenberger*, C-414/16, EU:C:2018:257, paragraph 76, and of 22 January 2019, *Cresco Investigation*, C-193/17, EU:C:2019:43, paragraph 76).

37 According to the settled case-law of the Court, that general principle requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified. A difference in treatment is justified if it is based on an objective and reasonable criterion, that is, whether the difference relates to a legally permitted aim pursued by the legislation in question, and it is proportionate to the aim pursued by the treatment (judgment of 9 March 2017, *Milkova*, C-406/15, EU:C:2017:198, paragraph 55).

38 Accordingly, it is for the referring court to ascertain, in the first place, whether the refusal to grant the applicant the prior authorisation provided for in Article 20(1) of Regulation No 883/2004 establishes a difference in treatment based on religion. If that is the case, its task is then to examine, in the second place, whether that difference in treatment is based on an objective and reasonable criterion. However, the Court, giving a preliminary ruling on a reference, has jurisdiction, in the light of the information in the file, to give clarifications to guide the referring court in giving judgment in the main proceedings (judgment of 2 December 2009, *Aventis Pasteur*, C-358/08, EU:C:2009:744, paragraph 50).

39 In the present case, it appears that the national legislation at issue in the main proceedings is formulated in a neutral way and does not give rise to direct discrimination based on religion.

40 It is also important to examine whether, in the light of the material in the file, that refusal brings about a difference in treatment which is indirectly based on religion or religious beliefs.

41 The referring court states that the applicant's religious beliefs affect that person's choice in the area of healthcare, in contrast to individuals whose health condition, or that of their children, requires a medical procedure of the kind at issue in the main proceedings, but who are not Jehovah's Witnesses. As the prohibition of blood transfusions is an integral part of the religious beliefs of Jehovah's Witnesses, they could not agree to undergo a medical procedure involving such transfusions. Since the Member State of residence does not cover the costs of a different treatment,

one allowed by their religious beliefs, the expenditure occasioned by it would have to be borne personally by individuals such as the applicant.

42 It therefore appears that an indirect difference in treatment is liable to arise in such a situation between, on the one hand, patients who undergo a medical procedure with a blood transfusion, the costs of which are assumed by the social security system of the Member State of residence, and, on the other, patients who, for religious reasons, decide not to have such a procedure in that Member State and to have recourse, in another Member State, to treatment which is not contrary to their religious beliefs, the costs of which are not assumed by the Member State of residence.

43 In the light of the foregoing, it must be noted that the refusal to grant the applicant in the main proceedings the prior authorisation provided for in Article 20(1) of Regulation No 883/2004 establishes a difference in treatment indirectly based on religion. It is, therefore, necessary to examine whether that difference in treatment is based on an objective and reasonable criterion.

44 The referring court states that the objective of the national legislation at issue in the main proceedings 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.

45 It must be noted that where a national measure falls within the field of public health, account must be taken of the fact that the health and life of humans rank foremost among the assets and interests protected by the FEU Treaty.

46 The Court has, in particular, pointed out that the number of hospitals, their geographical distribution, the mode of their organisation and the facilities with which they are provided, and even the nature of the medical services which they are able to offer, are all matters for which planning, generally designed to satisfy various needs, must be possible. For one thing, such planning seeks to ensure that there is sufficient and permanent access to a balanced range of high-quality hospital treatment in the State concerned. For another thing, it assists in meeting a desire to control costs and to prevent, as far as possible, any wastage of financial, technical and human resources. Such wastage would be all the more damaging because it is generally recognised that the hospital care sector generates considerable costs and must satisfy increasing needs, while the financial resources which may be made available for healthcare are not unlimited, whatever the mode of funding applied (judgments of 12 July 2001, *Smits and Peerbooms*, C-157/99, EU:C:2001:404, paragraphs 76 to 79; of 16 May 2006, *Watts*, C-372/04, EU:C:2006:325, paragraphs 108 and 109; and of 5 October 2010, *Elchinov*, C-173/09, EU:C:2010:581, paragraph 43).

47 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. The objective of maintaining a balanced medical and hospital service open to all may also fall within the derogations on grounds of public health in so far as it contributes to the attainment of a high level of health protection (see, by analogy, in the area of freedom to provide services, judgment of 5 October 2010, *Elchinov*, C-173/09, EU:C:2010:581, paragraph 42 and the case-law cited).

48 As noted in paragraph 24 above, the insured person who has obtained the prior authorisation provided for in Article 20(1) of Regulation No 883/2004 must in principle, for the period fixed by the competent institution, enjoy the benefits in kind provided on behalf of that competent institution by the institution of the Member State of stay, in accordance with the provisions of the legislation that institution administers, as if the insured person were insured with it. The Court has found, in

that regard, that the right thus conferred on the insured person consequently means that the cost of the treatment given is initially borne by the institution of the Member State of stay, in accordance with the legislation it administers, and the competent institution is subsequently to reimburse the institution of the Member State of stay under the conditions laid down in Article 35 of Regulation No 883/2004 (see, to that effect, judgment of 12 April 2005, *Keller*, C-145/03, EU:C:2005:211, paragraphs 65 and 66). Under that provision, the benefits in kind provided by the institution of a Member State on behalf of the institution of another Member State are, in accordance with the chapter to which the provision belongs, to be refunded in full.

49 As a result, in a situation where benefits in kind provided in the Member State of stay give rise to higher costs than those relating to benefits which would have been provided in the insured person's Member State of residence, the obligation to refund in full may give rise to additional costs for the Member State of residence.

50 As the referring court rightly acknowledged, such additional costs would be difficult to foresee if, in order to avoid a difference in treatment based on religion, the competent institution were obliged to take account of the insured person's religious beliefs when implementing Article 20 of Regulation No 883/2004, 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 January 2019, *Cresco Investigation*, C-193/17, EU:C:2019:43, paragraph 58 and the case-law cited).

51 Furthermore, as the Italian Government stated in its written observations, it is possible that national health systems may face a large number of requests for authorisation to receive cross-border healthcare which are based on religious grounds rather than on the insured person's medical situation.

52 If the competent institution were obliged to take account of the insured person's religious beliefs, such additional costs 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 recognised by EU law. Accordingly, a prior authorisation 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.

53 As regards the necessity for the legislation at issue in the main proceedings, it must be borne in mind that it is for the Member States to determine the level of protection which they wish to afford to public health and the way in which that level is to be achieved. Since that level may vary from one Member State to another, Member States should be allowed a measure of discretion (judgment of 12 November 2015, *Visnapuu*, C-198/14, EU:C:2015:751, paragraph 118 and the case-law cited).

54 It must, therefore, be held that the Member State of affiliation would, in the absence of a prior authorisation 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.

55 In those circumstances, not to take into account the insured person's religious beliefs, in examining a request for prior authorisation 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 in paragraph 52 above, which does not

exceed what is objectively necessary for that purpose and satisfies the requirement of proportionality noted in paragraph 37 above.

56 Having regard to the foregoing, the answer to the first question is 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 authorisation 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.

The second question

Admissibility

57 The Ministry of Health and the Latvian and Polish Governments argue that Directive 2011/24 is not relevant in the context of the main proceedings, as A did not seek prior authorisation for the competent institution to assume the costs of the cross-border healthcare for his son in accordance with that directive. In addition, at the hearing before the Court, it was also argued that A had failed to seek reimbursement of the cross-border healthcare received by his son within the one-year time limit required by the Latvian legislation transposing Directive 2011/24.

58 In that regard, it should be reiterated that 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, to that effect, judgments of 5 December 2006, *Cipolla and Others*, C-94/04 and C-202/04, EU:C:2006:758, paragraph 25; of 19 June 2012, *Chartered Institute of Patent Attorneys*, C-307/10, EU:C:2012:361, paragraph 32; and of 9 October 2014, *Petru*, C-268/13, EU:C:2014:2271, paragraph 23).

59 However, that is not the situation in the present case.

60 As to the reasons which led the referring court to enquire about the interpretation of Article 8(5) of Directive 2011/24, it is clear from the order for reference that the parties to the main proceedings disagree on the interpretation of that provision. The referring court asks whether that provision applies where the authorities of the Member State of residence refuse to grant the authorisation referred to in Article 8(1) of that directive in circumstances such as those at issue in the main proceedings. The referring court considers that the outcome of the main proceedings depends on the answer to be given to that question.

61 The interpretation requested, and the examination of the nature and scope of the requirement to obtain such a prior authorisation, relate to Article 20(2) of Regulation No 883/2004 and Article 8 of Directive 2011/24, in order to enable the referring court to ascertain whether A is entitled to the reimbursement in the Member State of affiliation of some or all of the costs of the cross-border hospital care provided to his son.

62 Consequently, the interpretation sought is not obviously unrelated to the facts of the main action or its purpose and the issue raised is not hypothetical, but relates to the facts at issue between the parties to the main proceedings, which it is for the referring court to determine. Furthermore, the

Court has before it the factual and legal material necessary to give a useful answer to the question submitted.

63 It will be for the referring court to determine whether the applicant in the main proceedings could have requested the prior authorisation for treatment at issue in the main proceedings in accordance with the national statutory provisions transposing Article 8 of Directive 2011/24 and whether a subsequent reimbursement request should be considered as having been lodged outside the statutory time limits. In that context, it must be found that such a request for reimbursement within the limits laid down in Article 7 of that directive is, implicitly but necessarily, contained in a request for full reimbursement under Regulation No 883/2004.

64 It follows that the second question is admissible.

Substance

65 By its second question, the referring court asks, in essence, whether 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 authorisation referred to 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.

66 As is apparent from recital 8 of Directive 2011/24, that directive has 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.

67 Accordingly, Article 7(1) of Directive 2011/24 provides that, without prejudice to Regulation No 883/2004 and subject to the provisions of Articles 8 and 9 of that directive, the Member State of affiliation must ensure that the costs incurred by an insured person who receives cross-border healthcare are reimbursed, if that healthcare is among the benefits to which the insured person is entitled in the Member State of affiliation.

68 Article 7(4) of Directive 2011/24 further 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 the Member State of affiliation, had this healthcare been provided in its territory without exceeding the actual costs of healthcare received.

69 Furthermore, Article 8 of that directive states that a Member State may provide for a system of prior authorisation for hospital care. However, that article specifies that such a system, including the criteria and the application of those criteria, and individual decisions of refusal to grant prior authorisation, must be restricted to what is necessary and proportionate to the objective to be achieved, and may not constitute a means of arbitrary discrimination or an unjustified obstacle to the free movement of patients.

70 Recital 43 of Directive 2011/24 states that the criteria attached to the grant of the prior authorisation should be justified in the light of the overriding reasons of general interest capable of justifying obstacles to the free movement of healthcare, such as planning requirements relating to the aim of ensuring sufficient and permanent access to a balanced range of high-quality treatment in the Member State concerned or to the wish to control costs and avoid, as far as possible, any waste of financial, technical and human resources.

71 In that regard, the Latvian Government submits in its written observations that the system of prior authorisation which implements Article 8(1) of Directive 2011/24 is intended to control costs and to ensure sufficient and permanent access to a balanced range of high-quality treatment. Since those are legitimate objectives, as is apparent from paragraphs 46 and 47 above, it remains for the referring court to determine whether the system in question is restricted to what is necessary and proportionate to achieve them.

72 As regards, first, the objective relating to the need to protect the financial stability of the social security system, it is important to note the existence of a systemic difference between the reimbursement system established by Regulation No 883/2004 and that provided for by Directive 2011/24.

73 In contrast to Article 20(2) of Regulation No 883/2004, the first subparagraph of Article 7(4) of Directive 2011/24 provides, as noted in paragraph 68 above, 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.

74 The reimbursement provided for by Article 7 of Directive 2011/24 may, therefore, 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.

75 Since reimbursement of that healthcare under Directive 2011/24 is subject to that twofold limit, the healthcare system of the Member State of affiliation is not liable to be faced with a risk, such as that noted in paragraphs 49 to 54 above, of additional costs linked to the assumption of the cross-border healthcare costs.

76 That interpretation is indeed supported by recital 29 of Directive 2011/24, which expressly states that that assumption of costs cannot have any significant effect on the financing of the national healthcare systems.

77 Accordingly, in the context of Directive 2011/24, and by contrast with situations governed by Regulation No 883/2004, the Member State of affiliation will not, as a rule, be exposed to any additional financial costs with respect to cross-border healthcare.

78 In such circumstances, such an objective cannot, as a rule, be relied on to justify the refusal to grant the authorisation provided for in Article 8(1) of Directive 2011/24 in circumstances such as those in the main proceedings.

79 Secondly, concerning the objective of maintaining treatment capacity or medical competence, it is for the referring court to examine whether the Latvian system of prior authorisation implementing Article 8(1) of Directive 2011/24 was restricted to what was necessary and proportionate to achieve that objective, when the Member State of affiliation refused to assume the costs of the cross-border hospital treatment provided to the applicant’s son at the level of what would have been provided for the same treatment in that Member State.

80 Accordingly, if the referring court finds that that is not the case, the Latvian authorities cannot make reimbursement of the costs of that treatment, at the level of what would be provided

for the same treatment in the Member State of affiliation, conditional on obtaining prior authorisation issued in accordance with Article 8(5) and (6)(d) of that directive.

81 On the contrary, if that court finds that that system of prior authorisation was restricted to what was necessary and proportionate in order to achieve that objective, it is important to note that Article 8(5) and (6)(d) of Directive 2011/24 must be interpreted as meaning that that latter provision takes account only of the patient's medical condition.

82 Indeed, there is no reason which seriously justifies different interpretations depending on whether the context is Article 20(2) of Regulation No 883/2004 or Article 8(5) and (6)(d) of Directive 2011/24, since in both cases the question is whether the hospital treatment required by the patient's medical condition can be provided on the territory of his or her Member State of residence within an acceptable time which ensures its usefulness and efficacy (see, by analogy, judgment of 16 May 2006, *Watts*, C-372/04, EU:C:2006:325, paragraph 60).

83 That being the case, when the Member State of affiliation refuses to grant the prior authorisation provided for in Article 8(1) of Directive 2011/24, on the ground that the requirements laid down in Article 8(5) have not been met, that Member State is implementing EU law, within the meaning of Article 51(1) of the Charter, so that it is required to respect the fundamental rights guaranteed by the Charter, inter alia those enshrined in Article 21 thereof.

84 In line with the considerations set out in paragraphs 41 and 42 above, such a refusal introduces a difference in treatment indirectly based on religion. As that difference in treatment pursues a legitimate objective of maintaining treatment capacity or medical competence, it is for the referring court to assess whether that difference is proportionate. It must in particular examine whether the taking into account of patients' religious beliefs when implementing Article 8(5) and (6)(d) of Directive 2011/24 gives rise to a risk for the planning of hospital treatment in the Member State of affiliation.

85 In the light of the foregoing considerations, the answer to the second question is 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 authorisation 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.

Costs

86 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring 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:

1. **Article 20(2) of Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, read in the light of Article 21(1) of the Charter of Fundamental Rights of the European Union, must be interpreted as not precluding the insured person's Member State of residence from refusing**

to grant that person the authorisation 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.

2. **Article 8(5) and (6)(d) of 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, read in the light of Article 21(1) of the Charter of Fundamental Rights of the European Union, must be interpreted as precluding a patient's Member State of affiliation from refusing to grant that patient the authorisation 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.**

[Signatures]

---

* Language of the case: Latvian.