EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

DECISION

Application no. 55021/15
Péter Géza JÁN
against Hungary

The European Court of Human Rights (Fourth Section), sitting on 28 November 2017 as a Committee composed of:

Faris Vehabović, *President,*
Carlo Ranzoni,
Péter Paczolay, *judges*,
and Andrea Tamietti, *Deputy Section Registrar,*

Having regard to the above application lodged on 20 October 2015,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant,

Having deliberated, decides as follows:

THE FACTS

1. The applicant, Mr Péter Géza Ján, is a Hungarian national, who was born in 1972 and lives in Budapest. He was represented before the Court by Mr S. Gergényi, a lawyer practising in Budapest.

2. The Hungarian Government ("the Government") were represented by their Agent, Mr Z. Tallódi, of the Ministry of Justice.

A. The circumstances of the case

3. The facts of the case, as submitted by the parties, may be summarised as follows.

4. Since 2000 the applicant has been suffering from multiple sclerosis. He has been treated on account of this ailment since 2006; however, the treatment has not been effective. Since 2009, he has received rehabilitation benefit.

5. In December 2010 the applicant underwent a surgical procedure aimed at improving the blood flow in his cerebrospinal veins, performed at a private clinic in Sofia, Bulgaria. The procedure was designed to treat a condition called "chronic cerebrospinal venous insufficiency" (CCSVI), which was argued by some researchers to be a factor contributing to multiple sclerosis. Other researchers doubted the very existence of this specific condition, its role in multiple sclerosis and the efficacy of the treatment. The procedure to improve the blood flow in the veins (hereinafter, the "CCSVI treatment") was not available in Hungary since in the opinion of the medical authorities, formed on the basis of the reports of medical experts (including the medical panel of the National Association of Patients Suffering from Multiple Sclerosis), the procedure was ineffective and dangerous on account of the risk of serious complications.

6. Prior to the treatment, the applicant had not requested the approval of the National Health Insurance Fund (*Országos Egészségbiztosítási Pénztár* – hereinafter "the OEP"), as required pursuant to Government Decree no. 227/2003.(XII.13.) on certain issues related to medical treatment outside the State (hereinafter, "the Treatment Abroad Decree" – see paragraph 19 below).

Rather, he financed the treatment himself, in the amount of 6,200 euros.

7. Subsequently, the applicant requested reimbursement of the costs incurred. In a letter dated 15 February 2011, the OEP informed the applicant that, under the rules of the Treatment Abroad Decree, the Fund could provide financial support for the costs of medical treatment provided in a foreign country if recourse to such treatment was found to be medically justified by the appropriate national professional institute. Recourse to medical treatment abroad was to be regarded as justified where such treatment was not available in Hungary and was indispensable to the patient's recovery.

8. The applicant submitted the last medical record received from the Bulgarian clinic and the medical records of 24 November 2010 and 12 May 2011, that is to say ones made before and after the surgery, issued by the outpatient department of the neurology clinic of Semmelweis University in Budapest – the institution that had been responsible for his regular treatment. These records contained no statements reporting any significant improvement in the applicant's health status.

9. In reply to the applicant's request, the Neurology Committee of the National Institute for Quality and Organisational Development in Health Care and Medicine ("the National Institute") in August 2011 issued an opinion in the matter in which it did not support the request. Referring to the joint report issued in January 2011 by the Neurology and the Radiology Departments, the report stated that at that time there was not sufficient evidence available to support the assertion that the treatment in question had had any valuable effect on the progress and symptoms of the disease. The

Committee pointed out that some individual and unchecked reports of improvement could in no way be seen as constituting evidence in the case of a disease which could improve of itself. The Committee added that clinical trials for examining the efficacy of the treatment were in progress in the United States and Italy; in Italy, however, the routine application of the procedure had been forbidden.

10. In an appeal lodged by the applicant with the Medical Research Council (*Egészségügyi Tudományos Tanács* – hereinafter "the ETT") on 6 September 2011, the applicant contested the professional position expressed by the National Institute. The ETT then asked an external expert to give an opinion on the treatment in the light of the applicant's medical status. Relying on this expert opinion, on 9 October 2012 the ETT confirmed that according to domestic, European, American and international reports and official records of test results, the condition which the treatment targeted was not proven to play a role in the occurrence of multiple sclerosis and the treatment itself was not proven to be effective. Reference was made to the concurring reports of the Hungarian Neurology Association and the medical panel of the National Association of Patients Suffering from Multiple Sclerosis, as well as to the position taken by the Multiple Sclerosis International Federation and the competent European medical associations. The ETT observed that on account of the lethal or serious complications experienced so far, the United States Food and Drug Administration considered this treatment dangerous and demanded a halt to such procedures in the treatment of multiple sclerosis.

11. Having regard to the absence of a supporting opinion from the medical bodies, the OEP dismissed the applicant's request for financial support for the costs of the treatment abroad. This decision of 24 October 2012 was upheld on appeal by the Office of Health Authorisation and Administrative Procedures on 3 January 2013.

12. The applicant sought judicial review.

13. On 13 October 2013 the Budapest Administrative and Labour Court held a hearing and asked the applicant to submit – in the context of an application by him for the appointment of an expert, and in addition to the list of general references to the medical literature he had already submitted – all the preoperative and postoperative medical reports he had. No medical reports were submitted.

14. On 6 March 2014 the court dismissed the applicant's action. In the reasoning of the judgment, the court stated that the three expert opinions already obtained unequivocally did not recommend the granting of the applicant's request for support, therefore the court saw no reason to appoint another expert.

15. On 23 February 2015 the applicant's petition for review was dismissed by the *Kúria* with the following reasoning:

"The [applicant] alleged that the final and binding judgment had been ill-founded because it had ignored his complaints related to the exercise of discretion by the administrative authorities and because of the expert evidence had not been taken; in this connection he also alleged a violation of his personal rights (right to health).

Under section 2(1) of the Treatment Abroad Decree, as in force at the material time, the [type of] support sought by the [applicant] could be provided where a person meeting the criteria laid down in section 1(2) had the supporting opinion of an institution of national competence operating in the medical field relevant for the disease and the required treatment under the supervision of the minister of health as a healing and preventive or organisational-methodological further-training and scientific-research institute or, in their absence, the supporting opinion of the institute specified under point b) [the National Institute]. The legislature conferred the task of establishing whether medical treatment was justified and of determining a patient's entitlement to the treatment on a [competent professional committee] [Treatment Abroad Decree section 2(3)]. Under Annex no. 1 to the Treatment Abroad Decree the professional committee was to form an opinion on the basis of the patient's medical examination and in the light of the patient's available medical files and was to issue a reasoned written decision as to whether the treatment in question was indeed successful in practice, whether there was a real chance of a successful outcome, whether the conditions for carrying out the treatment existed in a domestic medical institution or could be ensured by inviting a co-operating foreign expert [Treatment Abroad Decree section 2(2) and (5) and section 3(1)a)-b)].

Under section 3(2) of the Treatment Abroad Decree, the possibility of a remedy in respect of the professional bodies' decision was secured for a patient entitled to medical treatment or for his or her relative within the meaning of Article 685 point b) of the Civil Code and for the first-level social-security organ (the OEP). The remedy was to be adjudicated by the ETT. This latter provision also specified the scope of the remedy: the above persons could request a review of the professional committee's decision where they disagreed with the decision or did not find it sufficiently well-founded. In a decision which found medical treatment abroad justified, the professional committee or the ETT was to recommend a foreign medical-health institution[; the] recommendation was to be made after having obtained information about the health institution's readiness to accept the patient, about the date of his or her admission and about the prospective duration and costs of the treatment.

From the above Decree, it can be seen that for the provision of financial support for the costs of medical treatment abroad and, consequently, for a social-security authority decision granting such a request, a *sine qua non* condition was a decision by the professional bodies designated by the Government finding the treatment justified. The Decree allowed no discretion in this respect to the social-security bodies and compliance with the above Decree cannot be considered as a restriction by the administrative bodies on the [applicant]'s rights or lawful interests in violation of section 1(3) of the General Rules of Administrative Procedure and Services Act ("the Administrative-Procedure Act").

The reasons for the professional bodies' decision – bodies which proceeded in full compliance with the Treatment Abroad Decree – are clearly stated both in the first and the second-level decisions; and the [applicant] specified neither before the administrative bodies nor before the court or in the review proceedings what other reasons those decisions should contain under section 72(1)(e) and (ec) of the Administrative-Procedure Act. Against the professional bodies' decision, the [applicant] could and did, in the administrative proceedings, have recourse to the remedy provided under section 3(2) of Treatment Abroad Decree; his request was

adjudicated by the ETT on the merits, and the reasons for the decision were duly elaborated in the second-level body's decision. The Labour Court therefore correctly found that the above provisions of the Administrative-Procedure Act had not been violated.

Moreover, the [applicant] erroneously alleged a violation of law in connection with the expert evidence not being taken. The issue disputed by the [applicant] was determined by the ETT in the review proceedings initiated by the [applicant] against the National Institute's decision; and the reasons for the ETT decision are clearly specified in the second-level decision as well. The Decree, as in force at the material time, did not prescribe the provision of the support sought by the [applicant] as a right: it was a support that 'may be provided' by the OEP. The social-security bodies gave their decisions by assessing the circumstances specified in the Treatment Abroad Decree, circumstances which were adjudged identically by the professional bodies and the medical expert of the OEP. On the basis of the above considerations it cannot be concluded, contrary to the [applicant]'s allegations, that, in giving a discretionary decision, the administrative organ failed to comply with its obligation concerning the establishment of the facts, whereby the final decision would be in violation of the law [Article 339/B of the Code of Civil Procedure].

Furthermore, the [applicant] erroneously alleged a violation of Article 76 § 1 of the Civil Code. Social-security bodies give the decisions falling within their remit on the basis of the laws which govern the social-security services; and they cannot disregard the rules governing entitlement to such services by relying on the provisions of other laws, including the Civil Code rules governing a person's financial and personal rights."

16. The applicant did not lodge a constitutional complaint; he contested neither the decisions of the Administrative and Labour Court and the *Kúria* nor the constitutionality of the laws underlying those decisions.

17. In his submissions to the Court, the applicant stated that the procedure in question was medically recognised and admissible in Bulgaria, Germany, Poland, Slovenia, the Czech Republic, Romania and the United Kingdom. He explained that while the treatment administered to him under the domestic social-security scheme had brought no improvement, the treatment carried out at the Bulgarian clinic had brought some relief; in particular, his speech had improved.

B. Relevant domestic law

18. Under the Benefits of Mandatory Health Insurance Act (Act no. LXXXIII of 1997), financial support for medical treatment which has been received in a foreign country and is not available in Hungary may be provided for insured persons from the Health-Care Fund.

19. Under section 2(1) of the Treatment Abroad Decree (see paragraph 6 above) as in force at the material time, the OEP may provide financial support for the costs of medical treatment abroad for a person entitled to such treatment where such an entitled person possesses:

a) the support of an institution of national competence operating in the medical field relevant for the disease and the required treatment ... or, in the absence of such,

b) the support of the National Institute.

Subsection (5) provides that medical treatment abroad is considered justified where the treatment provided in the foreign country has already proved to be successful in practice, where there is a real chance of a successful outcome, and where the conditions for the application of the treatment do not exist in any domestic medical institution and cannot be ensured by inviting a co-operating foreign expert.

20. Decision no. Mfv.III.10.846/2012/3 delivered by the *Kúria* on 16 September 2013 (BH2014/57) contains the following passages:

> "The *Kúria* notes at the outset that no right to the support sought by the [applicant] can be deduced either from the Fundamental Law or ... Directive [no. 2011/24/EU of the European Parliament and the Council of the European Union]. The Fundamental Law, similarly to the former Constitution, provides for the right to physical and mental health, a right whose prevalence is ensured by, among other instruments, the health-insurance laws specifying the conditions for availing of health-care services.
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> In interpreting Article 70/D of the Constitution, in its decision no. 54/1996. (XI.30.) AB, the Constitutional Court held that to ensure the right to the highest possible level of physical and mental health was a constitutional task which the State must perform through the system of the central State bodies and the municipalities and other bodies. In performing this task the State must, among other things, operate a network of health-care institutions and must organise the provision of medical services. As to the network of health-care institutions and the organisation of the provision of medical services the Constitutional Court may only determine the critical volume of this State obligation – that is to say, the requisite minimum standards with which a failure to comply would result in unconstitutionality - *in abstracto*, in general terms, by specifying only extreme cases. Such a case would, for instance, be if in certain areas of the country health-care institutions and medical services were completely unavailable. Beyond such extreme cases no constitutional standard exists in respect of the State obligations prescribed in Article 70/D of the Constitution. Hence, the right to the highest possible level of physical and mental health cannot be interpreted in itself as a right of a person, because it is to be understood as a State obligation specified in Article 70/D of the Constitution, which includes for the legislature the obligation to provide for certain rights in certain physical and mental health-related areas.
>
> From the above it is logical that no citizen and no insured person may claim as a right the provision of the highest possible level of health-care services available in any EU member State.
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> Under Article 18 of the Directive, member States should continue to be able to specify, in their national legislation, who is considered an insured person for the purposes of their public health-care scheme and social-security legislation. Article 40 provides that, according to the consistent case-law of the Court of Justice [of the European Union], member States may subordinate to prior authorisation the undertaking by the national system of costs of hospital care provided in another member State. Article 44 states that, according to the consistent case-law of the Court of Justice, the criteria for granting or refusing prior authorisation should be limited to

what is necessary and proportionate in the light of the overriding considerations of general interest and basically also authorises the member State legislatures to determine these issues and the conditions.

The Government Decree relied on by the [applicant] was drafted by the Government in compliance with this Directive. The Decree allowed, subject to conditions specified in therein, for the authorisation of financial support for the costs of medical treatment abroad. The condition was the professional bodies' supporting opinion. This condition was not met in the applicant's case because the professional body was of the opinion that in the light of the medical methods available in Hungary, no treatment abroad was required. "Medical method" is basically the medical procedure or therapy which is used in a patient's treatment. "Surgical technique" is different, and in the case at issue the applicant chose, in fact, an alternative surgical technique rather than a medical method.

According to the expert opinions, the [applicant]'s disease could have been treated using several medical methods available in Hungary. The [applicant], however, requested support for a surgical technique which was available in Germany and which was not supported or found acceptable by the professional body. The National Centre for Health Care Audit and Inspection, as a professional body, issued its expert opinion after having examined the [applicant] in person. Since the operation was later performed on the [applicant] in Germany, the subsequent issuance by the ETT of its opinion merely on the basis of medical reports can in no way – as has been pointed out by the Labour Court as well – be held to have constituted a serious procedural irregularity. An examination of on an individual's postoperative status cannot be relevant for the assessment of the appropriateness of a preoperative medical method.

...

As to the merits of the professional body's opinion not to support the treatment, it is a professional issue which was to be clarified under Article 177 of the Code of Civil Procedure in the court proceedings by way of appointing an expert. The Government Decree required that the opinion and recommendation of the highest level professional body be obtained, even in the administrative proceedings, and the same body confirmed its former position in the subsequent court proceedings. The opinions submitted by the medical professional bodies both in the administrative and the court proceedings were congruent and raised no doubts or concerns[. ... T]herefore the administrative bodies in their proceedings and the Labour Court in the judicial phase took the correct decisions on the basis of these medical opinions."

21. By virtue of Decree 34/2003. (VI. 7.) of the Minister of Health, Social and Family Affairs on the Medical Research Council, the Medical Research Council is a proposal-making, opinion-giving, advisory and decision-preparing body of the minister responsible for health affairs. Amongst other tasks, it gives, following a request by the minister or its members, opinions in line with the current state of medical science on issues related to health policy, medical sciences, pharmaceutical sciences and health care.

COMPLAINT

22. The applicant complained under Article 2 of the Convention that the refusal of the Hungarian authorities to reimburse him the costs of the treatment he had availed himself of in Bulgaria had deprived him financially of potential similar treatment in the future, despite the fact that the treatment might improve his quality of life and life expectancy.

THE LAW

23. The applicant complained that the domestic authorities' reluctance to finance his treatment abroad had amounted to depriving him, financially, of the only treatment that was able to alleviate his symptoms and improve his life expectancy. He relied on Article 2 of the Convention.

24. The Court, being the master of the characterisation to be given in law to the facts of the case and being not bound by the characterisation given by the applicant or the Government (see *Aksu v. Turkey* [GC], nos. 4149/04 and 41029/04, § 43, ECHR 2012), considers that the applicant's submissions fall to be examined under Article 8 of the Convention which provides as follows:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

A. Arguments of the parties

1. The Government

25. The Government argued at the outset that the applicant had failed to exhaust the remedies that were available to him under Hungarian law. In particular, a constitutional complaint could have provided an effective remedy against the contested decision, since the Constitutional Court could have quashed the *Kúria*'s decision or could have prohibited, in the pending court proceedings, the application of law contravening the Fundamental Law.

26. Moreover, according to the Government, no interference with the applicant's right to private life had occurred in the sense that the authorities had not prohibited him from a treatment of his own choice at a place where it was available. The State refused, in accordance with the law, only the

financing of that treatment. Noteworthy is that the applicant undertook that treatment while circumventing the domestic rules, in that he sought reimbursement *post facto*, in defiance of those rules.

27. The Government emphasised that both the experts of the statutory medical advisory body and the medical panel set up by the National Association of Patients Suffering from Multiple Sclerosis were of the opinion that the treatment was not proven to be effective, which was also the opinion of several European and American expert bodies and health-care authorities.

28. The Government argued that the State had not exceeded its margin of appreciation where, on the basis of the negative opinion of a scientific committee set up by the Minister of Health, it had not permitted or supported therapies whose scientific value had not been established. Moreover, the State could not be expected to ignore or disregard the risks carried by a treatment even when deciding on permitting a treatment sought by a terminally ill patient; consequently, the assessment of the risks carried by a treatment sought by a non-terminally ill patient must definitely fall within the State's margin of appreciation. In the present case, the applicant had not been terminally ill and the treatment had carried substantial risks while offering no proven benefits. The Court had no mandate to review the national authorities' position either in respect of the assessment of the acceptable risk level or in respect of the efficient allocation of financial resources or in respect of the opinion of medical experts as to the efficacy and necessity of a particular medical treatment.

29. The Hungarian legal framework and the administrative and court proceedings conducted in the case had provided adequate possibilities to assess the applicant's particular situation; and the decisions given in his case had struck a fair balance between the applicant's interests and the public interest.

2. The applicant

30. The applicant argued that an individual might turn to the Constitutional Court by means of a constitutional complaint if he or she had suffered damage because of an unconstitutional act in judicial proceedings. In the applicant's case, the grievance did not lie in the unconstitutionality of any law but in the manner in which a particular law had been interpreted and applied. This state of affairs had excluded a constitutional complaint.

31. The applicant further submitted that the relevant treatments accepted in Hungary were significantly subsidised by the State. In comparison, the reimbursement sought would not have been more burdensome for the health-care fund.

32. He stressed that the procedure was accepted and practised in a number of European countries and that, in his particular case, it had proved to be the only treatment with any real therapeutic benefits.

B. The Court's assessment

33. The Court considers that it is not necessary to address the issue of exhaustion of domestic remedies in the present case, since the application is in any event inadmissible for the following reasons.

34. The Court notes that a similar grievance was considered an interference with the applicant's rights under Article 8 of the Convention in *McDonald v. the United Kingdom* (no. 4241/12, §§ 46-47, 20 May 2014). In that case, the Court accepted that the level of care offered by the authorities – which Ms McDonald felt had undignified and distressing consequences – had an impact on her private life. It is true that the present case is factually different from *McDonald*, notably because Mr Ján complained that the Hungarian authorities refused to reimburse him the costs of a medical treatment, not available in Hungary, which he had undergone abroad, although without the prior approval of the OEP. He further alleged that this had deprived him financially of potential similar procedures in the future. The Court recalls at this juncture that "Article 8 cannot be considered applicable each time an individual's everyday life is disrupted, but only in the exceptional cases where the State's failure to adopt measures interferes with that individual's right to personal development and his or her right to establish and maintain relations with other human beings and the outside world" (see *Sentges v. the Netherlands* (dec.), no. 27677/02, 8 July 2003). It seems questionable whether these conditions are met in the present case. However, this question can be left open. Even assuming that the present case involved an interference with the applicant's right to respect for his private life, the application is manifestly ill-founded for the following reasons.

35. An interference will be in breach of Article 8 of the Convention unless it can be justified under paragraph 2 of Article 8 as being "in accordance with the law", pursuing one or more of the legitimate aims listed therein, and being "necessary in a democratic society" in order to achieve the aim or aims concerned.

36. The Court observes that the impugned measure was taken in application of the relevant rules of social-security legislation (see paragraphs 18-19 above) and was thus "in accordance with the law". At any rate, this issue has not been in dispute between the parties.

37. It considers moreover that the principle at play in the present case, that is to say the rational allocation of social-security benefits, pursues the legitimate aims of ensuring the economic well-being of the country and of protecting the health and the rights of others.

38. It remains to be ascertained whether it was necessary in a democratic society.

39. In conducting the balancing act required by Article 8 § 2 the Court has to have regard to the wide margin of appreciation afforded to States in

issues of general policy, including social, economic and health-care policies The margin is particularly wide when, as in the present case, the issues involve an assessment of priorities in the context of the allocation of limited State resources. In view of their familiarity with the demands made on the health-care system as well as with the funds available to meet those demands, the national authorities are in a better position to carry out this assessment than an international court (see *McDonald*, cited above, § 54).

40. In the present case, the Court observes that the *Kúria* considered the applicant's case after having obtained several expert opinions on the therapeutic benefits and risks of the treatment in question. In particular, it was in possession of the report of the neurology clinic of Semmelweis University, which recorded no significant improvement in the applicant's case by virtue of the treatment (see paragraph 10 above), and of the opinion of the Neurology Committee of the National Institute, which did not give support to the applicant's request on the grounds that the efficacy of the treatment was not proven (see paragraph 9 above). Furthermore, the Medical Research Council, the highest national organ in such matters, took the view, after having obtained input from an expert, that the treatment was not proven to be effective and it carried significant risks of serious complications. The Medical Research Council made reference to the concurring opinions of the Hungarian Neurology Association and the Medical Advisory Body of the National Association of Patients Suffering from Multiple Sclerosis, the Multiple Sclerosis International Federation, competent European medical associations and the United States Food and Drug Administration (see paragraph 10 above). The *Kúria* took all these elements into account when rejecting the applicant's application, holding that the conditions for the health care fund to cover the expenses incurred by the applicant had not been met.

41. The Court notes that the proportionality of the decision not to fund the treatment was fully considered, when the *Kúria* thoroughly examined the efficacy and the risks of the treatment in the face of the applicant's submissions recounting the improvement he experienced. It is therefore satisfied that the national authorities adequately balanced the applicant's personal interests against the more general interest of the competent public authority in carrying out its social responsibility of provision of care to the community at large. In such cases, it is not for this Court to substitute its own assessment of the merits of the contested measure (including, in particular, its own assessment of the factual details of proportionality) for that of the competent national authorities unless there are compelling reasons for doing so (see, for example, *X v. Latvia* [GC], no. 27853/09, § 102, ECHR 2013, and *McDonald*, cited above, § 57). However, the present applicant has not adduced any such compelling reasons in his pleadings before the Court.

42. The foregoing considerations are sufficient to enable the Court to conclude that even assuming that there was an interference with the applicant's right to respect for his private life, it was both proportionate and justified in terms of the requirement of "necessary in a democratic society" under Article 8 § 2 of the Convention. It cannot be said that the competent authorities of the respondent State exceeded the wide margin of appreciation afforded to them, notably in relation to the allocation of scarce resources (see paragraph 39 above). It follows that the complaint is manifestly ill-founded within the meaning of Article 35 § 3 (a) and must be rejected, pursuant to Article 35 § 4 of the Convention.

For these reasons, the Court, unanimously,

Declares the application inadmissible.

Done in English and notified in writing on 21 December 2017.

Andrea Tamietti
Deputy Registrar

Faris Vehabović
President