CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FIRST SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 65653/01
by Zdzisław NITECKI
against Poland

The European Court of Human Rights (First Section), sitting on 21 March 2002 as a Chamber composed of

Mr C.L. ROZAKIS, *President*,
Mr G. BONELLO,
Mr J. MAKARCZYK,
Mr P. LORENZEN,
Mrs N. VAJIĆ,
Mrs S. BOTOUCHAROVA,
Mrs E. STEINER, *judges*,

and Mr E. FRIBERGH, *Section Registrar*,

Having regard to the above application lodged on 3 November 1999,

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

The applicant, Mr Zdzisław Nitecki, is a Polish national, who was born in 1932 and lives in Bydgoszcz, Poland. The respondent Government were represented by Mr Krzysztof Drzewicki, from the Ministry of Foreign Affairs.

A. The circumstances of the case

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

In 1976 the applicant was diagnosed with amyotrophic lateral sclerosis (ALS) also known as Lou Gehrig's disease.

In June 1999 the applicant was prescribed Rilutek, a drug used to treat ALS.

On 14 June 1999 the applicant asked the Kujawsko-Pomorski Health Insurance Fund (*Kasa Chorych*) to refund him the cost of the drug. He pointed out that he was a pensioner and that the price of a prescribed monthly intake of the drug exceeded his means.

In a letter of 28 June 1999 the Fund declined the applicant's request in the following terms:

> "In reply to your letter (...) I should explain that Kujawsko-Pomorski Health Insurance Fund does not have legal possibilities of refunding the price you paid for drugs. The Ministry of Health and Social Security publishes registers of drugs which are refunded and according to those registers the Health Insurance Funds make either partial or full refunds. In your case, four out of five drugs are fully refunded. As for Rilutec, it is included in the register of refunded drugs (patient's contribution at 30%) [...]. The Health Insurance Fund pays 70% of the price of [that drug].
>
> I should also inform you that you can be assisted by [...] the Bydgoszcz Social Services (...)."

On 19 July 1999 the applicant asked the Kujawsko-Pomorski Regional Office (*Urząd Wojewódzki*) to quash the decision of the Fund. He submitted that he could not afford to pay for the drug and that he had no children to help him. The Regional Office transmitted the applicant's request to the Bydgoszcz Social Services.

On 11 August 1999 the Director of the Bydgoszcz District Social Services (*Rejonowy Ośrodek Pomocy Społecznej*) issued a decision declining the applicant's application for the drug refund.

In a letter of 13 August 1999 the Bydgoszcz Municipal Social Services (*Miejski Ośrodek Pomocy Społecznej*) informed the applicant that:

> "(...) According to the applicable legislation the Director [of Social Services] issued a decision declining your request for assistance. It appears from your file that the total income of your family amounts to PLN 1,924.54 and is above the threshold set in Article 4(1) of the Social Security Law. Despite the fact that you have faced high costs

for the purchase of drugs, the social services – because of limited resources designated for that purpose – declined your request (...).

It should also be mentioned that it is possible to approach a certified doctor – through the Social Security Board – in order to change a degree of invalidity, which may result in the grant of a nursing benefit."

On 31 August 1999 the Ministry of Health and Social Services advised the applicant about the legislation concerning the refund of drugs. The Ministry's letter was in the following terms:

"The Kujawsko-Pomorski Health Insurance Fund correctly informed you in a letter of 14.07.[99] that there were no legal possibilities of refunding the expenses you incurred for purchasing drugs.

Rilutek is listed in the register of drugs used in chronic illnesses (...) for a payment of 30% [of the price]. That drug is refunded at the rate of 70% and the Health Insurance Fund pays such a part of the price. ...

As Rilutek continues to be a very heavy financial burden for patients, the Pharmacy Department has started to make efforts to decrease the rate at which it has to be paid for by patients, so that it becomes available free of charge. The matter has been transferred to specialists ...

The end of this work concerning the change of registers is foreseen for the fourth quarter of the year. However, any decrease in the rate at which [the drug] has to be paid for by patients depends on the financial resources available to the Health Insurance Funds."

On 1 September 1999 the applicant's degree of invalidity was increased from the second to the first degree.

The applicant lodged with the Supreme Court (*Sąd Najwyższy*) a complaint concerning the decision of the Ministry of Health and Social Security but on 29 February 2000 the court informed him that no appeal was available against the Ministry's decision.

B. Relevant domestic law and practice

The public health service in Poland is regulated by the Law on Public Health Insurance of 6 February 1997. National Insurance Funds, which represent the interests of the insured, buy medical services from contractors. They also refund the cost of drugs in whole or in part.

COMPLAINTS

The applicant complained under Article 2 of the Convention that the refusal to refund the full price of a life-saving drug violated his right to life. In that connection, he submitted that he had been making social security

contributions for over thirty-seven years. The applicant could not afford to pay 30% of the price of the required drug and therefore could not follow the prescribed pharmaceutical treatment. Consequently, his medical condition deteriorated and on 1 September 1999 his invalidity was assessed at the highest degree. Although he is one of two ALS sufferers in Poland who has survived longer than four years, the inability to follow the prescribed pharmaceutical treatment will result in his untimely death.

The applicant also submitted that the facts of his case disclosed a violation of Articles 8 and 14 of the Convention.

THE LAW

1. The applicant complained that the refusal to refund the full price of a life-saving drug violated his right to life guaranteed by Article 2, which in so far as relevant provides:

> "1. Everyone's right to life shall be protected by law. (...)"

The Government submitted that Article 2 of the Convention seemed to be "*ratione materiae* hardly applicable" in the instant case and that the applicant did not exhaust domestic remedies.

The Court recalls that the first sentence of Article 2 enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction. It cannot be excluded that the acts and omissions of the authorities in the field of health care policy may in certain circumstances engage their responsibility under Article 2 (see *Powell v. the United Kingdom* [decision], no. 45305/99, 4.5.2000).

The Court has held in cases involving allegations of medical malpractice that the State's positive obligations under Article 2 to protect life include the requirement for hospitals to have regulations for the protection of their patients' lives and also the obligation to establish an effective judicial system for establishing the cause of a death which occurs in hospital and any liability on the part of the medical practitioners concerned (see, among other authorities, *Erikson v. Italy*, [decision], no. 37900/97, 26.10.1999; *Calvelli and Ciglio v. Italy* [GC], no. 32967/96, § 49, ECHR 2002).

Furthermore, with respect to the scope of the State's positive obligations in the provision of health care, the Court has stated that an issue may arise under Article 2 where it is shown that the authorities of a Contracting State put an individual's life at risk through the denial of health care which they have undertaken to make available to the population generally (see *Cyprus v. Turkey* [GC], no. 25781/94, § 219, ECHR 2001-IV).

Turning to the facts of the instant case, the Court notes that the applicant submitted that despite the fact that he had been making social security

contributions during more than thirty-seven years of his professional career, the State refused to refund him the full price of a life-saving drug. However, the Court notes that the applicant's social security contributions made him eligible to benefit from the public health service in Poland. The applicant, like other entitled individuals, has access to a standard of health care offered by the service to the public. In fact, it appears that over many years he benefited from medical treatment and drugs paid for by the public health service.

The applicant was refused the full refund of a drug prescribed to him for the first time in June 1999. Under the standard of care available to all patients, the drug refund scheme provided for a 70% refund while the remaining 30% had to be paid by the applicant.

Bearing in mind the medical treatment and facilities provided to the applicant, including a refund of the greater part of the cost of the required drug, the Court considers that the respondent State cannot be said, in the special circumstances of the present case, to have failed to discharge its obligations under Article 2 by not paying the remaining 30% of the drug price.

Accordingly, the Court, assuming that the applicant exhausted domestic remedies, concludes that the complaint under Article 2 of the Convention is manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and must be rejected in accordance with Article 35 § 4.

2. The applicant also complained of a violation of Article 8 of the Convention (the right to respect for private and family life).

However, having regard to its finding in respect of Article 2 of the Convention, the Court considers that no separate issue arises under Article 8 of the Convention which requires examination.

3. Finally, the applicant claimed that the facts of his case disclosed a breach of Article 14 of the Convention (prohibition on discrimination).

The Court recalls that Article 14 only prohibits differences in treatment which have no objective or reasonable justification. However, the Court finds such justification to exist in the present health care system which makes difficult choices as to the extent of public subsidy to ensure a fair distribution of scarce financial resources. There is no evidence of arbitrariness in the decisions which have been taken in the applicant's case. Accordingly, this part of the application is also manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and must be rejected in accordance with Article 35 § 4.

For these reasons, the Court unanimously

Declares the application inadmissible.

Erik FRIBERGH
Registrar

C.L.ROZAKIS
President