Overview of recent cases before the European Court of Human Rights and the European Court of Justice (August-September 2010)

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CASE LAW

In this update, we look, in particular, at a number of recent decisions of the Court of Human Rights concerning the rights of same-sex couples and the rights of unmarried couples (Yiğit; Manenc; and J.M. v United Kingdom); and several decisions by the Court of Justice concerning free movement and the co-ordination of social security benefits, including cross-border access to health care and family benefits.

1. COURT OF HUMAN RIGHTS

_Yiğit v Turkey_ - piling non-sequitur on non-sequitur

This case concerned (or should have concerned) the right of an unmarried couple to social security benefits. Ms. Yiğit had contracted a ‘religious marriage’ not recognised under Turkish law and complained that she was unable to claim a survivor’s pension of health insurance cover on her partner’s death. As Judge Rozakis (concurring as to the outcome) pointed out:

‘The real comparators to be taken into account ... should have been a long-standing and stable family relationship outside marriage on the one hand, and marriage, as understood by the domestic legal system, on the other. In other words, the elements to be compared are long-standing cohabitation and marriage, rather than religious marriage and civil marriage.’

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1 See also the case of _Farcas v Romania_, 32596/04, 14 September 2010 concerning access for disabled people to public services and, inter alia, access to the courts. The Court, while rejecting the case on the facts, did emphasise that a lack of physical access to the courts could be a breach of Article 6. Although the case did refer to social security issues, it is primarily a disability case.

2 3976/05, 2 November 2010. This is a decision of the Grand Chamber following an earlier decision rejecting the claim by a Chamber of the Court (20 January 2009).
Given this comparison, Judge Rozakis accepted that ‘Convention case-law confers a particular status and particular rights on those who enter into a marital relationship’ and the Court’s case law ‘must lead us to the conclusion that in the circumstances of the case the absence of social security benefits ... is not contrary either to Article 14 (read in conjunction with Article 1 of Protocol No. 1) or to Article 8 of the Convention.’

However, perhaps influenced by the applicant’s arguments and its own recent decision in Muñoz Díaz, the Grand Chamber of the Court instead characterised the claim as one involving ‘religious marriage’ vis-à-vis civil marriage. In comparison with Muñoz Díaz, the Court at least came to the correct outcome (unlike the earlier case) but by a process of unnecessary, disjointed and unconvincing reasoning.

The applicants had been married under Islamic law, but Turkish law required a religious marriage to be preceded by a civil ceremony and did not therefore recognise the ‘marriage’ for legal purposes, including access to social security benefits. The Chamber had examined the issue only from the standpoint of Article 8 but the Grand Chamber invited the parties to make submissions as to the effect of Article 14 (taken with P1-1).

The Turkish government argued that a couple who had gone through a religious ‘marriage’ was not similarly situated to one which was legally married. The Court simply ignored this argument, holding that it must ‘accordingly’ examine whether the nature of marriage could be a source of discrimination covered by Article 14. It is a feature of this case that the Court’s judgment is a sequence of non-sequiturs. Faced by an argument it does not like, the Court ‘accordingly’ ignores it and goes off on a different track.

Although Judge Rozakis did ask whether ‘in view of the new social realities which are gradually emerging in today’s Europe, manifested in a gradual increase in the number of stable relationships outside marriage, which are replacing the traditional institution of marriage without necessarily undermining the fabric of family life, I wonder whether this Court should not begin to reconsider its stance as to the justifiable distinction that it accepts, in certain matters, between marriage on the one hand and other forms of family life on the other, even when it comes to social security and related benefits’.


At para 75. The government argued that the applicant’s ‘situation, as a person married according to religious rites, could not be likened to that of a wife married in accordance with the Civil Code. The refusal of the domestic courts to award the benefits in issue to the applicant had been based on the law, the justification for which was twofold: the protection of women, particularly through efforts to combat polygamy, and the principle of secularism.’
The Court pointed out that it had previously ruled that a difference in treatment between children born in and outside marriage was covered by Article 14, as was ‘the absence of a marriage tie between two parents’. These considerations applied ‘mutatis mutandis’ to the present case, the Court announced (given that the difference in treatment was based solely on the non-civil nature of the marriage). This, of course, does not really explain why a distinction between religious and civil marriage falls within the scope of Article 14 any more than saying that a distinction based on hair colour would fall within the scope of that Article because the distinction was based solely on hair colour.

The Court then examined whether the difference in treatment had a legitimate aim. The Court ruled that the marriage law aimed to

‘Put an end to a marriage tradition which places women at a clear disadvantage, not to say in a situation of dependence and inferiority, compared to men. For the same reason it introduced the principle of gender equality in the enjoyment of civic rights, particularly in relation to divorce and inheritance, and prohibited polygamy.’

Accordingly, the Court accepted that the difference in treatment pursued the legitimate aims of protecting public order and protecting the rights and freedoms of others.

The Court went on to examine whether there was a reasonable relationship of proportionality between the aim and the means employed to achieve it. It noted that the applicant had been aware of her position and that she needed to be legally married in order to benefit from social security on her partner’s death. The Court ruled that the case was distinguishable from Muñoz Díaz where the Court had found that the Spanish authorities ‘had recognised the applicant ... as her partner’s ‘spouse’’. In that case, the Court had found that the applicant had a legitimate expectation of being entitled to a survivor’s pension. In addition, the Court pointed out that it had found, that at the time Ms. Muñoz Díaz married, ‘it had not been

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6 At para 79.
7 At para 81. Judge Kovler (concurring as to the outcome), with some justification, suggested that ‘it would have been wiser to refrain from making any assessment of the complexity of the rules of Islamic marriage rather than portraying it in a reductive and highly subjective manner ...’.
8 Whether the Court was correct so to rule is discussed in the note on Muñoz Díaz supra.
possible in Spain, except by making a prior declaration of apostasy or of affiliation to a different faith, to be married otherwise than in accordance with the rites of the Catholic Church. The Court also pointed out that Ms. Yiğit had a sufficiently long time (26 years) to contract a civil marriage. Accordingly the Court concluded that the treatment was proportionate and there was no violation of Article 14.

As to Article 8, the Court agreed with the Chamber judgement that the applicant, her partner and children did constitute a family for the purposes of Article 8. The Court pointed out that ‘the essential object of Article 8 is to protect the individual against arbitrary interference by the public authorities’. In this case, the applicant had opted for a religious form of marriage and the Court found no interference by the State with family life. The Court ruled that ‘accordingly’ Article 8 did not impose an obligation on the State to recognise religious marriage.

Discussion

The only positive point from this decision is that the Grand Chamber at least managed to come to the right outcome, viz that, as the Court’s case law stands, it is not a breach of the Convention to treat unmarried couples differently from married couples and that this is not affected by the Muñoz Díaz judgement, which should be confined to its own ‘exceptional’ facts.

Manenc v France – pension rights and PACS

Manenc involved a claim that differential pension treatment of two men who had entered into a pacte civil de solidarité (PACS) or civil partnership was in breach of Article 14. This was rejected as manifestly ill-founded by the Fifth Section. The applicant was refused a survivor’s

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9 Though this point is rather undermined by Judge Myjer’s (concurring in part and dissenting in part in Muñoz Díaz ) observation that ‘[n]othing is known about the applicant's religious affiliation, if any’.
10 In contrast, Ms. Muñoz Díaz had 29 years between her marriage in 1971 and 2000 when her partner died (or 19 years from the institution of ‘open’ civil marriage in Spain in 1981). The Grand Chamber did not refer to this comparison in the instant case.
11 At para 98.
12 At para 100.
13 Or rather the facts of that case as (mis)understood by the ECHR.
14 Manenc v France, 66686/09, 21 September 2010. For reasons not outlined in the decision, there does not appear to have been any national litigation in this case.
pension which was only payable to married persons. The Court held that Mr Manenc’s relationship and the pension issue fell within the scope of Article 8. However, it decided that surviving members of PACS were not in an analogous position to married persons. In particular the Court referred to the fact that, under French law, the obligation of financial solidarity between the parties only applied to spouses. In addition, the Court held that there was no evidence that the difference in treatment was based on the applicant's sexual orientation, in that anyone in a situation similar to his would have received identical treatment, regardless of the sex of the partner. The Court noted that the majority of those entering into PACS were opposite-sex couples. Therefore, the Court concluded that French legislation concerning the right to a survivor’s pension had a legitimate aim, namely protection of the family founded on marriage, and that limiting the scope of the law to married couples, and excluding partners of a PACS regardless of their sexual orientation, fell within the wide margin of appreciation that the Convention leaves to States in this area.

At first sight, this is a surprising outcome. Although the legal and factual circumstances have been rather different, several recent cases concerning differential treatment of same-sex couples have been successful before the Court. More generally, the Grand Chamber in Burden appeared to equate married and PACS/civil partnership couples when it drew a distinction between

‘... married and Civil Partnership Act couples, on one hand, and heterosexual or homosexual couples who choose to live together but not to become husband and wife or civil partners, on the other hand ... ’

However, on further consideration, there is some rationale for the Court’s approach. As set out in its judgement, it does appear that members of PACS do not have the same mutual financial obligations as spouses and this is, of course, directly relevant to the issue of

15 Following Mata Estevez v Spain, 56501/00, 10 May 2001 but not referring to P.B. & J.S. v. Austria, 18984/02, 22 July 2010.
16 Article 220 of the French civil code.
17 Citing Mata Estevez, supra, and Marckx v. Belgium, 13 June 1979, series A No. 31.
18 Mata Estevez, supra.
19 P.B. & J.S. v. Austria, 18984/02, 22 July 2010 and J.M. v United Kingdom, 37060/06, 28 September 2010 (just after the decision here and discussed below).
20 Burden v United Kingdom, 13378/05, 29 April 2008, para 65.
survivor’s pension (which is, from a social policy point of view, arguably an outdated concept and one which should be phased out). The Court in Manenc did not deny a general alignment between married and PACS/civil partnership couples but rather said that surviving PACS couples were not in the same position vis-à-vis survivor’s pensions as married couples because French law as to financial obligation differentiates between them. In addition, as the Court pointed out, PACS are not confined to same-sex couples and the majority of couples are heterosexual (although the issue of indirect discrimination remains). On the other hand, the Court could have addressed this issue in more detail and have made some reference to the above case law. It would also have been more appropriate to decide the case on the basis of justification rather than comparison (i.e. bringing the issue of proportionality into the equation). Finally, the Court relied heavily on Mata Estevez but the authority of this case has rather been called into question and the Court made no attempt to explain why it was still a convincing precedent. Overall, one might suggest that this may not be the last word on the issue.

**J.M v United Kingdom**21 – discrimination against same sex couples

This case involves differential treatment of a same-sex couple as regards the UK child support scheme. The detailed facts are quite complex but, in short, the applicant was the divorced mother of two children whose care was shared between her and their father (who was the main carer). She lived in a long-term same-sex relationship. Her child support obligations were assessed differently (and less favourably to her) than had she been involved in an opposite-sex relationship. She argued that this involved discrimination on grounds of sexual orientation contrary to Article 14 taken in conjunction with Article 8 and/or P1-1. At the time when the matter came before the national courts, the House of Lords took the view that child support did not fall within the ambit of P1-1, so that most of the arguments before the UK higher courts focussed on Article 8.

In contrast, the Court of Human Rights focussed on P1-1. The Court ruled that

> the sums which the applicant paid out of her own financial resources towards the upkeep of her children are to be considered as “contributions” within the meaning of the second paragraph of Article 1, payment of which was required by the

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21 37060/06, 28 September 2010.
relevant legislative provisions and enforced through the medium of the [Child Support Agency].

The Court therefore found that that the issue fell within the ambit of P1-1 and that Article 14 was applicable.

Regrettably, despite the detailed arguments of the parties, the Court ‘did not find it necessary’ to decide whether the case fell within the scope of Article 8, continuing the Court’s long-standing refusal to define the scope of this Article and leading to a lack of clarity as to whether it applies to same-sex relationships. As Judges Garlicki, Hirvelä and Vučinić (concurring) pointed out, the Court has recently ruled that same-sex couples are within the scope of family life (see also Manenc) but, in this case, the majority refused to take a position.

Turning to the aim of the difference in treatment, the Court ruled that

‘where the complaint is one of discrimination on grounds of sexual orientation, the margin of appreciation of Contracting States is narrow. The State must be able to point to particularly convincing and weighty reasons to justify such a difference in treatment.’

The government argued that the situation was justified by the differences that existed at the time between the overall sets of benefits and burdens for same-sex and opposite-sex couples, married or unmarried in the social security code. However, the Court considered this ‘more an explanation of the situation in domestic law at that time than a weighty reason that would prevent the difference of treatment at issue in this case from falling foul of Article 14’. Bearing in mind the objective of the UK rules which was to avoid placing an excessive financial burden on the parent who was not the main carer, the Court could see no reason for

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22 At para 48.
23 Also refusing to clarify the current (somewhat unclear) status of Mata Estevez v. Spain, 56501/00, ECHR 2001-VI.
24 Schalk and Kopf v. Austria, 30141/04, 24 June 2010 and in P.B. and J.S. v. Austria, 18984/02, 22 July 2010 – noted in the last issue of this journal. A panel of the Grand Chamber has recently rejected a request to refer the Schalk case to the Grand Chamber. 22 November 2010.
25 At para 54.
26 At para 56.
treating the applicant differently on grounds of sexual orientation. The government also argued that the issue fell within the United Kingdom's margin of appreciation at the time until the passage of the Civil Partnership Act in 2004, which did away with the difference in treatment. However, as the Court concluded that justification was lacking in 2001-2002, it followed that the reforms introduced by the Civil Partnership Act some years later had no bearing on the matter.

Discussion
The Court's decision is clear and it is welcome that it has clarified that child support obligations fall within the scope of P1-1. It is unfortunate, as the minority pointed out (especially given that the point was argued in some detail) that the Court did not take the opportunity to express a view as to whether Article 8 was also engaged. Once Article 14 was engaged, the only real justification for the difference in treatment was that the national system had historically treated same-sex and opposite-sex couples differently, reflecting broader social views. While this does not provide much 'hard' evidence in support of a difference in treatment, the Court (today) allows a difference in treatment of same-sex and opposite-sex couples as to marriage. The Court was perhaps somewhat cavalier as to why in 2001-2 there was no basis for a difference in treatment in this particular case, but this is inevitably an inexact science.

Nationality discrimination in Greece

In Fawsie and Saidoun, the Court followed its previous jurisprudence in holding that nationality discrimination (in relation to a payment for large families) was in breach of

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27 Schalk and Kopf v. Austria.
28 In contrast, Lord Bingham in the House of Lords had reversed the analysis arguing that the Ms. M’s complaint was anachronistic: ‘By that I mean that she is applying the standards of today to criticise a regime which when it was established represented the accepted values of our society, which has now been brought to an end because it no longer does so but which could not, with the support of the public, have been brought to an end very much earlier. ... If such a regime were to be established today, Ms M. could with good reason stigmatise the regime as unjustifiably discriminatory. But it is unrealistic to stigmatise as unjustifiably discriminatory a regime which, given the size of the overall task and the need to recruit the support of the public, could scarcely have been reformed sooner.’
29 Fawsie v Greece, 40080/07 and Saidoun v Greece, 40083/07, 28 October 2010.
Article 14 and was not justified by the Greek government’s demographic policy objectives.\textsuperscript{31} In order to bring the issue within the scope of Article 14, it concluded that the granting of the allowance for large families allows the state to show its respect for family life under Article 8 of the Convention and was therefore within the scope of the latter. In this it differed from its own decision in Zeïbek (also a First Section case and also involving the allowance for large families) in which it had rejected the Article 8 complaint and only considered discrimination on the basis that the issue fell within P1.\textsuperscript{32} Typically, although the Court referred frequently to Zeïbek in these judgements, it did not even acknowledge that it was coming to a different conclusion on this point let alone attempt to explain why.

2. COURT OF JUSTICE

\textit{Van Delft – restrictions on the Dutch health insurance scheme}\textsuperscript{33}

The judgment in the \textit{Van Delft} case concerns the position of persons who, as a result of a new Dutch law, become covered by the EU coordination regulation and wished to escape this effect.\textsuperscript{34} Until 2006 only employees with an income below a certain wage level were covered by the Dutch statutory health care insurance. Those who were not covered bought private insurance. The new Dutch Act brought everyone under the statutory health care insurance and ended private insurance. Although the new Act affects all residents of the Netherlands (except those working in another Member State), it is, in particular, Dutch pensioners residing in another Member State who complain. The persons concerned in the \textit{Van Delft} case are pensioners who moved after pension age to a warm, attractive country, like Spain, for which reason they are often named by the Spanish term \textit{pensionados}.

\textsuperscript{31} The applicants were refugees and the Court also referred to Article 23 of the Geneva Convention which provides that ‘States shall accord to refugees lawfully staying in their territory the same treatment with respect to public relief and assistance as is accorded to their nationals’ (though without clarifying what weight, in any, it attached to this).

\textsuperscript{32} On \textit{Zeïbek} see volume 11(4) of this Journal.

\textsuperscript{33} This section was written by Frans Pennings, Professor of Labour Law and Social Security Law, Utrecht University.

\textsuperscript{34} C-345/09, \textit{Van Delft}, [2010] ECR I-000.
As a result of Articles 28 and 28a of the EU coordination regulation, a person who is entitled to a pension from their home country (the competent State, in this case the Netherlands), and who is not entitled to a pension under the legislation of their State of residence (e.g. Spain), is entitled to sickness benefits in kind under the legislation of the competent State if he would be entitled to sickness benefits in kind if he resided in that competent State. This also entails that contributions are due to the competent State.

From the point of view of the Regulation, the Van Delft case is an easy one. However, since the pensionados felt that they were worse off, the political protest by this group, which is quite large, was loudly heard. Under the private insurance provisions, they could often claim treatment in luxury institutions in their new State of residence, by Dutch speaking medical doctors. After the applicability of the Regulation, due to the new Dutch Act, they had to rely on the local provisions, which, even if they are of good quality, do not provide for the same facilities, such as Dutch-speaking doctors. Moreover, some of the pensioners had very generous conditions, such as insurance schemes paid by the former employer for the rest of their lives. The implementing Act terminated all private insurance contracts.

The question was, in view of these negative effects, whether the Regulation was indeed applicable and, if the answer was in the affirmative, whether this was contrary to Articles 45 and 21 TFEU (formerly Articles 39 and 18 EC). Not surprisingly, the Court argued that the Regulation does not leave the right to choose in this case. The pensionados were very creative in raising arguments and the Court dealt with them patiently. The fact that coordination systems are not harmonised may mean that persons can indeed be worse off as a result of the application of the Regulation. Such effects cannot constitute the right to choose, even if persons decide to waive the right to receive benefits according to the system of the State of residence.

A second question was whether the rules are consistent with Articles 45 and 21 TFEU. The Court referred to older case law to argue that a person who makes use of the right to free movement only after ceasing work cannot rely on Article 45 TFEU. This is a rather strange outcome in this case, since the problem followed exactly from the application of the rules relating to free movement in the area of social security (Article 48 TFEU – former Article 42
EC). Fortunately, Article 21 TFEU is applicable in this case and it seems that this is interpreted in this case in the same way as Article 45 TFEU would have been.

The Court then repeated its previous case law that Article 21 does not mean that a move to another Member State must be neutral (see also the *Leyman* case).³⁵ National social security legislation is still compatible with Article 21 TFEU as long as it does not simply result in the payment of social security contributions on which there is no return. After all, the disputed rule of the Regulation was exactly made to enable free movement. That it works out unattractively in some cases does not make it void.

The Court finally discussed an issue which is beyond the Regulation. It concerns the termination of the private contracts by the Implementing Act. This was necessary as otherwise persons might be covered both by the new Act and private insurance. However, the outcomes of this could be different for persons abroad and persons residing in the Netherlands. National courts have to consider this (difficult) question.

**Schwemmer – overlapping family benefits**

The *Schwemmer* case is yet another in a long line of cases concerning overlapping family benefits (i.e. where parents have entitlements to family benefits from different countries based on either EU and/or national law) and highlights the ongoing tension between the Court’s desire to ensure that persons do not lose out on national entitlements because of conflicting EU provisions³⁶ and the need to have a system which is administratively workable.

The facts of the case are relatively straightforward. Ms Schwemmer lived in Germany with two of her children. In 2005, she was in self-employment and, from May 2006, in ‘minor employment’ with a company. During the relevant period, Ms Schwemmer was not compulsorily insured and paid voluntary contributions in respect of retirement, sickness and care insurance. The children’s father, from whom Ms Schwemmer has been divorced since

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³⁶ As discussed in previous issues, this is the Court’s approach in practice if not in theory.
1997, worked in Switzerland. However, he did not claim the family benefits to which he was entitled under Swiss law. In principle the situation was clear: as the country of employment has primary responsibility for payment of family benefits (and as Ms. Schwemmer apparently was not in insurable employment for the purposes of Regulation 1408/71), Switzerland was responsible for payments, and this should override any German entitlement. However, it was equally clear that the Court would try to interpret EU law so that Ms Schwemmer did not lose her entitlement to German benefits.

The German authorities argued that whether the family benefits were or were not actually claimed in Switzerland was irrelevant, according to Article 76(2) of Regulation 1408/71, which, they argued, applied ‘by analogy’. The Court had earlier interpreted Article 76 to mean that, if benefits were not, in fact, claimed, the overlapping provisions did not apply but the Council had specifically amended that Article to reverse that position. However, as the Court pointed out, German legislation confers the right to family benefits on the basis of residence in Germany, and not, as required for Article 76, on the basis of employment and, therefore, Article 10 of Regulation 574/72 rather than Article 76 applied. Article 10 did not contain any provision analogous to Article 76(2), i.e. it did not specifically allow national authorities to ‘deem’ a person to have received benefits. Nor did Article 10 specifically require the opposite reading, and it had not been interpreted by the Court in that manner in previous cases. However, the Court ‘by analogy’ applied its earlier case law on Article 76, preferring this option to applying ‘by analogy’ the Council’s amendment to that Article. Therefore, Ms Schwemmer’s right to German benefits was not suspended by any right which the father might have had in Switzerland. It will be interesting to see how the Court will interpret the provisions of Regulation 883/2004 in this area.

37 Switzerland is not of course a member of the EU but an Agreement between the EU and Switzerland provides for the application of EU rules in this area.
38 See judgement, para. 34. See also the opinion of the Advocate General at paras 56-57.
39 Article 76(2) provides that ‘If an application for benefits is not made in the Member State in whose territory the members of the family are residing, the competent institution of the other Member State may apply the [overlapping] provisions of paragraph 1 as if benefits were granted in the first Member State.’
41 At para 55.
Cross-border access to health care

Finally the Court of Justice decided two cases in relation to cross-border health care. In *Commission v France*, the Court examined, first, whether it is permissible for a Member State to require prior authorisation for access to health care (in another Member State) in non-hospital settings involving ‘major medical equipment’. This case involved the Treaty provisions (then Article 49 EC, now Article 56 TFEU). The Commission argued that the requirement of prior approval, which had been upheld by the Court in relation to hospital settings, was not justified for non-hospital treatment. However, while the Court accepted that the requirement of prior authorisation involved a restriction on the freedom to provide services and, therefore, required objective justification, it held that it was so justified by the need to plan health services (as in the case of hospital services). The Court pointed out that the equipment involved could, in some cases, cost millions of Euros.

Second, the Commission argued that French law did not provide for the additional reimbursement of health costs arising from the Court’s decision in *Vanbraekel*. However, the Court pointed out that Article 49 EC (as interpreted by the Court) is directly effective and does not need national implementing measures. Admittedly, the national legal order should not give rise to an ambiguous situation that might keep the individuals concerned in a state of uncertainty as to the possibility of relying on that provision of directly effective EU law. However, in infringement proceedings, it is for the Commission to prove the alleged failure by placing before the Court all the information needed to enable the Court to establish that the obligation has not been fulfilled. In this case, French law, while not specifically providing for the reimbursement, did not prevent it and national case law had applied *Vanbraekel*.

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42 Case C-512/08, [2010] ECR I-000.
43 Judgement at para 21.
44 Paras 32-42.
45 At para 39.
46 Case C-368/98 *Vanbraekel and Others* [2001] ECR I-5363. In that case, the Court interpreted Article 49 EC as meaning that, if the reimbursement of costs incurred on hospital services provided in the Member State of stay, calculated under the rules in force in that State, is less than the amount which application of the legislation in force in the Member State of affiliation would afford to a person receiving hospital treatment in that State, additional reimbursement covering that difference must be granted to the insured person by the relevant institution.
47 At para 55.
Administrative circulars also addressed the need for domestic health institutions to comply with the Vanbraekel judgement. Therefore, the Court concluded that while ‘mere administrative practices, by their nature alterable at will by the authorities, cannot, in the context of national legislation incompatible with European Union law, be regarded as constituting proper fulfilment of Treaty obligations, the fact nevertheless remains that, in the circumstances of this case, the lack of any evidence of administrative practices contrary to European Union law bears out the finding that the French legislation, ..., does not give rise to a situation that deprives persons insured under the French system of the rights conferred by Article 49 EC, as interpreted in Vanbraekel.49

Accordingly, the Court ruled that the Commission had not established that the French legal order led to a situation capable of depriving persons insured under the French system of the right to an additional reimbursement under Vanbraekel.

The second case – Elchinov – raised a series of questions in relation to the interpretation of Regulation 1408/71.50 Mr Elchinov, who was resident in and covered by health insurance in Bulgaria, was diagnosed with a malignant eye disease. On the advice of his doctor, he was recommended treatment consisting of the attachment of radioactive plates or proton therapy. In March 2007, Mr Elchinov applied to the Bulgarian national health insurance fund (the Fund) under Article 22 of Regulation 1408/71 for the issue of an E 112 form, so that he could receive the prescribed treatment in a special clinic for eye diseases in Berlin with the cost to be covered by his Bulgarian health insurance. He argued that it was impossible to receive the prescribed treatment in Bulgaria, where he was only offered an alternative treatment consisting of the complete removal of the diseased eye. However, without receiving a reply to the request and, in the light of the seriousness of his medical condition, he travelled as a matter of urgency to the German clinic where the prescribed treatment was carried out. Subsequently the Fund refused Mr Elchinov’s application on the basis that the treatment concerned was not provided in Bulgaria.

49 At para 67. The Court also pointed out that the Commission had not specified any alleged refusal by a French social security body to allow an insured person the right to an additional reimbursement.

50 Case C-173/09, [2010] ECR I-000.
Mr Elchinov brought an appeal before the administrative court which gave judgment in his favour, annulling the decision and referring the case back to the Fund in order for it to issue the E 112. The court rejected the interpretation of Article 22 of Regulation 1408/71 given by the Fund and concluded that the treatment prescribed was provided for in Bulgarian law. In the opinion of the administrative court, the fact that the treatment was provided for in the legislation, even though it could not actually be carried out in Bulgaria, is sufficient for the application of Article 22, and therefore it held that it was appropriate to grant authorisation for the treatment to be carried out abroad.

The Fund appealed against the judgment to the Supreme Administrative Court. That court allowed the appeal and referred the case back for a new ruling by a different chamber of the lower court. The Supreme Administrative Court found that the interpretation of Article 22 by the lower court was incorrect since the fact that it is impossible to provide the treatment in issue in Bulgaria, even though it is referred to in the national legislation, established a presumption that it was not included among the benefits that are lawfully payable. The administrative court subsequently decided to refer a series of questions to the Court of Justice.

As the Advocate General pointed out, the replies to the questions could be found in the case-law of the Court. However, Advocate General Cruz Villalón opined that

‘it is also true that in recent years there have been significant changes which explain why these questions have been raised again. The relatively recent emergence of important case-law on the relationship between the Court of Justice and national courts may explain why the Administrative Court, Sofia, questions whether the statement of the law which the Court laid down in Rheinmühlen I in 1974 [as to referrals from national courts to the Court of Justice] continues to be valid. In addition, the accession to the European Union of new States with different healthcare systems, both in terms of their organisation and their financial resources, raises uncertainties about the applicability of case-law which was conceived and correspondingly developed in an era preceding that expansion … .’

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The referring court asked, first, whether a national court is obliged to take account of binding directions given to it by a higher court when its decision is set aside and the case referred back for reconsideration if there is reason to assume that such directions are inconsistent with EU law. The Advocate General suggested that the existing case law should be reviewed and that the national court be considered to be bound by national precedent. The Court of Justice did not agree, confirming the existing position that EU law precludes a national court from being bound by legal rulings of the higher court if it considers, having regard to the interpretation which it has sought from the Court, that those rulings are inconsistent with EU law. As will be noted, this answer refers to a situation where the national court has made a reference to the ECJ. However, the Court went further, stating that

‘a national court which is called upon ... to apply provisions of European Union law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation [including rules as to precedent] and it is not necessary for the court to request or await the prior setting aside of that national provision by legislative or other constitutional means.’\(^5\)

As to the substance of the case, the Court pointed out that the legislation of a Member State cannot exclude, in all cases, reimbursement in respect of hospital treatment given in another Member State without prior authorisation.\(^5\)

Second, Article 22(2) lays down two conditions which must be satisfied to render mandatory the grant of prior authorisation.\(^5\) The first condition requires the treatment to be among the benefits provided for by the legislation of the Member State of residence while the second condition requires that the treatment cannot be given within the time normally necessary for obtaining the treatment in question in the Member State of residence, taking account of the person’s state of health and the probable course of the disease.

\(^5\) At para 31.

\(^5\) Judgement, para 49. See also, opinion paras 49-50.

\(^5\) 'The authorisation required under paragraph 1(c) may not be refused where the treatment in question is among the benefits provided for by the legislation of the Member State on whose territory the person concerned resided and where he cannot be given such treatment within the time normally necessary for obtaining the treatment in question in the Member State of residence taking account of his current state of health and the probable course of the disease.'
The Court considered whether, with regard to medical treatment which cannot be given in the Member State of residence, Article 22(2) of Regulation 1408/71 must be interpreted as meaning that the authorisation required under Article 22(1)(c)(i) cannot be refused where, on the one hand, the treatment in question is among the benefits provided for under the legislation of the Member State of residence, but that legislation does not expressly and precisely stipulate the method of treatment applied, and, on the other hand, the person cannot be given alternative treatment offering the same level of effectiveness without undue delay.

In addition, the Court considered whether national courts could rely on a presumption that hospital treatment which cannot be given in that Member State is not included in the benefits for which reimbursement is provided by that State or, conversely, that the hospital treatment included in those benefits can be given in that Member State.

As to the first condition, the Court accepted that it is for each Member State to decide which medical benefits are reimbursed by its own social security system and that Member States are entitled to list precisely treatments or treatment methods or to state more generally the categories or types of treatments or treatment methods. 55 However, it also ruled that 'where the list of medical benefits reimbursed does not expressly and precisely specify the treatment method applied but defines types of treatment, on the one hand, then it is for the competent institution of the Member State of residence of the insured person to assess, applying the usual principles of interpretation and on the basis of objective and non-discriminatory criteria, taking into consideration all the relevant medical factors and the available scientific data, whether that treatment method corresponds to benefits provided for by the legislation of that Member State.'

It also followed that, where the treatment method did so correspond, an application for prior authorisation could not be refused on the ground that such a treatment method is not available in the Member State of residence. 56

As to the second condition, the Court held that where the treatment in question cannot be given in the Member State of residence and the benefits provided by that Member State are

55 At para 59.
56 At para 62.
not given as an exact list of treatments or treatment methods but as a more general definition of categories or types of treatment or treatment methods, Article 22(2) implies that, if it is established that the treatment proposed in another Member State falls within one of those categories or corresponds to one of those types,

‘the competent institution is required to give the insured person the authorisation necessary for the reimbursement of the cost of that treatment, when the alternative treatment which can be given without undue delay in the Member State of his residence is not, as in the situation described by the national court, equally effective.’

As to whether a presumption was allowed, it followed from the interpretation outlined above that national courts could not rely on presumptions on the basis of whether or not treatment could actually be given in the Member State concerned.\(^57\)

Finally, as to reimbursement, the Court ruled that there was now no point in issuing an E112 but that where a refusal to issue the authorisation required under Article 22(1)(c)(i) of Regulation 1408/71 was unjustified, when the hospital treatment has been completed and the related expenses incurred by the insured person, the national court must oblige the competent institution to reimburse the insured person the amount which it would ordinarily have paid if authorisation had been properly granted.\(^58\)

\(^{57}\) At para 69.

\(^{58}\) At para 81.