



File No. 3951/2016/VOP/KS
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Headnotes:

I. Differentiation on the grounds of State citizenship in the area of healthcare provision cannot constitute discrimination in the sense of the Anti-Discrimination Act. On the other hand, it may be at variance with EU law, which stipulates a prohibition of discrimination against EU citizens on the grounds of State citizenship (Art. 18 of the Treaty on the Functioning of the European Union). *(Translator's note concerning the term "State citizenship": in fact, the official text of the Treaty uses the term "nationality" for "státní příslušnost"; however, since the following Czech text operates with, and strictly distinguishes between, the concepts of "státní příslušnost", i.e. "State citizenship", and "národnost", which can only be translated as "nationality", we follow the same dichotomy also when referring to the text of the Treaty).*

II. A healthcare provider is in breach of EU law if it prescribes medicinal products to patients for a reduced time only because they are State citizens of some other Member State of the European Union, disregarding the fact that they are resident in the territory of the Czech Republic permanently and not temporarily.

Dear Mr A,

I would like to inform you about the result of an inquiry initiated on the basis of your complaint of June 2016. In the complaint, you contested the practice of Hospital X (hereinafter the "provider"), which consists in prescribing medicinal products to foreign State citizens for one month although the common practice is to dispense such medicines for a period of three months. Specifically, this concerns medicinal products prescribed to people infected with HIV. You state that the provider introduced this practice only in 2016; before then it dispensed medicinal products for the usual period of three months. Being a citizen of another EU Member State, you considered that this practice disadvantaged you compared to Czech State citizens despite the fact that you are properly insured and pay insurance under the Public Health Insurance Act¹ in the same manner as citizens of the Czech Republic and have permanent residence in the territory of the Czech Republic. The relevant medicinal products are vital for you and you find it rather complicated to visit the provider every month in order to obtain a new prescription. The provider specifically exempted you from this practice. However, the provider continues to differentiate among patients, which you consider discrimination on the grounds of State citizenship and nationality in access to healthcare.

¹ Act No. 48/1997 Coll., on public health insurance and on amendment to certain related laws, as amended.

The provider's practice of different treatment on the grounds of State citizenship still does not constitute discrimination in the sense of the Anti-Discrimination Act.² However, I consider that the provider's treatment of foreign State citizens is **erroneous as it violates EU law³ in relation to those persons who are **permanently resident** in the Czech Republic.**

I would like to make a practical comment before proceeding to detailed legal assessment of the conduct against which you object. I am aware that the related terminology and legal constructs can be rather complicated. Therefore, if you need more detailed clarification or explanation of any of my conclusions, please contact the employee of the Office of the Public Defender of Rights authorised by me, Mgr. Karel Suda (telephone 542 542 345, e-mail karel.suda@ochrance.cz).

Discrimination on the grounds of State citizenship

In accordance with Section 1 (5) of the Public Defender of Rights Act,⁴ I exercise competence *inter alia* in the area of right to equal treatment and protection against discrimination in the sense of the Czech Anti-Discrimination Act.⁵ Under the Anti-Discrimination Act, discrimination exists when a person is treated less favourably than another person in a comparable situation based on expressly listed grounds⁶ and if the conduct occurs in one of the situations specified in the Act.⁷

Therefore, not every less favourable treatment, even if it is otherwise at variance with the general principle of equal treatment and amounts to discrimination in the sense of other national and supranational sources of law, constitutes discrimination in the sense of the Anti-Discrimination Act.

In the present case, the provider prescribed medicinal products to foreign State citizens for a different (shorter) period of time. The facts of the case indicate that the provider differentiated by State citizenship and not nationality, treating differently only HIV patients having other than Czech State citizenship, regardless of their nationality.⁸

2 Act No. 198/2009 Coll., on equal treatment and legal remedies for protection against discrimination and on amendment to certain laws (the Anti-Discrimination Act), as amended

3 Specifically, violation of Article 18 of the Treaty on the Functioning of the European Union.

4 Act No. 349/1999 Coll., on the Public Defender of Rights, as amended.

5 This follows from footnote No. 1 on Section 1 (5) of the Public Defender of Rights Act, which refers to the Anti-Discrimination Act.

6 The grounds are contained in an exhaustive list in Section 2 (3) of the Anti-Discrimination Act. Nationality is one of the grounds listed in the Act.

7 Ibid, Section 1 (1).

8 It follows from the description of the facts available to me that a person claiming to be of other than Czech nationality who is currently a Czech citizen would obtain a prescription for medicinal products for the unrestricted, three-month period.

For the time being, State citizenship is not⁹ among the prohibited grounds¹⁰ listed in the Anti-Discrimination Act. **Consequently, the provider's practice as described above does not constitute discrimination in the sense of the Anti-Discrimination Act.**

However, considering the general task of the Defender to contribute to the defence of fundamental rights and freedoms and to promote the right to equal treatment, I find it appropriate to consider **whether the provider erred by violating EU law stipulating the prohibition of discrimination on the grounds of State citizenship. (translator's note - "nationality" in EU law.)**

The prohibition of discrimination on the grounds of **State citizenship (translator's note - "nationality" in EU law)** is one of the cornerstones of European integration. Only respect for that prohibition can ensure a truly functioning free movement of persons, services, goods and capital. Therefore, the prohibition of discrimination on the grounds of **State citizenship (translator's note - "nationality" in the text of the Treaty)** is enshrined at a general level in the Treaty on the Functioning of the European Union, which together with the Treaty on European Union forms the basis of European Union's law, lays down the basic objectives and values on which the EU is built and determines the basic rules applicable to individuals (both citizens and legal entities), the Member States and European Union as such.

Assessment of the provider's practice consisting in different treatment of HIV-positive patients who are foreign State citizens

Reduction of the time for which medicinal products are prescribed based on State citizenship

Although the precise time for which medicinal products should be prescribed to patients is not expressly stipulated by any legal rule, certain limitations follow from the Decree on Prescribing Medicinal Products.¹¹ The Decree stipulates, amongst other things, that medicinal products covered from public health insurance may be prescribed for a maximum of three months.¹² Thus, the Decree delimits the maximum period of time for which a doctor may prescribe a medicinal product; nevertheless, a doctor or provider may prescribe a medicine for a shorter time. The Decree does not impose any limitation in this respect. However, such shorter prescriptions may not be done arbitrarily. Prohibited grounds include those set out in the Anti-Discrimination Act, but also other grounds identified as discriminatory by other valid and effective sources of law. Differentiation on the grounds of **State citizenship (translator's note - "nationality" in the text of the Treaty)** is prohibited by the Treaty on the Functioning of the European Union,¹³ which is directly applicable and automatically establishes the rights and duties of private entities. **Consequently, a State**

9 An amendment to the Anti-Discrimination Act is expected to be passed and come into effect on 1 January 2018 (see parliamentary press No. 688 available at www.psp.cz).

10 A final list of the grounds is contained in Section 2 (3) of the Anti-Discrimination Act.

11 Decree of the Ministry of Health No. 54/2008 Coll., on prescribing medicinal products, details of medical prescriptions and rules of using medical prescriptions, as amended.

12 Section 5 (2) of the Decree on Prescribing Medicinal Products.

13 Specifically, Article 18 of the Treaty on the Functioning of the European Union prohibits any discrimination on grounds of **State citizenship (translator's note - "nationality" in the text of the Treaty).**

citizen of any Member State of the European Union may not be disadvantaged without justification in certain areas of social life.

In the provider's practice, the provider's doctors prescribe the necessary medicinal products to HIV-positive patients for only thirty days. They do so only for patients who are State citizens of a country other than the Czech Republic. The standard in other cases is that the provider prescribes medicinal products for ninety days, i.e. in relation to Czech citizens the provider uses the maximum time available under the Decree. You have documented the above differentiation on the provider's part by submitting correspondence with the provider and it has also been confirmed by the Ministry of Health. Consequently, the provider's practice is an undisputed fact.

Since the provider differentiates between the time for which its medical personnel prescribe medicinal products to HIV-positive patients on the basis of the patients' State citizenship (medicinal products are prescribed for a significantly shorter period to non-Czech citizens), **the provider's conduct is based on grounds that are identified as discriminatory by EU law. Thus, the provider does not provide foreign State citizens (State citizens of Member States of the European Union) with the same healthcare services as citizens of the Czech Republic.**

Objectives of the provider's differentiation, their proportionality and necessity

Differentiation on the basis of prohibited grounds can be justified only if the objective of the provider's differentiation is legitimate and the means chosen by the provider to achieve the objective would be proportionate and necessary. This rule is expressly stipulated by the Anti-Discrimination Act,¹⁴ however, it is also settled and universally applied in assessing unequal treatment prohibited by other sources of law.¹⁵ If these conditions are not fulfilled, differentiation is considered arbitrary and unjustifiable. The objective of the provider's practice could be seen as legitimate if it follows public interest.¹⁶ Means of achievement are proportionate and necessary insofar as they realistically enable achievement of the objective and are necessary to this end.

The provider applied the different treatment on the basis of State citizenship with the objective of reducing the financial losses it had previously suffered when foreign State citizens suddenly terminated their health insurance. Citizens are (on a mandatory basis) included in the system of public health insurance only if they have permanent residence in the territory of the Czech Republic or are employed with an employer registered in the Czech Republic.¹⁷ Loss of employment, or termination of permanent residence, may result in sudden termination of the foreign State citizen's insurance policy. If the policy is terminated during the three-month period of prescribed treatment, the health insurance company will not reimburse the provider for the treatment from the public health insurance system. The provider can claim the payment directly from the patient; however, according to

14 Section 7 (1) of the Anti-Discrimination Act.

15 The Court of Justice of the European Union performs an almost identical test in cases of asserted unequal treatment, as follows from an extensive volume of the Court's settled case-law.

16 BOUČKOVÁ, Pavla et al. *Antidiskriminační zákon (Anti-Discrimination Act): Commentary*. 2nd edition. Prague: C. H. Beck, 2016, ISBN 978-80-7400-618- 0, p. 316

17 Act No. 48/1997 Coll., on public health insurance and on amendment to some related laws, as amended.

information from the above provider, in an overwhelming majority of cases the provider is unsuccessful as the patient has left the country. In contrast, citizens of the Czech Republic participate in the system of public health insurance mandatorily under the law, and the health insurance company always provides reimbursement to the provider for the medicinal products dispensed. The provider has taken a measure which differentiates on the basis of State citizenship in spite of the fact that according to the provider's own statement, it would be sufficient for achievement of the given objective if the person concerned provided some other proof of insurance for the next three months.

I consider the objective declared by the provider legitimate. Although it is an individual economic objective of the provider, it also has a broader general impact. Financial losses on costly medicinal products necessary for persons with HIV may be considerable and are thus capable of having an effect on the quality of the healthcare services provided to every patient of the provider. If the purpose of the practice is to prevent economic consequences of a sudden exit from the system of public health insurance, i.e. to ensure predictability of the duration of stay and duration of health insurance, I consider that the duration in itself, in combination with other less restrictive measures, is guaranteed by granted permanent residence in the territory of the Czech Republic.

Under the law, **foreigners to whom permanent residence has been granted** have the duty to join the Czech system of public health insurance.¹⁸ The basic prerequisite for granting permanent residence in the Czech Republic is a continuous period of five years of residence in the territory of the Czech Republic; consequently, permanent residence is applied for by citizens who intend to live in the Czech Republic permanently and have centred their life, career and property in the Czech Republic. A permanent residence permit terminates on the basis of grounds exhaustively listed in the Residence of Foreign Nationals Act.¹⁹ The Act also stipulates the conditions for revocation of a permit by the Ministry of the Interior.²⁰ However, termination of participation in the system of public health insurance as a result of termination or revocation of a permanent residence permit is not a sudden, immediate event. Therefore, pending court or administrative proceedings which may result in termination or revocation of a permanent residence permit (affidavit of the patient that such proceedings have not been initiated) are a relevant indicator for assessing the risk of termination of a foreigner's permanent residence.

Thus, I am convinced that prescribing medicinal products for the standard general period of three months to foreign State citizens who have been granted permanent residence in the territory of the Czech Republic is a less restrictive measure which is directed at achieving the objective declared by the provider, with the possibility to request an affidavit from the patient that no administrative proceedings are pending that could result in revocation of the permanent residence permit.

Therefore, although the means chosen by the provider are aimed at achieving the declared objective, I do not consider them necessary and appropriate with respect to foreigners with

18 See Section 3 (1) and (2) of the Public Health Insurance Act, which specifies the commencement and termination of public health insurance in relation to a person's permanent residence.

19 Section 76 of Act No. 326/1999 Coll., on the presence of foreigners in the territory of the Czech Republic and on amendment to certain laws, as amended.

20 Section 77 of Act No. 326/1999 Coll., on the presence of foreigners in the territory of the Czech Republic and on amendment to certain laws, as amended.

permanent residence permits. **A difference in treatment of a State citizen of a Member State of the European Union with permanent residence permit for the territory of the Czech Republic cannot be justified; therefore, the provider breached EU law.**

Conclusion

Dear Mr A, as part of my methodological assistance to victims of discrimination I preliminarily assess whether or not certain conduct constitutes discrimination. This assessment gives perspectives on whether or not a victim of discrimination could succeed with an anti-discrimination lawsuit. In your case, based on the lack of competence entrusted to me by law, as described above, I have ruled out a suspicion of discrimination in your case and hence I have not found discrimination. **Consequently, I consider that filing an anti-discrimination action would be useless because you cannot invoke the individual claims²¹ stipulated in the Act** in the case at hand.

However, I find the conduct in question erroneous in that it **violates the prohibition of discrimination enshrined in the primary law of the European Union.**

Since you were dissatisfied with the manner in which the provider handled your complaint against the provider's conduct, you can **bring a complaint before the Prague City Hall (hereinafter the "City Hall") – the competent administrative authority which granted the provider the authorisation to provide healthcare services under Section 93 (2) of the Healthcare Services Act.**²² Should you be dissatisfied with the handling of your complaint by the City Hall, you can turn to me again with a new complaint. It is my statutory competence to inquire into the procedure of individual administrative authorities.²³ You can also file an **action for the protection of personal rights and plead, in addition to infringement of personal rights,²⁴ also breach of EU law.** This objection opens the question of interpretation of primary law, which can be brought before the Court of Justice of the European Union by national courts if the interpretation is crucial for the court's decision in the case.²⁵ If you wish to take any further legal steps, I recommend that you seek legal assistance of an attorney-at-law specialised in medical law.²⁶

As the Public Defender of Rights, at the time being I cannot assist you other than by providing the above information. Your case is closed at this point. I will briefly advise the provider of my findings. Even this alone can help promote the right to a more effective equal treatment of foreign State citizens in future.

21 If discrimination in the sense of the Anti-Discrimination Act exists in a particular case, the victim can invoke the claims exhaustively listed in Section 10 of the Act.

22 Act No. 372/2011 Coll., on medical services and the conditions of their provision (the Health Care Services Act), as amended.

23 Section 1 (1) and (2) of the Public Defender of Rights Act.

24 I consider that differentiation on the basis of State citizenship may also constitute infringement of these rights. A claim for the protection of personal rights is closest to discrimination on the grounds of State citizenship, although I consider that no such case has been brought before Czech courts to date. Action for performance is a possible alternative.

25 Article 267 of the Treaty on the Functioning of the European Union.

26 The web search on the website of the Czech Bar Association (<http://vyhledavac.cak.cz/>) can be used for this purpose. The lawyer's specialisation is one of the search criteria available. In this case, specialisation No. 45 – medical law, or No. 85 – protection against discrimination.

If you wish to **comment on my conclusions**, please do so within **30 days of delivery of this letter**.

Yours sincerely,

Mgr. Anna Šabatová, Ph.D., signed
Public Defender of Rights
(this letter bears electronic signature)

Attachment

Conditions of Free Legal Representation