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Judgment of the Court of Justice in Case C-372/04

The Queen, on the application of Yvonne Watts v Bedford Primary Care Trust and Secretary of State for Health

THE OBLIGATION TO REIMBURSE THE COST OF HOSPITAL TREATMENT PROVIDED IN ANOTHER MEMBER STATE ALSO APPLIES TO A NATIONAL HEALTH SERVICE WHICH PROVIDES SUCH TREATMENT FREE OF CHARGE

In order to be entitled to refuse a patient authorisation to receive treatment abroad on the ground of waiting time for hospital treatment in the State of residence, the NHS (United Kingdom National Health Service) must show that that waiting time does not exceed a medically acceptable period having regard to the patient's condition and clinical needs

Under Community law, the E 112 scheme enables an application to be made for authorisation to travel abroad in order to receive treatment there. That authorisation cannot be refused where the treatment in question is normally available in the Member State of residence but cannot be provided there in the individual case without undue delay. The health insurance fund is then required to reimburse the cost of treating the patient.

Suffering from arthritis of the hips, Mrs Watts applied to the Bedford PCT (Bedford Primary Care Trust, the primary healthcare fund for Bedford) for authorisation to undergo surgery abroad under the E 112 scheme. In that context she was seen by a consultant in October 2002 who classified her case as 'routine', which meant a wait of one year for surgery. The Bedford PCT refused to issue Mrs Watts with an E 112 form on the ground that treatment could be provided to the patient 'within the Government's NHS Plan targets' and therefore 'without undue delay'. Mrs Watts lodged an application with the High Court of Justice for judicial review of the decision refusing authorisation.

Following deterioration in her state of health, she was re-examined in January 2003 and was listed for surgery within three or four months. Bedford PCT repeated its refusal but in March

2003 Mrs Watts underwent a hip replacement operation in France for which she paid £3,900. She therefore continued with her application in the High Court of Justice, claiming in addition reimbursement of the medical fees incurred in France. The High Court dismissed the application on the ground that Mrs Watts had not had to face undue delay after the re-examination of her case in January 2003. Both Mrs Watts and the Secretary of State for Health appealed against that judgment. In those circumstances, the Court of Appeal referred to the Court of Justice of the European Communities questions on the scope of Regulation No 1408/71 and the Treaty provisions concerning the freedom to provide services.

The scope of Regulation No 1408/71¹

The Court points out, first of all, that under Regulation No 1408/71, the competent institution issues prior authorisation for reimbursement of the cost of the treatment provided abroad only if it cannot be provided within the time normally necessary for obtaining the treatment in question in the Member State of residence.

The Court finds that, in order to be entitled to refuse to grant authorisation on the ground of waiting time, the competent institution **must establish that the waiting time**, arising from objectives relating to the planning and management of the supply of hospital care, **does not exceed the period which is acceptable in the light of an objective medical assessment of the clinical needs of the person concerned in the light of his medical condition and the history and probable course of his illness, the degree of pain he is in and/or the nature of his disability at the time when the authorisation is sought.**

Furthermore, the setting of waiting times should be done flexibly and dynamically, so that the period initially notified to the person concerned may be reconsidered in the light of any deterioration in his state of health occurring after the first request for authorisation.

In the present case, it is for the referring court to determine whether the waiting time invoked by the competent body of the NHS exceeded a medically acceptable period in the light of the patient's particular condition and clinical needs.

The scope of the freedom to provide services

The Court finds that a situation such as that in issue in which a person whose state of health necessitates hospital treatment goes to another Member State and there receives the treatment in question for consideration **falls within the scope of the provisions on freedom to provide services** regardless of the way in which the national system with which that person is registered and from which reimbursement of those services is subsequently sought operates.

It points out, next, that the system of prior authorisation which governs the reimbursement by the NHS of the cost of hospital treatment provided in another Member State deters or even prevents the patients concerned from applying to providers of hospital services established in

¹ Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996 (OJ 1997 L 28, p. 1).

another Member State and constitutes, both for those patients and for service providers, an obstacle to the freedom to provide services.

However, it considers that **such a restriction can be justified in the light of overriding reasons**. It finds that, from the perspective of ensuring that there is sufficient and permanent access to high-quality hospital treatment, controlling costs and preventing, as far as possible, any wastage of financial, technical and human resources, the requirement that the assumption of costs by the national system of hospital treatment provided in another Member State be subject to prior authorisation appears to be a measure which is both necessary and reasonable.

Nevertheless, the conditions attached to the grant of such authorisation must be justified in the light of the overriding considerations mentioned above and must satisfy the requirement of proportionality. **The regulations on the NHS do not set out the criteria for the grant or refusal of the prior authorisation necessary for reimbursement of the cost of hospital treatment provided in another Member State, and therefore do not circumscribe the exercise of the national competent authorities' discretionary power in that context. The lack of a legal framework in that regard also makes it difficult to exercise judicial review of decisions refusing to grant authorisation.**

The Court finds in that regard that, where the delay arising from such waiting lists appears to exceed an acceptable period in the individual case concerned having regard to an objective medical assessment of all the circumstances of the situation and the patient's clinical needs, the competent **institution may not refuse authorisation on the grounds of the existence of those waiting lists**, an alleged **distortion of the normal order of priorities** linked to the relative urgency of the cases to be treated, **the fact that the hospital treatment** provided under the national system in question **is free of charge**, the duty to make available **specific funds** to reimburse the cost of treatment provided in another Member State and/or **a comparison between the cost** of that treatment and that of equivalent treatment in the Member State of residence.

Consequently, the competent authorities of a national health service, such as the NHS, must provide mechanisms for the reimbursement of the cost of hospital treatment in another Member State to patients to whom that service is not able to provide the treatment required within a medically acceptable period.

The mechanism for reimbursement

The Court finds that **the patient who was granted authorisation to receive hospital treatment in another Member State (the State of treatment), or received a refusal to authorise which was unfounded, is entitled to reimbursement by the competent institution of the cost of the treatment in accordance with the provisions of the legislation of the State of treatment, as if he were registered in that State.**

Where there is no provision for reimbursement in full, in order to place the patient in the position he would have been in had the national health service with which he is registered been able to provide him free of charge, within a medically acceptable period, with treatment

equivalent to that which he received in the host Member State, the competent institution must in addition reimburse him the difference between the cost of that equivalent treatment in the State of residence up to the total amount invoiced for the treatment received in the State of treatment and the amount reimbursed by the institution of that State pursuant to the legislation of that State, where the first amount is greater than the second. **Conversely, where the cost charged in the State of treatment is higher** than the cost of comparable treatment in the Member State of residence, the competent institution **is only required to cover the difference between the cost** of the hospital treatment in the two Member States up to the cost of the same treatment in the State of residence.

As regards the **travel and accommodation costs**, since the obligation on the competent institution exclusively concerns the expenditure connected with the healthcare received by the patient in the Member State of treatment, **they are reimbursed only** to the extent that the legislation of the Member State of residence imposes a corresponding duty on its national system where the treatment is provided in a local hospital covered by that system.

Unofficial document for media use, not binding on the Court of Justice.

Languages available: All

The full text of the judgment may be found on the Court's internet site

<http://curia.eu.int/jurisp/cgi-bin/form.pl?lang=EN&Submit=rechercher&numaff=C-372/04>

It can usually be consulted after midday (CET) on the day judgment is delivered.

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Pictures of the delivery of the judgment are available on EbS "Europe by Satellite", a service provided by the European Commission, Directorate-General Press and Communications,

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