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Press and Information

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Advocate General's Opinion in Case C-372/04

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

ADVOCATE GENERAL GEELHOED SUGGESTS THAT THE CURRENT NHS SYSTEM FOR GRANTING AUTHORISATION FOR TREATMENT ABROAD IS INCOMPATIBLE WITH COMMUNITY LAW

The sole use of NHS targets to determine whether a person can receive treatment without undue delay does not take sufficient account of the individual needs of each patient.

Under Community law a person is entitled to receive services throughout the EU. These include certain medical services. The E-112 scheme allows people to apply for authorisation to travel abroad for treatment. Authorisation may not be refused if the treatment is one which is normally provided and cannot be granted without undue delay in the home Member State. The sickness insurance fund is then obliged to reimburse the person for the costs incurred.

In September 2002 Yvonne Watts was told she had osteoarthritis in both hips and would need a total hip replacement on each side. Mrs Watt's daughter requested authorisation for Mrs Watts to receive treatment abroad. In the context of this application the examining consultant stated that Mrs Watts was in as much need of a hip replacement as any of the other patients on his waiting list, that her case was "routine" and that she would have to wait approximately one year for treatment. The request for treatment abroad was refused by Bedford Primary Care Trust (PCT) as the treatment could be provided within NHS targets and therefore without "undue delay".

Following a request for judicial review of this decision made by Mrs Watts she was re-examined by the consultant at the end of January 2003, who reported that her condition had worsened and she should be operated on within three to four months. As a result of this review the PCT again refused authorisation for treatment abroad as the operation could still be carried out by the NHS within an appropriate time.

Despite this reduction in waiting time Mrs Watts travelled to France for an operation in Abbeville on 7 March 2003. Upon her return she continued with her application for judicial review, seeking, in addition, reimbursement of her costs of £3,900.

In October 2003, the UK High Court rejected Mrs Watt's application stating that, whilst the PCT had been incorrect to state that her situation fell outside the scope of the EC Treaty, the reclassification of her situation in early 2003 meant that she would have received treatment without undue delay. Both Mrs Watts and the Secretary of State for Health appealed to the Court of Appeal which referred numerous questions to the Court of Justice of the EC.

The scope of the EC Treaty and the existence of a restriction on the receipt of services

Firstly, Advocate General Leendert Adrie Geelhoed suggests that, contrary to the position taken by the UK government, the **EC Treaty provisions on the free movement of services apply to the case in question**. He recalls that medical services are not exempt from the scope of the EC Treaty and that Mrs Watts received such a service in return for remuneration. The fact that the NHS is an entirely public body, funded by the State and providing health care free at the point of delivery, is irrelevant for determining whether the situation falls within the scope of the Treaty. The role of the NHS is merely instrumental in relation to the main transaction between Mrs Watts and the hospital in France. There is therefore no doubt that Mrs Watts was a recipient of services for the purposes of the EC Treaty.

The Advocate General considers that the **absence of a clearly defined procedure** within the NHS for considering applications for treatment abroad restricts the possibilities for patients to seek treatment outside the system. It therefore **constitutes a restriction of their freedom to receive services** and is contrary to the EC Treaty.

Justification of the restriction

Advocate General Geelhoed states that **the authorisation procedure in its present form is incompatible with the EC Treaty**. The **sole criteria** of whether the treatment can be provided with the **NHS Plan targets does not take the individual needs of patients sufficiently into account**.

In order to be compatible with Community law, the Advocate General suggests that waiting lists must be managed in a dynamic and flexible way, with regular reassessment and maximum waiting times set so as to balance the needs of the patient with the need to allocate limited resources. It is not sufficient for a request for treatment abroad to be rejected on the ground that treatment can be provided within a target set under the national system. Such a decision must rather be taken with regard to the individual condition of the patient involved, particularly the degree of pain, the nature of the disability and the medical history of the patient. The NHS system of using waiting lists for administering medical priorities cannot therefore justify a refusal for authorisation to receive treatment abroad.

Moreover the fact that authorisation may require additional funding for the NHS cannot be a consideration when assessing the needs of an individual. Budgetary considerations are only valid within the context of requests for treatment on a larger scale which put at risk the financial stability of the system. The Advocate General notes that the function of the prior authorisation procedure is to allow Member States to control the outflow of patients and that the financial burden incurred by treatment abroad must always be offset against the costs saved in the longer term of treatment which would otherwise have been provided by the NHS.

The concept of "undue delay"

Advocate General Geelhoed considers that the concept of "undue delay" must be determined with regard to the specific circumstances of each case, taking account not only of the patient's medical condition but also his medical history, with the prime consideration being whether the condition of the patient would make any postponement of treatment unacceptable. Waiting times and clinical priorities may be taken into account where they are determined on the basis of individual needs. Targets for providing treatment do not, in view of their abstract character, comply with this criterion. The management of hospital care in a situation of limited resources and the fact that health care is provided free at the point of delivery, both of which relate to the economic organisation of the NHS, cannot be taken into account.

Calculation of the amount to be reimbursed

Where a Member State, after having refused prior authorisation, is required to reimburse an individual for treatment which they received abroad, the Advocate General states that this must be at the level which would have been reimbursed had the treatment being carried out in the home Member State. If such tariffs do not exist in the home Member State, for example because treatment is provided free at the point of delivery, reimbursement must be made at the level of the actual cost of the treatment, that being the only remaining point of reference. On this point the Advocate General notes that such tariffs should exist in the UK so as to determine the costs that must be paid by foreign visitors receiving treatment from the NHS.

As to the travel and accommodation costs incurred by the patient, these must be refunded where national law provides for the reimbursement of such expenses when treatment is provided within the country concerned.

IMPORTANT: The Advocate General's Opinion is not binding on the Court. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are responsible. The Judges of the Court of Justice are now beginning their deliberations in this case. Judgment will be given at a later date.

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

Languages available: DE, EL, EN, ES, FR, HU, IT, NL, PL

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

<http://curia.eu.int/jurisp/cgi-bin/form.pl?lang=en>

It can usually be consulted after midday (CET) on the day of delivery.

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