SECRETARY OF STATE FOR HEALTH v R (WATTS)

Court of Appeal (Civil Division)
Philipps MR, May, Carnwarth LLJ
20 February 2004
[2004] EWCA Civ 166

Judicial review – EC Treaty, Art. 49 – Medical treatment in another Member State at public expense – Undue delay – Whether NHS obliged to authorise medical treatment for patients in other Member States in accordance with ECJ decisions in Geraets-Smits and Müller-Fauré – Interpretation of Council Regulation No. 1408/71, Art. 22(2)

Facts

In September 2002 Mrs Watts (the respondent) was diagnosed with osteoarthritis in both hips, and was informed by a consultant orthopaedic surgeon that she required bilateral total hip replacements. The waiting list for the surgery at Mrs Watts' local National Health Service (NHS) hospital was approximately one year.

Mrs Watts' daughter asked the Bedford Primary Care Trust (PCT) to authorise the surgery in another EC Member State using the Form E112 procedure under Art. 22 of Council Regulation No. 1408/71 (the Regulation) which conferred a right to be treated in another Member State at public expense where treatment was not available within the time normally necessary for obtaining the treatment in the Member State of residence. The PCT refused the request on the basis that the requisite treatment could be provided within 12 months, which did not constitute "undue delay".

In January 2003 Mrs Watts was examined by a consultant anaesthetist and an orthopaedic surgeon in France. The surgeon indicated that the operation should be carried out by the middle of March 2003. The PCT reassessed Mrs Watts' case and listed her for surgery in Bedford in April or May 2003, but again refused to pay for her treatment abroad.

Mrs Watts travelled to France in February 2003 and the operation was performed on her there on 7 March 2003. Mrs Watts claimed the costs of the operation and the hospital stay (£3,900).

At first instance, Mrs Watts relied on (amongst other things), Art. 49 of the EC Treaty and Art. 22 of the Regulation. Munby J held that although the PCT had erred in law in its understanding of the meaning of "undue delay", as the test for "undue delay" for the purposes of Art. 49 was not the same as that applicable under Art. 22, in the circumstances, the delay of the operation could not be said to have been "undue". Further, treatment within the time of a normal waiting list, properly administered, would justify refusal under Art. 22, and no error of law arose.

The main issues that arose on appeal were:

(a) whether the decision of the European Court of Justice (ECJ) which had held that institutions which provided medical treatment in one Member State may be obliged to reimburse the cost of a patient's treatment in another Member State applied to the NHS; and, if they did,

(b) whether the NHS could refuse to authorise the cost of treatment in another Member State, if effective treatment was available under the NHS within properly operated NHS waiting times.

CCC 1091–3297/04/040595–33

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Held

1. The ECJ had not directly considered the case of a state-funded national health service such as the NHS, and it could not therefore be asserted that that Court had addressed and rejected the argument that the NHS provided "services" within the meaning of Art. 49 of the EC Treaty. See post p. 620C–E.
2. As to the wording of Art. 22(2) of the Regulation, Munby J had erred in his interpretation of that article; the test did not in fact involve regard to normal waiting lists in the Member State of residence. The test was essentially one of clinical judgment, and there was no sensible place, in applying the test, for consideration of normal waiting times. If, however, that conclusion was correct, Art. 22(2) posed difficulty when the treatment in question was of static and not degenerative condition. See post pp. 620H–621F.
3. On the face of it, it seemed paradoxical that Art. 49, which was concerned with the freedom to provide services, should enable a person, who was entitled to have funded the receipt of medical services, to select a provider in a state other than the one where he lived only when the state was unable to provide them "in due time". However, the paradox was explained because the "due time" test arose only in the context of an exception to an exception to the general rule. It was logical that the test of what constituted an undue length of time should be the same test of clinical necessity as applied under Art. 22(2). An institution should not be permitted to invoke the need to maintain a balanced medical and hospital service to justify delaying treatment to which a patient was entitled to an extent that threatened the efficacy of the treatment. See post pp. 621H–622D.
4. There remained the question of whether Art. 49 obliged, as a matter of principle, the NHS to fund medical services supplied to UK residents abroad and, if so, whether the NHS could justify not doing so having regard to the manner in which it managed the resources it chose to devote to the provision of a health service. The recent ECJ decision of Case C-56/01 *Inizan v Caisse primaire d'assurance maladie des Hauts-de-Seine* (unreported) 23 October 2003 apparently equated the requirement as to delay under Art. 22 of the Regulation with Art. 49 of the EC Treaty. It therefore appeared that under both articles considerations of an economic nature were to be left out of the account in judging what was undue delay, and thus budgetary constraints were irrelevant. The critical question was whether Member States were obliged to provide resources to enable some of their nationals to receive medical treatment in another Member State at a time earlier than they would otherwise receive it, when the effect of this might be to postpone treatment in more urgent cases; and whether, to avoid this, the state may be obliged to supplement its NHS budget to whatever extent was necessary to avoid undue delay in treatment of patients. See post pp. 622F–623H.
5. If a state-funded national health service was obliged to reimburse costs incurred by a patient in having treatment in another Member State, it was not clear whether those costs should be calculated under Art. 22 in accordance with the legislation of the Member State where the treatment was performed, or under Art. 49 by reference to the legislation in the Member State of residence. These may be different, and clarification was required. It was also unclear whether travel and accommodation costs should be reimbursed. See post p. 624A–D.
6. The court was troubled by the conclusion to which the previous case law of the ECJ apparently led; it was not clear that the ECJ intended to require that those who

wished to jump the queue by having medical treatment in another Member State were able, if necessary, by so doing to dictate an increase in what may have been an already strained national health service budget, or to force the postponement of more urgent treatment for others. See post p. 624H.

7. A number of questions were to be referred to the ECJ, including the main issue of whether the NHS was obliged to authorise medical treatment for patients in other Member States in accordance with Case C-157/99 *Geraets-Smits v Stichtung Ziekenfonds VGZ, Peerbooms v Stichtung CZ Groep Zorgverzekeringen* [2001] ECR I-5473 and Case C-385/99 *Müller-Fauré v Onderlinge Waarborgmaatschappij OZ Zorgverzekeringen UA, van Riet v Onderlinge ZAO Zorgverzekeringen* (unreported) 13 May 2003. See post p. 625B–F.

Legislation cited

EC Treaty, Arts 45–50, 55, 152, 234
European Convention on Human Rights, Arts 3, 8
Council Regulation No. 1408/71 (OJ 1971 L149/2, English Special Edition, Series I, Chapter II 1971, p. 416), Arts 22, 36
National Health Service Act 1977
Council Regulation No. 2793/81 (OJ 1981 L275/1)

Cases referred to

Geraets-Smits v Stichtung Ziekenfonds VGZ, Peerbooms v Stichtung CZ Groep Zorgverzekeringen (Case C-157/99) [2001] ECR I-5473, [2002] QB 409
Inizan v Caisse primaire d'assurance maladie des Hauts-de-Seine (Case C-56/01) (unreported) 23 October 2003
Kohll v Union des caisses de maladie (Case C-158/96) [1998] ECR I-1931
Luisi and Carbone v Ministero del Tesoro (Joined Cases 286/82 and 26/83) [1984] ECR 377
Müller-Fauré v Onderlinge Waarborgmaatschappij OZ Zorgverzekeringen UA, van Riet v Onderlinge ZAO Zorgverzekeringen (Case C-385/99) (unreported) 13 May 2003
R v Cambridge Health Authority ex p. B [1995] 1 WLR 898, [1995] 2 All ER 129
R v North West Lancashire Health Authority ex p. A [2000] 1 WLR 977, [2000] 2 FLR 525
R (Watts) v Bedford Primary Care Trust and another [2003] EWHC 2228 (Admin), [2004] EuLR 25
Vanbraekel v Alliance nationale des mutualités chrétiennes (ANMC) (Case C-368/98) [2001] ECR I-5363

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Richard Gordon QC and Jeremy Hyam (instructed by Leigh Day & Co.) for the respondent

MAY LJ:

Introduction

1. This is the judgment of the court.

2. This appeal raises important questions as to the circumstances in which, under EC law, a National Health Service patient requiring surgery is entitled to have the surgery undertaken in another Member State of the European Union and require the National Health Service to pay for it.

3. Mrs Yvonne Watts, the claimant, had a hip-replacement operation in France and claims to be entitled to reimbursement of the cost of the operation. Munby J considered her application for judicial review of the Secretary of State's refusal to authorise payment. The judge, in a judgment handed down on 1 October 2003,[1] decided on the facts that Mrs Watts was not entitled to payment. However, in the course of a comprehensive judgment, he reached certain conclusions of law, embodied as declarations in his order, which the Secretary of State challenges on this appeal. By respondent's notice, Mrs Watts also challenges some of the judge's conclusions.

4. The Secretary of State invites this court to refer questions of law to the European Court of Justice under Art. 234 of the EC Treaty for preliminary rulings. It is submitted that decisions on these questions are necessary to enable this court to decide the appeal. Mr Richard Gordon QC, on behalf of Mrs Watts, opposes a reference. He contends that the Court of Justice has already decided all important material questions and that the judge decided the matters which the Secretary of State challenges on this appeal in accordance with those decisions.

5. This court considered that it was necessary to hear full submissions before deciding whether or not to make a reference to the Court of Justice.

6. This case is concerned with the entitlement to medical treatment which is performed in a hospital. In this country hospital treatment is provided free of charge under the National Health Service (NHS). NHS hospitals and those who work in them are funded directly by the Department of Health. Parallel with the medical services provided by the NHS there are medical services provided by the private sector. Those who use these services have to pay for them. Typically they do so with the proceeds of health insurance. The NHS can, and sometimes does, fund the provision of medical services either by the private sector in this country or by those who provide medical services abroad.

7. The case centrally concerns NHS waiting lists. The NHS does not have, and cannot have, unlimited funds. Waiting lists for operations and other treatment which are not true emergencies are inevitable. In the short term an imbalance between demand and supply inevitably leads to waiting lists. In the longer term it may be possible to restore the balance by increasing the resources devoted to the provision of medical services. It is also possible to bring demand and supply more into balance by restricting the range of treatments that are provided. But it is to be supposed that in reality waiting lists cannot be eliminated entirely.

8. The Department of Health hopes, in due course, to increase the resources devoted to the provision of medical services so as to reduce waiting lists. In the meantime it

[1] *R (Watts) v Bedford Primary Care Trust and another* [2003] EWHC 2228 (Admin), [2004] EuLR 25.

A applies a system of priorities under which the more urgent clinical needs take precedence over those which are less urgent. Those seeking less-urgent treatment often have to wait for months, sometimes many months, for treatment. It would be possible to reduce waiting lists by devoting more financial resources to the provision of medical services so as to fund, for NHS patients, the provision of these services in the private sector or abroad. Such action would be likely to be at the expense of public
B expenditure in other areas. The question that underlies this case is whether the state is entitled to decline to reallocate resources in this way, or whether European law requires it to do so. The direct question is the criteria that govern the right, if right there is, of a patient who is waiting for NHS hospital treatment to by-pass the queue by having the treatment abroad at the expense of the NHS.

9. NHS waiting lists are constructed and operated to give appropriate priority to
C patients according to their medical need. Are waiting lists so operated to be taken as the yardstick for judging the appropriateness of any delay in a patient receiving treatment? Or is the delay inherent in waiting lists capable of being undue delay and, if so, is the NHS obliged to fund the cost of a patient mitigating or avoiding the undue delay by having the operation or treatment in another Member State? The case law of the Court of Justice which enabled Munby J to answer the first of these questions "no"
D and the second "yes" is at the heart of this appeal.

10. The judge correctly observed that the implications of his decision for the NHS and its patients were profound.

Facts

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11. The claimant was 72 years old at the time of the judge's judgment. In September 2002 she was diagnosed by her general practitioner as having osteoarthritis in both hips. She was seen by a consultant orthopaedic surgeon, Mr Edge, at his private clinic on 1 October 2002. She would have had to wait between 19 and 21 weeks to see Mr Edge as an NHS consultant. In the meantime, the claimant's daughter had asked
F Bedford Primary Care Trust ("the PCT") to support an application by her mother to have bilateral hip surgery overseas using an EC Form, Form E112. This form intends to give effect to Art. 22 of Council Regulation No. 1408/71,[2] to which we shall refer later in this judgment.

12. On 28 October 2002 Mr Edge wrote to the PCT saying that the claimant was suf-
G fering from "severe bilateral hip pain". She had experienced severe deterioration in the last three months. She had to use two walking sticks. Examination showed her to have severe arthritis of both hips. She required bilateral total hip replacements. "She is battling tremendously with her mobility and is in constant pain." She was as deserving as any of Mr Edge's patients waiting for such surgery. Unfortunately, his NHS waiting list was approximately one year. She was as deserving as any of his other patients with severe arthritis of having the surgery performed abroad at the cost of the NHS. He
H noted that the claimant would need to be admitted to hospital several days before

[2] OJ 1971 L149/2, English Special Edition, Series I, Chapter II 1971, p. 416.