



Secretary of State for Health v. R (on the application of Watts)

[2004] EWCA Civ 166

Country: United Kingdom

Region: Europe

Year: 2004

Court: Court of Appeal, Civil Division

Health Topics: Health care and health services, Health systems and financing

Human Rights: Right to health

Facts

The claimant Yvonne Watts brought an action against the Secretary of State for Health claiming that she was entitled to the cost of reimbursement for an operation she underwent in France.

Watts was a resident of the United Kingdom. In September 2002, she was diagnosed with osteoarthritis in both of her hips. Soon after, it was determined that she required bilateral hip replacement surgery. The wait time for such an operation in the UK was approximately one year. The claimant's daughter reached out to Bedford Primary Care Trust (PCT) to determine if it was possible for her mother to undergo the surgery abroad with costs covered by the National Health Service (NHS), which provides medical services free of charge to all legal residents of the UK. The PCT informed the claimant's daughter that the NHS would not reimburse Watts since her condition was routine for someone suffering from osteoarthritis, and having to wait one year for her operation in the UK did not constitute "undue delay".

On January 31, 2003, a consultant orthopedic surgeon re-examined Watts. He recognized that her condition had deteriorated to some extent and there was some concern she would soon be too weak for surgery, and therefore re-classified her as a "soon" case, which meant that she should be operated on in three to four months. Watts did not wait until April, and elected to have the operation done on March 7, 2003 in France. The cost of the operation and hospital stay was approximately £3,900.

The lower court held that Watts was not entitled to reimbursement, which she challenged in this appeal. They also reached other conclusions of law that the Secretary of State challenged.

Decision and Reasoning

The Court referred certain questions that needed to be addressed to the Court of Justice and deferred reaching a conclusion on the issues raised in this appeal.

Watts based her claim on Article 49 of the Treaty establishing the European Community, which prohibited restrictions on services provided for the community, such as medical treatment. She also relied on Article 22 of Council Regulation 1408/71 which broadly speaking, stated that a patient may, when authorized by the competent institution (such as the NHS), go to another Member State of the European Union to receive appropriate treatment.

The Secretary of State contended that Article 49 did not apply to state-funded healthcare systems such as the NHS, and that it therefore did not apply in the present case. The Court rejected this submission. In the lower court judgment, it was held that to introduce restrictions on reimbursement for the cost of obtaining hospital treatment in another Member State infringed on the guaranteed freedom to provide services in the Treaty zone. In the present case, the Court agreed with this finding and did not further address it.

The Secretary of State also contended that treatment could be denied under Article 22 of Regulation 1408/71, if it was available under the NHS within properly operated waiting times. The Court disagreed with this interpretation. In *Inizan v. Caisse primaire d'assurance maladie des Hauts-de-Seine*, the Court had held that, in order to be eligible for reimbursement for medical treatment received abroad, the patient must not be able to receive treatment without undue delay in the Member State of residence. Therefore, normal waiting times within the country of residence were not to be taken into account in determining eligibility for reimbursement. The Court in the present case applied this same interpretation to Watts's case, holding that the question of Watts's eligibility to have her operation carried out abroad should not take into account NHS

waiting times. This determination was a matter of clinical judgment, not one of waiting times that were determined by economic considerations.

Despite this reasoning, the Court was hesitant to suggest that the NHS had an obligation to fund medical services provided to United Kingdom residents in other Member States. Articles 49 and 22, as interpreted by the Court, did not address budgetary constraints in determining undue delay, but in reality the NHS and other individual Member States had limited means. Imposing such reimbursement requirements could violate Article 152.5 of the Treaty establishing the European Community, which stated that the responsibilities of individual Member States must be respected in organizing healthcare services within the Treaty zone.

The Court was also unable to determine what exactly constituted "undue delay". Previous cases that looked at this issue were examined, but no conclusive answers were reached in defining "undue delay".

In examining Articles 49 and 22, the Court found that a number of relevant questions were raised regarding undue delay, the overlap of Article 49 and Article 22, the reasonable budgetary obligations that can be placed on the NHS, and how the responsibilities of the NHS should be balanced. The Court elected to refer such questions to the Court of Justice before reaching a conclusion on the issues raised by *Watts*™ case.

Decision Excerpts

"In the instant case, however, Mrs Watts condition proved to be degenerative. If we are correct, the question of whether she should have been authorised to have her hip replacement carried out abroad pursuant to Article 22.2 should not have taken waiting lists conditioned by economic considerations into account."
Paragraph 94

"As we understand the reasoning, it proceeds as follows. (i) Medical services, whether provided within or outside a hospital, are services within the ambit of Article 49. (ii) In principle, those in State A who are under an obligation to fund medical services for those resident in State A cannot insist that those who are entitled to those services should receive them in State A. So to insist would prejudice those seeking to provide the services in other Member States. To do so would thus constitute a restriction on the freedom to provide the services in question in the other Member States. (iii) Exceptionally, those in State A responsible for funding the services can insist that the services be provided in State A if this can be justified as necessary in order to maintain a balanced medical and hospital service open to all. (iv) This exception cannot be invoked in any case where it will result in a patient having to wait for treatment in State A for an undue length of time."
Paragraphs 96-97

"If the intent of Article 49 was to protect those who provide services in member states, it is not immediately clear why a state-funded national health service should be required to fund those who provide medical services privately in other member states; nor why it should be required to do so at the expense of those who provide medical services privately within its own state. Nor is it comfortable to derive a potential obligation on a member state to provide larger resources to a publicly funded national health service from a principle designed to protect commercial service providers in other member states."
Paragraphs 103

"The budget allocated, as a matter of governmental policy, to the NHS is not currently large enough to enable all who wish to have treatment, regardless of its urgency, to receive it promptly. The NHS could, as a matter of policy, have mitigated this situation by restricting the types of treatment provided. We imagine that some present or future Member States do not have health services which provide the range of treatments provided by the NHS. Instead, the NHS applies its finite resources by according priorities to different treatments and by having regard to the urgency of individual cases. This results at present in some quite lengthy waiting lists for less urgent treatment."
Paragraphs 109