IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
ADMINISTRATIVE COURT (The Hon Mr Justice Munby)

Royal Courts of Justice
Strand, London, WC2A 2LL
20th February 2004

Before:

THE MASTER OF THE ROLLS
LORD JUSTICE MAY
and
LORD JUSTICE CARNWATH

Between:

SECRETARY OF STATE FOR HEALTH **Appellant**

- and -

R on the application of YVONNE WATTS **Respondent**

Mr David Lloyd Jones QC and Miss Sarah Lee (instructed by The Office of the Solicitor) for the Appellant
Mr Richard Gordon QC and Mr Jeremy Hyam (instructed by Leigh Day & Co) for the Respondent
Hearing dates: 8th and 9th December 2003

Lord Justice May:

Introduction

1. This is the judgment of the Court.

2. This appeal raises important questions as to the circumstances in which, under European Community 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 1st October 2003, 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 Article 234 of the E.C. 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 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 expenditure in other areas. The question that underlies this case is whether the State is entitled to decline to re-allocate 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 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 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.

The Facts

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 1st October 2002. She would have had to wait between 19 and 21 weeks to see Mr Edge as a NHS consultant. In the meantime, the claimant's daughter had asked 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 Article 22 of Council Regulation 1408/71, to which we shall refer later in this judgment.

12. On 28th October 2002, Mr Edge wrote to the PCT saying that the claimant was suffering 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 noted that the claimant would need to be admitted to hospital several days before surgery to monitor her anti-coagulation levels. This was because she had had a valve replacement in her heart and was currently on Warfarin.

13. On 21st November 2002, the PCT wrote to the claimant's daughter refusing to support the claimant's application to be able to have hip replacements performed overseas on the E112 scheme. The letter said that Mr Edge regarded the claimant as a "routine case". The stated basis of this decision was that the conditions in Article 22 of Council Regulation 1408/71 were not met. Treatment was available to the claimant within the Government's NHS Plan targets for access to inpatient treatment of 12 months. By this criterion, there was not "undue delay".

14. On 12th December 2002, the claimant issued proceedings seeking judicial review of this decision.

15. The claimant's daughter had been in direct touch with the Department of Health. The Department wrongly informed her that there was no system of appeal against any decision that the PCT might take. Further contact with Mr Edge elicited from him that he felt unable to say whether the claimant should be treated overseas. He could only comment on her clinical priority, which was routine. The PCT understood that Mr Edge was not recommending that the claimant should have her hip operation overseas.

16. On 6th January 2003, the claimant and her daughter travelled to France, where she was seen by an orthopaedic surgeon and a consultant anaesthetist. The anaesthetist was reported to have expressed great concern about the claimant's continuing weight loss and to be worried that, if this continued, she would not be strong enough for surgery. The orthopaedic surgeon was reported to have indicated that, to be on the safe side, the operation should be carried out by the middle of March 2003. This orthopaedic surgeon subsequently declined to accept the claimant as a patient on being asked to provide evidence in the present proceedings, which he did not do.

17. There was a permission hearing of the judicial review proceedings before Wilson J on 22nd January 2003. It was suggested by the Secretary of State that the claimant should be re-examined so that the PCT might reconsider its decision. The question of permission was adjourned to be heard at the same time as the judicial review application.

18. Mr Edge re-examined the claimant on 31st January 2003, as did a consultant anaesthetist. Mr Edge reported the claimant as saying that her pain was now significantly worse. She had lost a stone in weight since he had last seen her four months before. X-rays showed continued moderate to severe arthritis in both hips. The consultant anaesthetist felt that she was essentially fit for surgery and likely to remain so into the foreseeable future. Mr Edge considered that the claimant probably had deteriorated since he had last seen her. She had perhaps become a little worse than the average patient. He was prepared to re-categorise her as a "soon" case. This meant that she should be operated on in 3 to 4 months, that was in April or May 2003.

19. On 4th February 2003, the PCT wrote recording Mr Edge's revised opinion. They said that the claimant would be listed for hip replacement surgery in Bedford in 3 to 4 months. They remained unable to support treatment overseas under Form E112.

20. The claimant did not wait until April or May 2003. She arranged to have her right hip replaced at a clinic in Abbeville in France on 7th March 2003. She travelled to France on 1st March and returned to England on 12th March 2003. The full cost of the operation and hospital stay was a fee of about £3,900. There was evidence from the claimant's daughter that the average NHS cost of a similar operation was approximately £4,000. The cost to the NHS of arranging such an operation to be carried out privately in England was somewhat more than £6,000. Neither the PCT nor the Secretary of State commented on these figures.

21. The claimant did not at any time make a direct application under Form E112 to the Department of Health, as distinct from the PCT. There was evidence from Mr McConn, who has power delegated by the Secretary of State to grant or refuse applications for treatment abroad under Form E112. He stated that an application to the Secretary of State in December 2002 or January 2003 would have been refused because the claimant's case had been classified as routine and there was nothing to distinguish her circumstances from those of others awaiting similar treatment. He stated that an application in February 2003 would also have been refused. Mr Edge did not consider her case to be urgent. She was likely to be fit to undergo the necessary surgery in the foreseeable future. She was going to have her operation within a relatively short period, in April or May 2003.

22. The claimant continued her application for judicial review. She sought declarations of law and reimbursement of the cost of her treatment abroad. She sought an order quashing the decision in the PCT's letter of 21st November 2002 and a mandatory order that the PCT "comply with the law and grant authorisation for the claimant's treatment overseas under Form E112 forthwith". She sought other alternative remedies. The PCT originally opposed the application on the ground that it was not the appropriate body to authorise treatment under Regulation 1408/71 and that no application had been made to the Secretary of State. The application was amended, following the permission hearing on 22nd January 2003, to seek relief against the Secretary of State.

23. The claimant accepted that she had no effective remedy under domestic law. The judge explained this at some length by reference to *R v Cambridge Health Authority ex parte B* [1995] 1 WLR 898 and *R v North West Lancashire Health Authority ex parte A* [2000] 1 WLR 977. The claimant also sought to rely on Articles 3 and 8 of the European Convention on Human Rights. The judge decided that the claim could not succeed in so far as it was founded on human rights law. There is no appeal against that part of the judge's decision.

24. The claimant based her claim mainly on European Community law and the appeal relates entirely to this part of her case. She relies on Article 49 (formerly Article 59) of the Treaty establishing the European Community and Article 22 of Council Regulation 1408/71 of 14th June 1971.

Article 49 of the Treaty and related Articles

25. Article 49 is within Chapter 3 of the Treaty, under the heading "Services". It provides:

> "… restrictions on freedom to provide services within the Community shall be prohibited in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended."

26. Article 50 (formerly Article 60) provides:

> "Services shall be construed to be "services" within the meaning of this Treaty where they are normally provided for remuneration …
>
> "Services" shall in particular include: … (d) activities of the professions.
>
> Without prejudice to the provisions of the Chapter relating to the right of establishment, the person providing a service may, in order to do so, temporarily pursue his activity in the State where the service is provided under the same conditions as are imposed by that State on its own nationals."

27. Article 55 (formerly Article 66) provides that the provisions of Article 45 to 48 shall apply to matters covered by Chapter 3.

28. Article 48 (formerly Article 58) provides:

> "Companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community shall, for the purposes of this Chapter, be treated in the same way as natural persons who are nationals of Member States.
>
> "Companies or Firms" means companies or firms constituted under civil or commercial law, including co-operative societies, and other legal persons governed by public or private law, save for those which are non-profit-making."

29. Our attention was also drawn to Articles 45, 46 and 47. It is not necessary to set these articles out in full.

30. Article 152.5 (formerly Article 129.5) provides:

> "Community action in the field of public health shall fully respect the responsibilities of the Member States for the organisation and delivery of health services and medical care."

31. It is evident that Article 49 was directed to prohibiting restrictions on those who *provide* services within the community. In the present context, that would mean doctors, nurses and hospitals, not patients. Its purpose was evidently to prohibit inter-state discrimination so as to prohibit, for instance, restrictions on a French doctor practising in England. The Court of Justice has, however, put in place on the foundation of Article 49 a substantial edifice not immediately apparent from its literal terms. One consequence of this, in our view, is that submissions based on the literal meaning of Article 49 and related articles may not be regarded as persuasive. There has been much judicial policy-making, and the policy goes well beyond the words of the Article.

32. In *Luisi and Carbone v Ministero del Tesoro* [1984] ECR 377, the Court of Justice said in its judgment at paragraph 16:

> "… the freedom to provide services includes the freedom, for the recipients of services, to go to another Member State in order to receive a service there,

> without being obstructed by restrictions, even in relation to payments and that tourists, persons receiving medical treatment and persons travelling for the purpose of education or business are to be regarded as recipients of services."

The case concerned restrictions on the transfer of foreign currency, and the reference to payments in this passage is to be read in that context. A freedom to receive services in another Member State does not necessarily connote an obligation on the part of those who might otherwise provide the services in the person's state of residence to pay for services provided in the other Member State.

Article 22 of Council Regulation 1408/71

33. Article 22 of Council Regulation 1408/71 of 14th June 1971 has as part of its heading the words "Need to go to another Member State in order to receive appropriate treatment". In conjunction with Articles 22a(14) and 36(15), it provides that a person, who is a national of a Member State and is insured under the legislation of the Member State and members of his family residing with him, who is "authorised by the competent institution to go to the territory of another Member State to receive there the treatment appropriate to his condition", may do so at the expense of the competent institution. This is a short, but, we believe, uncontentious précis of some dense prose. Paragraph 2 of Article 22 provides:

> "The authorization required under paragraph 1(c) may not be refused where the treatment in question is among the benefits provided for by the legislation of the Member State on whose territory the person concerned resided and where he cannot be given such treatment within the time normally necessary for obtaining the treatment in question in the Member State of residence taking account of his current state of health and the probable course of the disease."

34. There is no United Kingdom domestic legislation implementing this provision of the Council Regulation. It is implemented in this jurisdiction by means of Form E112. The procedure is operated on an understanding that "treatment within the time normally necessary for obtaining the treatment in question in the Member State of residence taking account of his current state of health and the probable course of the disease" embraces treatment in accordance with properly administered NHS waiting lists, which take account of medical need in assessing priority.

35. The present form of Article 22.2 was introduced by amendment by Council Regulation 2793/81 of 17th September 1981. It had previously provided:

> "The authorization required under paragraph 1(c) may not be refused where the treatment in question cannot be provided for the person concerned within the territory of the Member State where he resides."

One of the preambles to Regulation 2793/81 explained that experience gained from implementing the original Regulation had revealed the need to make improvements; and that in consequence the discretionary power of an institution of a Member State should be

extended in granting or refusing authorisation to a worker going to another Member State to receive appropriate medical treatment.

Decisions of the Court of Justice

36. The decisions of the Court of Justice which formed the main basis of the judge's decisions were *Geraets-Smits v Stichting Ziekenfonds YGS* and *Peerbooms v Stichting CZ Groep Zorgverzekeringen* [2002] QB 409; and *Müller-Fauré and Van Riet v Onderluige Waarborginaatschappij* Case C-385/99. The judge's decision in the present case preceded the publication of the Court's decision in *Inizan v Caisse primaire d'assurance maladie des Hauts-de-Seine* Case C-56/01.

37. The cases of *Geraets-Smits* and *Peerbooms* concerned a compulsory sickness insurance scheme in the Netherlands. This was established under the Ziekenfondswet (Law on sickness funds) ("ZFW"). The scheme covers all persons whose income does not exceed a certain amount. It is managed by sickness funds with separate legal personality. The scheme is financed from contributions paid by insured persons and employers and an annual payment made by the state. The sickness insurance funds are responsible for concluding with medical practitioners and specialist institutions agreements for the provision of health care to the persons registered with them. Insured persons are entitled to the provision of free health care, not to the reimbursement of whatever sickness costs they may incur. An insured person may choose the persons from whom and the establishments at which they receive treatment from among those with whom their sickness fund has entered into agreements. A sickness fund may authorise an insured person to apply for treatment to a person or establishment outside the Netherlands. A criterion for determining whether authorisation will be given is whether the treatment is "normal in the professional circles concerned". A further criterion is whether the medical treatment is "necessary for the healthcare of the person concerned".

38. Mrs Geraets-Smits had treatment for Parkinson's disease in Germany. Mr Peerbooms had neurological treatment in Austria. Each claimed reimbursement from their respective funds in the Netherlands. Each of the claims was rejected essentially on the ground that the treatments were experimental and not therefore "normal in the professional circles concerned".

39. The questions referred by the national court are set out in paragraph 16 of the opinion of the Advocate General. He recast the questions, in paragraph 35 of his opinion as asking:

> "… whether Articles 59 and 60 of the EC Treaty [now Articles 49 and 50] preclude social security legislation such as that at issue in the main proceedings which, by way of agreements concluded by sickness insurance funds with medical practitioners and health-care institutions, organises a system of benefits in kind which requires insured persons who need to consult a non-contracted practitioner or institution, whether situated on national territory or abroad, to obtain authorisation from their fund before they can receive the benefits to which they are entitled."

40. Although under the ZFW scheme patients are entitled to free medical treatment, the underlying system is an insurance fund which makes payment to contracted persons and institutions. Patients have a freedom to choose between these persons and institutions, who presumably operate on a commercial basis. The Advocate General recorded that ten of the fifteen member states (including the United Kingdom) submitted written observations and that nine states (including the United Kingdom) presented oral argument. The United Kingdom was among a group of member states which took the view that health care under a social security system organised in the form of benefits in kind does not constitute a service within the meaning of what is now Article 50. The Advocate General supported that position essentially on the basis that, where the patient receives free medical treatment, that service is not received in return for remuneration. The Court of Justice did not follow the Advocate General's opinion.

41. The court deals with this topic briefly but clearly in paragraphs 47 to 59 of its judgment. It recorded the fact that a number of governments had argued that hospital services could not constitute an economic activity within the meaning of Article 50 of the Treaty, particularly when they are provided in kind and free of charge under the relevant sickness insurance scheme. It was argued (as in the present appeal) that there was no remuneration and that the person providing the service must do so with a view to making a profit. These and a further argument on behalf of the German Government were rejected. It was settled case law that medical activities fell within in the scope of Article 50 of the Treaty. The fact that relevant national rules were social security rules could not exclude the application of Articles 49 and 50. The judgment then continued:

> "55. With regard more particularly to the argument that hospital services provided in the context of a sickness insurance scheme providing benefits in kind, such as that governed by the ZFW, should not be classified as services within the meaning of Article [50] of the Treaty, it should be noted that, far from falling under such a scheme, the medical treatment at issue in the main proceedings, which was provided in member states other than those in which the persons concerned were insured, did lead to the establishments providing the treatment being paid directly by the patients. It must be accepted that a medical service provided in one member state and paid for by the patient should not cease to fall within the scope of the freedom to provide services guaranteed by the Treaty merely because reimbursement of the cost of the treatment involved is applied for under another member state's sickness insurance legislation which is essentially of the type which provides for benefits in kind."

This appears to go some way to rejecting part of the Secretary of State's submission in the present appeal, that is that Article 49 of the Treaty does not apply unless the institution in the patient's state of residence provides services, as well as the person or institution in the member state to which the patient travels for treatment.

42. The judgment of the court continued:

> "56. Furthermore, the fact that hospital medical treatment is financed directly by the sickness insurance funds on the basis of agreements and preset scales of fees is not in any event such as to remove such treatment from the sphere of services within the meaning of Article [50] of the Treaty.
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> 57. First, it should be borne in mind that Article [50] of the Treaty does not require that the service be paid for by those for whom it is performed …
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> 58. Secondly, Article [50] of the Treaty states that it applies to services normally provided for remuneration and it has been held that, for the purposes of that provision, the essential characteristic of remuneration lies in the fact that it constitutes consideration for the service in question … In the present cases, the payments made by the sickness insurance funds under the contractual arrangements provided for by the ZFW, albeit set at a flat rate, are indeed the consideration for the hospital services and unquestionably represent remuneration for the hospital which receives them and which is engaged in an activity of an economic character."

Thus, under the Netherlands scheme, although the patient receives medical treatment free, the doctors and hospital providing the medical treatment operate on a commercial basis and are paid by the insurance funds. There is thus consideration, and the essential characteristic of remuneration subsists. This does not apply to a patient receiving treatment from the NHS. There is no insurance fund to which the patient contributes and no payment which might be characterised as remuneration is made by or on behalf of the patient.

43. The court considered the restrictive effects of the Netherlands legislation. It noted that, according to settled case law, Article 49 of the Treaty precludes the application of any national rules which had the effect of making the provision of services between member states more difficult than the provision of services purely within one member state. The requirement that the provision of hospital treatment in another member state must be a medical necessity, which would be the case only if adequate treatment could not be obtained without undue delay in contracted hospitals in the Netherlands, by its very nature would severely limit the circumstances in which such authorisation could be obtained. Such rules had to be objectively justified by acceptable overriding reasons. The court had held in *Kohll v Union des Caisses de Maladie* Case C-158/96 that the possible risk of seriously undermining a social security system's financial balance might constitute an overriding reason in the general interest capable of justifying a barrier to the principle of freedom to provide services. There might also be a justifiable derogation on grounds of public health under Article 46 of the Treaty. Restrictions might also be justified to maintain treatment capacity or medical competence essential for the public health, and even the survival of the population.

44. The court accepted that medical services provided in a hospital require to be properly planned to achieve sufficient and permanent access to a balanced range of high quality hospital treatment. Costs need to be controlled and waste of resources avoided. A requirement that the assumption of costs, under a national social security system, of hospital treatment provided in another member state must be subject to prior

authorisation appeared to be a measure which was both necessary and reasonable. The court said at paragraph 81:

> "Looking at the system set up by the ZFW, it is clear that, if insured persons were at liberty, regardless of the circumstances, to use the services of hospitals with which their sickness insurance fund had no contractual arrangements, whether they were situated in the Netherlands or in another member state, all the planning which goes into the contractual system in an effort to guarantee a rationalised, stable, balanced and accessible supply of hospital services would be jeopardised at a stroke."

45. The court considered the condition that the proposed treatment should be "normal in the professional circles concerned". It considered that for this to be justified, it must be based on objective, non-discriminatory criteria which are known in advance, in such a way as to circumscribe the exercise of the national authorities' discretion, so that it is not used arbitrarily. Only an interpretation of the condition on the basis of what is sufficiently tried and tested by international medical science could be regarded as satisfying this criterion.

46. As to the condition that the insured person's medical condition made treatment abroad necessary, the court said in paragraph 103 that this:

> "… can be justified under Article [49] of the Treaty, provided that the condition is construed to the effect that authorisation to receive treatment in another member state may be refused on that ground only if the same or equally effective treatment can be obtained without undue delay from an establishment with which the insured person's sickness insurance fund has contractual arrangements.
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> 104. Furthermore, in order to determine whether equally effective treatment can be obtained without undue delay from an establishment having contractual arrangements with the insured person's fund, the national authorities are required to have regard to all the circumstances of each specific case and to take due account not only of the patient's medical condition at the time when authorisation is sought but also of his past record.
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> 105. Such a condition can allow an adequate, balanced and permanent supply of high quality hospital treatment to be maintained on the national territory and the financial stability of the sickness insurance scheme to be assured.
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> 106. Were large numbers of insured persons to decide to be treated in other member states even when the hospitals having contractual arrangements with their sickness insurance funds offered adequate identical or equivalent treatment, the consequent outflow of patients would be liable to put at risk the very principle of having contractual arrangements with hospitals and, consequently, undermine all the planning and rationalisation carried out in this vital sector in an effort to avoid the phenomena of hospital overcapacity, imbalance in the supply of hospital medical care and logistical and financial wastage.
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> 107. However, once it is clear that treatment covered by the national insurance system cannot be provided by a contracted establishment, it is not acceptable that

national hospitals not having any contractual arrangements with the insured person's sickness insurance fund be given priority over hospitals in other member states. Once such treatment was ex hypothesi provided outside the planning framework established by the ZFW, such priority would exceed what was necessary for meeting the overriding requirements referred to in paragraph 105 above."

47. One of the court's conclusions was that "authorisation can be refused on the ground of lack of medical necessity only if the same or equally effective treatment can be obtained without undue delay at an establishment having a contractual arrangement with the insured person's sickness insurance fund."

48. We note that, although the expression "without undue delay" appears in the court's formulation of its answers to the questions referred, the question of delay did not arise directly in the referred cases. In each case, authorisation was refused on the basis of the experimental nature of the treatment.

49. The national court had not raised any question relating to Article 22 of Regulation 1408/71. The Advocate General had nevertheless considered it briefly, concluding that the conditions which applied to sickness funds in the Netherlands were the same as those in Article 22 for authorising treatment abroad.

50. The *Müller-Fauré* and *van Riet* cases also concerned the ZFW scheme in the Netherlands. While she was on holiday in Germany, Ms Müller-Fauré had dental treatment involving the fixing of six crowns and a fixed prosthesis on the upper jaw. None of the treatment was in hospital. When she returned from holiday, she applied to her insurance fund for reimbursement of the costs of the treatment, which was refused. She brought proceedings. The Dutch court upheld the fund's decision. The referring court pointed out that in any event only a limited part of her treatment was covered by the legislation and therefore eligible for reimbursement. It found that Ms Müller-Fauré voluntarily sought treatment from a dentist in Germany while she was on holiday there because she lacked confidence in dental practitioners in the Netherlands.

51. Ms van Riet had been suffering from pain in her right wrist since 1985. In April 1993, the doctor treating her requested that her insurance fund should authorise her to have arthroscopy at a hospital in Belgium where the examination could be carried out much sooner than in the Netherlands. The request was refused on the ground that the test could also be performed in the Netherlands. She had the arthroscopy carried out in Belgium in May 1993 and subsequently an ulnar reduction was carried out, partly in hospital, to relieve her pain. The Dutch insurance fund refused to reimburse the cost. The treatment was provided in Belgium without prior authorisation and without it being established that she could not wait, for medical or other reasons, until the insurance fund had taken a decision on her application. The referring court considered that the time which she would have had to wait for the arthroscopy in the Netherlands was not unreasonable. Both the arthroscopy and the subsequent operation were undertaken in Belgium more quickly than they would have been in the Netherlands.

52. The questions referred to the Court of Justice for a preliminary ruling were (1) whether Articles 49 and 50 of the EC Treaty are to be interpreted as meaning that in principle a requirement, which stipulates that, in order to assert entitlement to benefits, a person insured with a sickness insurance fund requires the prior authorisation of that fund to seek treatment from a person or establishment outside the Netherlands with whom or which the sickness insurance fund has not concluded an agreement, is incompatible with Articles 49 and 50 of the EC Treaty; and (2) if so, do the objectives of the Netherlands system of benefits in kind constitute an overriding reason in the general interest capable of justifying a restriction on the fundamental principle of freedom to provide services. The Court of Justice was also asked whether the fact that some or all of the treatment involved hospital care affected the answers to those questions. The referring court asked the Court of Justice to explain the import of paragraph 103 of its judgment in *Geraets-Smits*. The referring court specifically asked what was meant by "without undue delay" and whether that condition must be assessed on a strictly medical basis, regardless of the waiting time for the treatment sought.

53. As to the first question, the Court of Justice reiterated in paragraph 38 that it is settled case law that medical activities fall within the scope of Article 50 of the Treaty. The court referred to its decision in *Geraets-Smits*. It recorded in paragraph 44 that the court had already held that rules such as those in the Netherlands deter or even prevent insured persons from applying to providers of medical services established in member states other than that of the insurance fund and constitute, both for insured persons and service providers, a barrier to freedom to provide services. Before deciding whether Articles 49 and 50 of the Treaty precludes such rules, it was appropriate to determine whether those rules could be objectively justified, which was the subject of the second question.

54. As to the second and third questions, the court considered arguments submitted to the court by a number of governments including that of the United Kingdom. The court summarised the submissions of the United Kingdom Government as follows:

> "55. The Irish and the United Kingdom Governments submit that if insured persons were entitled to go to a Member State other than that in which they are insured in order to receive treatment there, there would be adverse consequences for the setting of priorities for medical treatment and the management of waiting lists, which are significant aspects of the organisation of sickness insurance. In that regard, the United Kingdom Government points out that the finite financial resources allocated to the National Health Service (the "NHS") are managed by local health authorities which establish time tables based on clinical judgments and medically determined priorities for different treatments. Patients do not have the right to demand a certain time table for their hospital treatment. It follows that if patients could shorten their waiting time by obtaining, without prior authorisation, medical treatment in other Member States for which the competent fund was nonetheless obliged to assume the cost, the financial balance of the system would be threatened and the resources available for more urgent treatment would be severely depleted, thereby placing at risk its ability to provide adequate levels of health care.

> 56. The United Kingdom Government adds that if hospital services were to be liberalised, its own hospitals would be unable to predict either the loss of demand that would follow from recourse being had to hospital treatment in other Member States or the increase in demand that would follow from persons insured in those other states being able to seek hospital treatment in the United Kingdom. Those effects of liberalisation would not necessarily offset each other and the impact would be different for every hospital in the United Kingdom.
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> 57. As regards the criteria by which it should be ascertained whether treatment which is the same or equally effective for the patient could be obtained without undue delay in the Member State in which the person is insured, the United Kingdom Government, like the Swedish Government, refers to Article 22(2), second paragraph, of Regulation No. 1408/71, in conjunction with Article 22(1)(c), from which it is apparent that the person concerned may not be refused the authorisation required to go to the territory of another Member State to receive there the treatment where, taking account of his current state of health and the probable course of the disease, he cannot be given the treatment within the time normally necessary in the Member State of residence. There is also a reference of the way in which those provisions were interpreted in paragraph 10 of the judgement in case C182/78 *Pierik* [1979] ECR 1977.
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> 58. In that regard the United Kingdom Government draws attention to the fact that in practice authorisation for treatment in another Member State is generally given in the United Kingdom where there is a delay for treatment beyond the maximum waiting times. National waiting lists take account of the different needs of different categories of patients and permit the best possible allocation of hospital resources. The lists are flexible so that if a patient's condition suddenly deteriorates, he can be moved up the waiting list and treated more quickly. To compel the competent authorities to authorise treatment abroad in circumstances other than where there is a delay beyond the normal waiting time and to pass the cost on to the NHS would have damaging consequences for its management and financial viability.
>
> 59. In any event, the United Kingdom points to the specific characteristics of the NHS and asks the court to uphold the principle that health care provided under such a national sickness insurance scheme does not fall within the scope of Article [50] of the Treaty and that the NHS, which is a non-profit-making body, is not a service provided for the purposes of the Treaty."

These paragraphs rehearse, substantially in full, the two main arguments relied upon by the Secretary of State in the present appeal.

55. The Court of Justice then made findings which essentially repeated findings in earlier cases including *Geraets-Smits*. It considered the risk of seriously undermining the financial balance of a social security system. It recalled, by reference to *Kohll*, that aims of a purely economic nature could not justify a barrier to the fundamental principle of freedom to provide services. However, the risk of seriously undermining the financial balance of the social security system might also constitute an overriding general interest

reason capable of justifying a barrier of that kind. As to hospital services, the court recalled that planning was necessary to achieve the aim of ensuring that there is a sufficient and permanent accessibility to a balanced range of high quality hospital treatment in the state concerned. It helped to control costs and to prevent waste. A requirement that the assumption of costs must be subject to prior authorisation appeared to be a measure which was both necessary and reasonable. The conditions attached to the grant of such authorisation must be justified in the light of overriding considerations and must satisfy the requirement of proportionality.

56. It had been explained by the national court in the *Müller-Fauré* case that the condition concerning the necessity of the treatment was in practice interpreted as meaning that the treatment was not to be authorised unless it appeared that appropriate treatment could not be provided without undue delay in the Netherlands. The Court of Justice repeated the substance of paragraphs 103 to 106 of its judgment in *Geraets-Smits*. The court then said at paragraph 92:

> "However, a refusal to grant prior authorisation which is based not on fear of wastage resulting from hospital overcapacity but solely on the grounds that there are waiting lists on national territory for the hospital treatment concerned, without account being taken of the specific circumstances attaching to the patient's medical condition, cannot amount to a properly justified restriction on freedom to provide services. It is not clear from the argument submitted to the court that such waiting times are necessary, apart from considerations of a purely economic nature which cannot as such justify a restriction on the fundamental principle of freedom to provide services, for the purpose of safeguarding the protection of public health. On the contrary, a waiting time which is too long or abnormal would be more likely to restrict access to balanced, high-quality hospital care."

In the present case, Munby J regarded this paragraph as critical to his decision.

57. The Court then proceeded to consider non-hospital services. In the course of this consideration, there are the following paragraphs:

> "103. Second, as has already been made clear in paragraph 39 above, a medical service does not cease to be a provision of services because it is paid for by a national health service or by a system providing benefits in kind. The court has, in particular, held that a medical service provided in one Member State and paid for by the patient cannot cease to fall within the scope of the freedom to provide services guaranteed by the Treaty merely because reimbursement of the costs of the treatment involved is applied for under another Member State's sickness insurance legislation which is essentially of the type which provides for benefits in kind (*Smits* and *Peerbooms*, paragraph 55). The requirement for prior authorisation where a person is subsequently to be reimbursed for the costs of that treatment is precisely what constitutes, as has already been stated in paragraph 44 above, the barrier to freedom to provide services that is to say, to a patient's ability to go to the medical service provider of his choice in a Member State other

than that of affiliation. There is thus no need, from the perspective of freedom to provide services, to draw a distinction between reference to whether the patient pays the costs incurred and subsequently applies for reimbursement thereof or whether the sickness fund or the national budget pays the provider directly.

104. …

105. First, when applying Regulation No. 1408/71, those Member States which have established the system providing benefits in kind, or even a national health service, must provide mechanisms for *ex post facto* reimbursement in respect of care provided in a Member State other than the competent state. That is the case, for example, where it has not been possible to complete the formalities during the relevant person's stay in that State (see Article 34 of Regulation (EEC) No. 574/72 of the Council of 21 March 1972 fixing the procedure for implementing Regulation No. 1408/71) or where the competent State has authorised access to treatment abroad in accordance with Article 22(1)(c) of Regulation No. 1408/71.

106. Second, as has already been stated in paragraph 98 above, insured persons who go without prior authorisation to a Member State other than the one in which their sickness fund is established to receive treatment there can claim reimbursement of the cost of the treatment received only within the limits of the cover provided by the sickness insurance scheme of the Member State of affiliation. …

107. Third, nothing precludes a competent Member State with a benefits in kind system from fixing the amounts of reimbursement which patients who have received care in another Member State can claim, provided that those amounts are based on objective, non-discriminatory and transparent criteria."

58. As we have said, the court's decision in *Inizan* was published after the judge's decision in the present case. Ms Inizan is resident in France. She is covered by medical insurance by CPAM. She asked them to reimburse the cost of multi-disciplinary pain treatment which she intended to undergo in Germany. This was refused on the ground that the requirement of the second sub-paragraph of Article 22(2) of Regulation 1408/71 had not been satisfied. The National Medical Officer considered that a wide range of treatments was available in France which could be considered equivalent to those offered at the hospital in Germany without involving undue delay. The National Court wondered whether, by making reimbursement of the costs of health services provided in another Member State subject to prior authorisation, the provisions constituted a restriction on freedom to provide services contrary to Articles 49 and 50 of the Treaty. The question referred to the Court of Justice was whether Article 22 of the Regulation was compatible with Articles 49 and 50 of the Treaty. They also asked whether the CPAM was entitled to refuse Ms Inizan reimbursement of the costs of the treatment in Germany following an adverse opinion from the National Medical Officer. The Court of Justice concluded that Article 22 was not inconsistent with Articles 49 and 50 of the Treaty. As to whether the CPAM had been right to refuse authorisation for Ms Inizan, the court considered the conditions in Article 22. In doing so, it said this at paragraph 44 of the judgment:

"44. That second condition requires, as noted in paragraph 37 of the present judgment, that the treatment which the patient intends to undergo in a Member State other than that in which he resides cannot be given to the patient within the time normally necessary for obtaining the treatment in question in the Member State of residence taking account of his current state of health and probable course of the disease.

45. It follows that such a condition is not satisfied whenever it is apparent that the treatment which is the same or equally effective for the patient can be obtained without undue delay in the Member State of residence (see, to similar effect, *Smits and Peerbooms*, paragraph 103, and *Müller-Fauré and Van Riet*, paragraph 89).

46. In that connection, in order to determine whether treatment which is equally effective for the patient can be obtained without undue delay in the Member State of residence, the competent institution is required to have regard to all the circumstances of each specific case and to take due account not only of the patient's medical condition at the time when authorisation is sought and, where appropriate, of the degree of pain or the nature of the patient's disability which might, for example, make it impossible or extremely difficult for him to carry out a professional activity, but also of his medical history (see *Smits and Peerbooms*, paragraph 104, and *Müller-Fauré and Van Riet*, paragraph 90)."

59. These paragraphs of the judgment and the court's formal answers to the questions referred appear to decide that the condition as to delay under Article 22 is the same as that which the court had indicated applied under Article 49 of the Treaty. The court does not appear to have given reasons for this conclusion. This is surprising, since a strong case can be made that the court's interpretation of "undue delay" with reference to Article 49 was not the same as "within the time normally necessary for obtaining the treatment in question" under the second paragraph of Article 22 of the Regulation. It is, however, clear that the Court of Justice has brought together the conditions for refusing authorisation under Article 49 of the Treaty and Article 22 of the Regulations. We consider this further later in this judgment.

The judge's judgment

60. The judge considered the relationship between Article 49 of the Treaty and Article 22 of the Regulation. He concluded that they were separate provisions which did not stand or fall together. They served fundamentally different purposes. Article 49 was directed to prohibiting restrictions on the freedom of those who provide services, rather than of those for whom the services are provided. Article 22, on the other hand, is a social security provision intended to safeguard the interests of an insured person who travels abroad to obtain treatment. The right to do so at public expense is limited to the circumstances referred to in amended Article 22.2.

61. The judge considered decisions of the Court of Justice and submissions based on them at great length. He concluded that Article 49 of the Treaty was not inapplicable merely because the subject matter might also fall within the scope of Article 22 of the

Regulations. He concluded that medical and hospital services fell within the scope of Article 50 of the Treaty, and thus within the scope of Article 49; and that this applied as much to the NHS in the United Kingdom as to hospital services provided on a more obviously commercial basis in other Member States of the Community. He decided specifically that medical and hospital services provided to and paid for by a United Kingdom patient in another Member State do not fall outside the scope of Articles 49 and 50 merely because the patient is a NHS patient and the costs are to be reimbursed by the NHS.

62. The judge noted that the Court of Justice had consistently rejected the argument advanced by various Member States, including the United Kingdom, that national systems which make reimbursement subject to prior authorisation and other restrictions do not restrict the freedom to provide services. Such a restriction needs to be objectively justified if there is not to be a breach of Article 49. It had to be objectively necessary and proportionate. The United Kingdom's requirement for prior authorisation could in principle be justified if it could be shown to be necessary in order to provide and maintain an adequate, balanced and permanent supply of high quality medical and hospital services accessible to all through the NHS; or in order to avoid the risk of seriously undermining the financial balance of the NHS. The test might be satisfied, if it could be shown that, without a system of authorisation, there would be waste resulting from hospital *overcapacity* resulting from large numbers of NHS patients deciding to be treated abroad. Restrictions going beyond this were not permissible. The crucial question in the present case was whether treatment for Mrs Watts could be provided by the NHS "without undue delay". In assessing this question, the national authorities are required to have regard to "all the circumstances of each specific case" including the patient's medical condition, the degree of pain and the nature and extent of the patient's disability.

63. The judge considered the relevance of NHS waiting times. He considered it to be obvious and consonant with Mr McConn's evidence that waiting times at present in the NHS are not determined simply by reference to the medical needs of patients and the needs of a complex organisation to make the best and most efficient use of its resources. He held that consideration of NHS waiting times and waiting lists was not irrelevant to an assessment of whether a patient is faced with "undue delay". He considered that, although the waiting time in any particular case was relevant, it could not be determinative. In most cases, it was unlikely to be even a significant matter in assessing whether a patient was faced with "undue delay".

64. The judge considered the claimant's case under Article 49 in the light of his analysis of the European cases. He first addressed the decision communicated in the PCT's letter of 21st November 2002. It was clear that this decision was based on the assumption that "undue delay" was to be understood by reference to the Article 22 criterion of "the time normally necessary for obtaining the treatment in question … taking account of [the patient's] current state of health and the probable course of the disease". He considered this to be a plain error of law. The test of "undue delay" for the purposes of Article 49 was not the same test as that applicable under Article 22. He considered it to be almost self-evident, unless waiting list time is taken as being at least of preponderant weight if

not determinative, that a delay in treating Mrs Watts' condition for a year was manifestly "undue" delay. Any national authority properly directing itself in accordance with the principles laid down by the Court of Justice would have been bound to reach this conclusion.

65. The judge then considered the decision in the PCT's letter dated 4th February 2003. He considered that the period of delay which was tolerable before it reached the level of what was "undue" was a period very much less than the year with which the claimant was originally faced, but a period significantly greater than the period of delay until April or May 2003 with which she was faced on 4th February 2003. Whether or not the PCT misdirected itself in law, the claimant had failed to establish, as she must if her claim under Article 49 was to succeed, that she was faced with the prospect of undue delay on 4th February 2003.

66. It followed that the claimant's case based on Article 49 failed. She had succeeded in demonstrating that the Secretary of State's understanding of the law was wrong. But her claim nevertheless failed on the facts.

67. The judge then considered the claimant's alternative case based on Article 22. The test here was not the same as under Article 49. Waiting lists were plainly of central significance in the context of Article 22, because of the words "the time normally necessary for obtaining the treatment in question in the Member State of residence". In short, treatment within the time of a normal waiting list, properly administered, would justify refusal of authorisation under Article 22. The decision letter of 21st November 2002 applied this criterion. In relation to Article 22, therefore, there was no error of law. This applied with equal force to the subsequent decision in the letter of 4th February 2003.

68. In the light of the judge's conclusions, the question of reimbursement did not arise. He considered the matter quite shortly by reference to paragraph 53 in the judgment of the Court of Justice in *Vanbraekel v Alliance Nationale* case C-368/98 [2001] ECR I-5363. He recorded that reimbursement under Article 22 was calculated in accordance with the legislation of the member state where the treatment is performed. The evidence indicated that in France the claimant would be entitled to 75% of the costs of the operation. She would not be entitled to reimbursement of any travel and accommodation costs. Reimbursement under Article 49 is calculated by reference to the legislation in force in the member state of residence. Since hospital treatment in the United Kingdom is free, reimbursement would extend to the full cost of the treatment. The judge expressed no view whether reimbursement under Article 49 would include travel and accommodation costs. This was a complicated topic on which he had not heard full submissions.

69. In conclusion, the judge granted a number of declarations, the terms of which we reproduce as an appendix to this judgment. He gave both the claimant and the Secretary of State permission to appeal to this court.

The Issues

70. The two main issues raised on this appeal are:

(1) whether decisions of the Court of Justice which have held that institutions which provide medical services in one member state may be obliged to reimburse the cost of a patient's treatment in another member state apply to the NHS; and, if they do,

(2) whether the NHS may refuse to authorise the cost of treatment in another member state, if effective treatment is available under the NHS within properly operated NHS waiting times.

There are also issues about the extent of reimbursement and the adequacy of the Department of Health's published information.

The Secretary of State's Case

71. The Secretary of State contends that only Article 22 of Regulation 1408/71 applies to the claimant's case. Article 49 of the EC Treaty and the judicially constructed structure built upon it does not apply. Further, authorisation for treatment in another member state may be refused under Article 22, if treatment is available under the NHS within properly operated waiting times.

72. The Secretary of State's essential case as to Article 49 is as follows. Article 49 is designed to protect those who provide services as defined in related Articles of the Treaty. Protecting those who provide services carries with it the right of those who benefit from the services to receive them without restriction. This in turn means that those who provide medical services under a social security system in the patient's state of residence must reimburse the cost of the patient receiving treatment in another member state, unless to refuse to do so is objectively justified and proportionate. The underlying purpose of protecting those who provide services in one member state means that the "competitor" in the state of the patient's residence must also be an institution which provides services. The Secretary of State contends that the NHS is not an institution which provides services within Article 49.

73. The Secretary of State points to Article 152(5) of the Treaty as indicating that member states are free to organise their systems for the provision of hospital and other medical care as they choose, provided they otherwise comply with the law. Any liability on the NHS under Article 49 to reimburse the claimant the cost of her treatment in France can only arise if the provision of hospital treatment under the NHS is the provision of services within chapter 3 of the Treaty. The claimant has to establish that her relationship with the NHS entitles her to receive services within the meaning of the Treaty. It is submitted that health care provided by the NHS does not fall within the scope of Article 49. NHS bodies do not provide services within Articles 48 and 55. NHS patients do not exercise a freedom to obtain services and have no entitlement to receive services within Article 49.

74. The Secretary of State accepts that the Court of Justice has extended the ambit of services under Article 49 so as to include medical and hospital treatment in certain circumstances. The fact that the national rules in question are social security rules does not remove them from the ambit of the principle of freedom of movement. It is accepted that in Case C-158/96 *Kohll* and Case-368/98 *Vanbraekel* the European Court of Justice held that the health systems in Luxembourg and Belgium constituted the provision of services. These are insurance schemes, under which insured persons are free to choose their general practitioner and specialist and are required to pay the costs of the service they receive. The sickness fund then reimburses part of the cost or, in the case of hospital treatment, pays the institution directly on their behalf. It is accepted that in *Geraets-Smits* and *Müller-Fauré*, the Court of Justice held that the Netherlands ZFW sickness fund came within Article 49. But there are crucial differences between the Netherlands Scheme and the NHS in the United Kingdom.

75. The Secretary of State submits that Munby J was wrong to conclude that he was bound by these decisions to hold that hospital treatment under the NHS constitutes the provision of services within Article 49; and that he was wrong to hold that in *Müller-Fauré* the Court of Justice had held that the principles applicable to the ZFW also applied to the NHS. There has been no direct decision of the Court of Justice that a state health care system such as the NHS constitutes the provision of services. It is submitted that the court was not intending to decide that every system of state health care necessarily constitutes the provision of services.

76. In support of the contention that the provision of hospital care under the NHS does not constitute the provision of services under Article 49, the Secretary of State points to Article 50. This provides that "services" within the meaning of the Treaty "are normally provided for remuneration". This does not apply to the NHS. The NHS receives its money directly from the state out of general taxation. The medical services which it provides are free to all persons ordinarily resident in the United Kingdom. Further, with reference to Article 48, hospital treatment is provided directly through NHS hospitals which are non-profit-making bodies. No question of reimbursement arises because patients do not pay for treatment, nor do they contribute to an insurance fund for that purpose. The Secretary State refers to paragraphs 2 to 14 of Mr McConn's witness statement; to a variety of sections of the National Health Service Act 1977; and to the decisions of this court in *R v Cambridge Health Authority ex parte B* [1995] 1 WLR 898 and *R v North West Lancashire Health Authority ex parte A* [2000] 1 WLR 977. By contrast, the payments made by the ZFW in the Netherlands were the consideration for the hospital services and represented remuneration for the hospital receiving them. It is accepted that the Court of Justice rejected, at paragraph 52 of its judgment in *Geraets-Smits*, an argument that the fact that medical services were not providing with "a view to making a profit" took them outside the scope of Article 49. But the court gave no reasons for rejecting this argument. Although the Treaty does not define "non-profit-making bodies", it is submitted that NHS bodies are plainly non-profit-making bodies within Article 48.

77. It is submitted that NHS patients do not exercise a freedom to receive services within Article 49. Within the NHS, they do not have freedom to decide what treatment shall be provided, in which hospital or by which medical staff they will be treated. These are matters for clinical judgment. The time at which treatment is provided is governed by considerations of clinical priority and the availability of resources. The Secretary of State relies on paragraphs 18 to 20 of Mr McConn's witness statement.

78. As to the circumstances in which the Secretary of State may refuse to authorise payment for hospital treatment in another member state, the Court of Justice has held that a system of prior authorisation is not in principle precluded, but that the conditions attached to the grant of such authorisation must be justified with regard to relevant overriding considerations and must satisfy the requirement of proportionality – see paragraph 82. The court also considered in *Geraets-Smits* the authorisation could only be refused if the same or equally effective treatment could be obtained without undue delay from an establishment with which the insured person's sickness insurance fund had contractual arrangements.

79. As we have said, the critical question is whether undue delay is to be judged by reference to NHS waiting times. The Secretary of State's essential case is that, if treatment is available within normal NHS waiting times which take account of medical need in assessing priority, there is no undue delay. It is submitted that Munby J adopted an unduly restrictive approach here to what might be objective justification. He did so by reference to paragraph 92 of the judgment of the European Court of Justice in *Müller-Fauré*, extracting from it the proposition that "considerations of a purely economic nature" could not justify restrictions on a patient requiring treatment from receiving that treatment in another member state at a time earlier than it would be provided by the NHS in accordance with their waiting times. It is submitted that the judge was wrong; or that the Court of Justice should be invited to reconsider this question with specific reference to the NHS.

80. Mr McConn's witness statement indicates that waiting lists exist as an inevitable consequence of the need to balance the demands made upon the NHS with the finite resources available to it. It is not possible to treat everyone immediately and some wait is inevitable. NHS bodies have to operate within their allocated budgets. The management of waiting lists and times for treatment are an important and necessary part of the organisation of hospital treatment within the NHS. Decisions on timing of treatment are based on clinical judgments and medically determined priorities. Waiting times are flexible, so that a patient whose condition unexpectedly deteriorates may be treated sooner, as happened in the present case. If patients were able to obtain earlier treatment in other member states at the expense of the NHS, although the treatment was available under the NHS within an appropriate waiting time taking into account clinical priority, the NHS would be unable to operate its present system. Patients would be able to choose to circumvent clinical decisions as to priorities. The financial balance of the NHS would be undermined. If patients could choose to jump the queue, resources would not be available to provide treatment for even more urgent cases. It would be impossible to predict the effect this would have on the planned allocation of NHS resources.

The claimant's case

81. The claimant seeks to uphold most of the declarations made by the judge. By respondent's notice, she appeals the judge's declarations in paragraphs (9b) and (12). She also appeals against his decision to dismiss her claim for reimbursement.

82. The first ground of her cross-appeal is that the judge was wrong to hold that national waiting times were relevant under Article 49 to a consideration whether there was undue delay in a particular case. It is submitted that the decision in *Müller-Fauré* makes clear that national waiting times are irrelevant.

83. The second ground of cross-appeal is that the judge was wrong to regard the relevant period of delay in the claimant's case as starting on 4th February 2003. He appears to have disregarded the earlier period between 1st October 2002 and 4th February 2003. It is submitted that the judge should have considered whether the period between 1st October 2002 and April or May 2003 (that is 7 to 8 months) was "undue delay". If he had considered this correct period, he would have concluded that it did constitute undue delay. There can be no reason in principle why a second decision, whereby the claimant's need for treatment was regarded as more pressing, made earlier periods of delay irrelevant.

84. The third ground of cross appeal challenges the judge's declaration (12). The judge there held that, under Article 22 of Regulation 1408/71, waiting lists and waiting times were of essential significance. He derived this from the use of the phrase "time normally necessary for obtaining the treatment in question in the Member State of residence". He considered that different considerations applied to Article 49 of the Treaty and Article 22 of the Regulations. It is submitted that the judge was wrong. The recent decision of the Court of Justice in *Inizan* makes clear that the same considerations apply to each and that waiting times are not relevant to Article 22.

85. The claimant opposes a reference to the European Court of Justice. It is submitted that the issues are not highly controversial. The United Kingdom Government has advanced all the main arguments relied on in this appeal in earlier cases before the European Court of Justice, especially *Müller-Fauré*. The line of cases including *Kohll*, *Vanbraekel*, *Geraets-Smits*, *Müller-Fauré* and *Inizan* provide clear answers. A reference would cause unnecessary delay. There is no sufficient justification for delaying the application of the principles which Munby J's judgment establishes. This case is not suitable to add to the overburden of cases referred to the European Court of Justice.

86. The main submissions advanced on behalf of the claimant are as follows. The provision of hospital services by the NHS constitutes the provision of services under Article 49 of the Treaty. The United Kingdom system has so far been limited to an implementation of Article 22 of the Regulations. The Secretary of State has misconstrued the effect of Article 49 of the Treaty and has no system in place to implement its proper effect. To that extent the issue of objective justification does not arise. If the Article 22 system in place is considered by reference to Article 49, it constitutes a barrier to and a restriction on

freedom to provide services under Article 49. Any requirement for prior authorisation of hospital treatment in another member state would only comply with the principle of proportionality if the same or equally effective treatment could be obtained without undue delay under the NHS. Unless the state establishes an overriding reason, undue delay is to be judged by the individual medical need. It does not embrace considerations of a purely economic nature, as if the cost to the NHS might, or would be increased. Reliance on national waiting times is not a relevant consideration. The decision in the present case was unlawful because the Secretary of State failed to address the relevant matters requiring consideration under Article 49. The decision was further in breach of Article 22 because prior authorisation under that provision is to be interpreted by reference to the same principles as those which apply to Article 49. The judge's conclusion in relation to the claimant was wrong because he failed properly to apply the principles in his declaration (10). He ignored the period of delay before 4th February 2003. If he had taken that period into account, he would have found undue delay. The claimant accordingly is entitled to be reimbursed.

87. It is agreed that reimbursement under Article 22 would be calculated in accordance with the legislation of the member state where the treatment was performed. In France, this appears to be 75% of the cost of the operation. It is submitted that success under Article 49 would result of reimbursement of the cost to the NHS of performing the operation in the United Kingdom or to such fixed rate of reimbursement as may have been fixed according to objective, non-discriminatory criteria. No such rate has yet been fixed. It is submitted that the claimant would also be entitled to any necessary travel and accommodation costs.

Discussion

88. Neither *Geraets-Smits* nor *Müller-Fauré* directly concerned a state-funded national health service such as the NHS. It is, however, in our view quite clear that the Court of Justice considered the submissions of the United Kingdom Government in paragraphs 55 to 59 of its judgment in *Müller-Fauré* and rejected those which constitute the basis of the contention in the present appeal that the Article 49 structure does not apply to a state-funded national health service. The use of slightly different expressions in paragraph 55 ("the National Health Service (the "NHS")") and paragraphs 103 and 105 ("a national health service") does not persuade us that the court intended to leave these submissions undecided. There is also the clear reference in paragraph 103 to the "national budget" paying the provider of the services in the other member state, and the stipulation in paragraph 105 that those who do not have a mechanism for reimbursement will have to devise one.

89. We would therefore reject the Secretary of State's first main submission on the basis that the Court of Justice has clearly addressed and rejected it. We do not consider that this submission alone justifies a reference to the Court of Justice.

90. As to the Secretary of State's second main submission, it is convenient to start with Article 22 of Regulation 1408/71, for this is expressly directed to the entitlement to

receive medical treatment. The issue is the effect of Article 22.1 (c) and Article 22.2. The Article only applies to a person "who satisfies the conditions of the legislation of the competent State for entitlement to benefits". The Article envisages that authorisation will be required from the competent institution if the person wishes to go to another Member State for the purpose of receiving treatment. The mandatory right to authorisation only arises in respect of treatment that is "among the benefits provided for by the legislation of the Member State."

91. This last requirement might have given rise to problems in relation to this country, for the legislation does not make provision for entitlement to any specific treatments, but leaves the treatments to be provided in the discretion of the Secretary of State. In practice the Department of Health appears to adopt the approach that treatment which is generally available under the NHS will fall within Article 22.2

92. The issue that arises in this case is the effect of the phrase:

> "… where he cannot be given such treatment within the time normally necessary for obtaining the treatment in question in the Member State of residence, taking account of his current state of health and the probable course of the disease"

This phrase is ambiguous. It may mean:

> "… where he cannot be given such treatment in the Member State of residence within the time normally necessary for obtaining the treatment in question, taking account of his current state of health and the probable course of the disease."

Alternatively it may mean:

> "… where he cannot be given such treatment within the time normally necessary in the Member State of residence for obtaining the treatment in question, taking account of his current state of health and the probable course of the disease"

93. Munby J has given the words the latter meaning, so that the test involves having at least some regard to normal waiting lists in the Member State of residence. The Secretary of State would support him in that conclusion. We are inclined to think that the former meaning is the true one. Our reading of the French text is that it bears the former rather than the latter meaning and the Advocate General certainly appears to have been of this view in *Inizan* – see paragraph 25 of his opinion. We note, however, that the Court of Justice does not appear to have rejected in terms the relevant submission of the United Kingdom Government in paragraph 57 of its judgment in *Müller-Fauré* and that paragraph 44 of the Court's judgment in *Inizan* does not grapple with the point. Article 22.2 recognises that there may well be delays in providing the treatment in the Member State of residence and provides an entitlement to have the treatment provided abroad when the delays are likely to be such as to threaten the efficacy of the treatment. The test is one, essentially, of clinical judgment. It involves considering the effect of the delay

that is confronting the individual in the particular case. We cannot see any sensible place, in applying that test, for consideration of normal waiting times.

94. If we are correct in the above conclusion, Article 22.2 poses a difficulty when the treatment in question is of a static and not degenerative condition – operations to address the problems of transsexuality provide an example. 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.

95. Although we would not expect the Court of Justice to conclude that its Article 49 structure did not apply to a state funded national health service, there are differences between a state funded national health service which has no fund out of which payment for treatment is made and an insurance fund such as the ZFW in the Netherlands. An insurance fund has financial obligations which are limited by the terms of the scheme. A state funded national health service providing free treatment for all does not have such financial limitations.

96. On the face of it, it seems paradoxical that Article 49, which is concerned with the freedom to provide services, should enable a person, who is entitled to have funded the receipt of medical services, to select a provider in a State other than the one where he lives **only when** the State where he lives is unable to provide them 'in due time'. The paradox is, however, explained because the 'due time' test arises only in the context of an exception to an exception to the general rule. As we understand the reasoning, it proceeds as follows.

97. (i) Medical services, whether provided within or outside a hospital, are services within the ambit or 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.

98. So far as the exception to the exception is concerned, it seems to us entirely logical that the test of what constitutes an undue length of time should be the same test of clinical necessity as applies under Article 22.2. As we understand it, the ECJ has so decided in *Inizan.* 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 is entitled to an extent that threatens the efficacy of the treatment. If this is correct, then there is no

difficulty in identifying the test to be applied when deciding whether Mrs Watts' case is an exception, though it may not be easy to apply the test.

99. There remains the problem of defining what amounts to undue delay. Although the Court of Justice was asked in *Müller-Fauré* to explain the import of paragraph 103 of its judgment in *Geraets-Smits* with specific reference to the meaning of "without undue delay", it does not appear to have responded clearly. If acceptable delay is not tied to properly administered NHS waiting times, by what criterion was the judge able to determine that a year's delay for the present claimant was excessive but a delay of 3 to 4 months was not? On one view, a 72 year old woman with severe pain in both her hips should ideally have them replaced immediately. What criterion justifies departure from the ideal? At a practical level, these are critical questions. Without clear answers, there are likely to be numerous time-consuming and expensive disputes.

100. But the more important issue in respect of Article 49, as we see it, is whether one reaches the stage of having to consider the exception to the exception. Does Article 49 oblige, as a matter of principle, the NHS to fund medical services supplied to United Kingdom residents abroad and, if so, can the NHS justify not doing so having regard to the manner in which it manages the resources that it chooses to devote to the provision of a health service?

101. The decisions of the ECJ to which we have referred establish that medical services fall within the ambit of Article 49, whether they are provided within or outside a hospital. Article 49 forbids the imposition of restrictions on those who wish to provide those services. They further establish that, if a social insurance scheme in State A is obliged to fund a particular medical treatment, whether directly or by reimbursing the patient, it is, prima facie, contrary to Article 49 for those administering the scheme to fetter the patient's choice as to where or by whom he receives the treatment.

102. There are problems in applying these principles to the NHS. Those resident in this country have no entitlement under private law to claim funding of medical treatment from the NHS. Nor does public law entitle them to any specific treatment at any particular time. Decisions of organs of the NHS as to whether to provide medical treatment can be challenged by judicial review according to established principles of domestic public law, but, as Munby J demonstrated, such challenges usually fail. In the present case, Mrs Watts has conceded that she has no claim for relief under domestic law. It follows, so it seems to us, that had she sought judicial review of the waiting time with which she was faced in this country, she would have failed. In these circumstances, the question arises of whether someone in the position of Mrs Watts is in a position to demonstrate that she has the entitlement to treatment in this country that, as we understand the ECJ jurisprudence, is a precondition to her right to claim funding of treatment obtained abroad. – see *Müller-Fauré* at paragraph 98.

103. These are obviously profound questions going well beyond the circumstances of the United Kingdom National Health Service. They are also questions which, in our view, have largely lost touch with the text and original intent of Article 49. 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.

104. The recent decision of the Court of Justice in *Inizan* has apparently equated the requirement as to delay under Article 22 of the Regulation with the equivalent part of its structure under Article 49 of the Treaty. It thus appears that under both Articles considerations of an economic nature are to be left out of the account in judging what is undue delay. This would appear to mean that budgetary constraints are irrelevant. The critical question is whether member states are 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 is necessary to avoid undue delay in treatment of patients.

105. Although it might be said that, if the NHS had to pay for a patient to have an operation or treatment in another Member State, that would do no more than advance an expenditure which the NHS would have to incur anyway, a case can obviously be made that in truth greater resources would be required. The case is also made that this would disrupt NHS budgets and planning and undermine any system of orderly waiting lists. In our view, this court cannot reliably predict what the effect might be. We should be surprised, however, if there was no effect financially. We consider that the court should proceed on an assumption that, if the NHS were required to pay the cost of some of its patients having treatment abroad at a time earlier than they would receive it in the United Kingdom, this would require additional resources. In theory, these could only be avoided if those who did not have treatment abroad received their treatment at a later time than they otherwise would or if the NHS ceased to provide some treatments that it currently does provide. This seems to us to be a consequence of the obvious fact that waiting lists are a product of limited resources.

106. It is a welcome simplification if considerations under Article 49 of the Treaty and under Article 22 of the Regulation are the same (contrary to the decision of the judge in the present case). If, however, a state funded national health service is obliged to reimburse costs incurred by a patient in having treatment in another Member State, it is not clear whether these should be calculated under Article 22 in accordance with the legislation of the Member State where the treatment is performed, or under Article 49 by reference to the legislation in the Member State of residence. These may be different and clarification is required. It is also unclear whether travel and accommodation costs should be reimbursed. If they should, this would place an additional burden on the NHS budget.

107. If reimbursement has to be made by reference to the legislation in force in the Member State of residence, a state funded national health service providing treatment at no expense to the patient would have to reimburse the full cost of treatment. If undue delay is to be judged without reference to budgetary constraints, this could mean that the edifice constructed on Article 49 of the Treaty may have the effect of dictating the national health service budget of individual Member States. It is a question for consideration whether this is the true intent of Article 49 or Article 22; whether individual Member States may be able to provide such a budget; and whether importantly these requirements are compatible with Article 152.5 of the Treaty. We would suppose that the responsibilities of Member States for the organisation and delivery of health services and medical care carried with it the ability to decide on the resources which the national budget should allocate to those services.

108. The ECJ has repeatedly emphasised that 'Community law does not detract from the power of Member States to organise their own social security systems. It is for the legislation of each Member State to determine the conditions concerning the right or duty to be insured with a social security scheme and the conditions for entitlement to benefits'. (*Geraets-Smits*, paragraphs 44 and 45).

109. 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.

Reference to the Court of Justice

110. We see the force of Mr Gordon's submissions that the Court of Justice has already addressed and decided the main questions which this appeal raises. Nevertheless, we are troubled by the conclusion to which those decisions in combination apparently lead. We are not clear that the Court of Justice intended to require that those who wished to jump the queue by having medical treatment in another Member State are able, if necessary, by so doing to dictate an increase in what may be an already strained national health service budget; or to force the postponement of more urgent treatment needed by others.

111. Reflecting these concerns, we would accede to the invitation to refer questions to the Court of Justice. Although this may cause delay, the subject is of very considerable general importance.

112. The Court would like to receive the views of the parties in formulating the questions to be referred. Meanwhile the following are suggested for consideration.

(1) Is the United Kingdom National Health Service obliged to authorise medical treatment for patients in another Member State in accordance with the decisions in *Geraets-Smits* and *Müller-Fauré*?

(2) What, if any, differences are there between authorising treatment under Article 49 of the Treaty and under Article 22 of the Regulations?

(3) If the United Kingdom National Health Service authorises medical treatment for a patient in another Member State, upon what basis is it obliged to pay or reimburse the cost?

(4) In deciding whether to authorise a patient's treatment in another Member State, is the United Kingdom National Health Service obliged to ignore the fact that authorisation may have the effect of requiring an increase in the National Health Service budget?

(5) Is the United Kingdom National Health Service entitled to refuse to authorise a patient's treatment in another Member State if it reasonably judges that to do so in the particular and similar cases would dislocate its system of administering priorities through waiting lists?

(6) Are National Health Service patients in the United Kingdom entitled to jump the queue constituted by waiting lists by having treatment carried out in another Member State at the expense of the National Health Service?

(7) In deciding whether to authorise a patient's treatment in another Member State, by what criteria is the United Kingdom National Health Service to judge whether otherwise there would be undue delay in the patient receiving treatment?

(8) Is the United Kingdom National Health Service obliged to authorise and pay for a patient's treatment in another Member State in circumstances when it is not obliged to authorise and pay for that treatment to be carried out privately in the United Kingdom? If so, under what circumstances is it so obliged?

113. We would defer deciding these and other questions raised in this appeal until the Court of Justice has considered these questions.

APPENDIX
Declarations granted by the Judge

(1) The decision communicated by the PCT by letter dated 21st November 2002 and endorsed by the Secretary of State was erroneous in law in that it failed to address the relevant questions required to be considered under Article 49 EC.

(2) The decision communicated by the PCT by letter dated 4th February 2003 and endorsed by the Secretary of State was erroneous in law in that it failed to address the relevant questions required to be considered under Article 49 EC.

(3) The provision of hospital treatment by the NHS constitutes the provision of services within Article 49 EC.

(4) Hospital treatment which is in fact provided to and paid for by an NHS patient in another Member State does not fall outside the scope of Article 49 EC merely because the patient comes from the United Kingdom and seems reimbursement from the NHS authorities.

(5) A national system which, as in the case of the United Kingdom, makes reimbursement of the cost of obtaining hospital treatment in another Member State subject to prior authorisation and other restrictions thereby creates a barrier to and restricts freedom to provide services, in a manner which requires to be justified if there is not to be a breach of Article 49 EC.

(6) By virtue of Article 49 EC, prior authorisation for treatment of an NHS patient in another Member State at the expense of the NHS can be refused on the ground of lack of medical necessity only if the same or equally effective treatment can be obtained without undue delay at an NHS establishment.

(7) A refusal of prior authorisation for treatment in another Member State can be justified if an insofar as it can be shown that such a refusal is necessary to provide an adequate, balanced and permanent supply of high quality medical and hospital services accessible to all through the NHS or in order to avoid the risk of seriously undermining the financial balance of the NHS. It can be justified if the refusal is based on a fear of logistical or financial wastage resulting from hospital overcapacity caused by the outflow from the NHS of large numbers of NHS patients who decide to be treated abroad, but not if the restrictions on the ability to provide services go beyond what is necessary to avoid such wastage.

(8) The fact that the NHS's financial costs may be increased is a consideration of a purely economic nature which cannot justify a restriction on the fundamental freedom to provide services.

(9) When assessing whether or not a patient is faced with "undue delay":

(a) the national authorities are required to have regard to "all the circumstances of each specific case" including the patient's medical condition and, where appropriate, the degree of pain and the nature and extent of the patient's disability; and

(b) although the national waiting time applicable in any particular case is a relevant matter to be considered, it cannot be considered determinative and in many – probably most – cases it is unlikely to be even a significant matter.

(10) In the circumstances of the present case, the period of delay of NHS treatment which is tolerable before it reaches the level of what is "undue delay", so as to result in a breach of Article 49 EC is:

(a) a period very much less than the year with which the Claimant was faced by the decision communicated by the PCT (and endorsed by the Secretary of State) by letter dated November 21 2002; but

(b) a period significantly (though probably not substantially) greater than the period of 3-4 months with which the Claimant was faced by the decision communicated by the PCT by letter dated 4 February 2003.

(11) The materials currently published by the Secretary of State as to the procedures that an applicant should adopt to obtain reimbursement under the NHS for medical treatment abroad fall short of the requirement under Article 49 EC to have a "procedural system which is easily accessible".

(12) Under Article 22 of Regulation 1408/71 Member States are bound to grant authorisation only where the treatment cannot be provided within such time as to ensure its effectiveness. Waiting lists and waiting times are of central significance in the context of Article 22 which, although it requires one to take account of the patient's current state of health and the probable course of the disease, primarily directs attention to "the time normally necessary for obtaining the treatment in question in the Member State of residence."

(13) Reimbursement under Article 49 EC is calculated by reference to the legislation in force in the member state of the patient's residence. Since hospital treatment is free at the point of delivery in the United Kingdom reimbursement by the United Kingdom authorities under Article 49 EC would be at the full cost of the treatment abroad.