

Judicial Communications Office

04 May 2023

COURT DISMISSES JUDICIAL REVIEW IN RELATION TO APPLICATION OF THE UK PLANNED TREATMENT SCHEME

Summary of Judgment

Mr Justice Colton, sitting today in the High Court in Belfast, dismissed an application for judicial review of the decision of the Department of Health for Northern Ireland relating to the interpretation and application of the UK S2 Planned Treatment Scheme.

These proceedings were initially issued against the South Eastern Health and Social Care Trust, and the Health and Social Care Board with the Department of Health being named as a notice party. However, since 1 April 2022, the Department of Health has assumed the responsibilities and liabilities of the Health and Social Care Board including the management of the UK S2 Planned Treatment Scheme.

Background

In June 2017 the applicant was urgently referred to the South Eastern Health and Social Care Trust's Neurology Service by her GP because of suspected Multiple Sclerosis. She was initially advised that the current waiting list for neurology appointments was 163 weeks. Her case was later assessed by the attending consultant to be "routine" and she was placed on a waiting list and advised to contact her GP in the event of any deterioration in her condition. She was due to have an appointment on 16 March 2020, but this was cancelled due to restrictions arising from the Covid-19 pandemic. A Consultant Neurologist conducted a virtual appointment with her on 11 March 2022 and MRI scans were conducted on 11 May 2022. As a result, she has not been diagnosed with Multiple Sclerosis and it is suggested that her symptoms should continue to be treated as Fibromyalgia.

Whilst the applicant was on the waiting list, and prior to diagnosis, she applied for a letter in support of an application for medical treatment under the UK S2 Planned Treatment Scheme ("the S2 Scheme"), whereby a person resident in the UK can apply for authorisation to travel to a European country for medical treatment. The applicant was informed in June 2021, that as a prior diagnosis was required before admission to the S2 Scheme could occur, her application would not be completed.

The S2 Scheme was an established process contained within EU Regulation EC and as part of the arrangements for the UK's exit from the European Union provision was made within the Social Security Coordination (SSC) Protocol ("the Protocol"), permitting the continuation of the S2 Scheme and protecting the right of an individual to enforce through the courts the rights established under the Protocol.

The applicant brought a challenge in relation to the delays she encountered awaiting referral and the refusal of access to the S2 Scheme. Although the matter of delay became academic, the court gave judgment dismissing the application in relation to delay on 9 January 2023. However, the court considered that the applicant was entitled to consideration of the issues raised in her application regarding the refusal of access to the S2 Scheme.

This judgment relates to the application for medical treatment under the S2 Scheme.

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The applicants case

In April 2021 the applicant's solicitor wrote to the Ulster Hospital indicating that she wished to make a "UK S2 Planned Treatment Application" and sought a letter from a consultant in respect of such an application. The Trust replied indicating that a full medical assessment supporting the diagnosis, treatment and medical timeframe necessary for the treatment was required and that as the applicant did not at that point have a confirmed neurological diagnosis it was unable to complete the S2 Scheme application.

The applicant's solicitor provided confirmation that the applicant wished to use the S2 scheme to obtain a diagnosis. The respondents indicated that the S2 Scheme did not cover diagnosis and pre-action correspondence between the parties ensued.

In July 2021 the applicant's solicitor sought clarification from the President of the European Commission and the Directorate-General of Health and Food Safety at the Commission as to the extent of the Protocol. The Directorate-General replied advising that the interpretation and the correct implementation of the Protocol was a matter for the UK authorities and any challenge to that, for the UK judiciary authorities to determine. It did however reference the Commissions broad interpretation of the EU Regulation that had been in place prior to the Protocol.

The applicant's solicitor provided the respondent with this response and requested a review of their decision that the S2 Scheme did not make provision for a diagnosis of a condition. The respondent replied confirming that it had nothing to add to its previous response.

The challenge

The applicant challenges the respondent's position that S2 Scheme may not be used for the purposes of diagnosis and that any proper interpretation of the Protocol supports the contention that diagnostic services are a step in the medical treatment.

The applicant proposed that the opinion of the Directorate-General of Health and Food Safety at the European Commission supports this position.

The respondents' position and the application of the Scheme

The Department's role under the S2 Scheme is to consider applications and where appropriate provide approval for medical treatment outside the UK. Before doing so four conditions must be met:

- (i) That a UK NHS consultant has confirmed, following a full clinical assessment, that the treatment will meet the patient's specific needs;
- (ii) That the providing hospital will accept the patient for treatment;
- (iii) That the requested treatment is available under the other countries State health scheme; and
- (iv) That the patient is entitled to similar treatment within the NHS.

If an application meets these eligibility criteria a S2 Scheme certificate is issued directly to the patient and acts as a form of payment authority for treatment. Transfer of funding happens at the central State level.

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Post the UK's exit from the European Union the Department is able to authorise treatment under the S2 Scheme by virtue of the Protocol. However, the Department's position is that the operation of the S2 Scheme requires that as a pre-cursor to considering an application, a medical diagnosis and a clinically supported treatment plan must have been made.

The court's conclusion

The court concluded that the respondents' interpretation of the Protocol is the correct one and that the S2 Scheme is not intended to cover diagnosis but is expressly for the provision of treatment after a diagnosis.

As such the court concluded that there had been no breach of the respondents' obligations under the Protocol nor its implementation of the Protocol.

The court in coming to that conclusion paid specific regard to the CJEU authorities provided and the interpretation of post exit European Union law. The court was mindful however not to extrapolate from post exit cases general principles which would have the effect of expanding rights post exit. It is for the domestic courts to interpret the Protocol. In any event the court was not persuaded that the CJEU authorities contradicted the approach of the respondents.

Conclusion

The application for judicial review was dismissed.

NOTES TO EDITORS

1. This summary should be read together with the judgment and should not be read in isolation. Nothing said in this summary adds to or amends the judgment. The full judgment will be available on the Judiciary NI website (<https://judiciaryni.uk>).

ENDS

If you have any further enquiries about this or other court related matters please contact:

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