Neutral Citation No: [2023] NIKB 59 *Judgment: approved by the court for handing down (subject to editorial corrections)**	*Ref:* **COL12138** *ICOS No:* **2021/75510/01** *Delivered:* **04/05/2023**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

KING'S BENCH DIVISION
(JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY EILEEN WILSON
FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

BETWEEN:

EILEEN WILSON

Applicant

and

1. **DEPARTMENT OF HEALTH FOR NORTHERN IRELAND**
2. **SOUTH EASTERN HEALTH AND SOCIAL CARE TRUST**
3. **HEALTH AND SOCIAL CARE BOARD**

Respondents

Mr Ronan Lavery KC with Mr Conan Fegan (instructed by McIvor Farrell Solicitors) for the Applicant
Mr Ian Skelt KC with Ms Laura McMahon (instructed by the Departmental Solicitors Office) for the Department of Health for Northern Ireland
Dr Tony McGleenan KC with Mr Gordon Anthony (instructed by the Director of Legal Services) for the South Eastern Health and Social Care Trust

---

COLTON J

Introduction

[1] I am obliged to counsel who appeared in this application for their helpful written and oral submissions.

[2] This application concerns the interpretation and application of what is known as the UK S2 Planned Treatment Scheme ("the S2 Scheme").

[3] The applicant is a 48-year-old lady who lives alone and who was referred to the South Eastern Health and Social Care Trust's ("the Trust") Neurology Service in

June 2017 by her General Practitioner because of suspected Multiple Sclerosis. The initial referral for assessment was classified as "urgent." 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." She was placed on a waiting list and was 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. MRI scans were conducted on the applicant on 11 May 2022. As a result of that scan, she has not been diagnosed with having Multiple Sclerosis and it is suggested that her symptoms should continue to be treated as Fibromyalgia.

[4] She brought a challenge ("*Wilson 1 and Kitchen*") against these respondents in relation to the delays she encountered awaiting referral to the Consultant Neurologist. Although the matter became academic in the sense that she did ultimately obtain an appointment with a Consultant Neurologist the court gave judgment in that application on 9 January 2023.

[5] Ultimately the court dismissed the applications, essentially on the basis that the applicants did not enjoy an enforceable duty in law against the respondents.

[6] Whilst the applicant was on the waiting list to see a Consultant Neurologist, on 21 April 2021 she applied to the Trust at the Neurology Department of the Ulster Hospital for a letter in support of an application for medical treatment under the S2 Scheme.

[7] Following an exchange of correspondence between the applicant's solicitor and the respondents, in a letter dated 10 June 2021 from Dr Andrew Kerr, Neurology Service Manager at the Ulster Hospital, the applicant was informed that a prior diagnosis was required before admission to the S2 Scheme could occur. Because the applicant did not have a diagnosis, the application would not be completed.

[8] It is that decision which is challenged in this application.

[9] The application was heard alongside the applications in relation to the waiting lists referred to above. Although the matter is now academic in light of the diagnosis received by the applicant, the court considers that the applicant is entitled to consideration of the issues raised in her application.

The S2 Scheme

[10] The genesis of the S2 Scheme is Regulation EC No 883/2004, in particular Articles 20 and 27(3). These made provision for travel within Member States of the European Union for the purpose or receiving benefits in kind and to authorise appropriate treatment outside the Member State of residence in another Member State.

[11] As part of the arrangements for the UK's exit from the European Union, the trade and co-operation agreement between the UK and EU contained a protocol mirroring Regulation 883/2004 ("the Social Security Coordination (SSC) Protocol"), thereby permitting the continuation of the S2 Scheme. The relevant provision is Article SSC.18 which provides:

> **"Article SSC.18**
>
> **Travel with the purpose of receiving benefits in kind – authorisation to receive appropriate treatment outside the State of residence**
>
> 1. Unless otherwise provided for in this Protocol, an insured person travelling to another State with the purpose of receiving benefits in kind during the stay shall seek authorisation from the competent institution.
>
> 2. An insured person who is authorised by the competent institution to go to another State with the purpose of receiving the treatment appropriate to their condition shall receive the benefits in kind provided, on behalf of the competent institution, by the institution of the place of stay, in accordance with the legislation it applies, as though that person were insured under the said legislation. The authorisation shall be accorded where the treatment in question is among the benefits provided for by the legislation in the State where the person concerned resides and where that person cannot be given such treatment within a time limit which is medically justifiable, taking into account their current state of health and the probable course of their illness."

[12] The definitions section of the Protocol provides:

> "(d) 'benefits in kind' means:
>
> (i) for the purposes of Chapter 1 [sickness, maternity and equivalent paternity benefits] of Title III, benefits in kind provided for under the legislation of a State which are intended to supply, make available, pay directly or reimburse the cost of medical care and products and services ancillary to that care;
>
> …"

[13] By Article SSC.67, the United Kingdom is required to effectively protect individual rights under the SSC Protocol and individuals have the right to enforce those rights through the courts:

> **"Article SSC.67**
>
> **Protection of individual rights**
>
> 1. The Parties shall ensure in accordance with their domestic legal orders that the provisions of the Protocol on Social Security Coordination have the force of law, either directly or through domestic legislation giving effect to those provisions, so that legal or natural persons can invoke those provisions before domestic courts, tribunals and administrative authorities.
>
> 2. The Parties shall ensure the means for legal and natural persons to effectively protect their rights under this Protocol, such as the possibility to address complaints to administrative bodies or to bring legal action before a competent court or tribunal in an appropriate judicial procedure, in order to seek an adequate and timely remedy."

[14] Section 26(1) of the European Union (Future Relationship) Act 2020 ("EUFRA 2020") incorporates the Protocol into domestic law.

The applicant's circumstances

[15] Before analysing how the law applies to the applicant's situation it is necessary to set out some further background detail.

[16] On 21 April 2021 the applicant's solicitor wrote to the Neurology Department at the Ulster Hospital indicating that she wished to make a "UK S2 Planned Treatment Application" whereby she would receive treatment in an EU country. The correspondence sought a letter from a consultant as required by the Health and Social Care Board in respect of such an application.

[17] On 10 June 2021 the Neurology Services Manager from the Trust replied to the applicant's solicitors indicating that:

> "To complete a UK S2 Planned Treatment Application, a full medical assessment which supports the diagnosis, treatment and medical timeframe necessary for the treatment the patient wants funding should be

> undertaken. At present Mrs Wilson does not have a confirmed neurological diagnosis or has had an initial consultant neurological review. As a result the Trust would be unable to complete this application."

[18] On the following day the applicant's solicitor replied confirming that the applicant wished to use the scheme to "obtain a diagnosis."

[19] On 24 June 2021 a pre-action protocol letter was sent to the respondents asserting that they had not complied with their legal duties under the Trade and Co-operation Agreement.

[20] The Trust set out its position in a pre-action protocol response on 9 July 2021 with the Department responding on 15 July 2021.

[21] On 27 July 2021 the applicant's solicitors wrote to the President of the European Commission and the Directorate–General of Health and Food Safety at the Commission. In the correspondence the applicant asked:

> "Therefore, please confirm that, if the UK certifies and authorises that the conditions set out in SSC.18 are met, **'diagnosis**' is covered, within the meaning '**treatment' under SSC.18.**"

[22] The Directorate-General replied on 23 August 2021. The letter pointed out that:

> "I would like to draw your attention that the Commission is not competent to monitor the correct implementation of the Protocol on social security coordination, including the interpretation of its provisions, by the competent UK authorities. It is for the competent UK judiciary authorities to monitor and to ensure, in accordance with Article SSC.67 of the Protocol, the correct interpretation of the implementation of the Protocol."

[23] The letter went on to deal with its interpretation of Article 20 of the 883/2004 Regulation which concerned travel within the EU, and which was the applicable Regulation in this jurisdiction prior to the UK's exit from the European Union. The letter advised that:

> "The Commission services take the view that the aim of establishing a medical diagnosis is the patient's recovery by securing the care, which his or her condition requires. It therefore can be considered as a sickness benefit in kind covered by Article 18 of Regulation (EC) No 883/2004."

[24] Obviously, the reference to Article 18 is in error and should refer to Article 18 of the Protocol.

[25] This letter was then sent to the respondents requesting a review of their decision that the S2 Scheme did not make provision for a diagnosis of a condition.

[26] The Trust replied on 8 September 2021 referencing the Commission's acknowledgment that it is for the competent UK judiciary authorities to monitor and ensure the correct interpretation and implementation of the Protocol. The letter confirmed that it had nothing to add to its previous pre-action response.

[27] Proceedings were issued on 28 September 2021 and leave was granted on 19 October 2021.

[28] These proceedings were listed and heard along with the *Wilson 1* and *Kitchen* applications in relation to waiting lists.

[29] 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.

[30] As a result the Department became a respondent to the proceedings and responded to the challenge at the hearing.

The challenge

[31] In her Order 53 Statement the applicant challenges the respondent's following decisions/omissions:

> "(a) Requiring a diagnosis as a pre-requisite to admission to the UK S2 Planned Treatment Application Scheme/SSC.18 authorisation;
>
> (b) Failing to provide a letter in support of the applicant's UK S2 Planned Treatment Application;
>
> (c) Otherwise provide an SSC.18 authorisation so that the applicant can access diagnostic services in an EU Member State."

[32] The dispute between the parties can be simply stated.

[33] It is the applicant's contention that the S2 route may be used for the purposes of diagnosis and so she should be allowed to access the Scheme for that purpose. The respondents maintain that the S2 route is expressly for the provision of treatment, subject to the satisfaction of clear criteria, including the diagnosed need for that treatment and acceptance of an application.

[34] What then is meant by "treatment" in Article SSC.18?

The applicant's case

[35] The applicant contends that any proper interpretation of Article 18 supports the contention that diagnostic services are included in what is meant by treatment. A medical diagnosis is one of the benefits provided for by the legislation in this State. It is a "benefit in kind." A diagnosis is a step in the medical treatment to which the applicant is entitled in this State. In the applicant's circumstances it is argued that she was not provided with such a diagnosis within a time limit which is medically justifiable.

[36] In support of this submission, Mr Fegan says that the opinion of the Commission, whilst not binding on this court, is persuasive. True it is that the Commission was dealing with the interpretation of Article 20 of the 883/2004 Regulations, but Article 20 is drafted in identical terms to Article 18 save that the drafting provides for treatment outside the State of residence as opposed to treatment outside a Member State of residence. Article 20 provides:

> "**Article 20**
>
> **Travel with the purpose of receiving benefits in kind – authorisation to receive appropriate treatment outside the Member State of residence**
>
> 1. Unless otherwise provided for by this Regulation, an insured person travelling to another Member State with the purpose of receiving benefits in kind during the stay shall seek authorisation from the competent institution.
>
> 2. An insured person who is authorised by the competent institution to go to another Member State with the purpose of receiving the treatment appropriate to his/her condition shall receive the benefits in kind provided, on behalf of the competent institution, by the institution of the place of stay, in accordance with the provisions of the legislation it applies, as though he/she were insured under the said legislation. The authorisation shall be accorded where the treatment in

> question is among the benefits provided for by the legislation in the Member State where the person concerned resides and where he/she cannot be given such treatment within a time-limit which is medically justifiable, taking into account his/her current state of health and the probable course of his/her illness."

[37] He therefore refers the court to a number of decisions of the CJEU which he says supports this interpretation.

[38] He refers to two cases in particular namely *A v Latvijas Republikas Veselibas Ministrija* [2021] 7 WLUK 273 and *WO v Vas Megyei Kormanyhivatal* [2020] 9 WLUK 247.

[39] These cases postdate the UK's exit from the EU but under section 6(2) of the European Union Withdrawal Act 2018 the court may have regard to the caselaw of the CJEU for the purposes of interpreting SSC.18:

> "(2) Subject to this and subsections (3) to (6), a court or tribunal may have regard to anything done on or after [F2IP completion day] by the European Court, another EU entity or the EU so far as it is relevant to any matter before the court or tribunal."

[40] Thus, in *A* the CJEU considered the concept of sickness benefit and recovery in the context of Article 20 at para [32]:

> "… the Court has already held that the essential aim of 'sickness benefits' within the meaning of that provision is the patient's recovery (see, to that effect, *Heinze v Landesversicherungsanstalt Rheinprovinz (14/*72 EU:C:1972:98 [1975] 2 CMLR 96 at [8]) by securing the care which his or her condition requires (see, to that effect *Gaumain-Cerri v Kaufmannische Krankenkasse-Pflegeksasse* (C-502/01 and C-31/02, EU:C:2004:413 [2004] 3 CMLR 27 at [21]), and that they thus cover the risk connected to a state of ill health (see, to that effect *Stewart v Secretary of State for Work and Pensions* (C-503/09 EU:C:2011:500 [2012] 1 CMLR 13 at [37]) and *Pensionsversicherungsanstalt v CW* (C-135/19 EU:C:2020:177 at [32])."

[41] In the *WO* case the CJEU held that:

> "It follows from the foregoing that the healthcare received in a Member State other than the State in which the insured person resides, on his own initiative, on the

> ground that, according to that person, that treatment or treatment with the same efficacy was unavailable in his Member State of residence within a time limit which is medically justifiable, comes within the definition of 'scheduled treatment' within the meaning of Article 20 of Regulation No 883/2004, read in conjunction with Article 26 of Regulation No 987/2009. In those circumstances, the receipt of such treatment is, in accordance with Art 20(1) of the first regulation, subject to the granting of an authorisation by the Member State of residence."

[42] Returning then to the Commission's letter the applicant points out that in its view diagnosis fell within the definition of a benefit in kind.

The respondents' position and the application of the Scheme

[43] The position of the respondents is set out in the affidavit filed, originally on behalf of the Health and Social Care Board, on 17 December 2021. The deponent was the Senior Manager for Service Contracts in the Health and Social Care Board who was responsible for the administration of extra contractual referrals by the Board for cross-border healthcare applications.

[44] She explains that the S2 Scheme applies where an individual seeks access to State funded treatment in another European Economic Area ("EEA country"). The role of the Board (now Department) was to approve applications submitted to it under the S2 Scheme. Before it can do so it must be satisfied that four conditions are 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.

[45] If an application meets these eligibility criteria a request will be sent to the NHS Business Service Authority (Overseas Healthcare Service) so that it might issue a S2 certificate. The certificate is given directly to the patient and acts as a form of payment whereby the EEA provider bills the NHS Business Service Authority for the treatment. Transfer of funding happens at the central State level.

[46] She goes on to aver as follows:

> "7. Applications under the S2 Scheme may be made where a person has been assessed as requiring either treatment which is not available locally or treatment which is not available within an appropriate time period. Where an application is made on the basis of delay, the patient must be able to demonstrate that he or she would be required to wait for a clinically inappropriate period of time for local treatment. For any such application to be approved, it must be supported by an objective clinical assessment by an NHS consultant. The relevant clinical information should detail the patient's clinical condition and the physical harm to which they will come to if they would be required to wait for the treatment locally.
>
> 8. It is important to note that, while HSCB may approve a patient for treatment abroad, the country to which they wish to go is not obliged to accept the patient for treatment (though the country will have to explain its decision to refuse treatment). Moreover, patients cannot expect to receive treatment ahead of a patient who is already within the receiving State's healthcare system. This means that patients under the S2 Scheme are required to observe local waiting times in the host country and/or any guidance on particular treatments that has been issued in that country."

[47] The affidavit exhibits documentation related to the operation of S2 prior to the UK's exit from the European Union. This not only included the route under Regulation 883/2004 but also under what is referred to as "the directive route" – under Directive 2011/24/EU. The key difference between the directive route and the S2 route was that S2 applied only to State provided treatment and costs were dealt with directly between Member States.

[48] In relation to the S2 Scheme post the UK's exit from the European Union it is noted that as before the Department is able to authorise treatment under the S2 Scheme. In para 16 it is averred that:

> "As before, HSCB is able to authorise treatment under the S2 Scheme only where there is a record of the diagnosis and treatment planned for the S2 funding application, which is supported by eligibility evidence for the medical treatments. In this first instance, this means that HSCB must be provided with a Northern Ireland consultant's letter/report confirming the diagnosis and medical need for the treatment(s), which should be dated no more than 6 months prior to the planned treatment date. If the

> application arises because of undue delay, HSCB requires written confirmation from a Northern Ireland consultant that the waiting time is clinically inappropriate based upon his/her objective assessment of the patient's individual clinical needs (this should also state how soon the patient needs treatment). HSCB also requires written confirmation from the proposed provider that:
>
> (i) they will accept an S2;
>
> (ii) the dates of the planned treatment;
>
> (iii) the estimated costs of the treatment.
>
> Guidance on the operation of the Scheme is exhibited at …"

[49] The guidance is publicly accessible and contains the following:

> "Where you have been assessed as requiring treatment which is not available locally, or is not available within a medically/clinically appropriate time period you may apply for treatment in another EEA country … In order for the Board to support the S2 application you will be required to submit the following supportive information:
>
> - Clinical confirmation from your HSC/NHS consultant that they are recommending the treatment.
>
> - If the treatment is available in Northern Ireland, written confirmation from your HSC/NHS consultant that the treatment cannot be provided by the health service in a time that is medically acceptable based upon an objective clinical assessment of your individual circumstances.
>
> - Written confirmation from the State provider of the agreed treatment(s), proposed dates and estimated costs. Please ensure this is in English or that an English translation is provided."

[50] The affidavit in evidence on behalf of the Department is supplemented by an affidavit from Mr Andrew Kerr who is the Neurology Service Manager for the South Eastern Health and Social Care Trust.

[51] In that affidavit he makes three points as follows:

"4. The first is that the Trust plays a clinical and diagnostic role in relation to the S2 Scheme. By this, I mean the Trust may be required to assess a person's needs and determine whether it would be appropriate for him or her to receive treatment in another country. I understand that the applications under the S2 Scheme can be successful only if they have been supported by an objective clinical assessment performed by an NHS consultant. A decision about whether to fund treatment under the Scheme thereafter lies with the HSCB.

5. The second point concerns the chronology of events that is noted in the applicant's grounding affidavit in this matter. I can confirm that I engaged in correspondence with the applicant's solicitor and that I was the author of the letter dated 10 June 2021 that is reproduced at paragraph 12 thereof. I would highlight for the court the final two paragraphs of that letter, which read:

> 'To complete a UK SC2 Planned Treatment Application, a full medical assessment which supports the diagnosis, treatment and medical timeframe necessary for the treatment the patient wants funding should be undertaken. At present Mrs Wilson does not have a confirmed neurological diagnosis or has had an initial consultant neurologist review. As a result, the Trust would be unable to complete this application. If Mrs Wilson feels there has been a deterioration in her condition, she should contact her general practitioner who may feel it appropriate to contact the consultant for advice or revise the referral to the Trust. To date no revised or updated clinical information has been received in relation to Mrs Wilson.'

6. A third point is that Mrs Wilson has not yet been re-referred to the Trust by her general practitioner."

[52] This affidavit was sworn on 14 December 2021.

[53] Mr Skelt on behalf of the Department submits that its interpretation of Article 18 is entirely lawful. Paragraph 2 of Article 18 refers to "receiving the treatment appropriate to their condition." The plain meaning of this is that a condition had been diagnosed and a clinically supported treatment plan has been made. In the final part of sub-paragraph 2 of Article 18 reference is made to "the probable course of their illness." Again, this pre-supposes that an illness has been diagnosed, something which did not apply in the applicant's case.

[54] Similarly, Article 18(2) specifically provides for access to the scheme in the face of delay where that person cannot be given such treatment within the time limit which is medically justifiable. The requirement of medical justification pre-supposes an assessment on clinical diagnosis.

[55] Not only is this interpretation clear from the language of the Article, but it makes sense conceptually. Mr Skelt argues that the absence of a diagnosis negates the possibility of defined treatment abroad being assessed under the Scheme. He submits that the prior diagnosis is operationally necessary if one considers that if an individual travels to an EEA State for the purpose of a diagnosis, then the clinician, upon seeing a patient returning from that State, will likely seek to form their own opinion and subsequent diagnosis before deciding if any treatment is necessary.

[56] Similarly, he argues were a UK resident who independently goes anywhere outside the NHS HSCB to seek a diagnosis, be that within the UK or overseas, that diagnosis would be still subject to review by an NHS HSCB clinician before determining what treatment would be appropriate.

The court's conclusion

[57] The court did not have to directly consider the question as to whether the applicant met the additional requirements of SSC.18. Her application to avail of the Scheme failed at the first hurdle and so the court did not have to consider issues in relation to whether any delay was medically justifiable or issues arising from the mandatory obligation had she met the "treatment" threshold.

[58] The court concludes that the respondents' interpretation of Article 18 is the correct one. I accept Mr Skelt's submissions that the language of Article 18 supports the conclusion that the S2 Scheme is not intended to cover diagnosis but is expressly for the provision of treatment (subject to the other requirements of Article 18) subsequent to a diagnosis.

[59] In coming to that conclusion I have had regard to the CJEU authorities to which Mr Fegan referred. I also bear in mind Dr McGleenan's warning to tread carefully in relation to the interpretation of post exit European Union law or expressions of opinion from the Commission. In particular courts should be careful not to extrapolate from post exit cases general principles which would have the effect of expanding rights post exit.

[60] That said I am not persuaded that the cases to which I have been referred contradict the approach of the respondents.

[61] In *A* when the court considered the concept of sickness benefit and recovery it referred to care which "his or her condition requires" and that they "cover the risk connected to a state of ill health."

[62] This reinforces in my view Mr Skelt's argument that the reference is to something which has been already established by way of diagnosis namely a "condition" or "a state of ill health."

[63] *WO* related to the efficacy of treatment within a period of time.

[64] Neither *A* nor *WO* focused on the question of diagnosis. *WO* was dealing with a different scheme, namely the scheme under the 2011/24 Directive. *WO* had suffered a retinal detachment in his left eye which resulted in a loss of vision. He had been diagnosed with Glaucoma in 2015. His complaint was that the treatment he received in medical establishments in Hungary was not effective. He had been offered an appointment with a doctor in Germany where, if necessary, eye surgery would be carried out. As matters developed when he was seen by that doctor eye surgery was carried out urgently in order to save *WO's* sight.

[65] He then sought reimbursement of his costs and relied on Article 20 of 883/2004. The court had to determine whether cross-border healthcare such as that in question came within the definition of "scheduled treatment" under Article 26 of Regulation No. 987/2004. This factual context is very different from that of the applicant.

[66] The court therefore concludes that there has been no breach of the respondents' obligations under Article 18 of the Protocol. It does not cover referral for diagnosis, in the circumstances pertaining to the applicant.

[67] The applicant advanced additional arguments in relation to this aspect of the claim based on a breach of Article 8 of the European Convention on Human Rights, a breach of section 3A of the Health and Social Care (Reform) Act (Northern Ireland) 2009 and Wednesbury unreasonableness.

[68] In light of the judgment in *Wilson 1* and *Kitchen* (the waiting list case) these grounds have in effect already been rejected. The court makes clear that it considers there has been no failure by the respondents to implement SSC.18 of the Protocol.

[69] For the reasons set out above and in the related judgment the applicant's application for judicial review is dismissed.