Neutral Citation No: [2024] NICA 53	*Ref:* **McC12549**
	ICOS No: **21/75510/A01**
*Judgment: approved by the court for handing down (subject to editorial corrections)**	*Delivered ex tempore:* **11/06/2024**

IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

KINGS BENCH DIVISION (JUDICIAL REVIEW)

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

v

DEPARTMENT OF HEALTH FOR NORTHERN IRELAND

Mr Ronan Lavery KC and Mr Conan Fegan (instructed by McIvor Farrell Solicitors) for the Appellant
Mr Ian Skelt KC and Ms Laura McMahon KC (instructed by the Departmental Solicitor's Office) for the Dept of Health

---

Before: McCloskey LJ and McBride J

McCLOSKEY LJ (*delivering the judgment of the court, ex tempore*)

INDEX

Introduction

[1] Eileen Wilson ("the appellant") appeals to this court against the judgment and ensuing order of Colton J whereby he dismissed her application for judicial review, leave having been granted by an earlier order of the court.

[2] The appellant's challenge concerns one element of the elaborate Brexit arrangements, namely Article 18 of the Protocol on Social Security Co-Ordination of the Trade and Co-Operation Agreement between the European Union and the United Kingdom of Great Britain and Northern Ireland, known colloquially as "SSC18" and the "S2 Scheme." In a nutshell, in her quest to secure medical treatment, specifically diagnostic services, under Article 18 the appellant applied to the appropriate authority for a SSC18 authorisation. This elicited the response that this could not be provided in the absence of a consultant's letter confirming diagnosis. The appellant's challenge is made accordingly.

Factual matrix

[3] The uncontested material facts are few in number. The appellant has been interacting with the public health system of Northern Ireland since 2017. She has engaged with the Department of Health for Northern Ireland ("the Department"), the South Eastern Health and Social Care Trust "(the Trust") and the Health and Social Care Board ("the Board"). In May 2022, following an appointment with a consultant neurologist and MRI scans, it was determined that the appellant was not suffering from multiple sclerosis and her previous diagnosis of fibromyalgia was confirmed. The appellant's legal challenge focuses on certain events predating this obviously important landmark.

[4] In 2021 the appellant determined to apply for medical treatment under the S2 scheme. As noted in para [2] above, she was met with the response, provided by Dr Andrew Kerr, neurology service manager at the Ulster Hospital, that a prior diagnosis was necessary. At that time the appellant did not have a diagnosis, with the result that she could not complete her application.

[5] What precisely is the appellant challenging? In short, the target of her challenge is a letter dated 8 September 2021 written by the Trust's solicitor containing the following passage:

> "Your letter does not identify the domestic legal basis for giving effect to the Protocol and, in those circumstances, we have nothing substantive to add to our pre-action response of 9 July 2021. We would simply reiterate the point that this is a matter that should be raised within the extant proceedings brought by Mrs Wilson, rather than by way of a further application to the court."

The initiation of these proceedings followed, on 28 September 2021.

The earlier judicial review

[6] At the time of the aforementioned exchange of correspondence the appellant was litigating in separate judicial review proceedings wherein her central complaint was one of unlawful delay in the provision of medical treatment and services to her. Those proceedings were initiated in 2020 and were uncompleted when this further judicial review challenge was mounted. Her application for judicial review was dismissed (see [2023] NIKB2), as was her ensuing appeal to this court ([2023] NICA54). Paras [55]–[57] of the judgment of this court are illuminating:

> "[55] We turn to examine the core facts of the two cases. First, Mrs Wilson. During the period June 2017-May 2022 this lady was in receipt of the various medical services summarised in para 3 above. The beginning of this period was marked by a referral of this appellant to hospital by her General Medical Practitioner ("GP"). The GP labelled her case 'urgent.' This was modified to "routine" by the hospital consultant who initially considered it. Subsequently the consultant remained satisfied with the initial assessment. During the later stages of the period under scrutiny it was suggested on this appellant's behalf that her condition had deteriorated. The response of the respondent Trust was to indicate that she should seek a further referral by her GP. This has not materialised.
>
> [56] There is no suggestion that the medical services provided to this appellant were other than in accordance with the arrangements and circumstances prevailing at the time of the GP referral; the hospital consultant's assessment was manifestly prompt; the GP referral having been made in the context of waiting list delays of 163 weeks for hospital neurology appointments, an appointment was allocated well within the aforementioned time scale (circa 30 weeks); this was cancelled due to the pandemic; some two years later a 'remote' consultation with a consultant neurologist was conducted; and unremarkable MRI scans followed within the ensuing two months.
>
> [57] Following the initial variation of her GP's 'urgent' categorisation, this appellant was not considered to require any kind of urgent hospital attention or service

> subsequently. At the outset of the period under scrutiny, a diagnosis of fibromyalgia was being debated and at the conclusion of the period under scrutiny this diagnosis was confirmed. It is appropriate to add that no detriment to this appellant's health in consequence of the timeline under consideration has been established. All of these considerations combine to point firmly to the conclusion that no breach of any duty to provide this appellant was any material health service or benefit, whether within a reasonable time or at all, has been established."

The judgment of Colton J in this further judicial review application was provided at a point between the aforementioned dates, on 4 May 2023.

This challenge

[7] State succinctly, the appellant's application for the authorisation required to enable her to access treatment under the S2 Scheme was refused. In their PAP letter the appellant's solicitors formulated the central issue in these terms:

> "The proposed respondents have not adequately adhered to their legal duties under the [TCA]. A patient has the right to seek treatment outside of the Health and Social Care (HSC) system pursuant to the [TCA] …. known as the S2 route ….
>
> A diagnosis is a necessary stage and integral part of any medical treatment process. We consider therefore that the diagnosis comes within the ambit of the UKS2 Planned Treatment Scheme. Therefore, the failure to provide or frustrate our client's right under [the S2 Scheme] to obtain a diagnosis so that treatment can begin is a breach of our client's statutory rights under the scheme."

What specific legal rights is the appellant asserting? Distilled from the Order 53 Statement, these are twofold namely (a) section 26(1) of the European Union Future Relationships Act ("EUFRA") 2020 and (b) article 8 ECHR.

[8] A perusal of the inter-partes correspondence reveals that the stance taken on behalf of the Trust is based on the following passage in the guidance published by the Board:

> "There must be written support from a Northern Ireland Consultant which, following their full medical assessment, supports the diagnosis, treatment and medical time frame

> necessary for the treatment the patient wants funding for ….
>
> The supporting Northern Ireland clinician's evidence/letter must be on official letter head and should not be more than six months older than the treatment start date."

The maintenance of the Trust's stance by its later letter dated 08 September 2021 has been noted in para [5] above.

[9] On behalf of the Department the response to the PAP letter included the following:

> "Where a patient wishes to make application under the S2 route, across the UK, the onus is on the patient to take this forward, usually with the help and assistance of their GP and consultant etc. Equally, eligibility for the Scheme operates in the same manner across the UK. Clinical evidence from a specialist consultant must be provided to confirm that the patient meets the eligibility criteria for the S2 Scheme. In Northern Ireland, it is then for the [Board] to consider applications, this preliminary step having been satisfied …
>
> The operational outworking of the S2 route is entirely a matter for the Trusts and respective Health Boards, who assess applications on the basis of information provided. The Department does not administer nor participate in any way …"

[10] The core of the appellant's case is formulated in these terms:

> "(a) Article SSC.18 is incorporated into domestic law by section 26 EUFRA 2020.
>
> (b) By its mandatory language – 'authorisation shall be accorded' – Article SSC.18 confers a right on citizens of the United Kingdom to travel to EU member states to obtain medical treatment if the criteria of the second sentence of Article SSC.18(2) are fulfilled:
>
> (i) where the treatment in question is among the benefits provided for by the legislation in the Member State where the person concerned resides; and

(ii) 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. See WO.[1]

(c) That right must be effective. If the competent authority does not authorise a person who otherwise fulfils the criteria, that person may through Article SSC.67 enforce the right to receive an authorisation in the UK courts.

(d) 'Benefits in kind' include that which is required for the provision of the patient's recovery by securing the care which his or her condition requires.

(e) The purpose of obtaining a diagnosis is to secure the care required for a patient's recovery. Prior diagnosis of a disease is not required under the scheme because, properly defined, 'illness,' and 'condition' can exist without a diagnosed 'disease'. Diagnostic services thus fall within the rights conferred by Article SSC.18.

(f) A qualifying UK citizen thus has the right to travel to a Member State for diagnostic services under Article SSC.18."

[11] The central submission on behalf of the Department is formulated thus:

"1. Applying the foregoing to the appellant, the following submissions are made:

(a) The appellant fulfils the criteria of the second sentence of Article SSC.18(2) because:

(i) neurological diagnostic services are provided in the UK; and,

(ii) she is well outside of a medically justifiable time limit to receive a diagnosis (which is not gainsaid by the respondent).

(b) The appellant suffered from an 'illness', or 'condition' for the purposes of Article SSC.18.

(c) The appellant thus had a right to receive an authorisation under the S2 Scheme and the right pursuant to Article SSC.67 to enforce the right to receive an authorisation by these proceedings.

(d) The refusal of the respondent to provide or allow to implement a scheme to allow for an authorisation is unlawful for the following reasons:

(i) Breach of Article SSC.18 and/or section 26(1) EUFRA 2020.

(ii) Frustrating the legislative purpose of Article SSC.18 and/or section 26(1) EUFRA 2020 in the Padfield sense in that the respondent did not use its statutory powers to promote the policy and objects of those statutory provisions and section 3A of the Health and Social Care (Reform) Act (Northern Ireland) 2009 which confers power on the respondent to provide or secure health care, including diagnostic services, outside Northern Ireland.

(iii) Ultra vires Article SSC.18, section 26(1) EUFRA 2020 and/or section 3A of the 2009 Act by failing to implement Article SSC.18.

(iv) Error of law because the respondent has failed to recognise that Article SSC.18 provides an enforceable right in domestic law for a qualifying UK citizen receive diagnostic services in a Member State.

(v) The refusal to provide the authorisation is Wednesbury unreasonable because the respondent has failed to provide any reasons for that refusal and because the respondent has made it a perquisite for the Article SSC.18 authorisation that the appellant first obtains a diagnosis in Northern Ireland thus keeping the appellant in a paradox. The respondent is therefore acting so unreasonably that no reasonable public body acting reasonably could have made the requirement to first obtain a diagnosis."

[12] The aetiology of SSC18 can be traced to Regulation (EC) Number 883/2004. These two measures are identical, with the exception that the terminology "Member State of residence" has been replaced by "State of residence." SSC18 is one of the provisions of the SSC Protocol which, in turn, has two legal homes. First, as already noted, it forms part of the TCA. Second, it has been converted into a measure of domestic law via section 26 of the EUFRA2020.

[13] The subject matter of the 2004 Regulation is the "co-ordination of social security systems" in the EU Member States. A perusal of the recitals confirms that this measure belongs firmly to the right of freedom of movement enjoyed by EU workers: see in particular the 1st and 45th recitals, the latter describing the objective of the measure as:

> "… the co-ordination measures to guarantee that the right to freedom of movement of persons can be exercised effectively …"

There is also a repeated emphasis on equality of treatment of the migrant worker and their counterparts in the host Member State. Pursuant to this measure the receipt of benefits in kind in the host Member State, together with the authorisation of appropriate medical treatment there, was possible for the migrant worker.

[14] The relevant provisions of the Social Security Co-ordination ("SSC") Protocol are Articles 18 and 67, which are in these terms:

> "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;

…"

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:

"**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."

As already noted, the SSC Protocol forms part of domestic UK law by virtue of section 26(1) of EUFRA 2020.

The core issue

[15] The fundamental argument addressed by Colton J in his judgment is rehearsed at para [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."

The nub of the argument on behalf of the appellant formulated at both judicial tiers is that recourse by a person such as her to the S2 mechanism is permissible for the purpose of securing a medical diagnosis as this constitutes a sickness benefit in kind within the meaning and embrace of Article SSC/18.

Academic appeal?

[16] This court proactively raised the issue of whether this appeal should proceed substantively on the ground that it is an academic appeal. We do not have to rehearse the history in dense detail and we refer to the above. Fundamentally, the appellant's application for judicial review had a single central purpose upon its commencement. That was to secure under the Protocol in question an authorisation from the appropriate Northern Ireland authority which would enable her travel to another EEA country to secure a medical diagnosis of whatever condition from which she was suffering.

[17] At the time the proceedings were initiated the appellant had not received a final diagnosis in Northern Ireland. Rather, she was in receipt of a tentative diagnosis of the condition of Fibromyalgia. Proceedings were commenced on that footing in September 2021. Material developments began around March 2022 when the appellant had a consultation with a hospital consultant. That gave rise to an MRI scan of the appellant which was carried out on 11 May 2022. The outcome of these steps was that the tentative diagnosis of Fibromyalgia was confirmed.

[18] The hearing at first instance proceeded before Colton J some two weeks later, on two successive dates. It entailed the hearing of this application for judicial review and the hearing of a related application for judicial review in which the appellant and another lady were co-applicants (see this court's judgment at [2023] NICA 54). On the

information before this court, at the very latest by October 2022 the appellant was in receipt of her diagnosis.

[19] Colton J gave judgment in the other judicial review in January 2023. He gave judgment in this case on 4 May 2023. He noted the two medical developments already mentioned. He also made the observation at para [9]:

> "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."

It is appropriate to reflect on the words used by the judge, in particular, "…the applicant is entitled to consideration of the issues raised in her application", because the outcome of the probing undertaken by this court is that the applicant had no longer any interest whatsoever in the issues raised by her application as she had received a diagnosis which was uncontested and unchallenged. Thus there was some evident uncertainty about the purpose for which the case was permitted to continue.

[20] Strictly, having regard to what Mr Lavery has helpfully clarified to this court , that sentence should read "…the public are entitled to consideration of the issues raised in her application." But that was not how the case proceeded. Thus, the question of whether the case should have proceeded at all given that it was entirely academic from the appellant's perspective, may not have been fully considered or investigated at first instance. That is not to criticise anyone, but it is material to how we determine the issue of whether this court should proceed with the appellant's challenge to the judgment which was to dismiss her application for judicial review.

[21] The judgment of Colton J ultimately was concerned with a single issue, namely the correct construction of one of the provisions in the Protocol in question, ie the S2 Scheme. This Scheme is contained in a Protocol which was initially enshrined in an international agreement and then transposed directly into domestic law by primary legislation and is one of the products of the complex Brexit arrangements, albeit it was in existence in identical form for all practical purposes from 2004 via Regulation EC883/2004.

[22] We turn to the application of what has come to be known as the *Salem* principle (*R v SSHD, ex parte Salem* [1999] 1 AC 450), per Lord Slynn:

> "My Lords, I accept, as both counsel agree, that in a cause where there is an issue involving a public authority as to a question of public law, your Lordships have a discretion to hear the appeal, even if by the time the appeal reaches the House there is no longer a lis to be decided which will directly affect the rights and obligations of the parties inter se. The decisions in the *Sun Life* case and *Ainsbury v.*

> *Millington* (and the reference to the latter in Rule 42 of the Practice Directions Applicable to Civil Appeals (January 1996) of your Lordships' House) must be read accordingly as limited to disputes concerning private law rights between the parties to the case.
>
> The discretion to hear disputes, even in the area of public law, must, however, be exercised with caution and appeals which are academic between the parties should not be heard unless there is a good reason in the public interest for doing so, as for example (but only by way of example) when a discrete point of statutory construction arises which does not involve detailed consideration of facts and where a large number of similar cases exist or are anticipated so that the issue will most likely need to be resolved in the near future."

We recognise that Lord Slynn (delivering the unanimous judgment of the House), in the best traditions of the common law, did not formulate this principle in exhaustive terms. We see no profit in dwelling on subsequent decisions (which we have considered) as these are unavoidably fact and context sensitive, lacking any precedent value.

[23] We return to the coalface. The present case was academic at first instance. It is far from clear that whether it ought to have proceeded was fully considered in circumstances where the respondent had failed to take appropriate proactive steps and the appellant's approach was demonstrably vague. Upon appeal, nothing has changed: the case remains academic. The principle in play is one which, inter alia, and inexhaustively, canvasses the possibility that there may be utility in the Court of Appeal conducting an otherwise academic appeal on the ground that there is an important point of construction of some legal instrument or statutory measure in play: in this case, the one described above. This court having probed this issue carefully, the reality is that the only possible utility which could emerge from this court conducting exactly the same exercise on exactly the same evidential foundation and exactly the same arguments as that undertaken by Colton J is that there might be some members of the population of Northern Ireland who would benefit.

[24] The first question which follows is: benefit from what? And the answer to that must be: benefit from this court taking a different view. That, in turn and logically, raises another question, namely, is there any evidential foundation for giving effect to that suggestion? The answer to that in our view is categorically 'No.' But the exercise does not end there as there is another question, having regard to Mr Lavery's submission, which is whether it is appropriate for this court to take judicial notice of the possibility of members of the population of Northern Ireland being potential beneficiaries of this court reaching a different decision. We respond to that unhesitatingly by saying 'No', because the doctrine of judicial notice itself is no

free-wheeling palm tree. On the contrary, it requires a clearly identifiable foundation of sorts. While sometimes it is so obviously to be applied that one does not give it a second thought, there are other cases where there is no such obvious course and it is necessary to probe the question of whether the doctrine applies at all. Given the absence of any tangible foundation, we are in no doubt that the doctrine of judicial notice has no application in these circumstances.

[25] We consider that the *Salem* principle in our view applies with particular force at the appeal stage in circumstances where it was fully engaged at the first instance stage. There may be an understanding or expectation among certain practitioners in this jurisdiction that an unsuccessful *Salem* outcome at first instance gives rise automatically to a rerun in the Court of Appeal. We take this opportunity to correct any such misconception.

[26] It is the case that in Northern Ireland, unlike in England & Wales, there is a right of appeal to the Court of Appeal, whereas in the other jurisdiction an appeal lies with permission only of either the High Court or the Court of Appeal itself. That right, however, is modified by practice and procedure: this, in this jurisdiction, has adopted without qualification the practice and procedure of the sister jurisdiction in the form of the *Salem* principle. Thus, the *Salem* principle represents the hurdle to be overcome in this instance. At first instance, an application for judicial review may have become academic, whether at the leave stage, on the day of the substantive hearing or at some other point eg between the substantive hearing and giving judgment (it matters not). Where an academic hearing has been permitted to continue at first instance, then the principle in our view has even stronger force at the appellate level for the simple reason that a judge of the stature of a High Court judge has considered the issue fully, has reserved judgment and has then provided a considered reserved judgment. The case for the Court of Appeal replicating this exercise must in our view be a compelling one.

[27] It is the experience of the Northern Ireland Court of Appeal that a significant proportion of its business includes academic judicial review appeals. This is both wasteful of limited judicial resources and costly. These appeals are invariably brought by a litigant who has failed at first instance and has the vital insulation of public funding at both judicial tiers. It is to be expected that applications for public funding to support such appeals will proactively and fully address the academic factor and will thereafter be rigorously examined by the Legal Services Agency.

[28] What all of the foregoing means is that the utility argument advanced by Mr Lavery must be rejected. That is the only argument before this court on which it is contended that the court should entertain the appeal and add its views to those of Colton J. The *Salem* principle operates to defeat this appeal in limine.

The Salem principle: Conclusion

[29] For the reasons given, we conclude that the application before this court, namely the appeal against the decision and order of Colton J, must be dismissed on the ground that it is academic and to pursue it to its conclusion will achieve nothing of utility.

Merits

[30] Since this court received comprehensive written argument on the merits of the appeal from both parties, we consider it appropriate to add the following. Mr Lavery KC prayed in aid a letter dated 23 August 2021 from the Directorate-General of Health and Food Safety of the EU Commission, which contains the following passages:

> [DLS] "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.
>
> ….
>
> "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."
>
> …
>
> "… *A v Latvijas Republikas Veselibas Ministrija* [2021] 7 WLUK 273 and *WO v Vas Megyei Kormanyhivatal* [2020] 9 WLUK 247."

The second building block in the argument consists of the decisions of the CJEU in *A* and *WO*.

[31] Brexit notwithstanding, it is permissible for this court to give consideration to these decisions, each of them post-dating withdrawal, by virtue of section 6(2) of EUWA 2018:

> "…. 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."
>
> …

In *A*, the subject of sickness benefit and recovery was considered by the CJEU, in the context of Article 20 of the 2004 Regulation. The court stated 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])."

[32] In *WO*, the CJEU gave specific consideration to the definition of "scheduled treatment" in Article 20 of the 2004 Regulation, holding as follows:

> "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."

[33] As the Board's published guidance makes clear, the practical outworkings of the S2 mechanism are that in order to secure a S2 certificate certain eligibility must be satisfied at the time of making the application by the person concerned. First, a UK NHS consultant must have confirmed, following a full clinical assessment, that the treatment will meet the patient's specific needs. Second, the patient must be entitled

to similar treatment under the NHS scheme. Third, the treatment must be available under the other country's public/State health scheme. Fourth, in cases where the treatment is available in Northern Ireland, the consultant must confirm that it cannot be provided in this jurisdiction in a time that is medically acceptable based upon an objective clinical assessment of the patient's individual circumstances. Finally, the proposed State provider of the treatment must confirm its availability to do so, together with proposed dates and estimated costs. Where all of these criteria are satisfied a S2 certificate is issued to the patient. The practical effect of this certificate is that the EEA treatment provider will seek reimbursement from the UK NHS Business Service authority and not the patient.

[34] Colton J formulated his conclusion succinctly at para [58]:

> [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."

At paras [61]-[65] the judge provided his reasons for concluding separately that the decisions in *A* and *WO* did not assist the appellant:

> "[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."

[35] The concept lying at the heart of Article SSC/18 is that of "… receiving the treatment appropriate to their condition …" In any given case this will not be possible unless the person concerned has received an authorisation from the "competent institution" of the United Kingdom. In every case the fundamental question for that entity is whether the proposed treatment in an EU Member State is "appropriate to" the "condition" of the applicant. We consider that on any showing Article SSC/18 manifestly contemplates that the first step in the exercise will invariably be ascertainment of the applicant's "condition." Elementary common sense and reason dictate this construction. Article SSC/18 does <u>not</u> permit the provision of an authorisation for the purpose of <u>medical diagnosis</u> in the host State concerned. Rather it plainly presupposes that the exercise of medical diagnosis will be completed in the patient's State. We consider that the appellant's proposed construction distorts the simple and uncomplicated language of this provision and effective seeks to rewrite it. To accede to it would effectively extinguish the manifestly sensible and reasonable division of functions and responsibilities as between the patient's home State and the host EU Member State concerned. The appellant's proposed construction also has the effect of deleting in full the second sentence of Article SC/18(2). That sentence categorically reinforces the construction that the vital, indispensable first step in the exercise will invariably be the diagnosis of the patient's "condition."

[36] This court therefore concurs with the trial judge. We further endorse his evaluation of the two CJEU decisions considered above. Finally, in common with Colton J, we decline to give effect to the non-legally binding opinion of the Commission, for the reasons elaborated.

New Evidence

[37] We add this separate ruling for the benefit of the parties and for the purpose of providing some education and guidance in other cases. This court raised the separate issue of whether it should permit the appellant to place any reliance on certain new materials which had been generated only at the appeal stage. These take the form of medical texts, and they are contained, peculiarly enough, in the bundle of authorities of all places. We have made particularly clear that they do not have the status of authorities, we have observed that they were not considered by the judge at first instance, we observe that they are evidence, not authorities, and because they did not

form part of the applicant's evidence at first instance, they were not the subject of either an evidential response by any of the respondents or appropriate argument on behalf of the respondents. The only mechanism for introducing this material in the Court of Appeal would be by a formal application addressing the *Ladd v Marshall* principles. We did, however, relax that strict approach in fairness to Mr Lavery and his client and we considered an informal application which was made orally. It is abundantly clear to us that the *Ladd v Marshall* principles are not satisfied in these circumstances and, in any event, given the practical and due process considerations which we have highlighted it would have been quite inappropriate to admit the materials at this appellate stage.

[38] A further observation is appropriate. The enthusiastic enterprise and imagination of junior counsel must always be tempered by the sombre reality of rules of Court, procedural norms and, where appropriate, alertness to the *Salem* principle. Oversight from senior counsel is indispensable. Runaway trains are to be avoided. A cold bath is required on occasion. The public purse and professional duties demand no less.

Our conclusions

[39] The order of this court, therefore, is one dismissing the appeal and affirming the judgment and order of the High Court at first instance in all respects. For the avoidance of any doubt this judgment entails no criticism of the decision of Colton J to permit the case to proceed. This lay comfortably within his margin of appreciation as first instance judge in the context of an essentially procedural, or case management, issue. He clearly considered that the central question of law raised was an interesting one and he was entitled to do so. In our estimation, the further communication between the senior bench and the profession in this judgment on the topic of academic appeals has proved necessary. Finally, for the record, we observe that the other grounds of challenge contained in the Order 53 pleading were, sensibly, not advanced.