

By Paul McGinn



## European court orders health authority to pay for private care outside of EU

The European Union's top court has ruled that a European Union country must pay for medical services abroad if a treating physician – even in another EU country – believes that such care is unavailable within the EU.

The decision, handed down by the Strasbourg-based European Court of Justice in April, arose after a German national living in Spain was referred to Switzerland for cancer therapy by

German physicians who believed she could not receive appropriate care within the EU.

For ophthalmologists, the case means that if they refer a patient to a clinic outside of the EU for necessary treatment that is unavailable within the EU, the patient's health authority – not the patient – should be legally required to pay the cost of the treatment.

### Travel to Germany

The case arose after Annette Keller, a German national who was living in Spain, travelled back home to visit her family in September of 1994 for a one-month visit.

Before she left Spain for Germany, Ms Keller received an E-111 form from Insalud, the Spanish health authority. That form indicated that if

Ms Keller required any immediate, necessary medical care during her stay in Germany, Insalud would reimburse the appropriate German health authority for that care.

### Diagnosis of cancer

During that visit, Ms Keller was admitted to the Gummersbach District Hospital, which is attached to the Cologne University Clinic. There,

### Patient's ophthalmologist "best placed" to determine patient's medical needs

The professional opinions of a patient's physicians – whether ophthalmologists or other specialists – are more important than that of health authority officials in determining appropriate medical care, according to the European Court of Justice.

In a landmark decision ordering Spain to pay for medical services received outside of the European Union, the Court stated that a patient's physicians – even those outside of Spain – should determine the best course of treatment for that patient.

#### Doctors – not bureaucrats – should decide

"The doctors established in the Member State of stay are clearly best placed to assess the state of health of the person concerned and the immediate treatment required by that state," the court wrote in the case.

The case arose after the Spanish health authority Insalud refused to reimburse Ms Annette Keller for the 87,030 Swiss francs she spent on cancer therapy at the private Zurich University Clinic in Switzerland between November of 1994 and February of 1995. Ms Keller has obtained treatment at the clinic after doctors in Germany referred her there for treatment they said was available nowhere in the EU.

In refusing to reimburse Ms Keller for her treatment costs, Insalud officials argued that she should have returned to Spain for a medical assessment and authorisation before undergoing the treatment in Switzerland.

#### Authorisation of care

The court, however, pointed out that Insalud could not require Ms Keller to return to Spain for such an assessment and authorisation

because it has already authorised such care by issuing the E-111 and E-112 forms. According to the court, the issuance of those forms indicated that Insalud placed its confidence in the German health authorities and in the doctors authorised by those authorities to determine the best treatment for Ms Keller.

"It must be recalled in this respect that, as the Court has held in the field of the freedom to provide services, doctors established in other Member States must be regarded as providing the same guarantees of professional competence as doctors established within the country," the court wrote. "Accordingly, where the competent institution (Insalud), by issuing a Form E-111 or Form E-112, has agreed that one of its insured persons is to receive medical treatment outside the competent Member State, it is bound by the findings relating to the need for urgent vital treatment made by the doctors authorised by the institution of the Member State of stay."

#### Spain bound by German doctors' opinions

"Similarly, the competent institution is bound by the choice of treatment made by those doctors on the basis of their findings and in accordance with the current state of medical knowledge, including where that choice is to transfer the person concerned to another State to be given the urgent treatment necessitated by his condition which it is not possible for the doctors in the Member State of stay to provide," the court added.

The court referred to the opinion of the Advocate General, who regularly advises the court about issues affecting EU law. In his opinion, the Advocate General had advised the court that it was "of no importance for

determining whether the competent institution is bound by such findings and decisions that the State to which those doctors have decided to transfer the patient is not a member of the European Union, since the choice of treatment thus made is within the competence of the doctors authorised by the institution of the Member State of stay and of that institution."

#### No requirement to return

In those circumstances, a patient whose treatment has already been authorised "cannot be required to return to the competent Member State to undergo a medical examination there, when doctors authorised by the institution of the Member State of stay consider that his state of health requires urgent vitally necessary treatment," the court wrote.

The court added that no health authority had the right to reject the findings made and decisions on treatment taken by doctors authorised by the health authorities of another EU country. "Such an argument would amount to disregarding the rule of shared responsibilities and the principle of mutual recognition of doctors' professional skills, and would be contrary to the interests of patients who need urgent vitally necessary treatment," the court stated.

#### Health care planning at risk?

The court noted that the Spanish health authorities had contended that the objective of planning and organising the provision of hospital care within every European country would be endangered if insured persons were allowed to have free access to health services in any State, including non-member countries.

Although the Court acknowledged that a health authority has a right to require prior authorisation of medical care outside of its borders, it pointed out that Insalud had already authorised Ms Keller's treatment in Germany – and in any other country that the German doctors believed necessary care was available. In those circumstances, Insalud could not retroactively rescind its approval.

#### Approval extends to care outside EU

"Where the competent institution has consented, by issuing a Form E-111 or Form E-112, to one of its insured persons receiving medical treatment in a Member State other than the competent Member State, it is bound by the findings as regards the need for urgent vitally necessary treatment made during the period of validity of the form by doctors authorised by the institution of the Member State of stay, and by the decision of those doctors, taken during that period on the basis of those findings and the current state of medical knowledge, to transfer the patient to a hospital establishment in another State, even if that State is a non-member country," the court ruled.

"In such circumstances, the competent institution is not entitled to require the person concerned to return to the competent Member State in order to undergo a medical examination there or to have him examined in the Member State of stay, nor to make the above findings and decisions subject to its approval."

she was diagnosed with a malignant tumour of the nose, nasal cavity, eye socket, and base of the skull. Doctors at the hospital believed that the cancer had spread so far that Ms Keller would die without immediate treatment.

Because she wanted to stay in Germany and continue receiving medical treatment – at the expense of the Spanish health authorities – Ms Keller requested Insalud to extend its approval of her care in Germany by issuing an E-112 form. Such forms are usually issued in situations where medical care is available in another EU state that is not available in the patient's country of residence.

#### **Renewal of entitlement**

In Ms Keller's case, Insalud agreed to issue the E-112 form and approve her continued care in Germany on the ground that she was too ill to return to Spain for her treatment. The period of validity of her E-112 ran until June 21, 1996.

Following numerous examinations and a thorough analysis of the various possibilities of treatment available, the doctors of the Cologne University Clinic considered that Ms Keller required an immediate and vitally necessary operation at the Zurich University Clinic in Switzerland. Ms Keller's doctors said that the private clinic was the only one in Europe that could treat Ms Keller's cancer with any recognised scientific efficacy.

#### **Transfer to Switzerland**

The doctors of the Cologne University Clinic thereupon transferred Ms Keller to the Zurich University Clinic. There, in November of 1994, she underwent surgery.

After what the surgeons considered a satisfactory outcome, Ms Keller received a course of radiotherapy. Ms Keller remained in Zurich for her radiotherapy treatment

from December 15, 1994 to February 22, 1995. The total cost of the treatment in Zurich amounted to 87,030 Swiss francs. Ms Keller paid the bill in full.

#### **Refusal of reimbursement leads to lawsuit**

In April of 1995, Ms Keller sought reimbursement of that sum from Insalud. Insalud refused the application in August of 1995. Relying on Spanish law, Insalud officials stated that reimbursement of the costs of medical treatment provided in a non-EU state required their express prior authorisation.

Ms Keller's appealed against that refusal, but that appeal was also refused by Insalud officials in December of 1995.

In May of 1999, Ms Keller again applied for reimbursement of the costs of her hospital treatment in Switzerland. This time, the health inspectorate of Insalud refused her application on the grounds that "although the illness was serious, it did not have the character of a life-threatening emergency which justifies going outside the national and/or [European] Community public health scheme in order to be treated in a private setting outside the Community, without allowing the Spanish management authority to examine and propose the corresponding care options appropriate to the condition from which the patient was suffering."

Soon thereafter, Ms Keller brought court proceedings against the refusal. In October of 2001, however, she died; her heirs carried on her legal proceedings.

#### **Spanish court turns to EU**

Eventually, a Spanish court heard Ms Keller's case in 2002. To help it decide the case, the court sought an

interpretation of EU law from the Court of Justice. In particular, the Spanish court asked the Court of Justice whether Insalud was bound to reimburse Ms Keller for her treatment based on the diagnosis and choice of treatment of German doctors, over whom Insalud had no control.

#### **Free movement of EU citizens**

In its judgment, delivered in mid-April, the Court of Justice relied largely on an EU regulation introduced in 1971. According to the Court, that regulation – which laid the groundwork for the E-111 and E-112 approval by Insalud of Ms Keller's care in Germany – was introduced to facilitate the free movement of persons, a basic principle of EU law.

The Court noted that the Insalud approvals of Ms Keller's care – which were embodied in its issuance of the E-111 and E-112 forms – were intended to assure that the hospital and doctors who treated a patient from another EU state get paid by the patient's home country for any necessary care that they – or other doctors or hospital they believed to be appropriate – provided to the patient.

#### **Spain bound by initial findings**

"Consequently, the institution of the Member State of affiliation [Spain] was bound by the findings relating to the need for urgent vital treatment made by the doctors authorised by the institution of the Member State of stay [Germany], and by the decision of those doctors to transfer the patient to another State [Switzerland] to be given the urgent treatment which the doctors of the Member State of stay are unable to provide," the Court wrote.

It was of no importance that the State to which the

doctors decided to transfer the patient was not a member of the European Union, the Court added.

"The institution of the Member State of affiliation cannot require the person concerned to return to the Member State of residence to undergo a medical examination there, nor can it have him examined in the Member State of stay, nor subject the medical findings and decisions to its approval," the Court stated.

#### **Spain must pay for care**

As to responsibility for the costs of medical treatment given in the non-member country following a medical decision to transfer the patient, the Court stated that, usually, the cost of that treatment would be borne by the country where the referral decision was made – in this case, Germany. The country where the patient lived permanently – in this case, Spain – would then reimburse Germany for that care.

The Court ruled that it did not matter that Ms Keller paid for her treatment in Switzerland herself. Because the sickness fund in the German region from which Ms Keller was referred to Switzerland would have assumed those treatment costs and because Ms Keller's cancer treatment was among the benefits provided for by Spanish social security legislation, the Court held that Insalud should reimburse the entire cost of Ms Keller's treatment in Switzerland directly to the heirs of Ms Keller.

#### **Contacts**

The full text of the judgment, *Heirs of Annette Keller v Instituto Nacional de la Seguridad Social (INSS) and Instituto Nacional de Gestión Sanitaria (Ingesa)*, formerly Instituto Nacional de Salud (Insalud), is available through the Internet site of the European Court of Justice at :

<http://curia.eu.int/jurisp/cgi-bin/form.pl?lang=en>

In the case number box, type "C-145/03" to read a copy of the court's judgment in the case.