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HCJ 2974/06

1. **Victoria (Vicki) Yisraeli**
2. **Bekol: Organization for Hard of Hearing and Deaf People**
3. **Physicians for Human Rights**
4. **Adva Center**

Versus

1. **Health Basket Expansion Committee**
2. **Minister of Health**
3. **Minister of Finance**
4. **Government of Israel**
5. **Clalit Health Services**

The Supreme Court sitting as the High Court of Justice

[11 June 2006]

Before President A. Barak, Justices M. Naor and E. Rubinstein

Petition to grant an order *nisi* and an interim order.

Date of Hearing: 4 May 2006.

For the petitioners: Adv. David Spivak.

For the respondents 1-4 Adv. Dana Briskman; Adv. Michal Tzuk

For respondent 5: Adv. Ariel Meitliss

JUDGMENT

Justice E.Rubinstein

A. The Petition

1. Like other petitions in the area of health insurance that come before this Court, this petition touches on the tragically raw nerves that characterize the tension between the aspiration to offer as much as assistance as possible to the sick in their strife, and the consequences of budgetary limitations. In some cases, the matters concern life itself, or procedures or medications that can save or lengthen life; in others, they concern medications or procedures affecting the quality of life. We might even say that this is what distinguishes man as a social being who interacts with his fellow man and sustains himself in dignity. The petition before us is concerned with the latter matter.

2. The petitioners comprise a woman seeking this Court's decision on her need and request to undergo an operation known as "cochlear implant" that will save her hearing, and another three public petitioners: Bekol: Organization for Hard of Hearing and Deaf People, Physicians for Human Rights, and the Adva Center.

3. The petition is directed against one particular item in the National Health Law, 5754-1994 (hereinafter- "the Law" or "the National Health Law"): item 14 of the chapter titled "Services for Self-Participation of the Insured", in the Second Supplement of the Law. This chapter covers the services that were provided on the determining date - 1.1.94 - by the Health Fund of the Histadrut

Labour Federation, as it was known when the Law was passed (currently respondent 5). The petitioner's request is that the item be amended so that an adult suffering from bilateral deafness which cannot be remedied by hearing aids and who requires a cochlear implant in order to save his hearing, will be exempted from the "payment of participation" currently required by the Law, which amounts to 70% of the cost of the operation, i.e., seventy thousand of one-hundred thousand NIS. Alternatively, the petitioner asks that the participation rate be reduced so that the operation will be available to those in need. Another alternative request is to amend the Services Basket so that the Health Funds will be obligated to provide the operation free or at a reduced participation rate in cases in which the sense of hearing is vital to the dignified existence of the person going deaf.

4. The petitioner is a teacher, and a single mother who does not receive child support from her ex-husband. Her salary is low, and she works about thirty percent more than what would be constitute full time employment. This – it is averred -- enables her to barely eke out a living for the members of her family. Her hearing has already been impaired for a number of years, but of late the problem has unfortunately become increasingly acute, and she is gradually going deaf (her hearing is currently defined as 15% of that of a healthy person). The cochlear implant procedure is liable to save her hearing capacity, and it is argued that without it her livelihood and her ability to function within her family will suffer. She turned to the petitioners, and is attempting to enlist contributions for the operation. It should be noted that the implant

technology is more effective for those in the process of hearing loss and who are not yet deaf than it is for those who have already suffered total hearing loss for a long time. Hence the importance of the operation in the near future, scheduled for 25.6.06.

5. The petitioners claim that the authority to determine participation rates for services included in the health basket should be narrowly construed, and that determining participation at such a high rate means that publicly funded health services will be provided only to the rich. On the basis of an estimate made by Prof. Joseph Attias of the "Schneider Children's Medical Center, it is argued that every year there are about twenty adults like the petitioner who are going deaf and require this treatment (as set forth in detail below, the requirement for participation does not apply to children), at a total cost of about NIS 1,400,000. It further bears mention that according to Prof. Attias (in his letter of 4.4.06), between 80 – 90 percent of the cochlear implant operations in Israel are performed on children, and the adults with whom we are concerned here only account for the remainder .

6. Alternatively, it is argued that sliding-scale criteria should be established for participation, so that a person going deaf and lacking the financial means, could continue to work and live with dignity.

7. It is argued that the basic right to health insurance, as expressed in the Health Insurance Law, is part of human dignity, and that in this context there may be justification for some participation by the insured in the cost of medicines or treatments,

but that 70% is not reasonable and not proportionate. Participation should be at a low rate, so as not to prevent accessibility to basic health services. In our case, the collection of such a high rate of participation has the effect of providing a subsidy for those who can afford to pay for the operation from their own pocket, and there is no justification for a formal equality that results in substantive inequality.

8. It is argued that the Health Basket has been expanded over the years, in the wake of legislation and case law, and that that even in this specific area -- the cochlear implant - there has been a two-stage cancellation of the payment of participation for minors. On the level of economic efficiency, too, accommodating the petitioner and other people going deaf is preferable to their being transformed into welfare cases, the price of which is higher, and which infringes their dignity.

9. Alternatively it is argued that in cases such as this the Health Funds should exercise discretion on an individual basis, as they do through their exceptions committees for needs not covered by the Health Basket.

10. In their supplementary pleadings, deviating somewhat from their basic argument, the petitioners raised the petition to a quasi-constitutional level. They claim that the required level of participation (70%) is extreme and exceptional in comparison with the other levels of participation required under the Health Insurance Law, thereby infringing their right to equality, because a person financially incapable of funding the "participation" will not even

receive the sum allocated by the Law. Resource allocation should be in accordance with the right to equality. The petitioners claim that the participation requirement does not satisfy the proportionality tests of Basic Law: Human Dignity and Liberty, because at the very least, any participation in excess of 50% is not proportional. Accordingly, this is a petition to determine criteria which could limit the infringement, and alternatively for a hearing by an exceptions committee. The petitioners claim that the Health Funds are not prohibited from considering exceptions, even in regard to items within the Health Basket, and not just those external to it. In the petitioners' view, such a proposal could remove the stain of unconstitutionality attendant to this issue, by reconciling the conflict between equality and the high rate of participation required.

B. *The Position of Respondents 1 - 4: The State*.

11. The state argues for the dismissal of the petition, given that it involves the striking down of primary legislation, without any basis having been established to show the violation of a constitutional right. The Health Insurance Law "duplicated" the existing situation in 1994 with respect to the services provided by the Clalit Health Fund at that time. The arrangement in item 14, namely, participation of 70% is fundamentally a "duplicate of the existing situation" at the time, to the extent that it concerns adults (regarding minors, the Supplement has been amended twice, to exempt them all from participation). According to section 8 (1) of

the Law, no addition can be made to the health services basket without a source of financing. The mechanism for deciding on a change is complex, including a public committee for the expansion of the basket (hereinafter - the Basket Committee) that engages in a protracted professional process. The adopting of new technologies requires the establishing of priorities and preferences that take account of the relative weight of all the factors. The Basket Committee is followed by the Health Council, which is followed in turn by proceedings in the Government, which takes a comprehensive view.

12. It is argued that apart from the amendments to the Supplement, which exempted minors from payment for the implant, the Basket Committee is considering an increase in the funding so as to include adults as well, but that thus far the decision has been to give high priority to other technologies, rather than this one. As for the "cochlear implant" it is estimated that there are about 30 cases a year (as opposed to the 20 claimed by the petitioners), which means a cost of about NIS 2.25 million. At this stage, the Basket Committee has decided against including this implant in the basket, as well as other new technologies and medicines for the treatment of cancer, pulmonary hypertension, HIV carriers, and others, all despite the significant increase in the basket. The Health Council and the Government confirmed the recommendations that failed to include this implant. The matter was, therefore, duly deliberated, and there are no grounds for the Court's intervention.

13. Furthermore, according to the state, the case concerns a socio-economic right, which is not necessarily part of the right to human dignity enshrined in Basic Law: Human Dignity and Liberty. The Government and the Knesset have the prerogative to establish priorities, and the decision on the cochlear implant cannot be isolated from the overall context of the health basket. The Convention on Economic, Social and Cultural Rights, which was ratified by Israel in 1966, includes the right to the highest level of healthcare, subject to progressive realization and the availability of resources. The discharge of that duty requires establishing priorities. The right is therefore not an absolute, concrete right that can be severed from its internal context.

14. We were also informed that the next time new technologies are discussed for the purpose of their inclusion in the health basket, the subject of participation in the cost of the cochlear implant will also be raised.

15. In a supplementary notice, it was argued that the petitioners' request compels direct intervention in the work of the Basket Committee, which is obliged to prioritize in the course of its work. Moreover, the proposal to distinguish among categories of newly deaf people in accordance with their employment or economic status is liable to violate the principle of equality.

16. It was stated that nothing prohibits the Health Funds from deducting reduced participation, under conditions of equality

C **The Position of Respondent 5 : Clalit Health Services (hereinafter: the Fund)**

17. Although the Fund identifies with petitioner 1 on the humanitarian level, it regards this as a subject that has been determined by the legislature, and it has no independent position on the matter. All the same, it spread the payment of the –participation fee for the implant over 10 instalments without interest or linkage, and it is prepared to extend it to 24 such payments.

18. The Fund claims that under section 8 of the Health Insurance Law, it is prevented from granting discounts or benefits unless statutorily prescribed. Section 8 establishes the discounts that may be given, and regulations were accordingly enacted. The discounts established relate to health insurance fees and not to the purchase of medical services. Furthermore, various provisions of the Health Insurance Law restrict the Fund, preventing it from exercising its own discretion in this context.

19. The Exceptions Committee that operates within the Fund deliberated over medicines not included in the basket, or that would not be included by reason of the rarity of the syndrome. Its concern is the medical situation rather than the economic one, inasmuch as the Health Law is fundamentally based on equality.

D. Deliberations

20. Under the circumstances, the following discussion will be brief, in light of the short time remaining until the date scheduled

for the petitioner's operation, and so that the current legal situation be clear to her.

(1) *The Normative Framework*

21. As noted earlier, the purpose of the Health Insurance Law is to provide health services to every resident, as a responsibility of the state and as the specific responsibility of each Health Fund in regard to all those registered in it, within the framework of the funding sources determined by the Law (section 3). The health basket is defined in section 7, and for our purposes, it refers to the Second Supplement of the Law. When the law was adopted, it "duplicated" the services basket that was provided by respondent 5 on 1.1.94, including the said implant. The current participation rate of 70% is the same as it was at the time of its legislation.

22. The Law established hierarchies of authority for the purpose of altering the basket, and as far as it relates to additional cost, such as in the present case, the authority was conferred jointly upon the Minister of Health, the Minister of Finance and the Government (section 8 (b)(1) of the Law), and there a source of financing is required (section 8 (e)).

23. The mechanism operating in this field is the Public Committee for Expanding the Health Basket (the Basket Committee), consisting of persons from different disciplines, which makes recommendations to the Health Council that operates by virtue of section 48 of the Health Insurance Law. This Council is also authorized to advise the Minister of Health regarding changes pertaining to new technologies (section 52 (1)(b)). Thus, the order

in which a matter is handled is: the Basket Committee, the Health Council, the Minister of Health, the Minister of Finance, and the Government.

24. Item 14 of the Second Supplement states:

> Inner ear implants – the insured will participate in 70% of the cost of the implant. Insured under the age of 18 with bilateral deafness that cannot be restored by means of hearing aids, will not be required to participate in the cost of the implant.

This version differs from the original version, because item 14 was amended in 1999 and 2002. Initially, in 1999, it was extended to grant full coverage from the ages of 2 until 18, and later (2002), it was extended to include infants under the age of 2. We were informed, and the point is not disputed, that the overwhelming majority of the implant operations are for minors.

25. The subject is one governed by primary legislation, and is not static, as evidenced both by past amendments and by the deliberations in the Basket Committee, which are ongoing and, as we were informed, will also continue specifically with respect to the matter at hand. The Basket Committee considers new technologies and medicines on a regular basis, and proof of this is that it twice changed the policy in regard to the item that is the subject of our deliberations in relation to minors, and the changes were confirmed and enacted. As stated in the State's response, the subject of the implant was recently addressed by the National Labor Court (App. 284/05 *Drori v. Leumit Health Fund and the*

State of Israel), and the Court ruled that "the language of the law in this case is clear. A person insured by a fund, over 18 years old, is liable for participation in 70% of the implant's cost". In that case, the court ruled that the distinction between minors and adults did not constitute illegal discrimination, because it was based on clinical considerations related to the special needs of the minors, medical reasons, as well as social considerations (the minor's own lack of financial means).

(2) *Prioritization and Participation*.

26. It is indisputable that, firstly, that we are concerned with an orderly decision-making process, and secondly, that prioritization is essential in the circumstances of the health services basket. The couch will always be too short for stretching out, and a handful will never satiate the lion. In a world in which medicine and technology are rapidly changing, often beyond recognition, but in which the costs of the technology and medications are high, there is no escaping the need to establish priorities. It is hard to say, even in painful cases such as this, that setting priorities constitutes discrimination. Indeed, the battle over dividing the limited pie is the reason for petitions that are filed in this Court, parallel to parliamentary and extra-parliamentary public struggles. In other cases, it is exceedingly difficult to be unmoved by the cries of those whose lives may be lengthened if they receive certain medicines, just as it is impossible to be indifferent to the request of petitioner 1, who desires to continue pursuing her personal and professional

life, when the medical possibility of doing so is available, but the necessary economic resources are not. Reading the affidavit that was appended to the petition, given by a person who actually had a cochlear implant, one can see just how much quality of life and functionality benefit from the implant. Instead of joining the ranks of unemployed, this person is productive and successful. The same is true of the chances of petitioner 1, who so far has succeeded in functioning in her family and in her profession as a teacher, despite the impairment, and requests to continue doing so in the future. It is our hope that this will come to be.

27. We would add that the petitioner, justifiably, has great hopes for an improvement in her hearing and rehabilitation. In his article titled "The Cochlear Implant and the Halakhic Definition of Deafness" (24 *Tehumin* 173), Dr. Israel Brama writes: "It can be said that we are on the threshold of a new era, one in which the ears of the deaf will be opened" (p. 176, although there are different views regarding the law applying to a person who has had a transplant with respect to the fulfillment of certain religious duties). The cochlear implant has characteristics that set it apart from other hearing aids. Summing up, Dr. Brama writes:

> In effect, the cochlear implant creates an artificial ear. It is not a regular hearing aid, but rather, it replicates the hearing mechanism of the inner ear even though the instrument itself is partially external. It seems to me that that a person with a cochlear implant can, for all intents and purposes,

> be regarded as someone who hears, even for the hearing of the blowing of the shofar[1]….as distinct from the hearing aids considered by Halakhic authorities (there are those who did not regard such people as "hearing" in the Halakhic sense – E.R)… the deaf person who has had an implant hears like any other person. Concededly, he must first learn how to understand what he hears, and must configure the computer, but this is comparable to a new immigrant who can only understand what he hears after having studied in a language institute. He would certainly not be regarded as being "deaf" in the Halakhic sense.

These words are instructive regarding the level and quality of the implant.

28. Was the respondents' conduct in this case defective? I am perturbed by a point which was further sharpened in the supplementary pleadings of the petitioners, namely, the proportionality of the "participation". Even before the submission of the pleadings, I perused the Second Supplement. As the petitioners stated, the participation payments included therein are for the most part 10%, only a small minority of the items require

[1] Ram's horn blown by Jews on the Jewish High Holidays.- The question is whether a person who hears by way of a hearing aid discharges the duty of "hearing" the Shofar.

participation of 25% or 50%, and there is one additional instance of 70% (CPAP for sleep apnea), and one instance of 80% (limb prosthetics). The petitioners claim that the cases in which the required participation is 70% and 80% are in fact never realized (the state did not respond to this case specifically), leaving only the case before us. Whether this is true or not, at all events, our concern is with a minority of cases. The question is whether 70% of the cost can properly be called "participation". On the face of it, shouldn't "participation" be at a lower level? Doesn't participation mean that another party bears the principal burden, and the "participant" *adds* his own contribution, and not that he bears the principal burden of payment, as it was determined here? The question remains even if participation of 70% was the norm before 1.1.94, when the list of health services provided by respondent 5 was "duplicated". Granted, it might be argued, by way of analogy from Torts law, that "contributory" negligence can be fixed at 100% - i.e. the "contribution" is for the entire negligence, and hence "participation" too can constitute the majority of the required payment. The *Gur* Dictionary defines "participation" as "the act of a participant and the person who takes part in something, taking part in ….". The *Even Shoshan* Dictionary (9th ed.) defines it as "taking part in something, being a partner to… (the examples cited include "participation of a merchant in a business"). It would seem that the definitions are inconclusive in either direction, but my feeling is that the linguistic sense points in the aforementioned direction, that fundamentally "participation" represents a part which is smaller than that of main

bearer of the burden. I will add that “participation” in insurance payments, in regard to significant damage, will generally be for a small part only (this is not the case where the damage is minor). At the end of the day, our concern is with a specific social issue, and the legislature *was aware* that this procedure was included in the health basket. This being the case isn’t 70% participation too high? I think that the issue gives cause for wonder. This argument, however, is problematic given the fact that at issue is the *legislature's* determination, in primary legislation, on a subject that had been common practice for years. The Supplement, concededly, was amended by an Order, i.e., by secondary legislation, but the provision itself received the direct approval of the legislature.

29. Parenthetically, I will add that I see no need to address the interesting constitutional question as to whether the Supplement is primary legislation, and thus subject to constitutional review, or perhaps secondary legislation, subject to administrative review. It also bears note that the Supplement to the basket under section 8 of the Law does not require Parliamentary confirmation, but any derogation from the basket (under section 8 (b)(1) must be confirmed by the Labor and Welfare Committee of the Knesset. On the one hand, the mere fact that the legislature gives its stamp of approval brings it nearer to being a legislative provision, and on the other hand, the procedure for its amendment brings it nearer the scope of the review of secondary legislation; the arguments cut both ways. However, given that no flaws are evident in the

mechanism established for matters regarding the basket – the Basket Committee – and its work procedures, and even the petitioners had no substantive claims against them, there is neither reason nor need for a ruling on this question.

30. Following the hearing, the attorney for the petitioners raised the argument to a quasi-constitutional level, in the context of equality. The argument was that the high participation requirement constituted illegal discrimination which disqualified it. On this matter, the petitioners focused on the proportionality conditions enumerated in section 8 of Basic Law: Human Dignity and Liberty. While I have expressed my view that the high participation rate raises questions, the petitioners have not laid a sufficient foundation for the constitutional review of this matter, and it would seem that this point is also clear to the attorney for the petitioners, who was somewhat ambivalent on this point. The strength of his claim, when viewed against the background of the data presented to us, and primarily the system of deliberations conducted by the Basket Committee, does not present a picture that would clearly support the quasi-constitutional claim of an absence of proportionality, given that the committee that deliberated the question was composed of a broad range of representatives of different disciplines.

31. The right to equality has been recognized by this Court, and the point requires no elaboration (see, recently, HCJ 6472/02 –

Movement for Quality of Gov't v. Knesset (not yet published); HCJ 7052/93 *Adallah v. Minister of the Interior* (not yet published)). Nonetheless, in this case we were unable to accept the claim of discrimination. This case devolves on the impossible dilemma in which the state finds itself in the context of the health services basket, and which we referred to above (see HCJ 4613/03 *Shaham v. Minister of Health* (not yet published) (*per* Justice Levy). We also accept the position of the state, to the effect that subjects therein cannot be examined in isolation, but rather must be viewed from a broad perspective. The ability to take a broad perspective is part of the Basket Committee's expertise, and there is no basis for casting any aspersion on its work or its determination of priorities.

32. In view of all of the above, I fear that we have no legal grounds for granting the requested order.

(3) *Towards the Future*

33. Nevertheless, given that the subject is about to be reconsidered by the Basket Committee, we find it appropriate to draw its attention to the comments above and to the petitioners' claims. First, it seems reasonable that twelve years after the establishment of the health basket, and having decided at the time, and over the years to waive participation in this item where it concerns minors, it might be appropriate to introduce additional changes, not necessarily by canceling participation, but by significantly reducing it. The issue at hand concerns "participation" of 70%, which is exceptional from an overall perspective. The

claim of "proportionality" can also not be ignored. It seems that consideration should likewise be given to the social and economic changes since 1994, even though we refrain from expressing a position in that regard. Presumably, in addressing these considerations, the Basket Committee will also examine the cost-benefit question apart from the humanitarian-medical need underlying the matter. That is to say: Isn't the improvement of the quality of life of receivers of the implant an improvement that enables them to continue in their work in a manner that precludes their becoming an economic burden on the public, apart from the preservation of the sense of human dignity, and the saving of other public funds? By the same token, and again without expressing any opinion, we will present the question of whether consideration could be given to a mechanism of a national exceptions committee for reduction of the participation itself with respect to *particular* items in the Second Supplement in which the participation required is high, and in accordance with the economic capacity of the person concerned, which would be individually examined (it is granted, that this might necessitate a legislative amendment).

34. Regarding the Health Fund, without addressing the question of jurisdiction over relations between petitioner 1 and respondent 5, which under section 54 of the National Insurance Law is given to the Labor Court, we also lack an adequate foundation on the question of the nature, the source of authority, and the modus operandi of the exceptions committee operating within the Health Fund. We also examined section 56B of the State Comptroller's Report, which was referred to by the petitioners. At this time, all

that we can say is that we presume the veracity of the State's claim, that there is no legal impediment to the collection of reduced self-participation, on the basis of equality.

35. We reiterate that we are cognizant of the need in this case for a comprehensive picture, and the Basket Committee, with its composition and professionalism, is granted the discretion in this matter. Nonetheless, the uniqueness of the item at hand is that it one of the very few for which the participation rate is extremely high.

E. *Final Word*

36. We are aware that our decision provides no immediate assistance to petitioner 1 for the operation that she requires. This distresses us, and we wish her a complete recovery. However, she and the public petitioners may find some consolation in the fact that they have raised the problem and given it publicity, so that it will at very least be heard and deliberated by the institutions tasked with the subject.

37. Subject to all of the above, we are unable to grant the petition. We make no order for costs.

Justice

Justice M. Naor

1. I concur. It saddens me that we are unable to assist the petitioner. Her plight has touched our hearts, but we are unable to interfere in the setting of priorities established by the Basket Committee. This is not a situation in which the gains of one party do not come at the expense of the other, but rather it is one in which one party gains and the other loses. We cannot rule that the petitioner should be given preference at the expense of others, and it appears that even the attorney for the plaintiff does not expect us to do so (ss. 16- 18 of the supplementary pleadings).

2. I prefer to refrain from addressing the question of the relations between the petitioner and the Clalit Health Services – respondent 5. My colleague Justice Rubinstein correctly noted that we lack sufficient foundation regarding the nature, the source of authority, and the work proceedings of the Exceptions Committee operating in the Health Fund. This being a matter given to the jurisdiction of the Labor Court, I think it preferable for us to avoid addressing the subject, given the existence of an alternative remedy, so that this petition will not constitute *res judicata* between the petitioner and respondent 5, and without expressing any view on the merits of the issue.

Justice

President A. Barak

I concur with the judgment of my colleague Justice E. Rubinstein, and with the comments of my colleague Justice M. Naor.

The President

Decided in accordance with the judgment of Justice E. Rubinstein.

Handed down today, 15 Sivan 5766 (11.6.06)

President Judge Judge