AB 2007,81
The Administrative Jurisdiction Department of the Council of State (Multiple Chamber),
The 11th of October 2006, nr200600633/1, LJN:AY9897
Mrs. Polak, Bijloos, Roemers

Legislation:
General Administrative Law Act {Algemene Wet Bestuursrecht} (herineafter referred to as the GALA) Article 1:1 sub 1 *chapeau* and under b; of the GALA Article 1:3 sub 1; of the GALA Article 6:19.

Essence:
Administrative Authority; Benefit Entitlement Act {Koppelingswet}

Summary:
According to the explanatory memorandum of the Benefit Entitlement Act, care providers who cannot recover the costs of the medical care provided to illegal immigrants from the illegal immigrant or third parties will have to be provided with a form of financing which is at the expense of the state in order to prevent any lesser reasonable consequences of the draft legislation. In principle, the Government is to make a sum available, equal to the savings that results from the deletion of Article 84 of the General Assistance Act {Algemene Bijstandswet}. The budget of the Ministry of Health, Welfare and Sports, will be increased to this end. The Minister proposes to place the respective sum in a separate fund. This fund grants whole or partial compensation to the care provider for its unpaid bills if certain conditions are met, and this is governed by the Foundation Koppeling, the Appellant in this case. From this legislative history it can be deduced that the Government has committed to financing medically necessary care. For the judgment in this case it is important that, as can be deduced from the legislative history, the Government interpreted the abovementioned service as its responsibility and to this end ordered the Appellant to establish a fund. Taking this into account, and the close (financial) relationship between the Minister and the Foundation, as well as the fact that the conditions/criteria formulated by the Minister are fully discounted in the regulation, it has to be concluded that the Foundation is exercising public authority in the sense of Article 1:1 sub 1 *chapeau* under b of the GALA when it grants contributions based on the Regulation. The fact that the Foundation can stipulate further terms to the awarding of sums, does not affect the previous conclusion. It has not been proven nor has a reasonable case been made that the Foundation has the liberty to spend the means at it's disposal to make other payments than for purposes of which the Benefit Entitlement Fund {Koppelingsfonds} is established. Since the execution of the Regulation in the present case amounts to exercising a task of the Government which is stipulated in a more detailed manner than the Regulation, the decision concerning the assessment of the contribution bears the characteristics of a public-law juridical act in the sense of Article 1:3 sub 1 of the GALA.

Parties:

The board of the Foundation 'Koppeling', is the Appellant, against the judgment of the District Court Rotterdam in the case nr. AWB 05/2126-WIE of the 16th December 2005 in the proceedings between:

the Foundation 'BAVO RNO Groep' located at Rotterdam

and

The Appellant.

1. Procedure

By a letter of 14 January 2005 the Applicant (hereinafter referred to as the Foundation) awarded a sum of € 203 847,00 to the foundation 'BAVO RNO Groep' (hereinafter referred to as BAVO RNO) by way of compensating the costs of medical treatment and/or admission of uninsured illegal immigrants in the year 2002.
Moreover the Foundation confirmed with their decision that the request for additional compensation shall not be granted.
By a decision of 25 April 2005 the Foundation informed BAVO NRO that it is not able to decide upon the objections lodged against the decision not to grant additional compensation to the foundation, since the foundation is not an administrative authority and therefore no objections can be filed against it.
By the judgment of 16 December 2005, sent on 20 December 2005, the district Court decided that the appeal of BAVO RNO was well founded and so over-turned the decision concerned. This judgment is attached (not included, *red.)*.
The Foundation appealed this judgment by a letter, which was received by the Council of State on 23 January 2006. The grounds are completed by a letter 27 March 2006.These letters are attached (not included, *red.*).
In a letter of 24 April 2006 BAVO RNO replied.
In the decision of 14 June 2006, the Foundation, in compliance with the judgment of the district Court, it was declared that the complaint filed by BAVO RNO partially non-admissible and for the remaining part as ill-founded. BAVO RNO lodged an appeal against this decision on 22 June 2006.
The Administrative Jurisdiction Department has investigated the case in a session on 4 July 2006, where the Applicant, represented by M.J.M. Schoonhoven LL.M., lawyer, located at 's-Hertogenbosch, accompanied by T.A.N. Stam, and BAVO RNO, represented by mr. J.G. Sijmons, lawyer located at Zwolle, made an appearance.

2.Considerations

2.1.The Foundation was established on 28 April 1997 according to its statute.
In accordance with Article 3 sub 1 of the statute, the Foundation has the objective of granting

financial contributions to appointed institutions for activities in the field of medical care for the benefit of persons, who based upon their asylum status are excluded from access to social healthcare insurance.
Under Article 4 of the statute, the financial means of the Foundation consists of subsidies and other benefits. In accordance with Article 13 of the statute, the general management arranges the working method by means of further regulations in compliance with the statute and the law.

2.1.1.In accordance with Article 1 of the regulation of financial contributions of the benefit entitlement foundation (hereinafter referred to as the Regulation), medically necessary care means: the care, insofar as not excluded by appendix A of this Regulation, as described in the Compulsory Health Insurance Act {Ziekenfondswet} and the General Act on Exceptional Medical Expenses { Algemene Wet Bijzondere Ziektekosten, abbreviated as AWBZ} and insofar as this care is considered necessary according to the generally recognised professional standards within a professional group. Medically necessary care can at least be understood to mean:
a. care provided in or in order to prevent life-threatening situations, or else in or in order to prevent situations of permanent loss of essential functions.
b. Care provided for in situations where a danger to third parties occurs, such as infectious diseases or mental disorders that are accompanied by aggressive behavior;
c. pregnancy and the care with regard to the birth of a child;
d. preventive youth healthcare as well as a vaccination program in accordance with the state's vaccination program, insofar as the access thereto is not already insured as a part of the State budget financed preventive (youth) healthcare.

2.1.2. In accordance with Article 2 sub 1 of the Regulation, the Foundation provides appointed institutions with contributions in order to counteract the bottlenecks in regional health care with regard to uninsured persons.
In accordance with Article 2 sub 2 of the Regulation, the contributions are only provided if the general management decides that these relate to the costs of medically necessary care.
In accordance with Article 2 sub 4 of the regulation, the contribution can only be provided insofar as the Foundation has the necessary financial means at its disposal.

2.1.3. In accordance with Article 23 sub 1 of the Regulation, an individual request for the compensation of loss of income of care providers ought to take place by means of an application form which is provided for by the appointed institution or Foundation. This application form satisfies at least the requirements which are enshrined in appendix F to the Regulation. The form refers to the Regulation and the applicant declares the following requirements are met to the best of its knowledge:
- the application concerns necessary medical care;
-the care is given to persons who, due to their asylum status in the Netherlands, cannot insure themselves and is in fact uninsured;
- the costs of the medical care cannot be (completely) recovered from the person requesting

the care.
The form has to be signed by the applicant.
In accordance with sub 2 of this Article, the individual applicant is, in the given circumstances under an obligation of ascertaining to the best of their capabilities that the requirements as mentioned in sub 1 of this Article are met.
2.1.4. In accordance with Article 24 sub 1 of the Regulation, the Regulation is intended to have a safety net function in order to compensate the considerable loss of income for care providers and institutions as a consequence of the Benefit Entitlement Act.
In consequence to the second sub, the question if it concerns a situation of substantial loss of income to the primary care provider and medical specialist is for the individual care provider to establish.
Under sub 3, a normative regulation applies to AWBZ institutions which provide that those costs which reflect one percent of the institution's budget remain at the expense of the institution. The remaining part qualifies for compensation. The volume of the institution's budget can be regarded as equal to the total amount of assets according to the ultimate (group) annual account. The said account has to be annexed to the request for compensation.
Subsequently sub 4, the general management reserves the right, in case of social and/or financial circumstances which give rise to this, to modify the provisions which are enshrined in the preceding subs.

2.1.5. In accordance with Article 29, the Foundation can deviate from the previous provisions, if there are pressing reasons to do so or if a strict application of this provision would lead in its judgment to a clear inequity.

2.2. The Foundation informed BAVO RNO in relation to the decision which was appealed in first instance, that it could not take a decision upon the objections lodged to the decision. The Foundation took the position that it cannot be regarded as an administrative authority, as a result of which no objections can be lodged against its decision to grant compensation.
The Court considered that the Foundation can be regarded as an administrative authority in the sense of Article 1:1 *chapeau* and under b of the GALA and that a complaint can be lodged against the granting of compensation in accordance with this law. The Court has therefore terminated the appealed decision and ordered the Foundation to take a new decision in response to the complaint.

2.3. The Foundation contests the judgment of the Court in which it can be considered as an administrative authority in the sense of the GALA. The Foundation argues that the Court wrongly considered that the Dutch State is obliged under treaty law to provide necessary medical care and that the activities of the Foundation can therefore be regarded as a task of the Government. The Foundation argues that the Court consequently denied, as can be deduced from the legislative history, that the Government took on the financing of necessary medical care, voluntarily. The fact that the Minister of Health, Welfare and Sports regards the activities of the Foundation as a concern to the general interest and supports these activities financially, does not justify, according to the Foundation, the conclusion that it consequently

exercises a task of the Government.
Furthermore, the Foundation argues that the Court incorrectly considered that it's activities can be regarded as a task of the Government because the legislator, with a reference to the principle of 'égalité devant les charges publiques'{equality of public burdens}, is of the opinion that the costs of the integrated Dutch immigrants policy should not be borne by the care sector alone. The Foundation argues that the Court clearly assumes that this compensation should be regarded as a compensation for damage and thus neglected that there was no causal link between the entering into force of the Benefit Entitlement Act and non-compensation of necessary medical care to illegal immigrants. These problems also existed preceding the entering into force of the Benefit Entitlement Act. Moreover, the Foundation contests the reference that there exists a close financial relationship between her and the Minister. According to the Foundation, the Court denied the fact that there exists a mere subsidy relationship between it and the Minister and that it is the end an addressee of the subsidy. The Foundation spends the subsidy in a way which in its judgment is necessary to solve the bottlenecks and to attain the goal as enshrined in its statute. The conditions which the Minister has formulated are merely conditions under which the Minister is willing to grant a subsidy. Apart from these conditions, the Foundation can stipulate further conditions to the granting of contributions to the appointed institutions.

2.3.1. In accordance with Article 1:1 sub 1 of the GALA, an 'administrative authority' in the sense of this law is understood to mean:
a. an organ of a juristic person governed by public law, or
b. any other person or body vested with public authority.
Under Article 1:3 sub 1 of the GALA, a decision is understood to mean: a written decision of an administrative authority constituting a public-law juridical act.

2.3.2. It is undisputed that the Foundation is not a juristic person, in the sense of Article 1:1 sub 1 under a, of the GALA. It should be assessed if the Foundation can be regarded as a person or body in the sense of sub b of this provision. In order to answer this question, it is relevant whether or not the decision regarding the granting of the compensation as mentioned in the Regulation is taken as an exercise of any public authority, as stipulated in Article 1 of the GALA. As the Administrative Jurisdiction Department considered in its judgment of 30 November 1995 in the case nr. H01.95.0274/Q01 (*AB* 1996,136), one ought to have a closer look to the role of the Government in applying the regulation of the Foundation in order to answer the abovementioned question.

2.3.3. The entry into force on 1 July 1998 of the law of 26 March 1998 so as to modify the *Aliens Act* {Vreemdelingenwet} and some other laws in order to link the entitlement of illegal immigrants in relation to administrative authorities and the provision of services, social benefits, remissions and licenses to a lawful residence of an illegal immigrant in the Netherlands (*Stb.* 1998, 203,204, the Benefit Entitlement Act), has the effect that the immigrant who is not a lawful resident has no entitlement to - amongst other things - financed medical care. According to the explanatory memorandum (*Kamerstukken II* 1994/95, 24 233, nr. 3, p. 17), an exception ought to be made in a situation in which the provision of medical care cannot be postponed or withheld without severely endangering the life or the state of health of the person concerned or the Dutch public health. In this scenario, as is inherent to

the Dutch legal system, certain duties to provide for medical care to such a person exist, from which neither the Government nor a private person can withdraw. These obligations entail that the person who is in this situation should be offered medical care which terminates the immediate danger, if a care provider can do such without endangering his own life, honour or good. Those obligations entail moreover that doctors or nurses in said situations cannot withhold medical care to exceptional persons and that a residence test provides no legal basis to withdraw from this obligation. It concerns henceforth a bond, also of private individuals for the financial consequences that the Government will not be axiomatically forced to cover. The Government nevertheless wishes to provide a current contribution to compensation for the foreseeable risk that the here intended Government institutions and private parties will manage. However, the Government commits to this service voluntarily.

2.3.4. It is clear from a letter of the Minister of the 2nd of July 1999 to the House of Representatives, in which he informs the House of Representatives among other things about the state of affairs regarding the Benefit Entitlement Act, that during the parliamentary debate about the Benefit Entitlement Act, the original intention to give illegal immigrants access only to medical care in case of an immediate life-threatening situations was dropped. Instead of this, the description 'medically necessary care' was chosen. This position leaves the judgment of whether medical care is necessary entirely to the doctor or care provider.

2.3.5According to the previously mentioned explanatory memorandum, care providers shall have to be provided with a form of financing which is incorporated into the State budget, in order to prevent any possible lesser reasonable consequences of the draft legislation insofar as it concerns care providers who cannot recover the medical care provided to illegal immigrants from the illegal immigrant or third parties. The State budget can be resorted to in specific circumstances for the purposes of care providers. In principle, the Government ought to make a sum available, equal to the savings that results from the deletion of Article 84 of the General Assistance Act. The budget of the Ministry of Health, Welfare and Sports, will be increased to this end. Possible deficiencies will come at the expense of the Minister's budget. The Minister proposes to place the respective sum in a separate fund. This fund can grant a whole or partial compensation to a care provider for their unpaid bills if at least the following conditions are met:
1. it should concern care provided to an illegal immigrant, and in such a situation adequate and inevitable medical care;
2. the care is provided in an emergency situation, and/or a situation where the Dutch public health is concerned;
3. In said situation the care provider should make it agreeable to the general management of the fund that costs cannot be recovered from the person requesting the care or from third parties;
4. And the situation would moreover, in the judgment of the general management of the fund, amount to an apparent situation of hardship in the event that a bill of the caregiver is not completely or partially reimbursed.

2.3.6. According to the previously mentioned letter of the of the 2nd of July 1999, the Foundation submits an application for subsidy to the Ministry of Health, Welfare and Sports based on the total of subsidies which she approved. The Benefit Entitlement Fund pays the approved sums to the institutions after this yearly subsidy is granted. The ministry of Health, Welfare and Sports will deal with the difference between the advanced and the paid sums in a flexible manner. The fund will be able to hold on to these differences for future applications.

2.3.7. Like the Foundation has argued, it can be deduced from legislative history that the Government has committed to financing 'medically necessary care'. It is of no relevance for the decision in this case whether or not the Government is obliged under treaty law to provide for necessary medical care. In contrast to the assumption of the Foundation, in order to answer the question whether or not the Government is obliged to fulfill a certain task, it is irrelevant to answer the question if the Government exercises public authority, in the present case in which they are already, whether or not obliged, committed to this task.
The latter also applies to the argument that the problem with regard to the 'medically necessary care' provided to illegal immigrants also existed preceding the entry into force of the Benefit Entitlement Act.
What is of importance however, as can be deduced from the previously mentioned legislative history, is that the Government has committed to the task of providing the above mentioned service and to this end ordered the Appellant to establish a fund.
Taking this into account, and the close (financial) relationship between the Foundation and the Minister, as described in par. 2.3.5 and 2.3.6., as well as the fact that the conditions as formulated by the Minister are fully discounted in the Regulation, as enshrined in par. 2.1 until 2.1.5., it should be concluded that the Foundation is exercising public authority in the sense of Article 1:1 sub 1 *chapeau* under b of the GALA when it grants contributions based on the Regulation. The fact that the Foundation can stipulate further terms in relation to the award of funds, does not affect the previous conclusion. It has not been proven nor has a reasonable case been made that the Foundation has the liberty to spend the means at its disposal so as to make other payments other than for which the Benefit Entitlement Fund is established.
Since the execution of the regulation, as considered by the Court, in the present situation this amounts to exercising a task of Government and as stipulated in detail in that Regulation, the decision concerning the assessment of the contribution bears the characteristics of a public-law juridical act in the sense of Article. 1:3 sub 1 of the GALA.
It follows from the above mentioned that the decision in which the Foundation established the financial contribution, should be regarded as a decision, which interested parties can appeal to in accordance with Article 8:1 read in conjunction with art. 7:1 sub 1 of the GALA. The judgment of the district Court was therefore correct.

2.4. From a decision of 14 June 2006, the Foundation, in compliance with the judgment of the District Court regarding the appealed decision, decided again on the objection lodged by BAVO RNO. This decision is regarded as a subject of this legal proceeding according to Article 6:24 sub 1 GALA, read in conjunction with Articles 6:18 sub 1 and 6:19 sub 1 of that law.

2.4.1. The Administrative Jurisdiction Department considers that the BAVO RNO has substantial objections to the new decision which were not decided upon by the District Court. Taking this into account, the Administrative Jurisdiction Department sees reason to refer the decision on appeal against the new decision back to the District Court Rotterdam with the

assessment of Article 6:19 sub 2 of the GALA, because this would be to the advantage of fair proceedings and furthermore avoid that both parties might lose an opportunity to appeal.

2.5. The appeal is ill-founded. The appealed decision should therefore be affirmed.

2.6. The Administrative Jurisdiction Department orders the Appellant to reimburse the costs of this Appeal.

3. Judgment

The Administrative Jurisdiction Department of the Council of State;
rendering justice;

I. Affirms the appealed decision;

II. Orders the 'Stichting Koppeling' to reimburse the procedural costs and expenses of the 'Stichting BAVO RNO Groep' made with regard to the appeal of the amount of € 644,00 (in words: sixhundredfortyfour euro), to be fully attributed to a third party who has provided the legal aid professionally; to be paid by the 'Stichting Koppeling' to the 'Stichting BAVO RNO Group' with the mentioning of the case number.

Ruled by J.E.M. Polak LL.M., President, and A.W.M. Bijloos LL.M. en D. Roemers LL.M., Chairmen, in the presence of mr. T.E. Larsson-van Reijsen, civil servant of the State.

w.g Polak w.g. Larsson-van Reijssen
President civil servant of the State

Pronounced in a public session on the 11th of October 2006.