Translation provided by the Lawyers Collective (New Delhi, India) and partners for the Global Health and Human Rights Database.

Case No.: 2798

Judgment No.: 176/2003

December 17, 2003

JUDGMENT

At issue: the request for suspension of Articles 3, 4, 9, and 10, paragraph 1, of the French-speaking Community of Belgium Decree of February 27, 2003 “amending the provisions relating to healthcare studies in the Decree from September 5, 1994 regarding the system of university education and academic degrees, and in the Decree of July 27, 1971 on the financing and control of university institutions,” introduced by R. Collet and others.

The Court of Arbitration,

composed of Presidents M. Melchior and A. Arts; and judges L. François, P. Martens, R. Henneuse, M. Bossuyt, E. De Groot, L. Lavrysen, A. Alen, J.P. Snappe, J.P. Moerman, and E. Derycke; assisted by Clerk P.Y. Dutilleux; chaired by President M. Melchior,

after deliberation, reached the following judgment:

I. *Purpose and application of the procedure*

In an application to the Court by registered mail on October 9, 2003 and received by the Registry Office on October 10, 2003: R. Collet, residing at 1040 Brussels, rue des Aduatiques 62; A. Harmansa, residing at 6020 Dampremy, rue J. Wauters 48-1; M. Leroy, residing at 7742 Hérinees-les-Pecq, Audenarde road 157; L.A. Nguyen Minh, residing at 7500 Tournai, Douai road 30; A Nizigiyimana, residing at 7700 Mouscron, rue des Moulins 13; and E. Rwagasore, residing at 1200 Brussels, rue du Campanile 39, applied for a suspension of Articles 3, 4, 9, and 10, paragraph 1, of the French Community Decree of February 27, 2003 "Amending the provisions relating to healthcare studies in the Decree from September 5, 1994 regarding the system of university education and academic degrees, and in the law of July 27, 1971 on the financing and control of university institutions" (published in the Belgian Official Journal of April 11, 2003, second edition).

In the same request, the petitioners seek annulment of the Decree provisions.

At the public audience on November 26, 2003:

- Appeared:
  - J. Boudry, attorney with the Bar of Liège, for the petitioners;
  - P. Levert, attorney with the Bar of Brussels, for the government of the French-speaking Community of Belgium;
- The Judges-Rapporteur, R. Henneuse and E. Derycke reported;
- The aforementioned lawyers were heard;
- The case was taken under advisement.

The provisions of the special law of January 6, 1989 concerning procedure and the use of languages in the Constitutional of Arbitration were implemented.

II. *In law*

– A –

Admissibility

A. 1. Because the special law of March 9, 2003 – which now provides that suspension requests must be submitted within three months of publication of the contested norm – only came into force on April 21, 2003, the petitioners believe that this shorter notice only applies to standards issued after April 21, 2003. It is noted, in support of this argument, firstly, no transitional measure was intended by the legislature and, secondly, the legislature did not intend to infringe on the rights petitioners have, in terms of deadlines, in the applicable legislation at the time the publication of the Decree petitioners contest.

A. 2. In support of their plea, the petitioners argue that they were students for the applicable academic year in their final round for a Doctor of Medicine [M.D.] degree at the Catholic University of Leuven.

They state that, as first year students for a Doctor of Medicine degree in the year 1999-2000, they did not suffer, under the previous regulations, any restrictions on access to postgraduate healthcare studies.

The provisions they contest alter this situation, prejudicially, in two ways. First, access to doctoral courses is now subject, in addition to obtaining a Doctor of Medicine degree, to obtaining a special certificate. Second, the provision for priority treatment, a transitional measure, is planned to grant these certificates, and it is a system under which [petitioners] would be excluded, making them likely to find themselves in neither of the situations where this priority treatment applies.

They may therefore be denied the ability at the end of their Doctor of Medicine degree to register for postgraduate courses.

Pleas raised in support of the application for suspension

A. 3.1. The first two pleas are based on an infringement of Articles 10, 11, and 24, § 4, of the Constitution.

These pleas argue, in essence, that the contested provisions of the Decree wrongly treat identically students who were enrolled in the first year of graduate study (Ph.D.) before the academic year 2000-2001 and those students who registered during or after that same academic year, while these two categories of students find themselves, in terms of the prospects of access to postgraduate studies, in fundamentally different situations.

Indeed, unlike the students in the second category, those in the first – as is the case of the petitioners – had never in the past been affected by access restrictions: Article 14, § 2a, in effect declared the restrictions imposed by the Decree of July 25, 1996 inapplicable to these students.

A. 3.2. The first plea criticizes this identical treatment in relation to Articles 3 and 9 of the Decree of February 27, 2003. By adding the special certificate requirement to the only previous requirement for enrolling in postgraduate courses – being a medical doctor – these provisions "betray the legitimate hopes" of the petitioners, and would therefore have, according to [petitioners], "the effect of a retroactive standard." Noting particularly that the preparatory courses provide no explanation for this change, the petitioners submit that this retroactive standard cannot be justified.

A. 3.3. The second plea criticizes the same treatment described above, but in relation to the transitional provision in Article 10, paragraph 1, of the same decree.

To grant the aforementioned certificates, Article 10, paragraph 1, provides undifferentiated priority rules even though, according to the petitioners, the situations under which this priority scheme applies only pertains to students in their first year of doctoral studies for the 2000-2001 academic year, therefore excluding students like the petitioners, who attended in the 1999-2000 academic year. Consequently, the petitioners would be considered "other candidates" within the meaning of Article 10, paragraph 1, which would in effect place them in the third tier of

applicants for a registration certificate. Using the same criticized treatment, the Community legislature would violate the equality principle, because it should have stopped "rules of priority which, in a way that can't be ignored, are detrimental to students who, by the legislature's actions, were never able to be placed in the first or second tier."

A. 4. The third and final plea also alleges infringements of Articles 10, 11, and 24 § 4 of the Constitution.

In considering (cf. A. 3.3) students enrolled in the first year of doctoral studies in the 1999-2000 academic year like the "other candidates" within the meaning of Article 10, paragraph 1, this article treats identically two categories of students who are substantially different.

While those listed above have not been able to obtain the reviews and certificates which are required under the planned priority scheme, the other students who will be considered "other candidates" will not be able to either, on the grounds that they have not fulfilled the conditions for their approval, which is a very different reason. This identical treatment will have the effect of increasing competition among the applicants and cannot be reasonably justified.

As to the risk of serious injury which will be difficult to repair

A. 5.1. The petitioners sequentially reveal the reasons why this potential harm should be considered serious and difficult to repair; furthermore, according to [petitioners], the harm would be of a moral nature.

A. 5.2. To support the seriousness of the harm, the petitioners submit the fact of being deprived access to postgraduate studies, despite their medical doctor degrees; this risk is all the more serious because it is not only a single year which would be lost, but several. Since it appears that only 280 of the 330 students who will graduate as medical doctors at the end of the current academic year would have access to postgraduate studies, 50 of these graduates would be "left behind," among whom, "very likely," are the petitioners. In addition, it is noted that the return to the previous situation is, without annulment, impossible once the certificates and admissions referred to in Article 10 of the Decree – allowing persons to leave the residual category that provision establishes – shall no longer be issued.

A. 5.3. The harm will also be of a moral nature. While continuing medical education is a long-term undertaking, the petitioners see that, at the end of this, the Flemish Parliament will call into question the assurance, previously given, that petitioners will not be subject to a limitation on their access to postgraduate studies. This would undermine the free choice of an occupation, which is protected by the Constitution.

A. 5.4. Regarding the nature of the harm making it difficult to repair, the petitioners argue, in addition to the elements raised above in support of its serious nature, the fact that, in case of annulation of business provisions, the return to the previous state was "extremely difficult, if not impossible." First, it would infringe on the rights of students who would, hypothetically, benefit from the implementation of the contested provisions. Second, besides the risk of appeals that

may be introduced by the students whose situations may be reviewed, the execution of an annulling judgment would cause enforcement problems for large educational institutions.

The petitioners also point out that the contested provisions are already going into effect this academic year and that access to postgraduate studies for students who will be licensed medical doctors at the end of the 2003-2004 academic year may be decided before the Court rules on the annulment action. In addition, even though the Government has yet to adopt the rules of operation for university committees referred to in the new Article 14, § 2a of the Decree, "it is nevertheless likely that these commissions will collect the applications from the end of the 2003-2004 academic year."

–B –

B. 1.1. Article 6 of the special law of March 9, 2003, amending the special law of January 6, 1989 about the Constitutional Court, has amended Article 21 of the latter act with a paragraph 2 to read:

> "Notwithstanding Article 3, requests for suspension will be accepted only if they are submitted within three months of the publication of the law, decree, or rule referred to in Article 134 of the Constitution."

B. 1.2. This provision comes from an amendment introduced in the Senate, which was justified as follows:

> "[…] By its nature, the procedure for suspension is an emergency procedure which requires special diligence from the Constitutional Court (see the condition required by Article 23, under which the Court held 'without delay'). In these circumstances it is necessary, it seems, to support the due diligence of the petitioners and to not require them to wait out the six month period to demand a suspension." (Doc. parl., Senate, 2001-2002, n° 2-897/4, amendment n° 45, pp. 10 and 11)

B. 2.1 The special law of March 9, 2003 was published in the Belgian Official Journal on April 11, 2003 (first edition). In the absence of a specific provision, it enters into force on April 21, 2003.

B. 2.2. Petitioners request the suspension of Articles 3, 4, 9, and 10, paragraph 1, of the French Community's Decree of February 27, 2003 "Decree amending the provisions on health studies in the Decree of September 5, 1994 on the system of university education and academic degrees, and in the Decree of July 27, 1971 on the financing and control of university institutions." This Decree was published in the Belgian Official Journal on April 11, 2003 (second edition), the same day as the publication of the special law of March 9, 2003. The petitioners were therefore unaware that under the special law of March 9, 2003, a request for suspension of the contested decree was only admissible, starting April 21, 2003, if it was submitted within three months of the decree's publication.

B. 2.3. Once the request for suspension was introduced on October 9, 2003, the period referred to in Article 21, paragraph 2 of the special law of January 6, 1989 regarding the Court of Arbitration had expired.

B. 2.4. The application for suspension is therefore inadmissible.

For these reasons,

the Court

rejects the application for suspension.

Delivered in French and Dutch, in accordance with Article 65 of the special law of January 6, 1989 regarding the Constitutional Court, at the public hearing on December 17, 2003.

The clerk,	The president,
P.Y. Dutilleux	M. Melchior