09/0365 AWBZ
09/3626 AWBZ

Central Appeals Tribunal

Multiple chamber

Judgement

On the appeal of:

A. residing at A. legally represented by his mother V. (hereinafter: the Appellant),

Against the judgement of the District Court of Amsterdam of the 3rd of December 2010, 08-3099 (hereinafter: appealed judgement),

In the proceedings between:

The Appellant

And

Agis Zorgverzekeringen Plc, located at Amersfoort (hereinafter: Agis)

Date of judgement: 20 October 2010

I. PROCEDURE

Mr. B.C. Cerezo- Weijsenfeld, attorney-at-law located at Haarlem, lodged an appeal on behalf of the claimant.

Agis presented a counter-plea.

The investigation in session, combined with the investigation in the proceedings with reg. numbers 09/362 AWBZ and 09/365 AWBZ, occurred on the 26th of August 2009. Mr. W.G. Fischer appeared on behalf of the appellant. Agis was represented by Mr. M.A. Wood, employed by Agis. After the closing of the investigation in session, the combined cases have been divided once more.
This case is now ruled separately.

II. CONSIDERATIONS

1. For a review of the facts and circumstances the Tribunal refers to the appealed judgement. It currently suffices for the following.

1.1. The Appellant is born in the Netherlands on the 16th of May 1999. His mother, V. emigrated around 13 years ago from Nigeria to the Netherlands. The Appellant requested an application for a residence permit on the basis of the *Aliens Act 2000* { Vreemdelingen Wet 2000}. The Appellant made an objection against the rejection of this application to the administrative authority who rejected his application. At the time of proceedings, the Appellant had no permanent street address or residence. Together with his mother and his younger sister he has been residing since December 2008 in reception services made available by the municipality of Amsterdam. The Appellant has been visiting a children's day nursery since 2002.

1.2. The appellant is diagnosed with an autistic disorder and an intellectual deficiency. The Care Needs Assessment Centre {hereinafter referred to as the CAC} has by means of a decision of the 28th of April 2008, indicated the care needed by the Appellant as:
- Requiring counseling day activity, 9 sessions per week, for a period from the 8th of May 2008 to the 8th of May 2010;
- Supporting counseling day program, 2 sessions per week, for a period from the 8th of May 2008 to the 8th of May 2010.

1.3 On behalf of the Appellant, Agis has been requested to validate the care received pursuant to the General Act on Exceptional Medical Expenses { Algemene Wet Bijzondere Ziektekosten, hereinafter referred to as the EMEA } of the 9th of May 2008.

1.4. By a decision of the 26th of May 2008 Agis denied the Appellants request.

1.5. By a decision of the 4th of July 2008 Agis declared the raised objections against the decision of the 26th of May 2008 as unfounded. It considered that the Appellant does not belong to the circle of insured persons who conform to the EMEA. In this respect Agis pointed out the stipulations of Articles 5 and 5b of the EMEA and has taken the point of view that the international treaties, to which the Appellant refers in his objections, cannot give rise to an entitlement to care at the expense of the EMEA.

2.1. In the appealed decision, the court with rulings concerning the notarial fee and legal costs, ruled that the appeal of the Appellant against the decision of the 4th of July 2008 was well-founded, terminated the said decision and ordered Agis to take a new decision on the raised objections with due observance of that judgement.

2.2. The court considered, in summary review, that it is not disputed that the Appellant on the grounds of Article 5 EMEA and the corroborated stipulations do not belong to the circle of insured persons of the EMEA. The court deems itself posed with the question whether the Appellant could not nonetheless derive a right to EMEA-care from the international treaties. While referring to the standard jurisprudence of this Tribunal (of which, for example it is mentioned CRvB 11th of November 2007, LJN BB 5687) the court considers that on behalf of the Appellant the quoted articles of the European Social Charter and the Convention on the Rights of the Child (hereinafter referred to as the CRC) cannot be regarded as binding on all persons as mentioned in the Articles 93 and 94 of the Dutch Constitution. The court likewise rejected the appeal on the alleged violation of the Articles 3, 8 and 14 of the European Convention on Human Rights (hereinafter referred to as the ECHR) with a reference to the standard jurisprudence of the European Court on Human Rights (hereinafter referred to as the ECtHR) and of the Central Appeals Tribunal. Consequently the appeal made by the Appellant on the Articles 28 and 29 of the CRC, the court decided that Agis responded insufficiently to the question of whether or not the deprivation of care in this specific instance could result in the appellant being unable to receive education.

3.1. The Appellant argued against this decision on appeal. The Appellant's complaint was that the court, unrightfully, did not test the quoted articles of the European Social Charter and the International Covenant on Economic, Social and Cultural Rights. In the opinion of the Appellant, government organs should also comply with treaty provisions even if these do not have direct effect. Furthermore the Appellant is of the opinion that on the basis of the jurisprudence of the ECtHR, it must be concluded that the deprivation of care in his situation results in the violation of the Articles 3, 8 and 14 of the ECHR. More specifically he brought forward that in the event that the care which is argued for by the Appellant is not provided, Article 8 ECHR, the right to a private life, is being violated. Lastly the court is of the opinion that the Appellant unrightfully neglected Articles 2, 3, first paragraph, 6, second paragraph, 9, 18, 23, second paragraph, 24 and 27, third paragraph, of the CRC. The judicial review of the court remained limited, incorrectly, to the right to education as enshrined in Articles 28 and 29 of the CRC.

3.2. By a decision of the 8th of May 2008, Agis decided again on the objections of the Appellant. On basis of Appellant's statements, amongst which was a declaration for a school of special education located in Amsterdam, Agis assumed that the Appellant, paying due regard to the acknowledged disorder and his behavioral problems, required special education, if there was specialized counselling available. On the basis of the previously mentioned, Agis noted the preconditions of CAC estimated care in a placement at a school for special education.
Agis furthermore ascertained that CAC's decision of the 6th of January 2009 on behalf of the Appellant altered their assessment decision. Presuming that in the situation of the Appellant, the EMEA care ought to fine tune their claim in accordance with care for education, which should be at the expense of the EMEA, the CAC assessed the appellant for 373 minutes of supporting counselling per week. In doing so it indicated that this assessment applies to the special education of the Regional Expertise Centrum and starts the 12th of February 2008.

Because the assessment decision of the 28th of April 2008 did not *strictu sensu* mention an indication for the provision of care in education, Agis denounced the objections raised by the Appellant as unfounded, insofar as it involved the allocation and financing of the assessment indicated, EMEA-care. Insofar the objections involved the allocation and financing of EMEA-care for education, Agis decided the complaints were founded.
The Appellant is to be eligible for supporting counseling as indicated by a decision of the 6th of January 2009 for the period of the 28th of April 2008 to the 6th of January 2009.

3.3. On behalf of the Appellant it was indicated at the time of writing at the 18th of June 2009 that the decision of the 8th of May 2009 on the basis of the Articles 6:18 and 6:19 of the General Administrative Law Act (hereinafter referred to as the GALA) should be taken into consideration in the procedure of the appeal, because the objections raised by the Appellant were only partly declared as founded.

4. The Tribunal reaches the following judgment.

4.1. Agis did not fully consider the Appellant's objections to the decision of the 8th of May 2009, henceforth the Tribunal agrees with the Appellant that, paying due regard to Article 6:24 in combination with the Articles 6:18 and 6:19, first paragraph, of the GALA, the appeal of appellant is to be considered as aimed also against the decision of the 8th of May 2009.

4.2.1. Article 5 of the EMEA states:
"1. Insured according to the provisions of this act is the person who:
A: is resident;
B: is not a resident; but in respect of labor fulfilled in the Netherlands is subject to payroll-taxes.
2: Contrary to the first paragraph, immigrants who are not legitimately residing in the Netherlands as mentioned in Article 8, under a to and including e and l, of the *Alien Act 2000*, are uninsured.
3: Contrary to the second paragraph are insured:
A: Children born in the Netherlands as a child of illegal immigrants residing in the Netherlands who have a residence permit as mentioned in Article 8, under a to and including e of l, of the *Aliens Act 2000*, or born abroad as a child of parents who are legitimately residing in the Netherlands as mentioned in Article 8, under a to and including e or l, of the *Aliens Act 2000*.
B: Children who are adopted by persons legitimately residing in the Netherlands with a Dutch nationality, or a legitimate residence as mentioned in Article 8, under a until e or l, of the *Aliens Act 2000* and for whom the adoption has been given initiation clearance { beginsel toestemming } on grounds of Article 2 of the Adoption of Foreign Children Act. The insurance starts from the moment of adoption in accordance with the law of the country where the child has his regular residence or from the moment of the transfer of this child with the intention of adoption to a married couple or a person who has his regular residence in the Netherlands and who has followed the procedure of admission for adoption consequent to the Adoption of Foreign Children Act.
4. According to a governmental decree, contrary to the first and second paragraph, expansion or limitation can be issued to the circle of insured persons. In that governmental degree the College of healthcare insurances can be instructed to provide a declaration to an application of a concerned party who by governmental degree has been exempted from this act, stating that he is uninsured.

5. By governmental degree, contrary to the first and second paragraph, the circle of insured persons can be extended insofar as it concerns:
A: Immigrants who legitimately conduct or have conducted labor in the Netherlands;
B: Immigrants who, after legitimate residence in the Netherlands as mentioned in Article 8, under a to and including e and l, of the *Aliens Act 2000*, requested timely admission in liaison to said reception, or have raised objections or lodged an appeal against the withdrawal of the decision of admission, until on that application, those objections or that appeal has been decided."

4.2.2. Due to Article 28 of the CRC States Parties to this Convention recognise the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular:
A Make primary education compulsory and available free to all;
(…)

4.3. The Tribunal ascertains that between the parties it is no longer disputed that the Appellant in connection to his appeal on in relation to Article 28, first paragraph of the CRC includes the right to education and therefore entitlement to EMEA-care. By a decision of 8 May 2009 Agis determined the care that was to be provided to the Appellant on the basis of a decision of the CAC of 6 January 2009. For the sake of elaboration Agis pointed out that CAC assessed the amount of care by applying the recommendation regarding delimitation and scope of education { Richtlijn afbakening en reikwijdte onderwijs } and the EMEA. Application of this recommendation led to the size of the care being estimated at supporting counselling in the form of individual counselling during the times that the Appellant is effectively receiving education, also defined as "care for education". With regard to the decision of the CAC of 28 April 2008 this means a reduction of the indicated care. The amount of hours of supporting counselling is reduced from 8 to 6 and the activating counselling is removed in its totality.

4.4. The Tribunal understands the request of the Appellant to give effect to the decision of the CAC of 28 April 2008 requiring care, paying due regard to its past and the elaboration issued at session of the Tribunal, as entailed by the Agis granted "care for education", that the other stated care in the concerned decision will be available to him. The judgement thus focuses on the question if Agis rightfully limited the entitlement of the Appellant to "care for education" in the form of supporting counselling for the 373 minutes per week for a period from 28 April 2008 to 6 January 2009. More specifically, it concerns the question of whether or not in the context of granting the remaining by the CAC's care, in Article 5 EMEA included the Benefit Entitlement principle and can be invoked against the Appellant.

4.5.1. In Article 5 of the EMEA it is decided whoever may be insured must conform to the provisions of the EMEA. Between parties it is not disputed that the Appellant is not an illegal immigrant who on the grounds of the judgement by virtue of Article 5 of the EMEA, belongs to the therein specified class of insured persons. Article 5, second paragraph, of the EMEA has been adopted in this act by virtue of the amendment of 26 March 1998 that came into force on 1 July 1998 (Stb. 998, 203; hereinafter: Benefit Entitlement Act} .

4.5.2. With regards to the appeal of the Appellant in relation to Article 8 of the ECHR, the Tribunal considers the following:

4.5.3. As the Tribunal in its judgement of 22 December 2008 (LJN BG8776) has considered, the ECtHR deems the human dignity and human freedom as "the very essence" of the ECHR.

In Article 8 of the ECHR is included the right to respect for the private life of a person which also includes the physical and psychological integrity of that person and is primarily aimed at, without external interferences, guaranteeing the development of the personality of each person in his association towards others. This article not only envisages forcing states to refrain from interfering with the private life of persons, but under special circumstances it also entails obligations which are inherent in the right to respect of private life, that are essentially needed for an effective guarantee of the ends enclosed in this article.
This is particularly the case for children and other vulnerable persons who enjoy a right to this kind of protection. The ECtHR has ruled time and time again that Article 8 of the ECHR is also relevant in cases that concern the expenditure of public means. In this it is nonetheless of importance that in similar situations the state enjoys an extra broad "margin of appreciation", whereas the ECtHR in deciding on Article 8 attains value to the legal be it illegal status of reception that the person concerned has.
The Tribunal would like to refer amongst others to the case of the ECtHR of the 27th of May 2008, the case of N versus the U.K., nr. 26565/05 (EHRC 2008/91).

4.5.4. It becomes apparent from the available date that for the Appellant at a here relevant time, by a decision of the CAC of 28 April 2008, the necessity of receiving care has been ascertained. Corroboration for this decision is that the Appellant in consideration of the identified disorders is reliant on the 9 sessions to utilise counselling from the KDC Nieuwlandhof and is furthermore under continuous supervision. Contrary to Agis, the Tribunal fails to see that in the realization of this decision, which according to standard jurisprudence of this Tribunal can be qualified as indivisible, the providing of "care for education" should be seen as a separately addressable division. The Tribunal henceforth considers that the the decision of 9 January 2009 should not be adopted and the stipulations from the decision of 28 April 2008 of the CAC as being essential conditions for the providing of care that are necessary for the physical and mental development of the Appellant.

4.5.5. The tribunal determines that the Appellant during the period of proceedings legitimately resided in the Netherlands on grounds of the Article 8, *chapeau* and under f, g, or h, of the *Aliens Act 2000* mentioned provisions. Bearing in mind his age, the Appellant belongs to the category of vulnerable people who in light of Article 8 ECHR are entitled to protection of their private life. The Tribunal arrives at the conclusion that deprivation of the indicated supporting and active counselling of the Appellant, results in his personal development being effectively made impossible, which in turn severely threatens the maintenance of his human dignity. Also in the perspects of the CRC it cannot in all reasonableness be stated that the denial of the indicated care shows any sign of "fair balance" between the public concerns involved with said denial and the private concerns of the Appellant to receive this care, which in the case at hand connotes that Agis has a positive obligation to provide for the Appellant necessarily deemed care.

4.6. The abovementioned means that Article 5, second paragraph, of the EMEA in this case, due to conflict with Article 8 of the ECHR ought to be left out of application. It means furthermore that the appeal against the decision of 8 May 2009 is to be declared as well founded and that the decision is to be terminated. Agis should take a new decision on the objections raised by the Appellant with due regard of the considerations for the case at hand.

4.7. Out of the previously considered it follows that Agis is obliged to provide care, as indicated in the decision of the CAC of 28 April 2008. The Tribunal is unable to further deliberate upon the grounds against the decision of 4 July 2008 which are brought forward in

the appeal, as the judgment of appeal against the decision of 8 May 2009 already served the envisaged goal of the lodged appeal. The Tribunal henceforth denounces further appeal as inadmissible.

5. The Tribunal decides that Agis is responsible for the procedural costs of appellant. These are estimated at €966,00 in appeal for the provided legal assistance.

III. JUDGEMENT

The Central Appeals Tribunal;

Rendering justice:

Declares the appeal against the decision of 8 May 2009 well founded;
Terminates the decision of 8 May 2009;
Orders Agis to take a new decision on the objections raised with due regard of this judgement;
Declares the further appeal as inadmissible;
Orders Agis to pay the procedural costs of the Appellant of € 966,00.
Orders Agis to reimburse the Appellant appellant for paid notarial fees of € 107,00.

This judgement has been ruled by R.M. van Male as Chairman and G.M.T. Berkel-kikkert en H.C.P. Venema as members, in presence of C. de Blaeij as registrar. The judgement has been pronounced in a public session on 20 October 2010.