Date of ruling: 26-07-2006
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Field of Law: Civil Law, other
Type Procedure: Summary procedure
Contents indication: Summary procedure involving the costs of clinical reception of illegals by an institution for mental healthcare. Due to the entry into force of the Benefit Entitlement Act { Koppelingswet } on the 1st of July 1998, the right to finance medical treatment for illegals in a general sense ceased. The institution exists due to the Benefit Entitlement Act (hereinafter referred to as Benefit Entitlement Act), confronted with increasing costs for the clinical reception of illegals, because illegals do not have an entitlement to care as financed by the General Act on Exceptional Medical Expenses { Algemene Wet Bijzondere Ziektekosten, abbreviated AWBZ } . A substantial number of the illegals to whom the institution is offering care, are under forced or voluntary hospitalization on the basis of a judicial warrant or another measure under the Act Extraordinary Admissions in Psychiatric Hospitals { Wet bijzondere opnemingen in psychiatrische ziekenhuizen, abbreviated Wet bopz } (the Act). The institution is under an obligation to provide care to the illegals. The main question in this summary trial is whether the costs of that care are to remain for the account of the institution, or should be at the expense of the State. The summary trial judge is of the opinion that these costs should be at the expense of the State.

Judgement

District Court ‘s-GRAVENHAGE
Sector Civil law- summary trial judge

Verdict in summary trial of the 26th of July 2006,
Appointed in the case with rollnumber KG 06/686 of:

The foundation Stichting Bavo RNO Groep,
Located at Rotterdam,
Plaintiff,
Solicitor Mr. P.J.M. von Schmidt auf Altenstadt,
Attorneys-at-law Mr. J.G. Sijmons and Mr. T.A.M. van den Ende located at Zwolle,

Against:

The State of the Netherlands (ministry of Health, Welfare and Sports)
Established at ‘s-Gravenhage,
Defendant,
Solicitor Prof. Mr. G.R.J. de Groot,
Attorneys-at-law Mr. G.R.J. de Groot and Mr. G.M.H. Hoogvliet.

1. AS TO THE LAW

1.1 Article 10 of the *Aliens Act* 2000 {Vreemdelingenwet 2000, abbreviated Vw2000} states:

1. An immigrant who is not lawfully a resident may not claim entitlement to benefits in kind, facilities and social security benefits issued by the decision of an administrative authority. The previous sentence shall apply mutatis mutandis to exemptions or licenses designated in an Act of Parliament or Order in Council.

2. The first subsection may be derogated from if the entitlement relates to education, the provision of care that is medically necessary, the prevention of situations that would jeopardize public health or the provision of legal assistance to the illegal immigrant.

3. The granting of entitlement does not confer a right to lawful residence.

1.2. Article 64 *Aliens Act* 2000 states:

An illegal immigrant shall not be expelled as long as his health or that of any of the members of his family would make it inadvisable for him to travel.

1.3. Article 5 second paragraph of the General Act on Exceptional Medical Expenses states:

In contradiction to the previous paragraph, immigrants who are not legally residing in the Netherlands as referred to in article 8, under a to e and I, of the *Aliens Act* 2000, are not insured.

2. AS TO THE FACTS AND CIRUMSTANCES

On the basis of the documents and the matters addressed in session of the 21st of July 2006, in appeal the following be will presumed.

2.1. The Applicant, being an institution for mental healthcare, is primarily charged with providing care, financed on the basis of the General Act Exceptional Medical Expenses (hereinafter referred to as EMEA), for the citizens of Rotterdam and surrounding areas, whom are looking for help with social-psychological and psychiatric problems. The institution also provides care to illegals, for instances where a judicial warrant based on the EMEA (ordering the illegal immigrant to seek help at a mental healthcare facility) has been issued. "Illegals" refers to immigrants who are not legitimately residing in the Netherlands.

2.2. By the coming into force of the Benefit Entitlement (or Residence Status) Act (Act of the 26th of March, 1998, Stb. 1998, 203) on the 1st of July 1998, the right to financed medical care for illegals in general, amongst others, has been terminated. This Benefit Entitlement principle, finds reference *inter alia* in Article 10 of the *Aliens Act* 2000.

2.3 In the explanatory memorandum, which accompanied changes to the *Aliens Act* (old) (kamerstukken II 1994/95, 23 233, nr. 3), attention was drawn to the possibility of healthcare being one of the possible exceptions to the Benefit Entitlement principle (p. 17):

'A third exception to the benefit entitlement principle did not have to be laid down in the concerned bill explicitly, as has been elaborated at the end of § 2.5. It concerns an exception which already finds sufficient basis in the several regulations out of which the Dutch legal order is composed. It involves an exception whereby on the one hand there exists an obligation to grant medical care to an exceptional person regardless of his residence status,

however this obligation should not be considered as a subjectively enforceable right to claim medical care for that person. It here concerns the situation in which the grant of medical care cannot be postponed or denied without bringing the life or the health situation of the person involved, or in general the Dutch public health, at serious risk. In this case, as stipulated by Dutch law, specific due diligence obligations of care exist with regards to such a person, from which neither the government nor private persons, and the latter we would like to emphasize, can withdraw.
These obligations entail that the person who finds himself in the abovementioned situation, will be offered medical care that eliminates the acute danger, provided that the person to whom the due diligence obligation applies can provide such care and provide this care without direct danger to his own life, decency or property. Those obligations also entail that doctors or nurses in that kind of situations cannot withhold from providing medical care to exceptional persons and that a lack of a lawful residence permit provides no legal basis to stop providing care required by this obligation. It concerns furthermore an obligation, which is typical for this due diligence obligation of care, and also for private individuals (including private care facilities) to care for the financial consequences that the government will not be axiomatically forced to cover."

The explanatory memorandum furthermore states that (p.19):
"The risk that the essential medical care will have to be provided in order to prevent a serious jeopardizing of life and health, but will appear to remain unreimbursed because of the illegal status of the recipient of this care, will only exist in a limited selection of categories. These categories will be definable in advance, regardless of the concerned risk. Because we are of the opinion that the costs of this principle in having an intergraded immigrant policy, should in all fairness not be borne solely by this one category, after all the entire Dutch society benefits from a fitting implementation of this principle, we are prepared to ensure a form of financing at the expense of the State budget for the costs of that medical care which has been provided to illegals in acute medical emergencies, provided that these costs cannot be reimbursed in any other way and there is moreover a clear situation of hardship in the event that a bill of the caregiver is not reimbursed.

2.4. Aiming to cover the financial risks that the care institutions would encounter by providing medical care to illegals in the future, the former Minister of Public Health brought the Benefit Entitlement Fund { Koppelingsfonds }into action. The Benefit Entitlement Fund is controlled by the Foundation "Koppeling" (hereinafter referred to as: the Foundation), which was founded on the 28th of April 1997.

2.5. According to Article 3 of the statute the Foundation has the objective of:
"Providing financial assistance to appointed facilities for activities of health care for the benefit of those, who on grounds of their resident status are excluded from access to the social health insurance".
In relation to Article 4 of the statutes, the financial substances of the Foundation are composed of subsidies and other benefits. Hitherto the Benefit Entitlement Funds are fully financed by the State, that is to say the Ministry of Health, Welfare and Sports.

2.6. In the context of expenditure of the pecuniary means placed at it's disposal, the Foundation has developed a regulation in which conditions are laid down regarding the compensating of a care provider (regulation Foundation Benefit Entitlement). To such ends

the Foundations developed an "Application financial assistance EMEA-institutions Protocol" {Protocol aanvraag financiële bijdragen AWBZ-instellingen}.

2.7. The Minister of Health, Welfare and Sports replied to questions of members of the House of Representatives; Arib in the following manner: (Kamerstukken II 2004/05, Aanhangsel van de Handelingen nr. 357, p. 747-748):

"[Question] 2
The Benefit Entitlement Fund gives care providers financial compensation for the providing of medically necessary care to illegals. It thus involves medically necessary care for illegals. Therefore it also involves necessary medical care, which cannot be postponed. Uninsured immigrants without a legal residence permit are, as per definition, not entitled to long-term care that presupposes an unlimited stay in the Netherlands. Those illegal immigrants must return to their country of origin. Illegals who, due to their health situation, are (temporarily) incapable of traveling can appeal to Article 64 *Aliens Act*. If their appeal to this article is successful, postponement of their return will be granted. They can then claim necessary medical care. However these provisions, considering the intention of Article 64 *Aliens Act*, are of a temporary nature.

(…)
[Question] 5
I have advised the Foundation to cease taking bills from EMEA financed health care into consideration– paying due regard to the meaning of the regulation Foundation Benefit Entitlement –.
(see also question 2)."

2.1. According to her annual account of 2005 the Applicant in 2004 possessed a positive financial balance of € 381.374,00 and of € 463.241,00 in 2005. The net worth grew from € 3.818.362.00, in 2004 to € 4.281.603,00 in 2005.

2.9. In 2006 the Applicant treated until the 1st of July, or had in treatment a total of 27 illegals in her hospital.

3. THE CLAIMS TOGETHER WITH THE GROUNDS AND DEFENSE.

3.1. Applicant claims are summarily enumerated:
I. to suspend the Benefit Entitlement principle as defined in Article 10 *Aliens Act* 2000 with regard to those illegals currently admitted to the Applicant's psychiatric hospital, until they are expulsed from the Netherlands, or, if it is sooner the case, until proceedings in primary instance have been decided upon;
II. That the court should order the State to put a regulation in place, which allows the costs of the provided mental healthcare to aforementioned illegals to be reimbursed ex. the legal tariffs for equivalent healthcare for those who are EWEA insured;
III. To order the State to paying within 7 days after the writ of this verdict a sum of € 500.000.00, as a payment in advance for the sake of damage compensation, respectively as a payment in advance for the reimbursement of the provided and yet to provide care for aforementioned illegals until their expulsion;
IV. To make such a provision which the summary trial judge deems necessary.

3.2. Therefore the Applicant brings forward the following.

The Applicant considers herself to be confronted with increasing costs for clinical reception of illegals as a consequence of the Benefit Entitlement Act. The costs for clinical reception are as a rule reimbursed on basis of the EMEA, but due to the Benefit Entitlement principle the illegals in principle are not entitled to healthcare financed on grounds of the EMEA because they are not allowed to insure themselves.
None of the illegals undergoing treatment at the Applicants institution fall under Article 64 *Aliens Act* 2000 which grants a delay of the illegal's expulsion for medical reasons; if such a claim were to be granted the costs of necessary care could in fact be reimbursed. The Immigration and Naturalization Service { Immigratie- en Naturlaisatiedienst, abbreviated as IND } is aware of the illegals but has, in spite of the legislation and regulation in this area not gone as far as to expel them from the Netherlands.
On humanitarian and societal grounds, care cannot be withheld from illegals with a psychic or psychiatric disorder, especially when they are a threat to themselves and their surroundings. The social importance of this is exemplified in, for instance, the adoption of illegals into mental health care institutions by means of judicial warrants on the grounds of the Act. The Applicant is not at liberty to deny or to end the provision of care because of the failure of payment due to the rules of medical professional ethics. The Applicant could incriminate herself with a punishable offence, in which a suicide risk of the denied illegal could serve as an aggravating circumstance. The Benefit Entitlement principle is illegitimate, due to the fact that it is in conflict with the international treaties that address essential fundamental social rights, amongst which is the right to healthcare. Article 10 *Aliens Act* 2000 is thus illegitimate towards the Applicant because of the fact that it entails that the costs for essential care for illegals in psychiatric reception are to be at the expense of the care provider.
Article 10 *Aliens Act* 2000 should henceforth be left out of application.
In any case the States policy, with regard to the compensation of care for illegals is in conflict with the prohibition on arbitrariness. This is so because the State in all reasonableness should not have accepted this current policy, bearing in mind the interests that could have been known or should have been known at the time of creation of the Benefit Entitlement Act. The policy is moreover in conflict with the principle of equal apportionment of public burdens { égalitédevant les charges publiques } and with the principle of proportionality { evenredigheids beginsel }, because the State allows the disproportionate consequences of its policy to be left to the expense of a limited group of institutions, amongst which, is the Applicant. The State additionally violates the principle of equality before the law { gelijkheidsbeginsel}, as there is a distinction between EWEA-institutions and other than EWEA-institutions in the granting of financial imbursements, without any motivation. The Applicant has an urgent interest in the provisions as requested by her. The costs for the care to illegals that she issued have risen up since 2000 to a total of € 2.136.735.00, whereas the State ever since 2004 *in toto* no longer provides reimbursements for EWEA institutions. These costs of the care to illegals have also risen to such an extent that they no longer corroborate with care facilities' existing obligations of regular care to insured persons. This problem worsens the negotiation position of the Applicant towards concurrent care facilities.

3.3. The State brings forward a motivated defense, which insofar as is necessary will be elaborated upon.

4. The Judgment

4.1. The Applicant forwards her claim with the notion that the State, in its capacity as legislator, has conducted a wrongful act against her. By the corroboration on the occurrence

of a wrongful act, the qualification of the civil court to acknowledge the claims has been asserted in this case by the summary trial judge in summary procedure.

4.2. The State argued in context of one of the stipulations in the claims that the Applicant did not possess an urgent interest for that requested claim. This concerns the claim under III, which concerns the payment to the Applicant of an advance fee of her, in her notion, rightful reimbursement. The State pointed to the mentioned financial position of the Applicant under Section 2.8 to corroborate it's argument. This defense is rejected. When assuming an urgent interest of a claim in a summary trial, it is not necessary that the requesting party is in a situation of financial emergency in the absence of payment.
It has been asserted that the Applicant has been making costs for quite a couple of years by providing care to illegal patients without a substantial, and further, during the last years, absolutely no, form of compensation. This situation continues. Implied in this is a sufficiently urgent interest. The Applicant's financial position is not of such a nature that the claimed amount constitutes a trivial matter. Other reasons for the questioning of the urgent interest have not been brought forward or become apparent.

4.3. The Applicant's claims are therefore admissible to the civil court. There is after all no other court on basis of special legislation appointed to decide on one or more parts of the appeal. It is especially not the case that there was a "decision" {besluit} from (organs of) the State in the sense of Article 1:3 paragraph 1 of the General Administrative Law Act { Algemene Wet Bestuursrecht], against which legal action for the settlement of an administrative dispute can be instigated.

4.4. The claim at issue extends to a temporary disregard for the stipulation of Article 10 *Aliens Act* 2000. This claim cannot be sustained. If this Article is to be discarded with regards to those illegals that have been admitted to the Applicant's hospital, this discarding will not mean that the Applicant enjoys entitlement to reimbursement from the State or any other institution to cover the costs of care provided to this group of persons. Thus the illegals in this scenario will also remain deprived of an entitlement on the grounds of the EMEA, because they do not qualify as insured persons as a consequence of this act.

4.5. The claim under II can likewise not be sustained. This claim aims to order the State to make a "provision" for the aforementioned group of illegals. Such a claim is too generally formulated to be sustained in a summary trial. The Applicant did not pose anything concrete about the nature of the requested provision. Apparently she aims to have a generally binding regulation { algemeen verbindend voorschrift } issued. In general, the judge is supposed to be very reserved in issuing an obligation for a government organ to create a generally binding regulation. In forming a generally binding regulation, even when the leading principle is clear, many subsequent deliberations and decisions should be made. These belong *pur sang* to the work domain of the legislator, together with all the appropriate political control. The judge would be exceeding his task by making these deliberations and decisions himself. This also applies to the subject of this summary trial. Besides, this, the summary trial debate does not provide a sufficient basis for a judgment which would order the state to make a provision, since it was only in limited fashion aimed at doing so.

4.6. In the judging of the claim under III the following is presumed. All persons, including illegals, are entitled to medical care insofar as this care is required, with immediate effect. This means that care providers in certain situations lack the right to deny that treatment. This is left undisputed between the parties. It has been asserted that most of the illegals to whomthe

Applicant provides care in her psychiatric hospital, are forced patients on the grounds of a judicial warrant or another order stipulated in the Act. According to the Applicant's own declaration these concern are in the preceding years around (and more often than not; more than) half of the amount of the treated illegals. In all the cases of people from this category it can be stated, insofar as it concerns their admission, that they require acute medical care. This follows from the fact that their deprivation of liberty is necessary according to a judicial decision for the sake of preventing the very same envisaged harm the Act aims to prevent. According to the matters addressed in session this *an sich* is left undisputed by the State. The Applicant could thus not refuse to give care to this category of persons.

4.7. Considered equal with this group of persons are (as a rule) the illegals that, notwithstanding that they fulfill the requirements of the danger criterion of Article 2, second paragraph of the Extraordinary Admissions in Psychiatric Hospitals Act but for whom nonetheless no warrant is needed because they – in the words of Article 2, paragraph 3 of this Act – "[give] notice of the required willingness" to reception and stay. The mere fact that because of this there is no situation of a forced admission does not result in the lack of need for acute medical care. Likewise applied for this category of people is that the Applicant (or at least as a rule) has the obligation to provide care.

4.8. The State notes that the obligation to start with treatment does not follow from necessity to continue that treatment in the long term, possibly years as is evidently the situation for some, And in any event, the matter of whether or not there was a necessity to do so with each individual, long-term treatment by the Applicant is, according to the State, within the limited frame of this summary trial not up for judgment. These statements of the State can be affirmed, but do not signify, and at the very least not necessarily, that after a set period or a period in which there was still mention of danger in the sense of Article 2, second paragraph Act Extraordinary Admissions in Psychiatric Hospitals, the obligation to provide care came ceased. The Applicant has established credibly that she entertains regular contact with the healthcare inspections and with the Immigration and Naturalization Service, both of which are organs of State , but that there were in some cases no probable alternatives for continuation of the treatment in her hospitals. She cannot leave the concerned patients to their fate. It deems noteworthy that the State in the situation as described above apparently does not consider expulsion as being a responsibly just decision and in any case is not willing or capable to effectuate such an expulsion. Neither has the State from their side, proclaimed that there are currently probable and befitting alternatives available. On the basis of the previously mentioned, the conclusion is justified that the Applicant has an obligation to provide further care with regard to (at least a part of) the mentioned persons. The fact that there does not exist a direct legal foundation for the said obligation, does not affect the veracity.

4.9. The Applicant brought forward that she spent from the years 2000 and onward in total more than € 2, 1 million on care for illegals without being in any way compensated. She based this statement on the EMEA-tariffs, which find no application here merely because the illegals are not insured on grounds of this act. The Applicant states that she left out of the equation that the care for this category of illegals in practice proves to be more intensive than the care for any other group of patients.

4.10. The State argued that it cannot assess the statements of the applicant. This plea is not to be regarded as also taking into consideration the limited frame of this summary trial, sufficient dispute of the Applicant's statement that she made expenditure in the acclaimed order of size according her calculated module. It is important that there has been a repeated

contact between parties on this matter and that the State is in a position to acquire a general picture of the size of the problem brought forward by the applicant.

4.11. It is highly likely that the costs the Applicant was forced to make for the categories of illegals that are meant in the section 4.6-8 of this judgment, exceed the sum of € 500.000.00. This concerns the illegals who were either forced, or admitted with application of Article 2 paragraph 3, of the Act to voluntary treatment in the psychiatric hospital of the Applicant, and indeed: (i) during the period in which the admitted illegals satisfied or had satisfied the danger criterion of the Act; or (ii) afterwards, as long as the detailed obligation of care for the applicant under Section 4.8 existed.

4.12. The central question in this summary trial is then if these costs are to be borne by the Applicant, or if they should come at the expense of the State. The State argues the first notion and agrees that these costs belong to the risk that a care provider "simply has to bear", in the event, as is the case here, the costs are neither covered by insurance nor can they be afforded by the patient. In this the central question is whether theses involved persons who must leave the Netherlands, but are refraining from doing so are moreover not (by or because of the State) expelled, whereas at the same time Article 64 *Aliens Act* 2000 is apparently not applicable.

4.13. The summary trial judge answers the mentioned central question in the sense that the costs should be borne by the State. In the summary trial it remains unresolved whether or not the State on grounds of any international treaty is bound to reimbursing the costs to the Applicant, and thus to another, other than the person requiring acute medical care. This care and the subsequent costs are derived directly or be it indirectly from a public interest, *videlicet* the protection of the society and of the persons themselves, against acute dangers consequent to their mental disorder. The Applicant suffers disproportional damages due to the treatment it has to offer, besides its legal obligation as a care providing institution because of government regulations on the grounds of the Act. This damage is disproportionate because of the fact that the Applicant has been considered as a care institution fit for the treatment of persons for whom the Act applies, and thus more than other institutions or persons, who are not considered for the offering of care on grounds of the Act, they are confronted with this type of cost. This cost cannot be deemed to belong to the normal social risk or the corporate risk of an institution such as the Applicant and should be at the expense of the central government. By denying adequate compensation, the State is acting illegitimately towards the Applicant.

4.14. The previous leads to the conclusion that the claim under III will be sustained. It can be left open whether the amount is provided as an advance payment for the reimbursement or as an advance payment for the (direct) compensation due from the provided care. The other assumptions and defenses can be left unaddressed, as they do not affect the claim under III. The claim under IV has, given the claim under III, no added value.

4.15. The State will, in the capacity of wronged party in primary appeal, be responsible for the costs of this appeal.

5. FOR THESE REASONS THE COURT

Orders the State to pay, within seven days after the writ of this judgment, € 500.000.00, to the Applicant be it as advance payment of reimbursement or as compensation for both, what the applicant has provided and what is yet to provide to illegals until their expulsion.

Orders the State to pay the costs of this appeal, hitherto estimated for the applicants party at € 5.567,87, of which € 816.00, as solicitors salary, € 4.667.00, as notarial fee and € 84,87 as summons costs.

Declares this judgment hitherto as provisional enforcement.

Denies the more or otherwise requested.

This judgment has been ruled by mr. H.F.M. Hofhuis and pronounced at public session of 26th of July 2006 in presence of the court registrar.