Roll number: 1975
Judgement nº133/2001
of 30 October 2001

# JUDGEMENT

*At issue*: the preliminary question for articles 141, 146 and 156 of the Law relating to mandatory healthcare and benefits insurance, coordinated on 14 July 1994, introduced by the Appeal Commission of the INAMI [*National Institute for Health and Disability Insurance*] Medical Control Service.

The Court of Arbitration,

composed of the Presidents A. Arts and M. Melchior, and of the Judges L. François, P. Martens, R. Henneuse, M. Bossuyt, E. De Groot, L. Lavrysen, A. Alen, J.-P. Snappe and J.-P. Moerman, and, pursuant to article 60bis of the special Law of 6 January 1989 on the Court of Arbitration, of the President Emeritus H. Boel, assisted by the court clerk P.-Y. Dutilleux, presided by the President Emeritus H. Boel,

after having deliberated, render the following judgement:

I. *Subject-matter of the preliminary question*

By way of a decision on 23 May 2000 in the case of Mr. Bal, which reached the Court of Arbitration's court clerk on 30 May 2000, the Appeal Commission of the INAMI Medical Control Service posed the following preliminary question:

"Does article 141, read in conjunction with articles 146 and 156 of the Law relating to mandatory healthcare and benefits insurance, coordinated on 14 July 1994, violate articles 10 and 11 of the Constitution considered in themselves, read in conjunction with, on one hand, article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms and, on the other hand, article 14.1 of the International Covenant on Civil and Political Rights, in as much as these articles would involve, on the one hand, that a contestation about a prohibition to intervene in the cost of healthcare is processed by the Appeal Commission and the restricted chamber established within the INAMI and referred to in articles 142 and 156 of the coordinated Law of 14 July 1994, and, on the other hand, that the investigation and the findings about a prohibition to intervene in the cost of healthcare are completed by workers within and under orders of the Medical Control Service in accordance with article 146, while any contestation between the insured (or, the case being, the healthcare provider) and the INAMI itself is submitted to ordinary tribunals and to the guarantees offered by them, amongst others, through the intervention of an independent and indivisible auditeurs' office, and referred to in articles 580, 581 and 583 of the Judicial Code, as well as in article 167 of the Law relating to mandatory healthcare and benefits insurance, coordinated on 14 July 1994, and in articles 138, 140, 145, 152 and 764 of the Judicial Code?"

II. *The facts and the previous proceedings*

On the basis of articles 141 and 156 of the coordinated Law of 14 July 1994, the dentist Mr. Bal is accused of offences to the legal and regulatory provisions relating to mandatory healthcare and benefits insurance.

A 13 January 2000 decision from the restricted chamber of the Medical Control Service Committee has prohibited the insurance companies, for a period of three months, from intervening in the cost of healthcare services provided by the dentist Mr. Bal.

On 9 February 2000, the dentist in question appealed this decision. He invokes a violation of articles 10 and 11 of the Constitution, read in conjunction with article 6 of the European Convention on Human Rights, with article 14.1 of the International Covenant on Civil and Political Rights and with the right of defence and the principle of legal certainty.

Before issuing a ruling, the Appeal Commission of the Medical Control Service of the National Institute for Health and Disability Insurance posed the aforementioned preliminary question.

III. *The proceeding before the Court*

By order of 30 May 2000, the current President designated the sitting judges pursuant to articles 58 and 59 of the special Law of 6 January 1989 of the Court of Arbitration.

The judges-rapporteur estimated that it was not relevant to apply articles 71 or 72 of the organic law.

The decision to refer was notified pursuant to article 77 of the organic law, through registered letters in the mail on 18 June 2000.

The notice required by article 74 of the organic law was published in the *Moniteurbelge* of 28 June 2000.

Briefs were filed by:

- Mr.Bal, residing at 2910 Essen, Kalmthoutsesteenweg 290, by registered letter in the mail on 2 August 2000;

- the Council of Ministers, de la Loi street 16, 1000 Brussels, by registered letter in the mail on 4 August 2000.

These briefs were notified pursuant to article 89 of the organic law, by registered letter in the mail on 22 September 2000.

Responses to the briefs were filed by:

- the Council of Ministers, by registered letter in the mail on 25 October 2000;

- Mr. Bal, by registered letter in the mail on 26 October 2000.

By orders of 26 October 2000 and 26 April 2001, the Court extended to 30 May 2001 and 30 November 2001 respectively the delay for which the judgment must be rendered.

By order of 6 February 2001 and 22 May 2001, the Court completed its seat with judges L. Lavrysen and J.-P. Snappe respectively.

By order of 30 May 2001, the President H. Boel submitted the case to the Court reunited in plenary session.

By order of the same day, the Court declared the case ready and fixed the hearing to 20 June 2001. This order was notified to the parties as well as to their lawyers, by registered letter in the mail on 31 May 2001.

At the public hearing of 20 June 2001:

- came before the Court:

. Me F. Liebaut, lawyer at the Termonde Bar, *loco* Me P. Devers, lawyer at the Gand Bar, for Mr. Bal;

. Me P. Masureel*loco* Me G. Demez, lawyers at the Brussels Bar, for the Council of Ministers;

- the judges-rapporteur L. Lavrysen and J.-P. Snappeprovided reports;

- the aforementioned lawyers were heard;

- the judgment was deliberated.

The provisions of articles 62 and following of the organic law on the use of languages before the Court have been respected for this proceeding.

IV. *As concerns the Law*

- *A* -

A.1.1. The Council of Ministers first of all observes that the Court does not have jurisdiction on the compliance of the litigious articles to conventional provisions.

A.1.2. Mr. Bal answers that it is not a judicial control of conventional provisions that is asked of the Court, but rather the judicial control of articles 10 and 11 of the Constitution read in conjunction with conventional provisions.

A.2.1.The first aspect of the preliminary question concerns the designation of the court that has jurisdiction over contestations relating to the prohibition for insurance organisations to intervene in the cost of healthcare services.

It is not contested that such a prohibition constitutes an administrative sanction. It is also not contested that the restricted chamber of the Medical Control Service Committee that can declare this prohibition is intervening as an administrative body.

A.2.2. According Mr. Bal, results from articles 580, 581 and 583 of the Judicial Code that the labour court has jurisdiction over contestations relating to the rights and obligations resulting from laws and regulations relating to health and disability insurance. Pursuant to the *travaux préparatoires*, the aforementioned provisions would be aimed at all contestations that could result from the implementation of provisions relating to social security matters. As concerns the mandatory health and benefits insurance, this is confirmed by article 167 of the coordinated Law of 14 July 1994.

A.2.3. The Council of Ministers, however, considers that the provisions of the Judicial Code invoked do not defer to the labour court all the contestations relating to legislation on mandatory health and benefits insurance, but only to a portion of them. Labour courts do not have jurisdiction over contestations relating to the prohibition to intervene in the cost of healthcare

provided by a healthcare provider that does not comply with the provisions of the mandatory health and benefits insurance. Article 167, aforementioned, does not either delegate explicitly such contestations to labour courts. And even if this was the case, the general provisions must defer to the specific and unambiguous provision of article 156 of the coordinated Law of 14 June 1994.

A.3.1. The Council of Ministers examines if there exists an unjustified difference in treatment in as much as, as concerns the contestations relating to mandatory healthcare insurance, an administration court has jurisdiction over a category of contestations and the labour courts for another category of contestations.

For the contestations under the jurisdiction of labour courts, parties are the socially insured and the insurance organisations, and the rights and obligations of the socially insured constitute what is at stake. For the proceedings before the restricted chambers and the appeal commissions, it is health insurance as a system that is opposed to the care provider, and it is the collaboration of the provider that is the object of the contestation. These contestations can result in an administrative sanction for the care provider in its capacity as a collaborator to the National Institute of Health and Disability Insurance (INAMI), for a breach of public law provisions.

The particular nature of these contestations requires, according to the Council of Ministers, that they be processed by specific bodies and jurisdictions. The contestations related to a prohibition to intervene in the cost of healthcare services are assigned to the restricted chambers and the appeal commissions being the only bodies, due to their particular composition, in a position to process in an informed manner the specific contestations concerning, amongst others, the implementation of the nomenclature of healthcare services.

A.3.2. Mr. Bal contests this justification. He considers that there exists no objectively controllable element demonstrating that the contestations relating to the prohibition to intervene in the cost of healthcare would necessitate an approach so specialised and informed by an expertise that only the restricted chambers and appeal commissions created within the INAMI could produce informed judgments. Furthermore, he stresses that the labour court is supposed to be in a position to decide a number of contestations occurring between the care provider and the insurance organisation and the services of the INAMI.

A.3.3. Mr. Bal also puts forward that article 144 of the Constitution, inasmuch as it states that the contestations whose content are civil rights are exclusively under the jurisdiction of courts, grants to everyone a guarantee that cannot be withdrawn arbitrarily to certain persons. Should it be the case that a category of persons, in this case the care providers, would be deprived of the right to bring before a court a contestation concerning a civil right, this difference in treatment would not be justified. He refers to case nº 14/97 of the Court.

A.3.4. As concerns this last point, the Council of Ministers observes, firstly, that the preliminary question does not mention article 144 of the Constitution, opposed to the preliminary question at the basis of case nº 14/97. It considers it does not have jurisdiction to rule on this topic.

The Council of Ministers further considers that the contestations in question involve a political right. Pursuant to article 145 of the Constitution, the contestations on political rights are under the jurisdiction of courts, except for the exceptions established by law. In order to conclude to a violation of this article of the Constitution, the right at issue, in the framework of the marginal control exercised by the Court, "must not blatantly constitute a political right". Furthermore, the notion that "rights […] of a civilian character" appearing in article 6 of the European Convention on Human Rights encase that of article 144 of the Constitution.

With abundant references to the case law and doctrine relating to the delimitation of civil rights and political rights, the Council of Ministers concludes that the object of the contestations in question is the evaluation of the care provider's respect of its obligations as a person collaborating to a public service. If such a contestation can result in the fact that in the future, and for a limited period, patients cannot benefit from the intervention of the mandatory insurance regime, the sanction will undoubtedly impact the professional revenues of the party concerned, but not his right to practice his profession. In any case, the sanction consists of a temporary suspension of a prerogative previously granted to a care provider, which is the refundable character of his benefits, considering he maintains a special relationship to public authority, namely through his active participation to the good functioning of a public utility service such as the mandatory healthcare and benefits insurance. Therefore, this consists of a decision relating to political rights. It can be deduced from the nature itself of the contestations that the care providers and the socially insured do not constitute comparable categories.

A.4.1. The second aspect of the preliminary question concerns the investigation and the findings relating to the breaches resulting in the prohibition imposed on insurance organisations to intervene in the cost of healthcare services.

A.4.2. Mr. Bal notes that if the dispute could be brought before the labour court, he could count on a processing of his case by three judges and the intervention of an indivisible and independent labour auditeurs' office. He is referring to, respectively, article 81, paragraph 2, and to articles 138, paragraph 2, 140, 399, paragraphs 2 and 3, and 764 of the Judicial Code. He feels discriminated by the absence of an intervention by a public minister.

Whereas, before ordinary courts, the public minister can be counted on to control the correct and equal implementation of the law, he is currently confronted to an investigation led by staff members of the INAMI. The rights of the defence would thus be lessened. The fundamental condition of impartiality is, according to him, the total independence of investigators in relation to the involved parties, in order to ensure that they are not exposed to an appearance of partiality. Furthermore, the parties to a civil case must received equal chances to refute the proofs presented by the other parties. The interested party considers that article 6 of the European Convention on Human Rights must be respected.

A.4.3. According to the Council of Ministers, there exists no difference in treatment for the purposes of article 6 of the European Convention on Human Rights and article 14.1 of the International Covenant on Civil and Political Rights. Indeed, the proceedings before the administrative jurisdictions do not violate these principles. It refers, in this respect, to cases from the State Council ($n^{os}$14.385, 32.994, 39.098, 45.756 and 47.774) and from the Court of

Arbitration (nº 28/93). If there would still exist a difference in treatment, it would justified by the specificities of the disputes and the pursued objective, namely their processing by persons with the required competence.

*- B -*

B.1. Pursuant to the Law relating to mandatory healthcare and benefits insurance, coordinated on 14 July 1994, the mission of the Medical Control Service of the National Institute for Health and Disability Insurance consists of, amongst others, controlling the healthcare insurance and benefits insurance service "in terms of reality and in compliance with the provisions" of this coordinated Law and implementation decrees (article 139, 1º). In order to accomplish its missions, it disposes of doctor-inspectors, pharmacist-inspectors, nurse-controllers, and social controllers of different ranks, as well as administrative officers (article 147, first paragraph).

The Medical Control Service is lead by a Committee that comprises at least two restricted chambers (article 141, §2). The Committee refers to the restricted chambers the findings on the care providers (article 141, first §, 9º). These chambers can prohibit the insurance organisations, for a period of five days to a year, from intervening in the cost of healthcare benefits when the care provider is not compliant with the legal or regulatory provisions related to mandatory healthcare and benefits insurance (article 156, first paragraph).

The restricted chambers are presided by a vice-president of the Committee or his substitute, who are magistrates, and include furthermore numerous categories of care providers. The President as well as the members are entitled to a voting right (article 141, § 2). The restricted chambers can only make a decision after having heard the interested parties; if they abstain or refuse to appear, the restricted chambers can validly decide. The interested parties can appeal the decision to an appeal commission (article 156, paragraphs 5 and 6).

The appeal commissions are constituted of three magistrates and three members belonging to the same professional group as the care provider about whom the findings have been made. These members are only entitled to a consultative voice. The mandate of the members of the appeal commission is incompatible with that of member of the Medical Control Service Committee. The King determines the operating rules of the appeal commissions (article 155, § 6).

Before the restricted chambers as well as before the appeal commissions, the interested parties can be assisted by a person of their choice. The King determines the method of publication of the definitive decisions prohibiting intervention pronounced by the restricted chambers or the appeals commissions; only the operative portion of the decisions is published (article 156, paragraphs 7 and 8).

B.2 The preliminary question is constituted of two parts. It is first of all asked to the Court to examine if the fact of referring the contestations relating to the prohibition to intervene in the cost of health benefits to the restricted chambers and the aforementioned appeal commissions constitutes a violation of articles 10 and 11 of the Constitution. It is then asked to the Court if the investigation and the findings related to the aforementioned prohibition, inasmuch as they are entrusted to workers within and under orders of the Medical Control Service, are compliant with

these same constitutional provisions, when read in conjunction or not with article 6 of the European Convention on Human Rights and with article 14.1 of the International Covenant on Civil and Political Rights.

B.3.1. The Council of Ministers objects that the Court does not have jurisdiction on the compliance of the contested articles to conventional provisions.

B.3.2. Considering that it is not asked of the Court to accomplish a direct control of article 6 of the European Convention on human Rights and of article 14.1 of the International Covenant on Civil and Political Rights, but rather of articles 10 and 11 of the Constitution read in conjunction with these conventional provisions, the lack of jurisdiction exception must be rejected.

B.4.1. The preliminary question does not mention article 144 of the Constitution. For this reason, the Council of Ministers objects that the Court does not have jurisdiction to include this provision in its control.

B.4.2. By providing that the contestations for which the object is civil rights are exclusively under the jurisdiction of court, article 144 grants to all a guarantee that cannot be arbitrarily withdrawn from certain persons: if it would be the case that a category of persons are deprived of the right to go before a court for a contestation relating to a civil right, this difference in treatment could not be justified because it would conflict with aforementioned article 144. It would thus violate articles 10 and 11 of the Constitution.

In order to answer the first part of the preliminary question, the Court must thus include article 144 of the Constitution in its control.

B.4.3. The lack of jurisdiction exception is rejected,

B.5. The legal provisions summarized at B.1 reveals that the restricted chambers do not rule on contestations, but rather, as bodies of the active administration, make decisions that will eventually be the object of contestations. These contestations are under the jurisdiction of appeal commissions.

Inasmuch as it concerns the restricted chambers, the preliminary question is thus without relevance.

B.6.1. In order to answer the first part of the preliminary question, the Court must verify if the legislator, by delegating to an administrative jurisdiction the contestations relating to the prohibition to intervene in the cost of health benefits, rightly implicitly considered the rights in question as political rights.

B.6.2. The Law relating to mandatory healthcare and benefits insurance, coordinated on 14 July 1994, provides for an intervention system in the cost of health benefits. The good functioning of this system supposes that the care providers are associated to the implementation of this law and that they are considered as collaborators to a public service.

A temporary prohibition to intervene in the cost of health benefits can be imposed to the

provider who does not respect the legal or regulatory provisions relating to mandatory healthcare and benefits insurance. This sanction is based on an obstacle to the good functioning of mandatory insurance. It consists of a temporary withdrawal of a prerogative, the refundable nature of healthcare.

B.6.3. The object of the contestations in question thus relate to the evaluation of the care provider's respect of its obligations as a person collaborating to a public service. When the Appeal Commission rules on such an object, it acts in the exercise of a function that is in such a relation to the prerogatives of the State's public powers that it is located outside of the sphere of civil disputes as provided by article 144 of the Constitution. Therefore, a contestation relating to a prohibition to intervene in the cost of health benefits is a contestation on a political right.

The legislator could thus, pursuant to the possibility offered by article 145 of the Constitution, delegate the dispute relating to a political right to an administrative jurisdiction that has full jurisdiction in the matter, created pursuant to article 146 of the Constitution.

B.6.4. Considering article 145 of the Constitution, the delegation of the evaluation of disputes on political rights to an administrative jurisdiction rather than delegating these disputes to a judiciary jurisdiction cannot constitute a violation of the equality and non-discrimination principle.

B.7.1. In the second part of the preliminary question, the court *a quo* asked the Court if the aforementioned constitutional provisions are violated inasmuch as the "investigation and findings on a prohibition to intervene in the cost of health benefits are accomplished by employees acting in service and under the orders of the Medical Control Service pursuant to article 146, whilst all contestations between the insured (or, the case being, the care provider) and the INAMI itself are submitted to ordinary tribunals and to the guarantees which they offer, including through the intervention of an independent and indivisible auditeurs' office.

B.7.2. The difference in treatment between some categories of persons resulting from the implementation of the different procedures before different jurisdictions and in circumstances at least partially different is not discriminatory in itself. There could only be discrimination if the difference in treatment resulting from the implementation of such procedures would result in a disproportionate limitation of the rights of the interested parties.

B.7.3. Pursuant to article 155, § 6, of the Law relating to mandatory health and benefits insurance, coordinated on 14 July 1994, the appeal commissions are constituted of three magistrates and, entitled to a consultative voice, three members belonging to the same professional group as the care provider about whom the findings have been made. The simple fact that persons who are not magistrates are parties to a judicial body due to their qualifications does not violate in itself the independence and impartiality of this body.

Pursuant to article 156, paragraph 6, of the coordinated law, the interested parties can be assisted by a person of their choice, before the appeal commissions. Moreover, considering that the operating rules of the appeal commissions are, pursuant to the same provision, determined by the King, they are not within the Court's jurisdiction. The legislator, when conferring a right, is not supposed to have wanted to authorize that the rights of the interested persons be limited in a disproportionate manner. It is for the ordinary judge and the administrative judge to rule on such

operating rules.

The absence of an independent auditeur's office does not lead to the conclusion that there would have been a violation of the interested persons' rights in a disproportionate manner.

The absence of such an auditeur's office, which moreover do not exist within civil chambers of the tribunals of the judiciary, does not prevent the parties to freely defend themselves and to contest the content of the investigations and the findings that are presented against them.

B.7.4. Inasmuch as they relate to the investigation and the findings relating to the respect, by the care provider, of the legal and regulatory provisions on the mandatory healthcare and benefits insurance, the provisions in question are not incompatible with articles 10 and 11 of the Constitution, read in isolation or in conjunction with article 6 of the European Convention on Human Rights and with article 14.1 of the International Covenant on Civil and Political Rights.

B.8. The preliminary question calls for a negative answer.

On these grounds,

the Court

rules that:

Articles 141, 146 and 156 of the Law relating to mandatory healthcare and benefits insurance, coordinated on 14 July 1994, do not violate articles 10 and 11 of the Constitution in as much as they delegate to an administrative jurisdiction the contestations relating to the prohibition to intervene in the cost of health benefits. They do not violate, either, these constitutional provisions, considered in isolation or read in combination with article 6 of the European Convention on Human Rights and with article 14.1 of the International Covenant on Civil and Political Rights, inasmuch as they relate to the investigation and the findings relating to the respect, by the care provider, of the legal and regulatory provisions on the mandatory health and benefits insurance.

Hereby delivered in Dutch and in French, in accordance with article 65 of the special law of 6 January 1989 on the Court of Arbitration, at the public hearing of 30 October 2001.

The court clerk, The President,

P.-Y. Dutilleux H. Boel