Roll number: 2028
Judgment nº26/2002
of 30 January 2002

JUDGMENT

At issue: the preliminary question for articles 142 and 157 of the *Law relating to mandatory healthcare and benefits insurance*, coordinated on 14 July 1994, introduced by the Control Commission, West Flanders section,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, 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 judgment:

I. *Subject-matter of the preliminary question*

By way of a decision on 2 August 2000 in the case of B. Simoens, which reached the Court of Arbitration's court clerk on 12 September 2000, the Control Commission, West Flanders section, of the National Institute for Health and Disability Insurance (INAMI) Medical Control Service posed the following preliminary question:

"Do articles 142 and 157 of the *Law relating to mandatory healthcare and benefits insurance* (coordinated on 14 July 1994) violate articles 10 and 11 of the coordinated Constitution, read in conjunction with its article 144, as they have as an effect that the settlement of disputes on the observation of eventual failures to meet the requirements of article 73, paragraphs 2, 3 and 4, of the *Law relating to mandatory healthcare and benefits insurance* (coordinated on 14 July 1994) as well as the corresponding sanctions are delegated to an administrative jurisdiction, and as such have waived such matter from the protection of the judicial power?"

II. *The facts and the previous proceedings*

B. Simoens is accused of having executed unnecessary services paid by the mandatory healthcare and benefits insurance regime. On 6 March 1998 the Medical Control Service lodged a complaint, and asked that the Control Commission declare that the complaint is substantiated, and that it demands the totality of the amount of expenses relating to the services prescribed.

B. Simoens contests the jurisdiction of the Control Commission. He considers that the legislator cannot delegate the contestations in question to an administrative jurisdiction, considering that they concern civil rights, which are, pursuant to article 144 of the Constitution, under the exclusive jurisdiction of tribunals.

Before ruling, the Control Commission asked the preliminary question reproduced above.

III. *The proceedings before the Court*

By order of 12 September 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 considered 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 13October 2000.

The notice required by article 74 of the organic law was published in the *Moniteur belge* of 21 October 2000.

Briefs were filed by:

- the Council of Ministers, de la Loi street 16, 1000 Brussels, by registered letter in the mail on 23 November 2000;

- B. Simoens, residing at 8000 Bruges, Kuipersstraat 20, by registered letter in the mail on 27 November 2000;

These briefs were notified pursuant to article 89 of the organic law, by registered letter in the mail on 20 December 2000.

Responses to the briefs were filed by:

- B. Simoens, by registered letter in the mail on 10 January 2001;

- the Council of Ministers, by registered letter in the mail on 19 January 2001.

By orders of 28 February 2001 and 28 June 2001, the Court extended to 12 September 2001 and 12 March 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 A. Lust, lawyer at the Brussels Bar, for B. Simoens;

. Me P. Masureel *loco* Me G. Demez, lawyer 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. *Provisions in question*

Article 73 of the *Law relating to mandatory healthcare and benefits insurance*, coordinated on 14 July 1994, provides:

"The doctor and the practitioner of dental art appreciate in conscience and with complete freedom the care provided to patients. They will ensure the provision of medical care with devotion and competency in the interest of the patient, and in consideration of the global means made available to them by society.

They refrain from prescribing unnecessarily expensive examinations and treatments, as well as executing or having executed superfluous services paid by the mandatory healthcare and benefits insurance regime.

Care providers other than those referred to in paragraph 1 also refrain from executing unnecessarily expensive or superfluous services paid by the mandatory healthcare and benefits insurance regime when they are authorized to initiate such services themselves.

The unnecessarily expensive nature of examinations and treatments as well as the superfluous nature of services must be evaluated in relation to the examinations, treatments and services that a care provider prescribes, executes or has executed within similar circumstances.

Services prescribers referred to in article 34, 5º, as regards non-hospitalized beneficiaries, are required to use the prescription documents for which the model is determined by the King and on which the identification number at the Institute of the prescriber is printed as a barcode.

The King can determine the conditions in which the previous paragraph does not apply for the patients treated in an ambulatory manner in a hospital and for the patients treated in a psychiatric care establishment."

Article 142 of the aforementioned law provided at the moment where the interested party introduced the case:

"1st §. Within the Medical Control Service is instituted a Control Commission responsible, without prejudice to the competences of the disciplinary bodies, of the declarations of infringements upon the provisions of article 73, paragraphs 2, 3 and 4.

This Commission is constituted of ten provincial sections and two regional sections for the bilingual region of Brussels-Capital.

The Liège provincial section hears cases in French and in German.

Within the bilingual region of Brussels-Capital, one of the sections hears cases in French and the other hears cases in Dutch.

All sections are headquartered at the premises of the central headquarters of the Institute in Brussels.

§ 2. Within the Medical Control Service is instituted an Appeals Commission, with a mandate to hear appeals against the decisions of the Control Commission.

The Appeals Commission is headquartered in Brussels. It is constituted of two sections. One of those sections is Dutch-speaking and hears cases in Dutch, the other is francophone and hears cases in French as well as cases introduced in German.

§ 3. The King can, by decree debated in the Council of Ministers, for care providers other than doctors either institute specific control commissions and appeals commissions with the mandate of evaluating the quantity of care prescribed or provided, as well as determining the specific rules relating to the constitution and the functioning of these commissions, thus adapting the constitution and the rules of functioning of the commissions referred to in § § 1 and 2.

Article 157 of the aforementioned law provides:

Without prejudice to the criminal and disciplinary prosecutions, the Commissions referred to in article 142, after having declared any infringement upon the provisions of article 73, recover in full or in part, from the care provider, the expenses relating to the benefits paid by the health and benefits insurance.

Simultaneously to such recoveries, they can prohibit the applying of the third-party payer regime for the benefits provided by the care provider in question.

The definitive decisions of the Control Commission and of the Appeals Commission are fully enforceable. The sums will generate interests from the first day following the expiration of the reimbursement delay set by the decision. In case of debtor's default, the value-added tax, registration and domains administration can be responsible for recovering the amounts due, pursuant to the provisions of article 94 on the laws of State accounting, coordinated on 17 July 1991.

The King determines the modalities for the publication of the definitive decisions relating to the prohibition referred to in paragraph 2.

The recovered amounts are recorded as revenues from the health insurance."

V. *As concerns the Law*

A.1. According to B. Simoens, the statement that he has provided superfluous services or prescribed unnecessarily expensive examinations and treatments creates a contestation on a civil right. By delegating to an administrative jurisdiction such a contestation, the legislator subtracted him, in a discriminatory manner, from the jurisdiction of tribunals and thus deprived him from the guarantees of article 6.1 of the *European Convention on Human Rights* and of article 14.1 of the *International Covenant on Civil and Political Rights*, in particular the guarantee of an impartial and independent judge.

In his view, the right of the doctor to exercise his profession in full therapeutic freedom and freedom of diagnostic is a civil right. This principle is recognized by article 73, 1st paragraph, of the *Law relating to mandatory healthcare and benefits insurance*, coordinated on 14 July 1994, by articles 11 and 12 of the royal decree nº 78 of 10 November 1967 and by article 130, 1st §, of the coordinated law on hospitals. The fact that this liberty is not absolute does not change a thing. The right to receive fees for obligations provided as a care provider also constitutes a civil right recognized by law. In this respect, he refers to article 15 of the aforementioned royal decree and article 23 of the Constitution, which provides a right to a fair compensation for labour. Would not matter who pays the counterbalance: the patient, an insurer or other third parties. The fees are the product of the exercise of a liberal profession and do not ensue from the participation of the doctor to the political community.

B. Simoens points out that it is not about knowing if the patient can claim for the intervention of his insurer, but to know if the insurer can have declared that a doctor committed a professional misconduct.

Finally, he mentions cases nº 14/97, 40/97 and 102/2000 of the Court. In the latter case, the Court explicitly considered that the action of the insurer based on article 164 of the *Law relating to mandatory healthcare and benefits insurance*, coordinated on 14 July 1994, was a purely civil action.

A.2. The Council of Ministers firstly points out that the Court does not have the jurisdiction to decide on the provisions in question as relates to article 144 of the Constitution.

As for the merits of the case, the Council of Minister claims that the contestations delegated to the Control Commission concern a political right, and that the aforementioned article of the Constitution is thus not violated. Pursuant to article 145 of the Constitution, the contestations on political rights are under the jurisdiction of tribunals, except for cases established by law. For this article of the Constitution to be violated, the right in question, in the framework of marginal control by the Court, "cannot in any case be a political right."

After having extensively referred to doctrine and case law on the delimitation of civil and political rights, the Council of Ministers argues that the contestations in question are about the respect of public law rules by a recognized participant to the mandatory healthcare insurance. The contestations, therefore, would not be on the exercise of the medical profession, or his therapeutic freedom, but rather on his collaboration to a public service. The nature of the contestation is not determined by its effects, but rather on the nature of the violated right, thus the right of the mandatory insurance to require that its providers conform themselves to their obligations. Considering that this public insurance regime intervenes on the basis of medical certificates

delivered by the care provider, this regime must be able to rely on the loyal collaboration of the care provider. If he or she wishes for the mandatory insurance to intervene in the medical costs of his or her patients, he or she must ask the INAMI and respect the provisions in effect. The contestations relating to the correct collaboration of the doctor are therefore about a political right.

The Council of Ministers refers on numerous occasions to case nº 14/97 of the Court. The choice to delegate the contestations relating to political rights to an administrative jurisdiction would not constitute, as such, a violation of the equality principle.

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B. 1. Pursuant to the *Law relating to mandatory healthcare and benefits insurance,* coordinated on 14 July 1994, the doctors and dentists must refrain from prescribing unnecessary expensive examinations and treatments, as well as executing or having executed superfluous services paid by the mandatory healthcare and benefits insurance. The other care providers must also refrain from executing unnecessarily expensive or superfluous services paid by the mandatory healthcare and benefits insurance regime when they are authorized to initiate such services themselves. The unnecessarily expensive nature of examinations and treatments as well as the superfluous nature of services must be evaluated in relation to the examinations, treatments and services that a care provider prescribes, executes or has executed within similar circumstances (article 73, paragraphs 2 to 4).

A Control Commission, created under the Medical Control Service, is responsible for finding infringements upon the provisions of article 73, paragraphs 2, 3 and 4. At the time where the interested party submitted its case, the Control Commission was constituted of ten provincial sections and two regional sections for the bilingual region of Brussels-Capital (article 142, 1st §) and it was constituted of three judges, including the president, and of six doctors, of which three were designated by the insurers and three by the organisations representing the doctors (article 144, 1st §). The King designated them for a renewable period of six years. The exercise of a mandate within the Control Commission was incompatible with the exercise of a mandate within the Medical Control Service Committee or within a profiles Commission as provided by article 30 of the coordinated law (article 143, § § 2 and 3).

When the Medical Control Service, a profiles Commission or an insurer considers that a care provider infringes upon the provisions of article 73, it can bring the matter before the Control Commission (article 145, 1st §). The sections of the Control Commission can only make a decision after having summoned the interested party to the hearing. The interested party may be assisted by a lawyer or any other person he or she may choose. The Control Commission's decision must be motivated (article 145, § 3). The care provider, the Medical Control Service and the insurers can appeal the decisions of the Control Commission (article 145, § 4).

An Appeals Commission, created under the Medical Control Service, rules on appeals. It is constituted of three judges, of which one is president. It includes as members four doctors, of which two are designated by the insurers and the two others by the organisations representing the doctors. They are subject to the same nomination and incompatibility conditions than the members of the Control Commission. Only the judges have a voting right (article 144, 1st §).

In the case of a noticed infringement upon the provisions of article 73, the Control Commission and the Appeals Commission, without prejudice to criminal or disciplinary trials, recovers in total or in part from the care provider the expenses relating to the benefits paid by the health and benefits insurance. Other than such recovering, it can prohibit the enforcing of the third-party paying system for the benefits provided by the relevant care provider (article 157, paragraphs 2 and 3).

B.2. The preliminary question asks the Court if the delegation to an administrative jurisdiction of contestations on infringements upon the provisions of the aforementioned article 73 violates articles 10 and 11 of the Constitution, read in conjunction with article 144 of the Constitution.

B.3. The Council of Ministers objects that the Court does not have the jurisdiction to control the provisions in question in view of article 144 of the Constitution.

The Court not being invited to directly control the provision in question in view of article 144 of the Constitution, but rather in view of articles 10 and 11 of the Constitution, read in conjunction with article 144, the objection to its jurisdiction is rejected.

B.4. By providing that the contestations of which the object are civil rights are exclusively under the jurisdiction of tribunals, article 144 of the Constitution affords to all a guarantee that cannot be revoked to some. If it would appear that a category of persons is deprived of the right to bring an issue before tribunals in cases of a contestation of a civil right, this difference in treatment could not be justified, considering it would infringe upon aforementioned article 144. It would thus violate article 10 of the Constitution.

B.5. In order to answer the preliminary question, the Court must verify if it is rightly that the legislator, because he has delegated the contestations relating to infringements upon aforementioned article 73 to an administrative jurisdiction, has implicitly considered the rights in question as political rights.

B.6. The *Law relating to mandatory healthcare and benefits insurance*, coordinated on 14 July 1994, created an intervention system in the medical services fees. The good functioning of this system supposes that the care dispensers, which are associated with the enforcement of this law and thus cooperate to a public service, do not prescribe nor execute unnecessarily expensive or superfluous services paid for by the mandatory health and benefits insurance.

The care provider who does not respect the provisions of article 73 of the coordinated law can be asked to reimburse in total or in part the expenses paid for by the mandatory insurance. Furthermore, the care provider can be excluded from the third-party payer regime. This sanction is an answer to the disturbance of the good functioning of the mandatory insurance. It consists of temporarily removing a prerogative, which is to have reimbursed health services.

B.7. The contestations in question thus are on the appreciation of the respect of the care provider's obligations as he contributes to a public service. When it decides on the matter, the Control Commission is acting within the exercise of a function in such a relation with the public power prerogatives of the State that it is located outside of the sphere of disputes of a civil nature under article 144 of the Constitution. As such, the legislator was able to qualify the dispute on the

prohibition to intervene in the fees for medical services as a contestation on a political right, in accordance with article 145 of the Constitution.

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

B.8. Pursuant to article 145 of the Constitution, the fact of delegating the hearing of disputes on political rights to an administrative jurisdiction rather than delegating these contentious matters to a judiciary jurisdiction cannot constitute a violation of the equality and non-discrimination principle.

B.9. The preliminary question must be answered in the negative.

On these grounds,

the Court

rules that:

Articles 142 and 157 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, read in conjunction with article 144 of the Constitution, inasmuch as they delegate to an administrative jurisdiction the resolution of contestations on infringements upon the provisions of article 73, paragraphs 2, 3 and 4, of the aforementioned law.

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 January 2002.

The court clerk, The President,

P.-Y. Dutilleux H. Boel