APPLICATION/REQUÊTE N° 11504/85

Jean-Claude NYSTRÖM v/BELGIUM

Jean-Claude NYSTRÖM c/BELGIQUE

DECISION of 7 November 1988 on the admissibility of the application

DÉCISION du 7 novembre 1988 sur la recevabilité de la requête

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Article 6, paragraph 1 of the Convention :

a) The right to continue practising medicine is a civil right.

b) Although the civil and criminal aspects of Article 6 para. 1 are not mutually exclusive, the Commission, having taken a decision on one aspect, declined to examine the other in this case.

c) Objective and organisational impartiality of the Appeals Council of the Belgian Medical Association : neither its composition (five doctors and four lawyers, one of whom presides) nor the manner in which the doctors are appointed justify the accusation that the body is partial.

d) When an offence falls within both disciplinary law and criminal law and the former but not the latter permits a reformatio in peius *on appeal, a decision by the Appeals Council to strike off the register of the Belgian Medical Association, in this case aggravating the sanction imposed at first instance, does not constitute an infringement of the right to a fair trial.*

Article 6, paragraphe 1, de la Convention :

a) Le droit de continuer à pratiquer la médecine est un droit de caractère civil.

b) Bien que les aspects civil et pénal de l'article 6 par. 1 ne s'excluent pas, la Commission, s'étant prononcée sur l'un des aspects, renonce à examiner l'autre dans le cas d'espèce.

(TRADUCTION)

THE FACTS

The applicant is a Belgian national born at Liège in 1939 and residing in Brussels. He is a doctor of medicine. In the proceedings before the Commission he is represented by Mr. Pierre Lambert and Mr. Georges-Henri Beauthier, lawyers practising in Brussels.

The facts of the case as submitted by the parties may be summarised as follows.

The applicant was accused by the Medical Association ("Ordre des médecins") of Brabant province of failure to observe medical ethics and to uphold the reputation, discretion and integrity of its members in that he had :

— abetted drug abuse by patients to whom he issued prescriptions for the drug "Burgodin" without having had any real contact with them ;

— failed to keep a systematic check on the treatment prescribed ;

— failed to draw up the patients' case history ;

— practised the art of healing on a commercial basis.

In accordance with medical ethics, the Brabant Provincial Council of the Association had issued a series of publications (bulletins of the Brabant Medical Association) in 1976, 1980 and 1982 laying down the guidelines to be complied with by practitioners treating drug addiction.

Disciplinary action was taken against the applicant in 1982 in response to the anxiety expressed in various quarters following the issue of a large number of prescriptions for the proprietary drug Burgodin, based on Bezitramide, a narcotic classified under No. 14 (c) in Article 1 of the Royal Decree of 31 December 1930.

The competent authorities (Pharmaceutical Inspectorate, French-language Medical Board of Brabant Province) were especially concerned by the fact that most

of the prescriptions were made out to drug addicts from Paris and the surrounding area who, having obtained this narcotic in a Brussels pharmacy, returned to their country to consume or market the drug and thereby circumvented the French legislation prohibiting Bezitramide.

This state of affairs prompted articles in several Belgian and foreign newspapers alluding to a "legal drug traffic", "a medical enquiry into the dealings of Dr. X" who was incriminated by the press in Paris, and a Brussels doctor's reply to accusations attributing "the basis of a drug traffic" to him.

The incriminated doctor is in fact the applicant, against whom action was taken by the Medical Association.

On 19 October 1982 the Brabant Provincial Council of the Association gave a decision imposing on the applicant a six-month suspension of his right to practice medicine. The applicant was informed of the decision on 26 October 1982 and lodged an appeal.

On 3 May 1983 1983 the French-language Appeals Council of the Association gave a decision against the applicant *in absentia*, overruling the earlier decision and directing that he be struck off the register of the Association, a heavier penalty than the one under appeal, notwithstanding that for a variety of reasons the applicant was not notified of the hearing of 3 May 1983 until that morning, and that the Appeals Council dismissed the request for an adjournment made in due form on 18 April by one of the applicant's lawyers on the ground that he would be abroad on the day of the hearing.

The applicant was informed of the decision taken *in absentia* by registered letter dated 4 May 1983. He lodged an objection which the Appeals Council declared admissible but ill-founded. It dismissed the applicant's objection and ordered that he be struck off the register by decision of 22 November 1983.

The applicant appealed against the decision to the Court of Cassation, relying on Article 6 para. 1 of the Convention, Article 107 of the Constitution and the general legal principle inferred from the observance of the rights of the defence and from the general principle in law, expressed in Article 202 of the Code of Criminal Procedure, to the effect that the position of a person facing a criminal charge cannot be made worse where he alone has appealed.

The Court of Cassation dismissed the appeal in a decision of 13 September 1984.

The Court of Cassation, in reply to the applicant's argument under Article 6 para. 1 of the Convention, held that "the mere fact that a disciplinary authority is totally or partially made up of elected members who engage in the same or a similar occupation or hold the same professional qualification as the persons tried by that

authority does not suffice to infer that it is not independent or impartial, particularly within the meaning of Article 6 para. 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms".

The Court of Cassation holds that in the final analysis Article 25 para. 4 of Royal Decree No. 79 of 10 November 1967, which provides that the Appeals Council may decide by a two-thirds majority to increase the penalty ordered by the Provincial Council,

> "is not incompatible with the requirements of a fair trial set forth in Article 6 para. 1 of the Convention;
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> Whereas the rule that the position of a person facing a criminal charge cannot be made worse where he alone has appealed is founded on Article 202 of the Code of Criminal Procedure and is inapplicable to the subject-matter governed by Royal Decree No. 79 of 10 November 1967 ;
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> Whereas the decision appealed against, which was given in accordance with Article 25 para. 4 of that Decree, therefore infringes neither the aforesaid Convention nor the principles invoked by the appellant ...".

The applicant was also prosecuted on criminal charges. The Brussels Criminal Court, in a judgment of 28 March 1985, sentenced him to four years in prison and a fine. The applicant and the prosecution appealed, and the Brussels Court of Appeal, in a decision of 7 November 1985, imposed on the applicant a single penalty of three years in prison, two-thirds of this term being suspended for five years subject to withdrawal of the rights set forth in Article 31 (1), (3), (4) and (5) of the Criminal Code and disqualification from practising medicine for life. The applicant did not appeal to the Court of Cassation.

COMPLAINTS

The applicant alleges that Article 6 para. 1 of the Convention was infringed by the disciplinary procedure before the Medical Association bodies.

He claims that his case was not heard by an independent and impartial tribunal in that, having before it his appeal alone, the Appeals Council followed the recommendations made by the Provincial Council and aggravated the penalty by ordering him to be struck off the register.

The Appeals Council does not meet the requirements of an independent and impartial tribunal under Article 6 in that it consisted of a majority of doctors (four law officers, one presiding, and five doctors) elected by the provincial councils and eligible for re-election, and also in that it relied on an investigation conducted by the Bureau of the Provincial Council — composed of doctors apart from the assessor — in determining a charge laid by the Provincial Council (composed only of doctors) and in determining the ethical rules adapted by the same council, so that the Council acted successively as rule-making authority, prosecuting party and judge.

Furthermore, under the terms of Article 6 para. 1, proceedings must comply with the rights of the defence and with the general principle in law to the effect that the position of a person facing a criminal charge cannot be made worse where he alone has appealed. This principle is applicable to disciplinary cases, at all events where the disciplinary offence charged also constitutes an offence under criminal law, such as abetting drug abuse.

It follows that the Appeals Council, hearing the case solely on an appeal by the applicant, could not aggravate the penalty imposed by the Provincial Council without disregarding Article 6 para. 1 and the general principles of law, and consequently could not apply Article 25 para. 4 of Royal Decree No. 79 of 10 November 1967 without violating Article 6 of the Convention.

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THE LAW

The applicant submits two complaints based on Article 6 para. 1 of the Convention. These relate solely to the proceedings against him before the bodies of the Medical Association, which led to his being struck off the Association's register.

The applicant firstly complains that his case was not heard by an "independent" and "impartial" tribunal in that the Association's Appeals Council which ordered his disqualification from practising medicine was composed of a majority of doctors.

He further contends that under the terms of the aforesaid provision of the Convention, proceedings must respect the rights of the defence and the general principle in law that the position of a person facing a criminal charge cannot be made worse where he alone has appealed.

The applicant considers this principle to be applicable to disciplinary proceedings where, as in the present case, the disciplinary offence charged also constitutes an offence under criminal law. The Appeals Council should therefore have applied Article 202 of the Code of Criminal Procedure and not the special law applying to medical discipline, namely Article 25 para. 4 of Royal Decree No. 79 of 10 November 1987, which is less favourable as the Appeals Council may, by a two-thirds majority, aggravate the penalty imposed by the Provincial Council.

1. The Commission is firstly required to decide as to the applicability of Article 6 para. 1 of the Convention.

It observes that the applicant's allegation that the Medical Association's bodies, in particular its Appeals Council, lacked independence and impartiality resembles the allegation made in cases which have given rise to two judgments by the European Court of Human Rights, namely the judgment of 23 June 1981 in the case of Le Compte, Van Leuven and De Meyere (Series A no. 43) and the judgment of 10 February 1983 in the case of Albert and Le Compte (Series A no. 58).

As to the question whether the dispute ("contestation") at issue before the disciplinary bodies involved the determination of a civil right, the Commission, confirming its constant case-law, endorses the Court's opinion in the two aforementioned judgments that "the right to continue to practise constituted, in the case of the applicants, a private right and thus a civil right within the meaning of Article 6 para. 1, notwithstanding the specific character of the medical profession ... and the special duties incumbent on its members".

Considering that the dispute ("contestation") over the decisions taken against the applicant concerned a "civil right", the applicant was entitled to have his case examined by a "tribunal" satisfying the conditions laid down in Article 6 para. 1.

It is true that the applicant's contention is that the Appeals Council of the Medical Association, in imposing on him the penalty of being struck off the register of the Association, was required to determine a "criminal charge". In aggravating the penalty imposed by the Provincial Council, it allegedly infringed Article 6 para. 1, in particular the rights of the defence and the general principle in law that the position of a person facing a criminal charge cannot be made worse where he alone has appealed.

In this connection the Commission must, however, recall the case-law of the Court, which in the aforementioned Albert and Le Compte judgment (para. 30) held that the two aspects, civil and criminal, of Article 6 para. 1 need not be mutually exclusive, and that it did not consider it necessary to decide whether, in the specific circumstances, there was a "criminal charge" because paragraph 1 of Article 6 applies in civil matters as well as in the criminal sphere.

The Commission considers that it must adopt the same approach in the present case.

2. The Commission is therefore required to examine the applicant's first complaint under Article 6 para. 1 of the Convention, namely the question whether his case was heard by an "independent and impartial" tribunal within the meaning of Article 6 para. 1.

This complaint is based on the established fact that in the appeal proceedings the Appeals Council was composed of a majority of five doctors and of four law officers, one of whom was presiding. The applicant, having regard to the Court's case-law, in particular the aforementioned Le Compte, Van Leuven and De Meyere judgment (para. 58), infers that the Appeals Council does not meet the conditions of independence and impartiality laid down by Article 6 para. 1.

In that judgment, the Court found that the "independence" of the Appeals Council could not be contested and added that "it is composed of exactly the same number of medical practitioners and members of the judiciary and one of the latter,

designated by the Crown, always acts as Chairman and has a casting vote. Besides, the duration of a ... member's term of office (six years) provides a further guarantee in this respect...".

As to the "impartiality" of the Appeals Council, it is true that the Commission expressed the opinion that it did not, in the particular circumstances, constitute an impartial tribunal : whilst the legal members were to be deemed neutral, the medical members had, on the other hand, to be considered as unfavourable to the applicants since they had interests very close to those of one of the parties to the proceedings. The Court, however, did not agree with this opinion regarding the Council's composition ; it held that "the presence ... of judges making up half the membership, including the Chairman with a casting vote ..., provides a definite assurance of impartiality, and the method of election of the medical members cannot suffice to bear out a charge of bias".

In the second judgment given in the Albert and Le Compte case (para. 32), the Court stated : "As for impartiality judged from an objective and organisational point of view ..., there is nothing in the material submitted to prompt the Court to call the matter into question. In particular, the manner of appointment of the medical practitioners sitting on the Appeals Councils provides no cause for treating those individuals as biased : although elected by the Provincial Councils ..., they act not as representatives of the Ordre des médecins but — like the legal members nominated by the Crown — in a personal capacity".

The Commission agrees with the Government that while it initially viewed the presence of doctors in the Associations's disciplinary bodies as possibly raising an issue, this was in the context of the particular circumstances of the Le Compte, Van Leuven and De Meyere case, namely the attitude of the applicants, who contested the very lawfulness of the Medical Association. As has been noted, the Court did not share this opinion.

It must be observed that in the present case there are no such circumstances. Action was taken against the applicant for failure to observe medical ethics and to uphold the reputation, discretion and integrity of the members of the Medical Association in that he had "abetted drug abuse" by patients, also an offence under criminal law for which the applicant was subsequently prosecuted and convicted by the Brussels Criminal Court and Court of Appeal.

The Commission further stresses that there is nothing in the material submitted to justify the conclusion that the lack of strict parity between doctors and legal officers in the present case would have rendered the disciplinary body "biased" contrary to the requirements of Article 6 para. 1.

Indeed, as the Government point out, the Court does not require parity between legal officers and doctors to be observed at all times in the Appeals Council, in that the doctors do not sit as representatives of the Medical Association but in a personal

capacity, as do the legal officers whose presence constitutes a further guarantee. In this respect, the Commission observes from the decision of 13 September 1984 given in the present case by the Court of Cassation that the Appeals Council decided by a two-thirds majority of members present, under a procedure which, as such, is not the subject of any specific complaint by the applicant.

The applicant has further argued that the Appeals Council lacks independence and impartiality in reaching its decision on the basis of an investigation conducted by the Bureau of the Provincial Council, which acted successively as rule-making authority, prosecuting party and judge.

The Commission considers that, just as a court cannot be criticised for basing its decision on evidence submitted to it by the prosecution, the investigating judge or the parties themselves, neither was it reprehensible for the Appeals Council of the Association to base its decision on the proceedings of the Provincial Council, provided of course that the necessary guarantees of independence and impartiality are afforded by the Appeals Council and that the case receives a fair hearing, which was so in the present proceedings.

The Commission thus arrives at the conclusion that in the circumstances the applicant's case received a fair hearing by an "independent and impartial" tribunal within the meaning of Article 6 para. 1 of the Convention.

It follows that this part of the application is manifestly ill-founded and must be rejected in accordance with Article 27 para. 2 of the Convention.

3. The Commission is also required to examine the second complaint based on Article 6 para. 1 of the Convention, concerning the fact that the Association's Appeals Council, hearing the case solely on an appeal by the applicant, imposed on him the penalty of disqualification from practising medicine, contrary to the general principle in law prohibiting the aggravation of the penalty.

The Commission considers that such a complaint may be regarded as being an allegation of an infringement of the principle of fairness of proceedings under Article 6 para. 1 of the Convention. It nevertheless considers, on the strength of the evidence with which it was provided in the context of the present case, that in imposing the penalty complained of the Appeals Council did not infringe any rights of which the applicant might avail himself in respect of Article 6 para. 1 and that consequently no violation of the Convention can be disclosed.

It follows that this part of the application is manifestly ill-founded and must also be rejected in accordance with Article 26 para. 2 of the Convention.

For these reasons, the Commission

DECLARES THE APPLICATION INADMISSIBLE.