REPUBLIKA SLOVENIJA
USTAVNO SODIŠČE

U-I-125/97
24.6.1998

D E C I S I O N

At the meeting of 24 June 1998 concerning the proceedings for the evaluation of constitutionality and legality commenced on the initiative of Dr. Klara Mihelič, Jerneja Weis and Vesna Gtemberger from Ljubljana, represented by Lea Trpin, lawyer in Ljubljana, the Constitutional Court

made the following decision:

In article 257 of Rules on compulsory health insurance (Official Gazette of RS, No. 3/98), the text "nor to the reimbursement of costs of health care services delivered on the basis of a referral slip issued in this local clinic" shall be annulled.

R e a s o n s :

A.

1. The initiators dispute the provision referred to in the disposition hereof, according to which the insured person is not entitled to the reimbursement of costs of medical treatment, including medicines, technical aids and transports, if health care services have been delivered in a clinic where costs are covered entirely by patients themselves, nor to the reimbursement of costs of health care services delivered on the basis of a referral slip issued in this local clinic. The initiators consider that such arrangement is not in conformity with articles 12, 23 and 80 of Health Care and Insurance Act (Official Gazette of RS, Nos. 9/92, 13/93 and 9/96 - hereinafter: "the ZZVZZ"), for the latter is claimed to have failed to differentiate between the rights of insured persons with regard to the status of the health care institution and/or the doctor. The statute determines the right of free choice of doctor and health care institution. The Health Insurance Bureau of Slovenia (hereinafter: "the Bureau") is supposedly empowered just to regulate the manner of exercising such choice, but no also to restrict the rights which the insured persons have acquired on the basis of the ZZVZZ, and/or to prevent access to the public sector on such basis. The disputed arrangement is supposedly in disagreement also with articles 36, 45 and 46 of Medical Services Act (Official Gazette of RS, Nos. 9/92, 37/95 and 8/96 - hereinafter: "the ZZDej"), according to which the doctor has the right and duty to refer the patient also to other doctors, and similar things. The initiators invoke also article 51 of the Constitution, according to which each person shall have the right to health care as determined by statute. The ZZVZZ and ZZDej are claimed to have determined identical rights for all insured persons, which is why a piece of secondary legislation should supposedly not reduce or restrict the rights acquired on the basis of statute.

2. The Bureau explains that health care activities as a public service are on the basis of a licence issued by the minister competent for health care carried out by domestic and foreign legal and natural persons, if they fulfil such conditions as are prescribed by statute. Health care services may under equal conditions be delivered by public institutions and other legal and natural persons on the basis of concession (article 41 of the ZZDej). In so far as a public service, health care activities should supposedly be carried out in the framework of public health care network, which shall be determined by the health care plan of the Republic of Slovenia (article 6 of the ZZVZZ and article 4 of the ZZDej). From the foregoing statutory provisions it supposedly follows that a public service can be delivered both by public institutions and other entities, the latter including individuals who satisfy the prescribed conditions, but just on the basis of appropriate concession for the delivery of a public service

(paragraph 2 of article 3 of the ZZDej). By concession agreement, licensor and concessionary regulate the relations regarding the delivery of a public service. If concessionary fails to deliver a public service in conformity with laws and regulations or agreement, the concession shall be taken away from him. In such a case, the licensor is obliged to ensure that patients will be accepted for medical treatment under equal conditions by another health care institution or private health care operator delivering the public service concerned (article 44 of the ZZDej). Now, the Bureau is supposedly the payer of the health care services defined as rights, and this is so in the case when these have been delivered in a public health care institution or by a private operator delivering a public health care service on the basis of valid agreement. The ZZVZZ demands that each year an agreement be reached concerning the programme of services under compulsory health insurance, the defining of capacities needed in the delivery of these and the determining of the scope of funds. On this basis, the starting points are supposedly determined concerning the concluding of agreements with the parties engaged in the performance of health care activities selected on the basis of announcement, but all bidders may not necessarily be selected.

3. The Bureau states that it supposedly clearly follows from the ZZVZZ and ZZDej which are the parties who may deliver a public health care service, the manner in which public health care network is determined and what are the procedures and methods relating to the concluding of agreements and the payment of health care services. On this basis, the Bureau could not have and should not have paid the services delivered by an operator with which it has not concluded an appropriate agreement, or with one who does not engage in the delivery of a public health care service. In the opinion of the Bureau, the foregoing supposedly does not constitute the restricting of the right of a person to freely select a personal doctor in accordance with article 80 of the ZZDej and article 47 of the ZZVZZ, as formulated in greater detail in article 160 of the Rules, for each person is free to select his doctor and health care institution. In the case of selecting a doctor outside the framework of public health care network which the State is obliged to set up, however, the Bureau should supposedly not be considered to be the payer of health care services. The Bureau should supposedly pay those health care services which have been delivered within the public network and, on condition that an appropriate agreement has been concluded. The right to free choice of doctor is supposedly not absolute but restricted to the statutory framework which regulates the public service. What is involved in this connection is the interest of the State to ensure, in the framework of available resources, for all citizens an appropriate level of health care services, which is why by taking into consideration the principles of fairness and equality of the insured persons the ways and procedures for the exercise of these rights have supposedly been prescribed. If complying with the claims as made in the initiative we would very soon find ourselves in a situation where the funds designed for the delivery of public health care service would be consumed, and the Bureau/State would not be in a position to be able to ensure the payment of health care services to those who deliver public health care services.

4. According to the opinion of the Bureau, the ZZVZZ supposedly does not prescribe just the rights arising from compulsory health insurance but also the collecting and allocation of funds for their ensuring and exercising. All that which should exceed the agreed upon framework as the result of the decision of a particular person must be ensured by such individual by himself from his own funds, and he may not demand reimbursement, for this would mean the endangering of the working of the public health care service. In this sense, it is supposedly necessary to understand also article 257 of the Rules. The fact that the initiator Dr. Klara Mihelič did not conclude an agreement on the delivery of health care services with the Bureau supposedly means that she no longer fulfils the conditions for the delivery of a public health care service as defined by applicable laws and regulations. The programme which the initiator carried out has already been assigned by the Bureau to another operator, to fulfil the statutory obligation of ensuring appropriate health care to insured persons (article 44 of the ZZDej). And it was supposedly incumbent upon the initiator to herself inform her patients who had selected her for their personal gynaecologist already at the time when she had delivered the public service that they would have to pay by themselves all the services delivered by her or by the operators to which she would refer them.

5. The initiators also attached to their application a number of photocopies of letters exchanged in reference with the resulting situation. Included among these is a reply of the Legislative Service of the Government to the letter of the Chamber of Doctors of Medicine, which demanded certain explanations concerning the possibilities for the exercise of the rights of insured persons. According to

the said position compulsory insurance scheme will only pay for the services delivered in the framework of public service. A doctor who has not been granted concession for the delivery of a public service cannot count on funds from compulsory health insurance scheme but only on the payment by the patient himself. In the Rules, the right to free choice of doctor is claimed to have been defined in sufficient detail so that each insured person could know in advance what rights he may expect from the personal doctor chosen. If he should choose a doctor without a concession for the delivery of the activity concerned, he should supposedly be prepared to accept all the consequences arising therefrom; and these supposedly include the fact that the doctors who do not deliver a public health care service may not deliver their services for the account of the Bureau. These doctors should draw the attention of each of their patients to such consequences.

B. - I.

6. The Constitutional Court accepted the initiative and, with conditions specified in paragraph 4 of article 26 of Constitutional Court Act (Official Gazette of RS, No. 15/94) fulfilled, immediately proceeded to decide on the merits of the case.

7. In paragraph 2 of article 50, the Constitution imposes upon the State the duty to regulate compulsory health insurance and to ensure the proper administration thereof. According to paragraphs 1 and 2 of article 51 of the Constitution, each person shall have the right to health care as determined by statute. Rights to government-financed health care shall be regulated by statute. With a view to implementing these provisions, in 1992 the ZZVZZ and ZZDej were passed. According to article 69 of the ZZVZZ, the implementing of compulsory health care insurance has been imposed upon the public institution Health Insurance Bureau of Slovenia. Health care activities are engaged in by health care workers and health care assistant staff who, in line with the content and organizational forms of health care, operate at primary, secondary and tertiary levels. Health care as an activity can be engaged in, on the basis of a license issued by the ministry competent for health care, by domestic and foreign legal and natural persons, if they fulfil the conditions set by the ZZVZZ.

8. Basic health care services are delivered by clinics, local health stations and private health care workers (paragraph 1 of article 8 of the ZZDej). Services in the field of such basic health care are delivered by personal doctors with assistant staff (from paragraph 1 of article 46). According to article 47 of the same statute, each person shall be entitled, under equal conditions and in conformity with law, among other things to free choice of doctor and health care institution, the right to be acquainted with the diagnosis of his disease, to give consent or refuse every medical intervention, to appel to the competent supervisory authority, to demand restitution of damages resulting from inappropriate medical treatment etc. This article, then, defines the choice of doctor and institution in general. As the major part of the subject matter of the ZZDej is also concerned with the regulation of health care activities in general and in this sense regulates the organization of public health care service and the carrying out of health care activities, the provision of article 47 on free choice of doctor should be understood as applying also to freedom to choose between a doctor or health care institution from the public health care network and a doctor or institution from the private health care services. However, when any part of the carrying out of health care activities is regulated in greater detail by a special statute, such free choice can only be realized within the framework set by such special statute.

9. A special statute in the said sense is the ZZVZZ, which regulates the rights and obligations of the entities covered by compulsory health care scheme. The said statute provides with regard to the area which it governs that the insured person has the right to choose a personal general practitioner, personal gynaecologist or personal dentist (paragraph 2 of article 80 of the ZZVZZ). When an insured person has selected a personal doctor, who will deliver health care services within the framework determined by the ZZVZZ, he shall have to choose it for the period of not less than one year. According to paragraph 5 of article 80 of the ZZVZZ, the manner of exercising the right relating to free choice of doctor and health care institution shall be regulated by the Bureau by means of a bylaw.

10. Free choice of doctor and health care institution have been made possible already by the former Health Care Act in article 101 (Official Gazette of SRS, No. 1/80). The need to envisage such specially prescribed right at that time arose from the principle that the consumers and performers of health care services should associate in municipal health care associations to ensure within the framework of

those the satisfying of the ascertained needs and interests with regard to health care (article 32). The engaging in health care activity was possible only through the use of socially-owned resources and in the framework of public health care service. By the introduction of the private practice and, consequently, competition aimed at ensuring a better quality and supply of health care services and attitude towards patients (Journal, No. 16/91), however, the right to free choice under article 47 of the ZZDej can no longer have the same content as it had in the former arrangement.

Undoubtedly, its content now also comprises the choice between public and private health care activities. From this point of view, the arrangement as given by statute is not perfect.

B. - II.

11. Health care among other things also comprises the rights arising from health insurance, by which social security is ensured for the case of illness, injury, birth or death (paragraph 3 of article 1 of the ZZVZZ). Health insurance is of compulsory and voluntary type. By means of compulsory insurance, the insured persons are guaranteed, within a certain scope, the payment of health care services, refunding of salary for the period of absence from work, funeral expenses and death benefit, and remuneration of travel expenses relating to the exercising of the right to health care services.

12. From article 17 of the ZZVZZ it follows that all citizens of the Republic of Slovenia as well as the other persons mentioned in the said article having permanent residence in the Republic of Slovenia are the insured persons under the compulsory insurance scheme. (All) insured persons, employers and other obligers defined by statute must pay contributions through which funds are ensured for compulsory insurance. Each person who is acknowledge as having the character of insured person under the ZZVZZ, that is, the insured persons and their family members, are entitled to assert the rights under the said statute (paragraph 1 of article 78 of the ZZVZZ). The said statute does not specify any case where an insured person would not be entitled to the assertion of the said rights. It is allowed, however, for a health care service or "assistance" to be denied under paragraph 2 of article 50 of the ZZDej if the patient has not provided the medical worker with true information concerning his health condition, if he fails to abide by the instructions of the health worker and if he fails to take active part in the protection, rehabilitation and restoration of his own health.

Urgent medical assistance, however, cannot be denied.

13. The operator of compulsory health care scheme is the Bureau. In connection with the implementing of the ZZVZZ, the legislator has transferred to the former some competencies, among others also to regulate in greater detail the manner of implementation of individual provisions of the said statute by its bylaws. The Bureau in its Rules on compulsory health insurance (Official Gazette of RS, No. 3/98), rectified text - hereinafter: "Rules on CHI") and the disputed article of the same provided that the insured person is not entitled to the reimbursement of the cost of medical treatment if health care services have been delivered in a clinic where costs are covered entirely by patients themselves, nor to the reimbursement of costs of health care services delivered on the basis of a referral slip issued in such clinic. The said provision, thus, in its initial part more explicitly (in comparison with the ZZDej) expresses the division of health care sector into public and private part, and the consequences of the choice of a doctor in basic health care service who delivers private health care services and who, consequently, has not concluded an appropriate agreement with the Bureau. In its subsequent section, the disputed provision automatically transfers the consequences of the choice of doctor in basic service, that is, on primary level, also to secondary and tertiary levels of health care service (specialist clinics and hospital activities, clinics and institutes).

14. On the basis of paragraph 2 of article 51, according to which rights to government-financed health care shall be regulated by statute, is was inadmissible by Rules on CHI to have regulated the question of the payment of health care services on the secondary and/or tertiary level of the sector in a different manner than the one arising from the intent of the statute. The statute provides for the right of free choice of doctor and health care institution, and in this connection the said right is not restricted just to primary, basic health care service. The right of free choice of doctor is thus also granted in the case where an individual decides on whether to go to a specialist or hospital engaging in the activity as a public service, or to a specialist or hospital engaging in the activity as a private service. The Bureau, in

so far as insurance company, (as well as any future statute) is obliged to allow free choice of doctor and health care institution (with the content of the right in conformity with this decision) on all levels of health care service, for such right of the insured person also follows from the paid-up contributions for compulsory health insurance. For the disputed provision with its second paragraph will bring the insured person into absurd position where, due to the choice of doctor who is not linked with the Bureau by any special agreement and for whose services he has paid a full price in spite of the paid-up contributions for compulsory insurance, he is additionally "punished" by the fact that he must pay the full cost also for the services of all other medical workers which his situation requires. Such arrangement for the payment of services annuls the right of free choice of doctor and brings private doctors in a position not envisaged by statute.

15. The system of rights and, in this context, also of their restricting can only be regulated by statute. With the disputed provision, the Rules on CHI, in so far as a piece of secondary legislation, independently regulated the relationships discussed and in this connection restricted/withdrew also a right arising from health insurance, which belongs to insured persons on the basis of the said insurance. The Rules on CHI in the disputed provision have exceeded the framework allowed in the case of a piece of secondary legislation, for the latter may not change or independently regulate the rights and obligations, for, in line with the principles of separation of powers (article 3 of the Constitution), these can only be regulated by statute. A piece of secondary legislation may break down a statutory norm only to the point where in doing so it will not define the rights and obligations and that, in particular, it will not restrict the rights and obligations as regulated by statute. It must strive to break down a statutory norm just to the extent that the aim of such norm will be reached. The Rules on CHI did not have any statutory basis for the disputed arrangement, for the ZZVZZ in the last, the third paragraph of article 80 gives authorization just for the regulation of the manner of the asserting of rights relating to free choice of doctor and health care institution within the framework of public health care network.

C.

16. This Decision was made on the basis of paragraph 3 of article 45 of the ZUstS by the Constitutional Court in the following composition: Dr. Lovro Šturm, President, and Dr. Miroslava Geč - Korošec, Dr. Tone Jerovšek, Matevž Krivic, M.L., Franc Testen, Dr. Dragica Wedam - Lukić and Dr. Boštjan M. Zupančič, the judges. The Decision was reached with six votes in its favour and one vote against it. The vote against was cast by judge Testen.

P r e s i d e n t:
Dr. Lovro Šturm