BELGIAN ADVISORY COMMITTEE ON Bioethics

Opinion No. 65 of 9 May 2016 concerning the issue of immigrants with medical problems, including serious psychiatric ones

Content of the opinion:

1. Referral to the committee and introduction

Mr. Harald Mollers, Minister of Family, Health and Social Affairs of the Government of the German-speaking Community wrote on 19 February 2013 to the Committee[1]:

"We hereby wish to submit the problem described below to the Belgian Advisory Committee on Bioethics for advice.

There is a serious ethical conflict within the psychiatric medical profession concerning patients who are asylum seekers suffering from acute psychiatric disorders due to traumatic experiences in their home countries. Very often these people are unable to describe their situation because these traumatic events of abuse and torture have not been sufficiently addressed. In many cases, this results in a negative opinion regarding their asylum application. These people then live in fear of being expelled as soon as the psychiatrist finishes their in-patient treatment. In their deep anguish over being expelled to their country of origin, where they fear further mistreatment and torture, the risk of suicide to themselves and to members of their families increases considerably.

The ethical conflict of psychiatrists in this case can well be imagined. From an ethical and professional conduct point of view, doctors cannot take responsibility for terminating the in-patient hospital treatment of these patients without the possibility of reopening the asylum procedure while respecting all aspects of the psychiatric medical record and while providing support for the patient, either from the treating psychiatrist or a specialist third party."

The Committee notes that these ethical and deontological questions for psychiatrists are shared by many medical specialists caring for seriously ill migrants.

Since 2013, more than 50 cases of applications for residence due to serious illness, which were rejected by the Immigration Office, have been submitted by doctors to the discretion of the Provincial Council of the Medical Association for Brussels-Walloon Brabant. These physicians have difficulty in ensuring quality care and continuity of care for these patients who are ordered to leave the country. They have difficulty in ensuring their obligations to their patients are met. The Federal Ombudsman opened an investigation in April 2015 on the basis of repeated complaints to examine the management measures of the Immigration Office service that deals with residence applications for medical reasons. The report to the Chamber is expected by 30 June 2016. On 1 October 2015, several organisations active on the issue of immigrants released the "(9th) White Paper on the residence permit for medical reasons – For an application of the law respecting the human rights of seriously ill immigrants."[2] These

[1] There was a delay in dealing with this request because of the beginning of the fifth term (2014-18).

[2] Work prefaced by Messrs Benoît Dejemeppe, advisor to the Supreme Court and Chairman of the National Council of the Order of Physicians, and Paul Martens, Chairman Emeritus of the Constitutional Court. See: http://www.cire.be/thematiques/sejour-et-regroupement-familial/regularisation-des-sans-papiers/l- autorisation-de-sejour-pour-raisons-medicales-un-permis-de-mourir-en-belgique.

complaints have also been echoed in the press[3] and in case law.

The Committee has therefore decided to extend Mr. Mollers' initial request to the problem of treating immigrants with medical problems, including serious psychiatric ones. The scope therefore includes cases covered by Article 9 of the Act of 15 December 1980 on access to the country, residence, and the establishment and expulsion of immigrants (see below).

However – and this is an essential point – these are *doctors* who have taken care of seriously ill migrants and who, when faced with an expulsion decision, are asking the governing, political and ethical authorities how they can fulfil their legal and ethical obligation to ensure quality care and continuity for their patients.

It is therefore useful in this introduction to recall the fundamental content of the text[4], adopted on 14 January 1980 by the International Conference of Orders and Similar Organisations:

"The practice of medicine is based on science and the personal conscience of each physician. It aims to defend the physical and mental health of humans and pain relief with respect for life and the human person without regard to religion, nationality, social status or political ideology both in times of peace and in times of war ... In all cases, the doctor must not forget that the best interests of the protection of health and of the human person requires reference to ethics whose value has been preserved but have remained intangible over the centuries. These rules, for which the profession is responsible for applying, bring the public a guarantee of dedication, integrity and professional quality that cannot always be provided by the legal framework alone."

Contrary to what some might think, this text does not set up medical ethics in opposition to the law: on the contrary the two combine harmoniously, as it is the law itself that has entrusted the governing authorities with the concern of ensuring doctors comply with their code of professional conduct, in such a way that the law itself that requires doctors to show dedication, integrity and professional quality – obligations which necessarily assume that, within their medical activity, doctors are free with regard to their patient from any hierarchical, contractual[5] or statutory structure to which they subscribe.

Several doctors treating these patients, and also some doctors who have worked at the

[3] See, for example, the open letter to parliamentarians published in le Soir on 20 May 2014 and signed by more than 100 doctors, as well as the article "De verschrikkingen van de vlucht - psychische problemen bij vluchtelingen" by Chris De Stoop in Knack, 24 June 2015.

[4] See https://ordomedic.be/fr/avis/conseil/guide-europ%E9en-d%27%E9thque-et-de-comportement-professionnel-des-m%E9decins and Bulletin 79 of 01/01/1981 of the Belgian Medical Association, p. 70.

[5] In his advice a143020 (Bulletin 143 of 16/11/2013 and available at www.ordomedic.be) the National Council of the Belgian Medical Association suggests adding a new appendix to active doctors' employment contracts, in which Article 3 states: "The agent fulfils his mission independently of the principal or other doctors in the service of the principal. For this purpose, the principal respects the doctor's professional autonomy as defined by law and ethics. (…)"

Immigration Office[6], feel that they are no longer able to fulfil their obligations to their patients and see the discrepancy between their ethical duty and the reality on the ground as a situation of "moral distress".[7]

2. Legal framework

2.1. Principle

The Act of 15 December 1980 on access to the country, residence, settlement and removal of immigrants is based on one principle: no foreign non-national of the European Union may enter the territory of the Kingdom without authorisation from the Minister of Interior or his deputy. This authorisation is implicit for nationals of countries with which Belgium has agreements so that these nationals may enter the country bearing only an identity document. For all others, it must be explicit and delivered personally by the Belgian diplomatic representation in the country where the immigrant legally resides. This specific authorisation is called a "visa" and is evidenced by entries in the immigrant's passport.

In principle, an entry permit is also permission to stay for up to three months (Article 6 of the Law). If immigrants wish to stay longer than three months, they must ask the Belgian diplomatic representation of the country of origin. They may, however, if they are already in Belgium regularly, do this with the local authority if they are in exceptional circumstances which mean they were unable to make such a request in his country of origin (Article 9b).

2.2 *"Humanitarian" residence*

Article 9, §1 of the Act provides that "an immigrant who is in Belgium who demonstrates his identity [...] and who suffers from an illness that it causes a real risk to life and limb or a real risk of inhuman or degrading treatment when there is no adequate treatment in his home country or the country where he resides, may request permission from the Minister or his delegated representative to stay in Belgium."

It will be noted that this provision, in its current wording going back to a law of 8 January 2012, does not allow an illegal immigrant who has no identity documents or fails to prove their identity in another way, to make an application for residence to receive treatment in the Kingdom of Belgium. The legislature has strictly limited the conditions under which immigrants may submit such a request: the document or "evidence" must (Article 9, §§ 2 and 3) contain the person's full name, and place and date of birth; be issued "by the competent authority in accordance with the International Private Law Code Act of 16 July 2004 or international conventions relating to the same subject"; allow a physical link to be made

[6] See testimony in *Le Soir* 30 May 2014 (quoted on p. 53 of the 9th White Paper).

[7] Jameton, A. (1984) Nursing Practice: the ethical issues. Englewood Cliffs, NJ: Prentice Hall. Jameton defines moral distress as occurring when “one knows the right thing to do, but institutional constraints make it almost impossible to pursue the right course of action”.

between the bearer of the document and the person concerned, and may not have been drawn up on the basis of simple statements by the person concerned. Under penalty of inadmissibility of the application, it must be lodged by registered letter, indicate the immigrant's current address in Belgium and include a medical certificate in accordance with the type established in a royal decree. The application will also be dismissed as inadmissible if the evidence relied on has already been relied on in the context of an earlier application based on the same Article.

2.3. Refugees

Neither prior authorisation to enter the country nor an identity document is required by immigrants arriving in Belgium and declaring themselves to be refugees. If they are given refugee status as a result of the specific procedure established by law (Articles 48 et seq.), they will be given identity documents and permanent leave to remain[8]. If they are not given this status at the end of this procedure, they will be invited to leave the country. For the duration of the procedure, foreigners are allowed to provisionally remain in the country.

Within the meaning of the International Convention relating to the Status of Refugees, signed in New York on 28 July 1951, as amended by the Protocol of 31 January 1967, a refugee is any person "*who has well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.* " (Article 1 (A) (2)). Article 49/3 § 2 of the Act of 15 December 1980 specifies what is meant by persecution in the Convention: it requires that acts of persecution are "*a) sufficiently serious by their nature or repetition as to constitute a violation of fundamental human rights, including rights to which no derogation is possible under Article 15.2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms; b) or be an accumulation of various measures, including violations of human rights which is sufficiently severe as to affect an individual in a similar manner to that which is stated in paragraph a)*".

2.4. Subsidiary protection

To supplement the international protection afforded by the recognition of refugee status, Article 48/4 of the Act of 15 December 1980, added to it by an Act of 15 September 2006, established subsidiary protection status "*granted to a foreign national who cannot be considered a refugee and who cannot benefit from Article 9 and in respect of whom there are serious grounds for believing that, if returned to his country of origin, or, in the case of a stateless person, to the country in which he was habitually resident, he/she would incur a real risk of suffering serious harm [...], and who cannot, or in view of this risk, is not prepared to*

[8] At the suggestion of the Minister of Security and the Interior, Jan Jambon, and the Secretary of State for Asylum and Migration Theo Francken, the Council of Ministers on 18 December 2015 approved a bill transforming the right of unlimited residence for refugees into a right of temporary residence for five years (see www.presscenter.org).

avail himself of the protection of that country" (§1). The following are considered to be such serious abuses: the death penalty or execution; torture or inhuman or degrading treatment or punishment, and serious threats to the life or person of a civilian due to indiscriminate violence in situations of internal or international armed conflict (§2).

2.5. Schengen

It will be noted that a residence permit issued by Belgium allows the immigrant to move freely within the territory of the Member States of the Convention implementing the Schengen Agreement.

3. Discussion of conduct and ethics

3.1. Concerning "humanitarian" residence applications

If an application for a residence permit meets legal requirements concerning form, the Minister's delegate – in this case an Immigration Office official – must be able to reasonably verify the basis for it. In this respect, Article 9, §1, Paragraph 5 of the Act of 15 December 1980 provides that:

"The risk assessment referred to in paragraph 1 on treatment options; accessibility in their country of origin or in the country where they lived and the illness; its severity, and the treatment estimated to be necessary as indicated in the medical certificate is carried out by a doctor or a designated official doctor by the Minister or his delegated representative who will express an opinion on it. This physician may, if he deems it necessary, examine the immigrant and seek additional expert advice."

In practice, the official doctor referred to in this provision, if he/she does not share the view expressed by the author of the certificate, almost never has contact with him, does not examine the immigrant, and does not request additional expert opinion. In many cases, the certificate is indeed drawn up in a university hospital by a specialist in the illness the immigrant is suffering from. However, the notice given to the administrative authority by the official doctor is a major element in the decision to allow or deny residence, and this decision may have vital consequences for the immigrant. Moreover, because the immigrant is illegally resident during the procedure, he can benefit only from urgent medical care.

This is probably why, when they learn of expulsion decisions, the drafters of model certificates often bring them up with their governing bodies (the Belgian Medical Association[9]). It should be noted that when they question the official doctor, they obtain only an objection, not from the official doctor, but from his administrative superior, giving the impression that the official

[9] In addition to the opinion concerning the above-mentioned appendix to employment contracts of doctors working for the Immigration Office, the National Council of the Order of Physicians has issued several other opinions concerning the formalisation of immigrants and the duties of doctors: see opinion a150016, a140013-R, R-a137020, a133002, a132015-R, a125012, a122005 a081009 available at www.ordomedic.be.

doctor does not have the authority to reply. From the interview with the Director General of the Immigration Office and the exchange of questions and answers, it can clearly be stated that doctors from the Immigration Office answer only to one authority: their administrative superior, the sole authority to for defending the decisions taken. Official doctors evaluate only the medical aspects of the case and never make decisions on residence; non-medical elements can also participate in this evaluation. The administrative authority's decision on an application for a residence permit may therefore be negative on the basis of Article 9 even if the immigrant suffers from a serious illness, because the country to which he is returned – which is not necessarily his or her country of origin – can provide the type of care needed given his/her state of health. The Advisory Committee on Bioethics recommends that, in this case, the decision should be clear and include the destination country, the health care available there and the possibility of immigrants to benefiting from it.

Official doctors therefore have no decision-making powers; they provide an opinion. In the eligibility investigation, this opinion focuses on the fact that the medical file submitted by the applicant either does or does not *prima facie* present the statutory condition of severity. If the official doctor gives a negative opinion on medical admissibility, the administrative authority must declare the application inadmissible. In the substantive study, the official doctor must evaluate, through a detailed opinion, whether the clinical condition communicated by the applicant in his medical file meets the legally required level of seriousness corresponding to the humanitarian risk. Also, according to the Director General of the Immigration Office, their task is not to make diagnoses or prognoses within the meaning of Article 124 of the Code of Medical Conduct[10] and they have no doctor-patient relationship with the immigrant. Opinions are not on the patient, but on the medical records submitted by the applicants. Since the task of the medical officer is not a diagnostic one and therefore differs from that of the attending physician, it is normal that his/her opinion may differ from the diagnostic assessment of the attending physician. According to the Director General of the Immigration Office, the task of the official doctor in this context is not comparable to that of a medical examiner in the context of occupational medicine. Official doctors therefore only provide an opinion to the authority, in which they perform no medical procedures and therefore do not need to contact the treating doctor who drew up the standard medical certificate in a particular case.

The Bioethics Advisory Committee cannot support this view. When a doctor – whether official or not – provides advice about a medical case, this is a medical procedure for which this doctor is subject to medical ethics. As explained in the introduction to this opinion, the perspective of ethical and professional conduct also falls within the framework of the law insofar as the law itself entrusts the professional bodies (the Belgian Medical Association) with the task of ensuring that doctors carry out their duties. All doctors, including official doctors of the Immigration Office, must therefore, in their medical practice, act according to an ethical and

[10] TITLE III: The doctor at the service of the community. CHAPTER IV: Medical consultant, controller, expert or official. Art. 124 (01/01/1975) "These doctors, when they feel they should diagnose or issue a prognosis, may only reach a conclusion if they have personally seen and interviewed the patient, even if they have carried out specialised examinations or have had information communicated by other doctors."

professional framework to which they are subject. In this context, an opinion on a patient's medical record therefore bears inevitably and obviously upon the patient, not only upon his record. From an ethical and professional perspective, the record is a tool for the medical procedure and never its purpose. As regards the patient, the official doctor has an ethical responsibility in which medical ethics plays a full part. Of course, not every article of the Code of Medical Ethics applies because this is not a treatment relationship but rather power to monitor and give an opinion within a specific legal framework. An ethical responsibility also exists as regards colleagues involved; for example, doctors treating and certifying the patient (Article 11 of the Code of Medical Ethics: "Doctors need to maintain good fraternal relations and assist each other", Art. 136: "Fraternity is a paramount duty; it must be exercised with respect for the interests of the patient"). In practice this means the consultation with the treating doctor is essential when the official doctor's opinion contradicts the testimony of the treating doctor.

Fraternity is not the only reason why consultation between the official doctor and the attesting and treating physician is essential in this context. The Advisory Committee on Bioethics, the official Immigration Department doctor is therefore carrying out a medical procedure in formulating an opinion. This medical procedure has a diagnostic component, given that these include "assessment [...] of the illness mentioned in the medical certificate, its severity and the estimated treatment required [...]" (Art. 9*ter* §1, Paragraph 5, of the Law of 15 December 1980). From a medical point of view, an assessment of an illness and its seriousness cannot be interpreted otherwise than as a diagnostic task, followed by giving an indication, namely the assessment, of the treatment considered essential. The task of the official doctor, of course, differs from that of the treating and attesting doctor, but at the same time there is some overlap from a medical perspective. Article 35 (b) of the Code of Medical Ethics states: "A doctor may not exceed his competence. He must take the advice of colleagues, especially specialists, either on his own initiative or at the request of the patient whenever it appears necessary or useful in the diagnostic or therapeutic context." When an official doctor who is not a specialist in the condition in question gives an opinion that departs from the opinion of a specialist in this condition, consultation between the two doctors is therefore imperative. If the divergence of opinion persists after the consultation, an interview and a clinical examination of the patient by the official doctor as well as an opinion from an independent expert (specialist in the ailment in question) will be indicated, as is legally possible but rarely applied in practice.

3.2. Concerning asylum procedures or applications for subsidiary protection

For subsidiary protection, the decision of the Commissioner General for Refugees and Stateless Persons is not based in principle on medical considerations: he will refer to the documentation in his possession to decide if the country that immigrant states he is fleeing from has the death penalty or execution, or carries out torture, inhuman and degrading treatment or indiscriminate violence against civilians during armed conflict. However, the doctor must check whether the immigrant originates from the country he/she says he/she is fleeing and why he/she may be killed or tortured or be a victim of such senseless violence.

The check involves an examination of the immigrant, after which the relevance of the story will be assessed.

It is through questioning that the Commissioner General confirms the validity of the application for recognition of refugee status: as, for the most part, immigrants do not have documents establishing their identity or the reasons why they fled the country they state they have come from. Again, it is the credibility of their narrative that is the most important factor.

Even if these interviews do not take place immediately after the arrival of the immigrant in Belgium, the fact is that here we are talking about people weakened by the traumatic circumstances that drove them to flee their country. There may also have been a tough journey on which they had to face various forms of violence, risked their lives or were victims of extortion by traffickers or exploiters of every kind. Particular attention should be required for unaccompanied foreign minors whose medical situation and serious psychiatric problems are probably more challenging than for adults.

Their contact with the public authorities, even benign, is not reassuring given their experiences. They are assisted by a lawyer, but, whatever their qualities, lawyers are not doctors or psychologists, and, in a significant number of cases, they need an interpreter when they meet their clients, seriously handicapping their communication. Since the end of the First World War, and particularly since the end of the Second and the return from the camps, it has become clear that the very seriously traumatic events experienced by those who are victims make it particularly for them to express what has happened to them[11]. This situation is likely to very significantly affect the applicant's narrative, to the point of making it not credible.

It is therefore essential that the administrative authority is informed with the greatest possible precision, before the hearing, of the existence and extent of psychological and even psychiatric disorders applicants are suffering from and any treatment they may be receiving. The hospital where they are staying or their physician should therefore be able to give those concerned or their lawyers a detailed medical certificate describing the disorder and treatment with precision and recommending that the hearing be postponed to a fixed date, it being understood that such a certificate must conform to reality and be limited to medical aspects.

The General Commission's annual activity reports reveal that a "psychological assessment unit" has been in existence some time so that the interviews can be carried out appropriately. Thus in 2012[12], out of 21,403 asylum applications this unit was consulted 137 times and 43 asylum seekers were invited to personal interviews with the psychologist, after which she put a detailed report on file.

It appears from the interview that the Chairman of the Committee had on 14 September 2015 with the Commissioner General for Refugees and Stateless Persons that a decision had been

[11] This is moreover what has led all Belgian legislation to better accommodate victims of crime and the group the practices to provide victims of disasters or painful events with psychological help.

[12] CGRA 2012 Annual Report, Brussels, June 2013 (see www.cgra.be).

made just over a year beforehand to cease working with the unit because it did not add enough value.

However, in the course of the interview, the Commissioner General pointed out that the difficulty for him, where injuries have been stated in a medical certificate produced to him, is verifying the causal link between these injuries and the torture the applicant has reported – a causal link whose existence can only be assessed on the basis of the applicant's own account.

4. Conclusions and recommendations

It should be recalled that in its Opinion no. 7 of 13 July 1998 on access to health care, the Committee stated that "it is fundamentally immoral to deny medical care to people in need. Neither the insolvency of the patient nor the illegality of his/her presence in Belgium are sufficient to justify such a refusal. The solution to the patient's vulnerability, whatever it may be, remains the first value to be taken into account in administering the justice that controls the distribution of health care. An immigrant's status, whatever the reason for his/her presence in Belgium, cannot have a negative influence on the provision of medical care".[13]

The Bioethics Advisory Committee emphasises that, for an official or other doctor, giving an opinion on a medical record is a medical procedure and that by doing this doctor falls within medical discipline.

In every structure where doctors are active, space must be left for ethical reflection on their professional activities. In this respect, in an application procedure for residence on medical grounds, if the doctor from the Immigration Office is of a different opinion to the doctor who writes the model medical certificate, it is necessary and conforms with medical ethics that the former contacts the latter or requests expert advice in the event of disagreement, as provided for in Art. 9 §1, Paragraph 5 of the Law of 15 December 1980, otherwise the decision of the Minister's delegate may not be reasonably justified (no material motivation[14]). It is in the public interest that an institution should not make mistakes. It will succeed in this respect only if its own doctors enjoy structural independence. Similarly, the Commissioner General for Refugees and Stateless Persons must systematically ensure the physical and mental health of any person requesting recognition of refugee status or subsidiary protection. In either case, the cost of the necessary examinations must be borne by the competent public authorities.

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[13] The Committee's opinions are available at www.health.belgium.be/bioeth.

[14] See the extensive case law on this subject from the Aliens Litigation Council (see www.rvv-cce.be).

This opinion has been prepared by:

- Paul Cosyns, Chairman, Office Representative
- Jacques Machiels
- Jules Messinne
- Joris Vandenberghe

Member of the secretariat: Lieven Dejager

Experts interviewed:

- Dirk Van den Bulck, Commissioner General for Refugees and Stateless Persons (CGRA)
- Freddy Roosemont, Director General of the Immigration Office

Documents of the working group for immigrants with serious medical problems (2015-16) – questions, personal contributions from members, minutes of interviews, documents consulted – are kept in the Committee's Documentation Centre, and may be inspected and copied.

This opinion is available at **www.health.belgium.be/bioeth**