COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

COURT (PLENARY)

CASE OF FELDBRUGGE v. THE NETHERLANDS

(Application no. 8562/79)

JUDGMENT

STRASBOURG

29 May 1986

In the Feldbrugge case*,

The European Court of Human Rights, taking its decision in plenary session in pursuance of Rule 50 of the Rules of Court and composed of the following judges:

Mr. R. RYSSDAL, *President*,
Mr. G. WIARDA,
Mr. J. CREMONA,
Mr. Thór VILHJÁLMSSON,
Mr. W. GANSHOF VAN DER MEERSCH,
Mrs. D. BINDSCHEDLER-ROBERT,
Mr. G. LAGERGREN,
Mr. F. GÖLCÜKLÜ,
Mr. F. MATSCHER,
Mr. J. PINHEIRO FARINHA,
Mr. L.-E. PETTITI,
Mr. B. WALSH,
Sir Vincent EVANS,
Mr. C. RUSSO,
Mr. R. BERNHARDT,
Mr. J. GERSING,
Mr. A. SPIELMANN,

and also of Mr. M.-A. EISSEN, *Registrar*, and Mr. H. PETZOLD, *Deputy Registrar*,

Having deliberated in private on 31 May, 1 and 2 October 1985 and 21 to 23 April 1986,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The present case was referred to the Court by the European Commission of Human Rights ("the Commission") on 12 October 1984, within the period of three months laid down by Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"). The case originated in an application (no. 8562/79) against the Kingdom of the Netherlands

* Note by the registry: The case is numbered 8/1984/80/127. The second figure indicates the year in which the case was referred to the Court and the first figure its place on the list of cases referred in that year; the last two figures indicate, respectively, the case's order on the list of cases and of originating applications (to the Commission) referred to the Court since its creation.

lodged with the Commission on 16 February 1979 under Article 25 (art. 25) by a citizen of that State, Mrs. Geziena Hendrika Maria Feldbrugge.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the Netherlands declaration recognising the compulsory jurisdiction of the Court (Article 46) (art. 46). The object of the request was to obtain a decision by the Court as to whether the facts of the case disclose a breach by the respondent State of its obligations under Article 6 para. 1 (art. 6-1).

2. In response to the inquiry made in accordance with Rule 33 para. 3 (d) of the Rules of Court, Mrs. Feldbrugge stated that she wished to take part in the proceedings pending before the Court and designated the lawyer who would represent her (Rule 30).

3. The Vice-President of the Court, acting as President, decided on 15 October 1984 that, in the interests of the proper administration of justice, both the present case and the case of van Marle and Others should be heard by a single Chamber (Rule 21 para. 6). The Chamber of seven judges to be constituted included, as ex officio members, Mr. G. Wiarda, the elected judge of Netherlands nationality (Article 43 of the Convention) (art. 43), and Mr. R. Ryssdal, Vice-President of the Court (Rule 21 para. 3 (b)). On 22 October 1984, Mr. Wiarda, in his capacity as President of the Court, drew by lot, in the presence of the Registrar, the names of the five other members, namely Mr. J. Cremona, Mr. J. Pinheiro Farinha, Sir Vincent Evans, Mr. R. Bernhardt and Mr. J. Gersing (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43).

4. Having assumed the office of President of the Chamber (Rule 21 para. 5), Mr. Ryssdal granted the lawyer for the applicant leave to use the Dutch language in the proceedings (Rule 27 para. 3).

5. Through the Registrar, the President consulted the Agent of the Netherlands Government ("the Government"), the Delegate of the Commission and the lawyer for the applicant on the need for a written procedure (Rule 37 para. 1). On 11 December 1984, he directed that the Agent and the lawyer should each have until 31 January 1985 to file a memorial, and that the Commission's Delegate should be entitled to reply in writing within two months of the date on which the Registrar transmitted to him whichever of the two memorials should last be filed. On 12 February 1985, he extended the former time-limit to 29 March 1985.

6. On 27 February 1985, the Chamber decided to relinquish jurisdiction forthwith in favour of the plenary Court (Rule 50).

7. The applicant's memorial was received at the registry on 21 January and the Government's on 9 April. On 24 April, the Secretary to the Commission informed the Registrar that the Delegate would present his submissions at the hearing.

8. On 8 March, after consulting, through the Registrar, the Agent of the Government, the Delegate of the Commission and the lawyer for the

applicant (Rule 38), the President directed that the oral proceedings should open on 29 May 1985.

9. The hearing was held in public at the Human Rights Building, Strasbourg, on the appointed day, the Court having held a preparatory meeting on the previous day.

There appeared before the Court:

- for the Government

Mr. G.W. MAAS GEESTERANUS, Legal Adviser,
Ministry of Foreign Affairs, *Agent*,
Mr. E. KORTHALS ALTES, Landsadvocaat, *Counsel*,
Mr. J.A. VAN ANGEREN, Ministry of Justice,
Mr. C.J. VAN DEN BERG, Ministry of Social Affairs and Employment,
Advisers;

- for the Commission

Mr. B. KIERNAN, *Delegate*;

- for the applicant

Mr. L.K.F. SCHUITEMAKER, advocaat, *Counsel*.

The Court heard addresses by Mr. Maas Geesteranus, Mr. Korthals Altes and Mr. van Angeren for the Government, by Mr. Kiernan for the Commission and by Mr. Schuitemaker for the applicant, as well as their replies to questions put by the Court and several of its members.

10. By letter received on 11 July, the Agent of the Government provided information on a point of fact raised at the hearing.

AS TO THE FACTS

I. PARTICULAR CIRCUMSTANCES OF THE CASE

11. Mrs. Geziena Hendrika Maria Feldbrugge was born in 1945 and is resident at Anna Paulowna. She is of Netherlands nationality.

In or about 1978, although she had been unemployed for some time, Mrs. Feldbrugge ceased to register at the Regional Employment Exchange (Gewestelijk Arbeidsbureau). This was because she had fallen ill and did not consider herself sufficiently recovered to be fit to work. On 11 April 1978, the Governing Board of the Occupational Association of the Banking and Insurance, Wholesale Trade and Self-Employment Sector (Bedrijfsvereniging voor Bank-en Verzekeringswezen, Groothandel en Vrije Beroepen) in Amsterdam decided that as from 24 March 1978 she was no longer entitled to the sickness allowances she had been receiving until then, as the Association's consulting doctor had judged her fit to resume work on that date.

12. She appealed to the Appeals Board (Raad van Beroep) in Haarlem.

The President of the Appeals Board sought the opinion of one of the permanent medical experts attached to the Board, a gynaecologist practising at Alkmaar, who examined the patient and gave her the opportunity to comment. After consulting three other doctors (a gynaecologist and two general practitioners, including Mrs. Feldbrugge's), the expert concluded on 1 June 1978 that, gynaecologically speaking, she had been fit for work since 24 March; however, he felt it necessary also to consult an orthopaedic specialist.

On 18 August 1978, another permanent medical expert, an orthopaedic surgeon, examined the applicant and offered her the opportunity to comment. He also sought the views of the three practitioners mentioned above. In his report of 22 August 1978, he too found that Mrs. Feldbrugge had been fit to resume employment as from 24 March of that year.

On the basis of these two reports, the President of the Appeals Board ruled against the applicant.

13. The applicant filed an objection (verzet), alleging that she had not been given a fair hearing.

On 17 November 1978, the Appeals Board declared the objection inadmissible as it fulfilled none of the grounds laid down in section 142 (1) of the Appeals Act (Beroepswet - see paragraph 19 below). In an obiter dictum, it stated that the case had been given a fair hearing, in that two permanent medical experts had examined the applicant and allowed her to state her objections orally.

14. Mrs. Feldbrugge challenged this decision before the Central Appeals Board (Centrale Raad van Beroep) at Utrecht. In particular, she maintained that the limitations imposed by sections 141 and 142 of the above-mentioned Act infringed the principle of a fair trial enunciated in Article 6 (art. 6) of the Convention.

On 13 February 1980, the Central Appeals Board declared the appeal inadmissible by virtue of section 75 (2) of the Health Insurance Act (see paragraph 20 below).

II. RELEVANT LEGISLATION

1. In general

15. As far as health insurance is concerned, social security in the Netherlands is managed jointly by the State - which in general confines itself to establishing the legal framework of the scheme and to seeing to co-ordination -, by employers and by employees.

The branches of the economy, including the liberal professions, are divided into sectors, each with an occupational association

(bedrijfsvereniging) responsible for implementation of the social security legislation.

These associations are legal persons within the meaning of Article I of Book II of the Civil Code; the method of their establishment, their structures and their powers are laid down in the Social Security Organisation Act 1952 (Organisatiewet Sociale Verzekeringen). They are subject to approval by the Minister for Social Affairs and Employment on the basis of their representative character. The Minister may also decide of his own motion to set up such an association; in that event, he determines and amends their articles of association as needed and he appoints, suspends and dismisses the members of their governing boards. In addition, he stipulates the assurances to be given for the discharge of the duties of the occupational associations and he receives from each of them an annual report and an annual statement of their accounts.

The occupational associations are semi-public institutions and operate like private insurance companies.

They may entrust to a common administrative office (Gemeenschappelijk Administratiekantoor), recognised by the Minister, the administrative work resulting from the application of social security law.

A Social Insurance Council (Sociale Verzekeringsraad), set up by the Government and comprising representatives of the State, employers and employees, supervises the proper implementation of the legislation in question.

2. Health Insurance Act 1913

16. Under the Health Insurance Act 1913 (Ziektewet), as amended in 1967, insurance against sickness is compulsory for persons under 65 who are bound by a contract of employment with a public or private employer, or who can be assimilated to this category (sections 3 and 20). Persons formerly bound by a contract of employment who are unemployed and in receipt of unemployment benefits are also treated as salaried employees for this purpose. Self-employed workers may take out policies with private companies.

Sickness includes accidents, whether related to the employment or not. In case of unfitness for work through sickness, an employed person receives an allowance of 80 per cent of his daily pay. He or she applies directly to the occupational association to which his or her employer belongs.

The entitlement to an allowance flows directly from the Act (section 19).

17. The scheme is administered by the occupational associations (see paragraph 15 above), and the funding is provided entirely by employers and employees. The Act specifies the rates of contributions, which are at present 1 per cent for the employee and 5.05 per cent for the employer, calculated on a maximum daily wage of 262 guilders.

3. Appeals Act 1955

18. Disputes arising out of the application of the Health Insurance Act 1913 are governed by the Appeals Act 1955 (as last amended on 17 October 1978). For disputes concerning fitness or unfitness for work, there exists a simplified procedure known as the permanent-medical-expert procedure (vaste deskundige procedure) (sections 131 to 144). The expert - a doctor who is a specialist or a general practitioner - is appointed for a year by the Minister of Justice and he is placed under oath.

On the lodging of an appeal of this kind, the President of the Appeals Board (there are twelve in the Netherlands) may immediately instruct its permanent medical expert to carry out an enquiry (onderzoek) into the matter (section 135).

Within three days of notification of the appeal, the authority that delivered the decision which is challenged must submit all relevant files on the case (section 136).

The permanent medical expert consults the private practitioner of the person concerned and the relevant occupational association doctor, except where the file shows that they share his opinion (section 137 (2)). He summons and examines the appellant (section 137 (3)); he may consult another practitioner (section 138). Finally, he makes a written report to the President of the Appeals Board (section 140).

The President - who is a judge appointed for life - gives a reasoned decision (beschikking) which refers to the conclusions of the medical expert.

19. An appeal against the President's decision lies to the full Appeals Board, but solely on one or more of the following four grounds (section 142(1): that the expert knew the patient in another capacity or failed to comply with the requirements of section 137 (see paragraph 18 above); that the President's decision does not bear upon the dispute or has not followed the expert's advice. Unless the Appeals Board declares the appeal inadmissible or unfounded, the normal procedure applies. The parties then have the opportunity of studying the case-file on the premises of the Appeals Board at a time determined by the clerk or of receiving copies. The President may however decide, in the mental or physical interest of the appellant, that he or she shall not have access to the medical reports but shall be informed of their contents and may designate a competent person, such as his or her private practitioner or lawyer, to inspect them on the premises (section 142 (2) in conjunction with section 114 (4) and (5)).

The Appeals Board gives its ruling after written pleadings have been filed and oral submissions heard.

20. Its decision is not subject to appeal before the Central Appeals Board (section 75 (2) of the Health Insurance Act). However, according to that Board's established case-law, an exception is made where rules of a formal nature have not been observed.

PROCEEDINGS BEFORE THE COMMISSION

21. In her application (no. 8562/79) lodged with the Commission on 16 February 1979, Mrs. Feldbrugge relied on Article 6 para. 1 (art. 6-1) of the Convention. She claimed that, in the determination of her right to health insurance allowances, she had not received a fair trial before the President of the Appeals Board in Haarlem.

22. The Commission declared the application admissible on 15 November 1983. In its report of 9 May 1984 (Article 31) (art. 31), it concluded that Article 6 para. 1 (art. 6-1) was not applicable to the facts of the present case, that it was not necessary to determine whether the proceedings compained of had complied with that Article and, by eight votes to six, that the Article had not been breached.

The full text of the Commission's opinion and of the two separate opinions contained in the report is reproduced as an annex to the present judgment.

FINAL SUBMISSIONS MADE TO THE COURT BY THE GOVERNMENT

23. In their memorial, the Government requested the Court "to decide that there [had] been no violation of the Convention in the present case".

AS TO THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 PARA. 1 (art. 6-1)

24. Article 6 para. 1 (art. 6-1) of the Convention reads as follows:

> "In the determination of his civil rights and obligations ..., everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law...."

The applicant claimed that she did not receive a fair hearing by a tribunal in the determination of her right to sickness allowances.

In view of the submissions made, the first issue to be decided concerns the applicability of paragraph 1 of Article 6 (art. 6-1), this being a matter disputed by the majority of the Commission and by the Government.

A. Applicability of Article 6 para. 1 (art. 6-1)

1. Existence of a "contestation" (dispute) over a right

25. As to the existence of a "contestation" (dispute) over a right, the Court would refer to the principles enunciated in its case-law and summarised in its Benthem judgment of 23 October 1985 (Series A no. 97, pp. 14-15, para. 32).

In the present case, it appears clear that a "contestation" (dispute) arose following the decision taken on 11 April 1978 by the Governing Board of the Occupational Association of the Banking and Insurance, Wholesale Trade and Self-Employment Sector in Amsterdam (see paragraph 11 above). This "contestation" was genuine and serious, and concerned the actual existence of the right asserted by the applicant to continue receiving a sickness allowance. The outcome of the relevant proceedings was capable of leading - and in the event did lead - to confirmation of the decision being challenged, namely the refusal of the President of the Haarlem Appeals Board to grant the claimed allowance; it was thus directly decisive for the right in issue.

The President of the Appeals Board thus had to determine a contestation (dispute) concerning a right claimed by Mrs. Feldbrugge.

2. Whether the right at issue was a civil right

(a) Introduction

26. According to the case-law of the Court, "the notion of ‘civil rights and obligations’ cannot be interpreted solely by reference to the domestic law of the respondent State" (see the König judgment of 28 June 1978, Series A no. 27, pp. 29-30, paras. 88-89). In addition, Article 6 (art. 6) does not cover only "private-law disputes in the traditional sense, that is disputes between individuals or between an individual and the State to the extent that the latter had been acting as a private person, subject to private law", and not "in its sovereign capacity" (see the same judgment, loc. cit., p. 30, para. 90). "The character of the legislation which governs how the matter is to be determined ... and that of the authority which is invested with jurisdiction in the matter ... are ... of little consequence": the latter may be an "ordinary court, [an] administrative body, etc." (see the Ringeisen judgment of 16 July 1971, Series A no. 13, p. 39, para. 94). "Only the character of the right at issue is relevant" (see the above-mentioned König judgment, Series A no. 27, p. 30, para. 90).

27. As in previous cases, the Court does not consider that it has to give on this occasion an abstract definition of the concept of "civil rights and obligations".

This being the first time that the Court has had to deal with the field of social security, and more particularly the sickness insurance scheme in the Netherlands, the Court must identify such relevant factors as are capable of clarifying or amplifying the principles stated above.

(b) Supplementary factors disclosed by the subject matter of the litigation

28. Under Netherlands legislation, the right in issue is treated as a public-law right (see paragraphs 16-17 above). This classification, however, provides only a starting point (see notably, mutatis mutandis, the Engel and Others judgment of 8 June 1976, Series A no. 22, p. 35, para. 82); it cannot be conclusive of the matter unless corroborated by other factors. In its König judgment of 28 June 1978, the Court stated in particular:

> "Whether or not a right is to be regarded as civil ... must be determined by reference to the substantive content and effects of the right - and not its legal classification - under the domestic law of the State concerned. In the exercise of its supervisory functions, the Court must also take account of the object and purpose of the Convention and of the national legal systems of the other Contracting States ... ." (Series A no. 27, p. 30, para. 89)

29. There exists great diversity in the legislation and case-law of the member States of the Council of Europe as regards the juridical nature of the entitlement to health insurance benefits under social security schemes, that is to say as regards the category of law to which such entitlement belongs. Some States - including the Netherlands - treat it as a public-law right, whereas others, on the contrary, treat it as a private-law right; others still would appear to operate a mixed system. What is more, even within the same legal order differences of approach can be found in the case-law. Thus, in some States where the public-law aspect is predominant, some court decisions have nonetheless held Article 6 para. 1 (art. 6-1) to be applicable to claims similar to the one in issue in the present case (for example, the judgment of 11 May 1984 by the Brussels Labour Court, Journal des Tribunaux 1985, pp. 168-169). Accordingly, there exists no common standard pointing to a uniform European notion in this regard. 30. An analysis of the characteristics of the Netherlands system of social health insurance discloses that the claimed entitlement comprises features of both public law and private law.

(i) Features of public law

31. A number of factors might tend to suggest that the dispute in question should be considered as one falling within the sphere of public law.

(1) Character of the legislation

32. The first such factor is the character of the legislation. The legal rules governing social security benefits in the context of health insurance differ in many respects from the rules which apply to insurance in general

and which are part of civil law. The Netherlands State has assumed the responsibility of regulating the framework of the health insurance scheme and of overseeing the operation of that scheme. To this end, it specifies the categories of beneficiaries, defines the limits of the protection afforded, lays down the rates of the contributions and the allowances, etc.

In several cases (see notably König; Le Compte, Van Leuven and De Meyere; Benthem), State intervention by means of a statute or delegated legislation has nonetheless not prevented the Court from finding the right in issue to have a private, and hence civil, character. In the present case likewise, such intervention cannot suffice to bring within the sphere of public law the right asserted by the applicant.

(2) Compulsory nature of the insurance

33. A second factor of relevance is the obligation to be insured against illness or, more precisely, the fact of being covered by insurance in the event of fulfilling the conditions laid down by the legislation (see paragraph 38 below). In other words, those concerned can neither opt out of the benefits nor avoid having to pay the relevant contributions.

Comparable obligations can be found in other fields. Examples are provided by the rules making insurance cover compulsory for the performance of certain activities - such as driving a motor vehicle - or for householders. Yet the entitlement to benefits to which this kind of insurance contract gives rise cannot be qualified as a public-law right. The Court does not therefore discern why the obligation to belong to a health insurance scheme should change the nature of the corresponding right.

(3) Assumption by the State of responsibility for social protection

34. One final aspect to be considered is the assumption, by the State or by public or semi-public institutions, of full or partial responsibility for ensuring social protection. This was what happened in the present case by virtue of the health insurance scheme operated by the Occupational Association of the Banking and Insurance, Wholesale Trade and Self-Employment Sector in Amsterdam. Whether viewed as the culmination of or a stage in the development of the role of the State, such a factor implies, prima facie, an extension of the public-law domain.

On the other hand - and the Court will revert to the point later (see paragraph 39 below) -, the present case concerns a matter having affinities with insurance under the ordinary law, which insurance is traditionally governed by private law. It thus seems difficult to draw from the consequences of the extent of State intervention any firm conclusion as to the nature of the right in issue.

35. In sum, even taken together the three foregoing factors, on analysis, do not suffice to establish that Article 6 (art. 6) is inapplicable.

(ii) Features of private law

36. In contrast, various considerations argue in favour of the opposite conclusion.

(1) Personal and economic nature of the asserted right

37. To begin with, Mrs. Feldbrugge was not affected in her relations with the public authorities as such, acting in the exercise of discretionary powers, but in her personal capacity as a private individual. She suffered an interference with her means of subsistence and was claiming a right flowing from specific rules laid down by the legislation in force.

For the individual asserting it, such a right is often of crucial importance; this is especially so in the case of health insurance benefits when the employee who is unable to work by reason of illness enjoys no other source of income. In short, the right in question was a personal, economic and individual right, a factor that brought it close to the civil sphere.

(2) Connection with the contract of employment

38. Secondly, the position of Mrs. Feldbrugge was closely linked with the fact of her being a member of the working population, having been a salaried employee. The applicant was admittedly unemployed at the relevant time, but the availability of the health benefits was determined by reference to the terms of her former contract of employment and the legislation applicable to that contract.

The legal basis of the work that she had performed was a contract of employment governed by private law. Whilst it is true that the insurance provisions derived directly from statute and not from an express clause in the contract, these provisions were in a way grafted onto the contract. They thus formed one of the constituents of the relationship between employer and employee.

In addition, the sickness allowance claimed by Mrs. Feldbrugge was a substitute for the salary payable under the contract, the civil character of this salary being beyond doubt. This allowance shared the same nature as the contract and hence was also invested with a civil character for the purposes of the Convention.

(3) Affinities with insurance under the ordinary law

39. Finally, the Netherlands health insurance is similar in several respects to insurance under the ordinary law. Thus, under the Netherlands health insurance scheme recourse is had to techniques of risk covering and to management methods which are inspired by those current in the private insurance sphere. In the Netherlands, the occupational associations conduct their dealings, notably with those insured, in the same way as a company providing insurance under the ordinary law, for example as regards

collection of contributions, calculation of risks, verification of fulfilment of the conditions for receipt of benefits, and payment of allowances.

There exists a further feature of relevance. Complementary insurance policies, taken out with friendly societies or private insurance companies, allow employees to improve their social protection at the price of an increased or fresh financial outlay; such policies constitute in sum an optional extension of compulsory insurance cover. Proceedings instituted in their connection are incontestably civil proceedings. Yet in both cases the risk insured against (for example, ill-health) is the same and, whilst the extent of the cover increases, the nature of the cover does not change.

Such differences as may exist between private sector insurance and social security insurance do not affect the essential character of the link between the insured and the insurer. Finally, the Court would draw attention to the fact that in the Netherlands, as in some other countries, the insured themselves participate in the financing of all or some of the social security schemes. Deductions at source are made from their salaries, which deductions establish a close connection between the contributions called for and the allowances granted. Thus, when Mrs. Feldbrugge was working, her employer withheld from her pay a sum paid over to the Occupational Association (see paragraph 17 above). In addition, her employer also bore a portion of the insurance contributions, which were included in the firm's accounts under the head of social insurance expenses. The Netherlands State, for its part, was not involved in the financing of the scheme.

(c) Conclusion

40. Having evaluated the relative cogency of the features of public law and private law present in the instant case, the Court finds the latter to be predominant. None of these various features of private law is decisive on its own, but taken together and cumulatively they confer on the asserted entitlement the character of a civil right within the meaning of Article 6 para. 1 (art. 6-1) of the Convention, which was thus applicable.

B. Compliance with Article 6 para. 1 (art. 6-1)

41. The Court must therefore inquire whether the proceedings before the bodies responsible for determining Mrs. Feldbrugge's asserted right satisfied the conditions laid down in Article 6 para. 1 (art. 6-1).

1. President of the Appeals Board

42. The applicant acknowledged that the President of the Appeals Board constituted an "independent and impartial tribunal established by law" and that he had heard her case "within a reasonable time". She further conceded that in medical actions the rule of public proceedings should yield before the

respect due to the private life of the patient whose case is being determined by the tribunal.

On the other hand, she submitted that she had been denied a "fair hearing" before the President of the Appeals Board. In this connection, she alleged a two-fold violation of the principle of equality of arms with the Occupational Association. In the first place, she had not had the opportunity of appearing - either in person or represented by a lawyer - to argue her case. Secondly, the reports of the two permanent medical experts had not been made available to her (see paragraph 12 above), with the result that she had not been able either to comment on them or, if thought necessary, to call for a counter-expertise; yet in practice these documents provided the President of the Appeals Board with the sole basis for his decision.

43. The Government replied that the President is not able himself to enter into the merits of a medical dispute and is bound to confine himself to verifying that the permanent medical expert has observed the procedure prescribed by the Appeals Act, notably the obligation to consult the doctors of both parties and to examine the person concerned. In their submission, only an expert of this kind is capable of deciding on an employee's unfitness to work for reasons of illness. The permanent medical expert, who is in a way an extension of the judge and enjoys the guarantees of impartiality above all suspicion, performs quasi-judicial functions. In any event, the Government concluded, the right to a fair trial safeguarded by Article 6 para. 1 (art. 6-1) can in no wise be taken to embody either the right to submit comments on the medical report drawn up by an expert after examination of the patient and consultation of the patient's doctor or the right to call for or produce a counter-expertise.

44. It is not within the province of the Court to review in isolation the Netherlands institution of the permanent medical expert (see, mutatis mutandis, the Bönisch judgment of 6 May 1985, Series A no. 92, p. 14, para. 27). The Court confines itself to noting that the permanent medical expert cannot himself determine a dispute (contestation) over a civil right. The sole responsibility for taking the decision falls to the President of the Appeals Board, even when - as in the instant case - he does no more than ratify the opinion of the expert.

Secondly, there has been no breach of the principle of equality of arms inherent in the concept of a fair trial (see, mutatis mutandis, the Delcourt judgment of 17 January 1970, Series A no. 11, p. 15, para. 28). The Occupational Association did not enjoy a procedural position any more advantageous than Mrs. Feldbrugge's, in that had the experts expressed an opinion unfavourable to its standpoint, the Association would likewise have been unable to present oral or written arguments or to challenge the validity of the unfavourable opinion. No lack of fair balance thus obtained between the parties in this respect.

On the other hand, the procedure followed before the President of the Appeals Board by virtue of the Netherlands legislation was clearly not such as to allow proper participation of the contending parties, at any rate during the final and decisive stage of that procedure. To begin with, the President neither heard the applicant nor asked her to file written pleadings. Secondly, he did not afford her or her representative the opportunity to consult the evidence in the case-file, in particular the two reports - which were the basis of the decision - drawn up by the permanent experts, and to formulate her objections thereto. Whilst the experts admittedly examined Mrs. Feldbrugge and gave her the opportunity to formulate any comments she might have had, the resultant failing was not thereby cured. In short, the proceedings conducted before the President of the Appeals Board were not attended, to a sufficient degree, by one of the principal guarantees of a judicial procedure.

2. Appeals Board and Central Appeals Board

45. Mrs. Feldbrugge attempted, unsuccessfully, to take her case to the full Appeals Board and subsequently to the Central Appeals Board, her action being declared inadmissible on both occasions (see paragraphs 13 and 14 above).

Under the so-called permanent-medical-expert procedure, an objection may only be lodged with an Appeals Board against the decision of the President of the Board on one of the following four grounds: that the expert knew the patient in another capacity or failed to comply with certain procedural requirements; that the President's decision does not bear upon the dispute or has not followed the expert's advice (see paragraph 19 above).

Decisions of an Appeals Board in the context of this kind of procedure are not subject to appeal before the Central Appeals Board save, as has been held in the case-law of the latter Board, in the event of non-observance of rules of a formal nature (see paragraph 20 above).

46. Framed as they were in such restrictive terms, the conditions of access to the two Boards prevented Mrs. Feldbrugge from challenging the merits of the decision by the President of the Appeals Board in Haarlem. Accordingly, the shortcoming found to exist in respect of the procedure before this judicial officer was not capable of being cured at a later stage.

3. Conclusion

47. In conclusion, there has been a breach of Article 6 para. 1 (art. 6-1).

II. APPLICATION OF ARTICLE 50 (art. 50)

48. At the hearings, the lawyer for the applicant and counsel for the Government requested the Court, should it find a violation, to defer its ruling on the possible award of just satisfaction.

Since therefore the question of the application of Article 50 (art. 50) is not ready for decision, it is necessary to reserve the matter and to fix the further procedure, taking due account of the possibility of an agreement between the respondent State and the applicant (Rule 53 paras. 1 and 4 of the Rules of Court).

FOR THESE REASONS, THE COURT

1. Holds, by ten votes to seven, that Article 6 para. 1 (art. 6-1) was applicable to the circumstances of the present case;

2. Holds, by ten votes to seven, that Article 6 para. 1 (art. 6-1) has been violated;

3. Holds, unanimously, that the question of the application of Article 50 (art. 50) is not ready for decision;

accordingly,

(a) reserves the whole of the said question;

(b) invites the Government and the applicant to submit, within the forthcoming two months, their written comments on the said question and, in particular, to notify the Court of any agreement reached between them;

(c) reserves the further procedure and delegates to the President of the Court power to fix the same if need be.

Done in English and in French, and delivered at a public hearing at the Human Rights Building, Strasbourg, on 29 May 1986.

Rolv RYSSDAL
President

Marc-André EISSEN
Registrar

A declaration by Mr. Pinheiro Farinha and, in accordance with Article 51 para. 2 (art. 51-2) of the Convention and Rule 52 para. 2 of the Rules of

Court, the joint dissenting opinion of Mr. Ryssdal, Mrs. Bindschedler-Robert, Mr. Lagergren, Mr. Matscher, Sir Vincent Evans, Mr. Bernhardt and Mr. Gersing are annexed to the present judgment.

R.R.
M.-A.E.

DECLARATION BY JUDGE PINHEIRO FARINHA

(Translation)

In my opinion, a distinction should be drawn between two sets of circumstances:

(a) If the beneficiary has participated in or contributed to the funding of the social insurance afforded, the resultant entitlements are civil rights and disputes (contestations) relating to them fall within the ambit of Article 6 (art. 6) of the Convention.

This was the position in the present case.

(b) If, on the contrary, the beneficiary has not so participated or contributed, the facts come within the domain of public law and Article 6 (art. 6) is not applicable (see my dissenting opinion in the Deumeland case).

JOINT DISSENTING OPINION OF JUDGES RYSSDAL, BINDSCHEDLER-ROBERT, LAGERGREN, MATSCHER, SIR VINCENT EVANS, BERNHARDT AND GERSING

1. We agree with the view of the majority of the Court as to the existence in the present case of a "contestation" (dispute) over a right claimed by the applicant, Mrs. Feldbrugge. In our opinion, however, the dispute did not involve the determination of her "civil rights and obligations" ("droits et obligations de caractère civil"), within the meaning of Article 6 para. 1 (art. 6-1) of the Convention. Our conclusion, therefore, is that Article 6 para. 1 (art. 6-1) is not applicable in the present case.

2. The majority finds that various "features of private law" comprised in the particular social security benefit claimed by Mrs. Feldbrugge so outweighed the "features of public law" as to confer on her claimed entitlement the character of a "civil right" for the purposes of Article 6 para. 1 (art. 6-1) (see paragraph 40 of the judgment). The relevant "features of private law" identified by the majority are, firstly, the personal and economic nature of the asserted right; secondly, the connection with the contract of employment; and, thirdly, the affinities with insurance under the ordinary law. In our view, the weakness in this reasoning is that the majority is taking as determining factors matters which may vary as between different social security systems and even from one category of benefit to another under the same system. We fear that this will give rise to uncertainty as to the obligations undertaken by the Contracting States in the field of social security by virtue of Article 6 para. 1 (art. 6-1) of the Convention.

3. Our reasons for finding Article 6 para. 1 (art. 6-1) to be inapplicable to the kind of right asserted by Mrs. Feldbrugge are as follows.

1. "Civil rights and obligations" - a limitative concept

4. Article 6 para. 1 (art. 6-1) lays down a procedural guarantee for the adjudication of certain disputes. The use of the expression "civil rights and obligations" must have been intended by the drafters of the Convention to set some limit on the application of Article 6 para. 1 (art. 6-1). The expression cannot be read as applying to disputes over the whole range of "rights and obligations" recognised by domestic law: the right or obligation in issue must be one that can be qualified as "civil". This adjective, however, is capable of bearing several meanings. The text of the Article is not sufficiently clear for it to be said, without more, which meaning was intended.

2. The Court's case-law

5. The Court's existing case-law gives some guidance as to where the line is to be drawn.

6. The starting point must in each case be the character attributed to the rights and obligations in question under the legal system of the respondent State. This, however, provides no more than an initial indication, as the notion of "civil rights and obligations" is an "autonomous" one within the meaning of the Convention and "cannot be interpreted solely by reference to the domestic law of the respondent State": "whether or not a right is to be regarded as civil within the meaning of this expression in the Convention must be determined by reference to the substantive content and effects of the right - and not its legal classification - under the domestic law of the State concerned" (see the König judgment of 28 June 1978, Series A no. 27, pp. 29-30, paras. 88-89).

For this purpose, account should also be taken of the legal systems of the other Contracting States, notably to see whether there exists any uniform concept of "civil rights and obligations" such as would either embrace or exclude the facts of the present case (see the above-mentioned König judgment, Series A no. 27, p. 30, para. 89).

7. The Court has held that the phrase "contestations" (disputes) over "civil rights and obligations" covers all proceedings the result of which is decisive for private rights and obligations, even if the proceedings concern a dispute between an individual and a public authority acting in its sovereign capacity and irrespective of whether under the domestic legal system of the respondent State they fall within the sphere of private law or of public law or indeed are of a mixed character (see the Ringeisen judgment of 16 July 1971, Series A no. 13, p. 39, para. 94; the above-mentioned König judgment, Series A no. 27, pp. 30 and 32, paras. 90 and 94). Moreover, it is not enough for the dispute or the proceedings to have a tenuous connection with or remote consequences affecting civil rights or obligations: "civil rights and obligations must be the object - or one of the objects - of the 'contestation' (dispute); the result of the proceedings must be directly decisive for such a right" (see the Le Compte, Van Leuven and De Meyere judgment of 23 June 1981, Series A no. 43, p. 21, para. 47).

Beyond this, the Court has expressly reserved for future consideration the question whether the concept of "civil rights and obligations", within the meaning of Article 6 para. 1 (art. 6-1), extends beyond those rights which have a private nature (see the above-mentioned König judgment, Series A no. 27, p. 32, para. 95; and the above-mentioned Le Compte, Van Leuven and De Meyere judgment, Series A no. 43, p. 22, para. 48 in fine).

8. The Court's existing case-law has thus identified certain areas to which Article 6 para. 1 (art. 6-1) is applicable, whilst leaving open whether or not there might be other such areas.

3. Application of the Court's existing case-law to the particular facts

9. Under Netherlands law, the entitlement to a sickness allowance asserted by Mrs. Feldbrugge is not private in character but is classified as a public-law right. Undoubtedly, under the statutory insurance scheme to which Mrs. Feldbrugge was subject, certain connections exist between the entitlement to health benefits and the insured's current or former contract of employment, which contract does clearly fall within the domain of private law. Nonetheless, the provisions governing health benefits do not constitute clauses incorporated by law in, or deriving from, the contract of employment; the claim is enforceable against a third party not privy to the contract; and the outcome of the claim does not directly affect the private legal relationship between the employer and employee created by the contract of employment, although it may have a certain incidence on performance of that contract. Furthermore, in Mrs. Feldbrugge's case there no longer existed at the relevant time any contract of employment (see paragraph 11 of the judgment).

Hence it cannot be said that the proceedings brought by Mrs. Feldbrugge to enforce her claim to a sickness allowance concerned, or entailed a result directly decisive for, a private right recognised by Netherlands law. Such consequences as there were for private rights were, in our view, too remote and tenuous to attract the application of Article 6 para. 1 (art. 6-1) on that ground alone.

10. We agree with the majority that the classification under Netherlands law, whilst it provides an initial indication, cannot be decisive, especially if it is out of line with the legal systems of the other Contracting States. However, as the majority concluded in paragraph 29 of the judgment, there exists no common European standard as regards the juridical nature of entitlement to health benefits under statutory social security schemes. In particular, such entitlement is not generally recognised as being private in character.

11. Accordingly, the facts of the present case fall outside the private-right criteria for the application of Article 6 para. 1 (art. 6-1) as established under the Court's existing case-law. What remains to be determined is whether those facts nonetheless do come within the scope of Article 6 para. 1 (art. 6-1) on other grounds.

4. Relevant principles of interpretation

12. In order to ascertain the meaning of the "autonomous" notion of "civil rights and obligations" in Article 6 para. 1 (art. 6-1), regard must be had to the object and purpose of the Convention (see the above-mentioned König judgment, Series A no. 27, p. 30, para. 89). As a matter of general approach, in the interpretation of the Convention, which is an international treaty, it is appropriate for the Court to be guided by the 1969 Vienna Convention on the Law of Treaties (see the Golder judgment of 21 February 1975, Series A no. 18, p. 14, para. 29). The "general rule of interpretation", as set out in Article 31 para. 1 of the Vienna Convention, reads:

> "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

Article 32 of the Vienna Convention further specifies that

> "recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31 ...".

The Court has also recognised the need to construe the European Convention on Human Rights in the light of modern-day conditions obtaining in the democratic societies of the Contracting States and not solely according to what might be presumed to have been in the minds of the drafters of the Convention (see, inter alia, the Marckx judgment of 13 June 1979, Series A no. 31, p. 19, para. 41).

5. Characteristics of the asserted right

13. The right to a sickness allowance claimed by Mrs. Feldbrugge was an economic right deriving, not from the private contract between herself and her former employer, but from a collective scheme of protection of the working population set up by the legislature. An allocation of society's resources as generated within the employment context has been decided upon by the domestic legislature; and the applicant, as a member of the section of society concerned, was compelled to participate in that scheme. Such schemes represent performance of society's duty to protect the health and welfare of its members; they are not merely examples of the State taking on or regulating an insurance activity equally capable of being carried on by the private sector.

Admittedly, concerning as it does the employment sphere, the Netherlands statutory scheme of health insurance is bound to have some repercussions on, connections with or features in common with "civil rights and obligations" existing under the ordinary law in that sphere. Thus, the availability of sickness allowances under the relevant provisions of the

Health Insurance Act 1913 is dependent upon there having been at some time a contract of employment; the allowance itself may be analysed as a kind of substitute for the salary payable by the employer under the contract of employment; recognition of entitlement to receipt of the allowance means recognition of incapacity to work and hence inability to perform the contract of employment; the statutory scheme of insurance could be said to have some affinity with classic insurance in the private sector. In our opinion, however, none of these factors alters the essential public character of the relationship between the individual and the collectivity which lies at the heart of the claimed statutory entitlement.

6. Context, object and purpose

14. It must therefore be determined, in the context of the provision and in the light of the object and purpose of the Convention, whether this kind of entitlement, despite its essential public character, is included within the notion of "civil rights and obligations", within the meaning of Article 6 para. 1 (art. 6-1).

15. The object and purpose of the Convention as pursued in Article 6 para. 1 (art. 6-1) are, to some extent, discernible from the nature of the safeguards provided.

The judicialisation of dispute procedures, as guaranteed by Article 6 para. 1 (art. 6-1), is eminently appropriate in the realm of relations between individuals but not necessarily so in the administrative sphere, where organisational, social and economic considerations may legitimately warrant dispute procedures of a less judicial and formal kind. The present case is concerned with the operation of a collective statutory scheme for the allocation of public welfare. As examples of the special characteristics of such schemes, material to the issue of procedural safeguards, one might cite the large numbers of decisions to be taken, the medical aspects, the lack of resources or expertise of the persons affected, the need to balance the public interest for efficient administration against the private interest. Judicialisation of procedures for allocation of public welfare benefits would in many cases necessitate recourse by claimants to lawyers and medical experts and hence lead to an increase in expenses and the length of the proceedings.

The nature of the safeguards afforded thus tends to show that the object and purpose of Article 6 para. 1 (art. 6-1) do not go so far as to guarantee judicial control of the administration of statutory collective schemes for the distribution of public welfare.

16. We have not overlooked the fact that the overall object of the Convention is the humanitarian one of the protection of the individual and that, for the man or woman in the street, entitlement to social security

benefits is of extreme importance for his or her daily life. However, as the Delegate of the Commission submitted, the economic importance for Mrs. Feldbrugge's livelihood of the allowance claimed is insufficient, on its own, to bring into play the applicability of Article 6 para. 1 (art. 6-1) and its specific judicial guarantees. Of course, it is equally essential that in the administrative field justice should be done and the individual's claims should be investigated in a responsible and objective manner in accordance with the rules laid down, but that is not to say that all the various requirements of Article 6 para. 1 (art. 6-1) of the Convention are therefore applicable. Indeed, as pointed out above in the present opinion (at paragraph 15), there exist underlying considerations justifying special procedures in social welfare cases.

17. This being so, the juxtaposition of "civil" and "criminal" in the context of Article 6 para. 1 (art. 6-1) cannot reasonably be taken to be a comprehensive reference to all systems of adjudicative proceedings under domestic law. On this construction, the use of the adjective "civil" would not therefore imply the applicability of Article 6 para. 1 (art. 6-1) to disputes over all matters other than "criminal" even where, as in social security disputes, the outcome is crucial for the personal life of the individual concerned.

18. These considerations point to the conclusion that, in principle, the collective and public features of the statutory insurance scheme giving entitlement are so predominant as to take the rights and obligations in issue outside the "civil" domain, within the meaning of Article 6 para. 1 (art. 6-1).

7. Supplementary means of interpretation

19. The foregoing analysis is corroborated by the fact that the relevant legislation predates the elaboration of the Convention by some decades, and there existed similar legislation predating the Convention in many other of the Contracting States. It is therefore reasonable to assume that the intention of the drafters of Article 6 para. 1 (art. 6-1) was not to include such statutory schemes of collective social protection within its ambit. On examination, the drafting history confirms this reading of the text.

20. The adjective "civil" was added to the English version of Article 6 para. 1 (art. 6-1) in November 1950 on the day before the Convention was opened for signature, when a committee of experts examined the text of the Convention for the last time and "made a certain number of formal corrections and corrections of translations" (Collected Edition of the Travaux préparatoires of the European Convention on Human Rights, vol. VII, p. 12, para. 6). Whilst no specific explanation was given for the last-minute change to Article 6 para. 1 (art. 6-1), it is a fair inference that the reason was merely to align the English text more closely with the language

of the French text: prior to the change, although the French version had spoken, as now, of "droits et obligations de caractère civil", the English version had read "rights and obligations in a suit of law" (ibid., vol. V, p. 148).

These two expressions had first been introduced at a meeting (March 1950) of the Committee of Experts on Human Rights of the Council of Europe and were evidently taken directly from the equivalent Article of the then existing draft of the International Covenant on Civil and Political Rights of the United Nations (ibid., vol. II, p. 296; vol. III, pp. 30, 160, 284, 290, 316; vol. IV, p. 60). It is therefore relevant to trace their history in the travaux préparatoires of the International Covenant.

21. The crucial discussion on the draft International Covenant took place on 1 June 1949 during the fifth session of the United Nations Commission on Human Rights. The French and Egyptian delegations had presented an amendment that referred to "droits et obligations"/"rights and obligations", without qualification. The reaction of the Danish representative (Mr. Sørensen) to this amendment was reported as follows:

> "The representatives of France and Egypt proposed that everyone should have the right to have a tribunal determine his rights and obligations. Mr. Sørensen considered that that provision was much too broad in scope; it would tend to submit to judicial decision any action taken by administrative organs exercising discretionary power conferred on them by law. He appreciated that the individual should be ensured protection against any abuse of power by administrative organs but the question was extremely delicate and it was doubtful whether the Commission could settle it there and then. The study of the division of power between administrative and judicial organs could be undertaken later. ... Mr. Sørensen asked the representatives of France and Egypt whether the scope of the provision in question might be limited to indicate that only cases between individuals and not those between individuals and the State were intended." (summary record of the 109th meeting, doc. E/CN.4/SR.109, pp. 3-4) The French representative (Mr. Cassin), speaking in French, replied that "the Danish representative's statement had convinced him that it was very difficult to settle in that article all questions concerning the exercise of justice in the relationships between individuals and governments" (ibid., p. 9). He was therefore prepared to let the words "soit de ses droits et obligations" in the first sentence of the Franco-Egyptian amendment be replaced by the expression "soit des contestations sur ses droits et obligations de caractère civil" (rendered in the English version of the summary record as "or of his rights and obligations in a suit of law"). He agreed that the problem "had not been fully thrashed out and should be examined more thoroughly".

Later the same day, a drafting committee produced a text which contained the expressions "in a suit of law" in English and "de caractère civil" in French (doc. E/CN.4/286). The formula employed in this text is the one that was ultimately adopted for Article 14 of the International Covenant in 1966.

22. It thus seems reasonably clear that the intended effect of the insertion of the qualifying term "de caractère civil" in the French text of the

draft International Covenant was to exclude from the scope of the provision certain categories of disputes in the field of administration "concerning the exercise of justice in the relationships between individuals and governments".

8. State practice and evolutive interpretation

23. It is not the case that, since the entry into force of the Convention, State practice has developed to the point where the Contracting States can be said to treat entitlement to health benefits under statutory social security schemes as giving rise to "civil rights and obligations" for the purposes of Article 6 para. 1 (art. 6-1). Indeed, as noted above (see paragraph 10), no common ground can be identified in the legal systems of the Contracting States as to the "civil" or other character of such entitlement. In sum, there is no uniform European approach in this regard such as to run counter to the interpretation we have reached on the basis of the other foregoing considerations. On the contrary, the diversity of approach existing even today tends to show that whether judicial protection of the kind guaranteed by Article 6 para. 1 (art. 6-1) should be afforded to claims, such as Mrs. Feldbrugge's, for health benefits is a policy decision for the Contracting States to take in the light of the various merits and disadvantages involved, but it is not as such required by Article 6 para. 1 (art. 6-1) itself.

24. Neither does an evolutive interpretation of Article 6 para. 1 (art. 6-1) lead to a different conclusion. The Convention is selective in the protection it affords, as is shown by the recital in the Preamble wherein the signatory Governments expressed their underlying resolve to be "to take the first steps for the collective enforcement of certain of the rights stated in the [United Nations] Universal Declaration" of Human Rights (see the above-mentioned Golder judgment, Series A no. 18, p. 16, para. 34). An evolutive interpretation allows variable and changing concepts already contained in the Convention to be construed in the light of modern-day conditions (see, for example, the Tyrer judgment of 25 April 1978, Series A no. 26, pp. 15-16, para. 31; the above-mentioned Marckx judgment, Series A no. 31, pp. 19-20, para. 41; the Dudgeon judgment of 22 October 1981, Series A no. 45, pp. 23-24, para. 60), but it does not allow entirely new concepts or spheres of application to be introduced into the Convention: that is a legislative function that belongs to the member States of the Council of Europe. The desirability of affording proper safeguards for the adjudication of claims in the ever-increasing field of social security is evident. There are, however, limits to evolutive interpretation and the facts of the present case go beyond those limits as far as Article 6 para. 1 (art. 6-1) is concerned.

We do not find the considerable developments witnessed in the social welfare field since the elaboration of the Convention to be such as to alter

the essential character of the rights and obligations in issue in Mrs. Feldbrugge's case.

9. Conclusion

25. Having regard to the text of Article 6 para. 1 (art. 6-1), to its object and purpose and to its drafting history, the conclusion of principle which we draw is that there exist areas within the field of public administration subject to special institutional regimes, such as that relating to social security, under which the rights and obligations of the individual not of a private nature may justifiably, for various reasons (see paragraph 15 above), be determined by special procedures of adjustment rather than by tribunals complying with all the requirements of Article 6 para. 1 (art. 6-1). In our view, the guarantees of Article 6 para. 1 (art. 6-1) attaching to "contestations" (disputes) over "civil rights and obligations" do not apply to disputes within such areas unless, as stated in the Court's case-law (see paragraph 7 above), the outcome of the dispute is directly decisive for private rights.

In the light of all the various considerations set out above, we accordingly conclude that the proceedings brought by Mrs. Feldbrugge before the Appeals Board in Haarlem did not involve determination of her "civil rights and obligations", within the meaning of Article 6 para. 1 (art. 6-1); and that the judicial guarantees of this provision are therefore not applicable to the circumstances of the instant case.