**APPEAL OF SENTENCE IN PROTECTION ACTION**

**FILE 1437-2009**

**CONSTITUTIONAL COURT**: Guatemala, February 9, 2010.

 On appeal and considering the prior procedural instances of the case, the Court will examine the sentence handed down on March 19, 2009, by the Second Chamber of the Court of Appeals for Labor and Social Security, acting as a Protection Tribunal, in the constitutional action brought by the Public Defender for Human Rights on behalf of Maria Gabriela Garcia Fernandez, against the Board of Directors of the Institute of Social Security of Guatemala. The claimant is represented by attorney José Guillermo Rodríguez Arévalo.

**PROCEDURAL HISTORY**

**I. THE PROTECTION ACTION**

**A) Presentation and jurisdiction:** Presented on December 5, 2008, before the Center for Auxiliary Services of Judicial Administration, and later remitted to the Second Chamber of the Court of Appeals for Labor and Social Security. **B) Act giving rise to the protection action:** The certain and determined threat to suspend medical treatment to Maria Gabriela Garcia Fernandez, who, since the age of six, has suffered from juvenile diabetes myelitis, and as of six years ago, from chronic kidney failure. **C) Violation alleged:** the aforementioned patient’s rights to life, physical integrity, health and social security. **D) Facts underlying the protection action:** The claimant’s argument is summarized as follows: **D.1) Occurrence of the act complained of: a)** Since the age of six, Maria Gabriela Garcia Fernandez has suffered from juvenile diabetes myelitis, and as of six years ago (since 2002), from chronic kidney failure. Her condition is terminal, chronic, progressive, degenerative and incapacitating, and requires treatment by hemodialysis three times a week for sessions lasting four hours. If the patient does not receive this treatment, she would be at risk of losing her life at any moment; **b)** the claimant has been affiliated with the Guatemalan Institute of Social Security since 2000, at which time she entered into an individual employment contract with the company Sacos Multipliegos y Cartones, Sociedad Anonima, which is still in existence, although it has been owned by different entities (Equipos y Materiales de Construccion, Sociedad Anonima; Andamios Eco, Sociedad Anonima; and most recently, Rafael Landivar University), but in each case the company has complied with its relevant obligations in respect of its employees, without interruption; **c)** as a result of her condition and as an affiliate of the Institute of Social Security, Maria Gabriela Garcia Fernandez sought the medical services of a nephrologist from the Institute of Social Security of Guatemala, and, later, was admitted for treatment at the hemodialysis unit of the City Hospital of Napoles, as of October 2005; and **d)** surprisingly to the patient, and without a personal notification to her (given that, as per the Institute of Social Security of Guatemala’s record of the notification, it was sent on September 9 of the same year to an address that was no longer listed as the patient’s address, which the Administration’s files also note, as the address was changed during the reissuance of identification that took place in 2007), when she arrived at the aforementioned hospital for her hemodialysis treatment on November 28, 2008, she was informed that it had been internally communicated to the hospital, by letter directed to the Chief of the Out-Patient Treatment Unit of the Institute of Social Security of Guatemala, that her course of treatment had been concluded, as she was no longer an affiliate of the Institute of Social Security; this is the act giving rise to her claim. **D.2) Damages caused as a result of the act complained of:** the claimant alleges that her rights were violated due to the direct and imminent to her right to life caused by the respondent authority’s failure to provide her with appropriate medical treatment for the conditions she suffers from, which puts her at risk losing her life and of suffering irreparable damage to her health. **D.3) Petition:** the claimant requests that the respondent authority be ordered to guarantee medical treatment to Maria Gabriela Garcia Fernandez for the conditions of juvenile diabetes myelitis and chronic kidney failure, as well as to provide her with medicine in the quantity and of the quality required in accordance with *lex artis*, until her full and complete recovery. **E) Use of resources:** none. **F) Applicable law:** The claimant cites to paragraphs a) and b) of Article 10 of the Law of the Protection Action, Personal Liberties and Constitutionality. **G) Laws violated:** The claimant cites to Articles 3, 51, 93, 94, 95 and 100 of the Political Constitution of the Republic of Guatemala, and to paragraphs a) and b) of Article 10 of the Law of the Protection Action, Personal Liberties and Constitutionality.

**II. PROCEDURE OF THE PROTECTION ACTION**

**A) Interim protective measures:** Granted. **B) Interested third parties:** Maria Gabriela Garcia Fernandez. **C) Respondent’s brief:** The respondent authority, through the Office of the Chief of the Out-Patient Treatment Unit, referring to a chronological report of Maria Gabriela Garcia Fernandez’s clinical treatment, gave a detailed account of the beneficiary’s medical situation, and in addition provided a list of examinations and medications that had been administered to her, noting that she had received hemodialysis treatments from the Special Nephrology Unit since December 2007, and that her treatment was ended because she was “not an affiliate of the Institute of Social Security,” in accordance with Resolution No. one thousand seven hundred and forty-eight – two thousand and eight. **D) Evidence: a)** a certified copy of Maria Gabriela Garcia Fernandez’s clinical file, **b)** uncertified copies of the following: **i)** the complaint presented by Cinthia Zulema Fernandez Roca, before the Office of the Public Defender for Human Rights, on December 1, 2008; **ii)** type A-1 residential identity card with numbernine hundred seventy-nine thousand and ten, issued by the Mayor of the Municipality of Guatemala, in the province of Guatemalato Maria Gabriela Garcia Fernandez; **iii)** social security card number two hundred seventy-eight million, two hundred fifty-one thousand, one hundred and twenty-nine, issued to Maria Gabriela Garcia Fernandez; **iv)** out-patient clinic card number SPS-forty-five, issued by the Autonomous Unit to Maria Gabriela Garcia Fernandez; **v)** invoices and receipts for payments made for employee contributions duly received by the Institute of Social Security of Guatemala by the companies Sacos Multipliegos y Cartones, Sociedad Anonima; Equipos y Materiales de Construccion, Sociedad Anonima; Andamios Eco, Sociedad Anonima; and Rafael Landivar University, respectively, for the period from March 2000 to October 2008; **d)** a medical certificate dated December 1, 2008, issued by the Out-Patient Treatment Unit of the Institute of Social Security of Guatemala; **e)** confirmation of Maria Gabriela Garcia Fernandez’s employment, issued by the Director of Human Resources of Rafael Landivar University, dated November 28, 2008; **f)** confirmation of Maria Gabriela Garcia Fernandez’s position, issued by the Director of Payroll of Rafael Landivar University, dated November 28, 2008; **g)** confirmation of Maria Gabriela Garcia Fernandez’s position and the amount of her salary, issued by the Director of Payroll of Rafael Landivar University, dated November 28, 2008; **h)** confirmation of Maria Gabriela Garcia Fernandez’s employment, issued by the General Manager and Legal Representative of Andamios Eco, Sociedad Anonima, dated December 1, 2008; **i)** confirmation of Maria Gabriela Garcia Fernandez’s employment, issued by the General Manager and Legal Representative of Equipos y Materiales de Construccion, Sociedad Anonima, dated December 1, 2008; **j)** confirmation of Maria Gabriela Garcia Fernandez’s employment, issued by the General Manager and Legal Representative of Sacos Multipliegos y Cartones, Sociedad Anonima, dated December 10, 2007; **E) Decision of the lower court:** The Second Chamber of the Court of Appeals for Labor and Social Security, acting as a Protection Tribunal, **found that:***“(…)Ms. Maria Gabriela Garcia Fernandez effectively demonstrated through the evidence in the record her affiliation with the Institute of Social Security of Guatemala, and its threat to withhold from the appropriate treatment for the condition from which she suffers, by failing to provide her with the appropriate medications and treatment. In accordance with the evidence on the record, the threat that the Institute of Social Security of Guatemala would withhold treatment from the claimant is clear, and the constitutional protection action can therefore proceed, as requested by the Office of the Public Defender for Human Rights. In protection proceedings, the Court is required to determine the payment of costs, although the losing party may be exempt from payment of costs if such party has acted in good faith. Given that the Institute of Social Security was acting to protect its own interests, by applying its internal regulations with no evidence of bad faith, the Guatemalan Institute of Social Security is exempt from the payment of costs.”***The Court therefore ordered:** *“…I)The protection action brought by the Public Defender for Human Rights in respect of the direct and imminent threat of the Guatemalan Institute of Social Security to suspend the provision of necessary medical treatment to Maria Gabriela Garcia Fernandez, is hereby granted. II. The Guatemalan Institute of Social Security is hereby ordered to take the necessary actions to ensure that Maria Gabriela Garcia Fernandez is able to fully enjoy her constitutional rights, guaranteeing her the appropriate medical treatment that corresponds to her condition, through the provision of the appropriate quantity and quality of essential medications and including the participation of relevant hospital employees or other personnel in providing her with such medical treatment as she may require due to her condition, with it being understood that this obligation includes the necessary medical assistance (consultations and hospitalizations, as the case may be), medical treatment (including medications and any equipment necessary for the administration thereof), and any other services tending to preserve her health and well-being, to be provided with the celerity that the circumstances merit. III): The respondent authority is not ordered to pay costs. So notified.”*

**III. APPEAL**

The respondent authority appealed.

**IV. ARGUMENTS BEFORE THE COURT.**

**A) The claimant** stated that the lower court’s decision on the protection action in question is in keeping with the law, given that Maria Gabriela Garcia Fernandez is an affiliate and a patient of the Guatemalan Institute of Social Security, and therefore the respondent authority’s actions, in refusing her appropriate medical treatment and medicines for the conditions from which she suffers, resulted in a direct and imminent threat to her right to life, and the failure to provide her with the aforementioned treatment exposes her to the risk of irreparable damage to her health and life. The claimant requests that the Court issue the corresponding resolution, and as a result that the lower court’s decision be upheld. **B) The respondent authority** stated that it disagreed with the lower court’s decision, given that during proceedings before the lower court, the respondent informed the court *a quo* that the protection action brought in favor of Maria Gabriela Garcia Fernandez does not comply with the constitutional principle of exhaustion, as the claimant did not challenge the resolution issued on June 23, 2008 (declaring her not affiliated with the social security administration), through the proper administrative channels and ordinary judicial instances, instead making undue and premature use of the extraordinary remedy of the protection action, for which reason the respondent requested that the proceedings in respect of the aforementioned action be suspended. In addition, the respondent alleges that there is no standing to bring the present action, given that the claimant brought its action against the Institute’s Board of Directors, and although it is true that the Board is the highest authority within the Institute, it does not have the executive powers reserved to the Management of the Institute, which, as per Article 15 of the Organic Law of the Guatemalan Institute of Social Security, Decree 295, is authorized to act as the Institute’s legal representative. **C) Maria Gabriela Garcia Fernandez, interested third party**, did not file a brief. **D) The Public Ombudsman** stated that it agreed with the lower court’s opinion regarding the granting of the protection action, given that, in effect, the respondent authority is clearly and imminently affecting the life of Maria Gabriela Garcia Fernandez, by withholding from her the treatment and medicines of the quality and quantity that she requires. The patient needs continuous hemodialysis in order to survive, as she has suffered from juvenile diabetes myelitis since the age of six, and, as of six years ago (2002), from chronic kidney failure. Given that her conditions are severe, she must be provided with immediate protection in order to ensure that she enjoys her constitutional rights, particularly those rights to life and health. The Ombudsman requested that the lower court’s decision be upheld, and as a result, that the protection action be definitely granted.

**WHEREAS**

**- I -**

 The protection action is a constitutional instrument designed to protect fundamental human rights, whether to ensure that such rights are enforced and respected, or to act as a remedy in the case of a threat of violation of such rights. The right to life is a fundamental right, and as such, it is subject to the State’s protection. Unless the protection action is illegitimate, the State has a duty to guarantee the right to life using all available methods at its disposal, in exercise of one of its primary functions.

 The protection action protects persons from threats of violations of their rights, or remedies such violations when they occur. There is no matter that is not susceptible to the safeguards of the protection action, and the action will always proceed when an authority’s acts, resolutions, provisions or laws imply a threat to or restriction or violation of those rights guaranteed by the Constitution and the law.

**- II -**

The Public Defender for Human Rights brings this protection action against the Guatemalan Institute of Social Security, indicating that the act complained of is the direct and imminent threat to suspend medical treatment to Maria Gabriela Garcia Fernandez, who has suffered since the age of six from juvenile diabetes myelitis, and, as of six years ago, from chronic kidney failure.

The claimant argues that the respondent authority has violated Maria Gabriela Garcia Fernandez’s rights, through its direct and imminent threat to her life, caused by its failure to provide her with appropriate medical treatment for the conditions from which she suffers, putting her at risk of her life and of suffering irreparable damage to her health. The decision to terminate her treatment in this irregular and arbitrary manner therefore violated her fundamental rights.

**- III -**

 From its analysis of the facts of the case, the Court observes that: **a)** Maria Gabriela Garcia Fernandez suffers from the aforementioned conditions, which require her to undergo hemodialysis three times a week, for four-hour sessions; **b)** her status as an affiliate of the Institute of Social Security, which she has enjoyed since 2000, was called into question and refuted by the Guatemalan Institute of Social Security, of which decision, according to the patient, she was only informed upon arriving at the City Hospital of Napoles, where she was informed that the hospital had received instructions not to treat her.

 This Court, in analyzing the facts of the case, notes that the respondent authority, by suspending the appropriate medical treatment for the conditions Maria Gabriela Garcia Fernandez suffers from, violated those rights invoked by the claimant, given that the position taken by the Deputy Office of Health Services, acting as the delegate of the General Manager and Chief of the Out-Patient Treatment Unit of the Guatemalan Institute of Social Security, in dictating its resolution—which the patient was not given personal notice of—on June 23, 2008, declared the patient not to be affiliated with the Social Security Administration, and, as a result, she was denied coverage for those protective programs that the Institute provides to its affiliates and beneficiaries in good standing, putting her at risk of losing her life at any time.

This Court, in respect of the rights that have been infringed by the decision previously mentioned, considers that a person’s health is fundamental, given that it arises from the right to life, which is the most elemental and fundamental of all human rights, and the right from which all other human rights derive. In this respect, the Court feels it relevant to mention such international law standards as, among others, Article 12 of the International Convention on Economic, Social and Cultural Rights, and Article XI of the American Declaration on the Rights and Duties of Man. However, apart from the protection that is provided at the international level of human rights law, the proper implementation of these rights includes a person’s actual ability to receive timely and effective medical treatment simply for the fact of being human, a right that includes the prevention of illness and treatment and rehabilitation through the provision of hospital services or medical attention, all with the objective of preserving the life of the person who is ill. The objective is to make the right to health a positive obligation of the State to protect all persons and to guarantee their lives and their comprehensive development, in accordance with Articles 1, 2 and 93 of the Political Constitution of the Republic of Guatemala. Article 94 of the Constitution refers to the State’s obligation to protect the health of and to provide social assistance for all of its inhabitants, and to implement these rights through institutions—which include the Guatemalan Institute of Social Security—which are responsible for taking actions designed to prevent illness and to provide for the recovery and rehabilitation of those who are ill, in order to provide the nation’s inhabitants with the most complete physical, mental and social well-being. This State obligation is implemented, in the case of workers in the private and public sectors, through the Institute of Social Security, established by Article 100 of the Constitution, and whose fundamental purpose is to provide hospital and medical services intended to protect or recover the health of its affiliates and beneficiaries, from the moment of their diagnoses through the application of the treatment required for recovery. Therefore, the role in society that the Institute of Social Security plays in order to preserve and maintain the population’s health is undeniable and unquestionable, with the objective of protecting the health and safety of all persons and guaranteeing the effective enjoyment of all persons’ right to life. This Court, in a sentence handed down on September 27, 2000 (Case File 459-2000), considered that: “*The right to life is fundamental, and, as such, is subject to State’s protection. Unless the claim brought in this respect is found to be illegitimate, the State has the responsibility to guarantee such right, making use of all measures at its disposal, and this is one of the primary responsibilities of the State*.”

 Furthermore, in respect of the condition of the patient requesting medical assistance from the Guatemalan Institute of Social Security, it should be noted that the former argues that she is an affiliate of the Institute of Social Security, and the latter denies it, which makes it relevant to refer to the law that governs this question. In Article 11 of Agreement 97 of the Board of Directors of the Guatemalan Institute of Social Security, “*affiliate*” is defined as “*an employee whose employer is registered formally with the Institute of Social Security*,” and, in this respect, in accordance with Agreement 410 of the aforementioned Board of Directors, the Institute of Social Security will therefore protect such person from illness, and will provide to such person medical assistance, in the out-patient facilities and hospitals of the aforementioned Institute. The system in question is administered by the Guatemalan Institute of Social Security, as per Decree 295 of the Congress of the Republic (Organic Law) and such corresponding regulations as issued in respect thereof. The aforementioned law provides that the aforementioned Institute must provide protection from common illnesses (Articles 28, paragraph c), and 31); that the Institution shall have a tripartite financing system, of which one component shall be the payments contributed by employed persons (Article 39); that the Institute must monitor the population’s health, which task to be carried out by inspections or social visits intended to monitor compliance with this requirement (Article 50); the management of the Institute has the exclusive authority to rule on appeals of its resolutions, as brought before the Board of Directors, and to defend such resolutions before the Courts for Labor and Social Security (Article 52); and all powers relative to order penalties and sanctions as a result of any infraction of the Institute’s governing law and regulations (Articles 53, 54, 56 and 57).

 It is relevant to note that the respondent authority does not object in any way to the registration of the patient’s employer, nor does it complain that the patient’s sponsoring employer was remiss in its payments or that any of the monthly payments remitted thereby to the Guatemalan Institute of Social Security was refused for any reason. On the contrary, the Guatemalan Institute of Social Security based its decision to declare that the patient in question was not its affiliate, and a result, to suspend the medical treatment that it was providing to her, on the fact that, according to a report from personnel of the Division of Inspections, it was established that Maria Gabriela Garcia Fernandez does not supply material and/or intellectual services in respect of a contract or other employment arrangement with the entity Equipos y Materiales de Construcciones, Sociedad Anonima. The Court questions this decision, given that the photocopies—which were uncontested—of the receipts presented by the employer—and logged into the record of the proceedings as evidence—name the patient in question as an employee.

 This Court, as the highest authority on those rights established by the Constitution, believes that coverage for medical services cannot be suspended based on the issuance of an (administrative) decision that is subject to appeal, given that this could lead to the State’s failure to comply with its primordial responsibilities—among these, the preservation of the life of its inhabitants. Given that in the present case, the Court does not consider that the patient had an adequate opportunity to defend herself, prior to the Institute’s declaration that she was not an affiliate thereof, the Institute should therefore first open proceedings to allow the affiliate to defend herself against such decision, including providing her with personal notice of the motivation for the review proceedings and the final decision resulting therefrom, and then the Institute of Social Security must provide for the Board of the Directors’ review of the decision of the aforementioned Deputy Office, and determine if the actions of the respondent authority were in keeping with the law. It is the responsibility of the aforementioned entity to resolve the administrative appeal, in accordance with Article 52 of the Organic Law governing the respondent authority. In the event that the decision of the Deputy Office of Health Services of the Guatemalan Institute of Social Security is confirmed, there still remains to the patient the possibility of bringing the matter before the Courts for Labor and Social Security, given that Article 52 of the law previously referred to provides for this possibility, as does Article 100, final paragraph, of the Constitution. That is, until there is a final and definitive judicial resolution of the case that is not susceptible to appeal before any legal body as permitted by law, the respondent authority cannot suspend Maria Gabriela Garcia Fernandez’ medical treatment.

 It is understood that when a controversy arises over whether or not a person is entitled to coverage, in cases such as the one at hand, the Guatemalan Institute of Social Security must proceed in the patient’s favor. If later it is determined in judicial proceedings that the person in question is not entitled to benefits for having failed to abide by the laws or regulations of the Institute of Social Security, nothing prevents the Guatemalan Institute of Social Security from, once the respective decision is final, from bringing a claim against such person for the costs the aforementioned Institute incurred in compliance with its obligations, in accordance with Article 54 of Decree 295 of the Congress of the Republic of Guatemala.

 The arguments set forth herein allow us to arrive at the conclusion that, as long as the situation of Maria Gabriela Garcia Fernandez as an affiliate of the Institute of Social Security has not been definitively established, she has the right to receive medical attention from the respondent authority. It is evident, as result of the conditions from which she suffers, that a denial of medical treatment to her would put her life at risk, and, given that the protection thereof must be the State’s primary concern, in accordance with the Political Constitution of the Republic of Guatemala, it is necessary to grant the constitutional protection action requested. It is not possible to deny the most fundamental right that the Constitution recognizes.

 The arguments set forth herein allow us to conclude that the protection action was correctly granted by the lower court, and therefore the decision under appeal is hereby confirmed, with the modifications as noted herein in respect of the scope of the constitutional protection available to the claimant.

**APPLICABLE LAW**

 Articles 93, 100, 265, 268, and 272, paragraph c), of the Political Constitution of the Republic of Guatemala, Articles 1, 2, 3, 4, 7, 8, 10, 11, 42, 43, 44, 45, 46, 47, 57, 149, 163, paragraph c), and 185, of the Law of the Protection Action, Personal Liberties and Constitutionality; and Article 17 of Agreement 4-89 of the Constitutional Court.

**THEREFORE**

The Constitutional Court, in base of the foregoing and the cited legal provisions, orders that: **I)** The appealed sentence is hereby **confirmed in respect of its Numeral I)**, with a modification in respect of the scope of the constitutional protection granted, in respect of the fact that, for purposes of the present decision, the respondent authority is ordered to, with the participation of the corresponding officials or employees, provide the necessary medical services required by Maria Gabriela Garcia Fernandez, who suffers from juvenile diabetes myelitis and chronic kidney failure, with it being understood that this obligation includes the necessary medical assistance (consultations and hospitalizations, as the case may be), medical treatment (including any medications that the aforementioned patient may require, the quality of which should be verified based on studies undertaken by professionals who are experts in their respective fields), and any other services tending to preserve her health and well-being, to be provided with the celerity that the circumstances merit. **II)** In order to determine whether Maria Gabriela Garcia Fernandez is its affiliate, the Guatemalan Institute of Social Security must initiate formal proceedings, in which the interested party shall be informed of the reasons for which her affiliation is under review, and personally notified of any decision in respect thereof. **III)** The Guatemalan Institute of Social Security is hereby ordered not to withhold the medical treatment required by its patient Maria Gabriela Garcia Fernandez, pending a final administrative, and, as the case may be, judicial, determination in respect of her case. In the case of the Institute’s failure to comply, it will be ordered to pay a fine in the amount of four thousand quetzals (Guatemalan currency), without prejudice to any other sanctions as applicable under the law. **IV)** So notified, case files to be returned to the lower court, with certification of the present decision.

**JUAN FRANCISCO FLORES JUÁREZ**

**CHIEF JUSTICE**

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| **ROBERTO MOLINA BARRETO****JUSTICE** | **ALEJANDRO MALDONADO AGUIRRE****JUSTICE** |
| **MARIO PÉREZ GUERRA****JUSTICE** | **GLADYS CHACÓN CORADO****JUSTICE** |

**AYLIN ORDOÑEZ REYNA**

**CLERK OF THE COURT**