



Case 393/2011

Decision No. 393/2011, 2nd Chamber of the Court of Civil Appeals, Montevideo, December 21, 2011.

Country: Uruguay

Region: Americas

Year: 2011

Court: Second Chamber of the Court of Civil Appeals [Tribunal de Apelaciones en lo Civil de Segundo Turno]

Health Topics: Chronic and noncommunicable diseases, Health systems and financing, Medicines

Human Rights: Right to health

Facts

This case was an appeal brought by the National Monetary Fund (â€œFNRâ€•, for its initials in Spanish) in a protection action before the Second Chamber of the Court of Civil Appeals. The action was brought against Resolution No. 67, which had found for the claimant, determining that coverage for the drug â€œNEXAVAR-DROGA SORAFENIBâ€•, should be provided to the patient until a decision was reached in respect of its inclusion on the Therapeutic Drug Roster for his case. The appellee argued that its decision to deny coverage for the drug was not manifestly unlawful, given that, although the medication was included in the Therapeutic Drug Roster, it was not included for the purposes for which the patient had requested it (the patient had liver cancer, and the drug was indicated for the treatment of renal cancer). Therefore there had been no unlawful action or omission by the FNR, which followed procedure.

Decision and Reasoning

The Court agreed with the lower court, which found that the FNRâ€™s decision not to cover a drug that was on the roster of medications but approved to treat renal, rather than liver, cancer, was "manifestly unlawful". It considered that the drug was approved to treat cancer and that all patients had the right, at the discretion of their doctors' technical and scientific judgment, to the treatment and medication that best benefited them.

Separately, the Court noted that the lower court's procedure for giving notice in this case had not followed the applicable law.

The Court therefore confirmed the lower court's decision to grant the protection action.

Decision Excerpts

â€œIt is indisputable that we must begin from a place of recognition of the fundamental right to the protection of human health; this protection must be put in place by the State, making use of all methods at its disposition and to the benefit of all persons; equal access for all persons to the necessary care in accordance with the health of each person, and particularly, the right to have access to necessary medicines, which form an essential part of the right to health.â€• (Translation page 2)

â€œEs indiscutible partir del reconocimiento de la existencia del derecho fundamental a la protecci3n de la salud de las personas; que  ste debe ser puesto en pr ctica por el Estado a trav s de todos los medios disponibles y en beneficio de todas las personas; que se debe garantizar el igual acceso de cada persona a los cuidados necesarios de acuerdo con su estado de salud y, particularmente, el derecho de acceso a los medicamentos necesarios forma parte esencial del derecho a la salud.â€• (Original page 4)

â€œAdministrative authoritiesâ€™ actions can be regulated in these cases [through the protection action]. If this not the case, we would have to ask ourselves what is the judiciaryâ€™s role, if we are unable to regulate administrative actions that affect the fundamental rights of citizens.â€• (Translation page 2)

â€œEs controlable el actuar de la administraci3n en estos casos, sino fuera as - cabr a preguntar separa qu 

estaríamos los jueces si no pudiéramos controlar actuaciones administrativas que afectan derechos fundamentales de los ciudadanos.â€• (Original, page 4)

â€œIn the case at hand, the respondent timely rejected the claimant's petition, despite the fact that the drug in question was listed in the FTM, because the drug was not specifically included as a treatment for liver cancer. In fact, Sorafenib is included in the list as an oncological medication, but as a treatment for renal cancer. Therefore, there is no argument whatsoever, as the respondent would have, that there is no manifest illegality, given that we are dealing with a medication that is covered by the FNR for the treatment of cancer, and which was rejected for a technicality.â€• (Translation, page 3)

â€œAhora bien en la especie la demandada rechaza la petici3n oportunamente presentada por el reclamante ,pese a estar en el FTM ,por no estar incluido espec3ficamente para el tratamiento para heparcinoma . En efecto en el listado de medicamentos surge que el Sorafenib esta incluido como medicamento oncol3gico pero indicado para el tratamiento del c3ncer de ri3n. Por consiguiente no puede hablarse en grado alguno como pretende la recurrente de la inexistencia de ilegitimidad manifiesta ya que se trata de un medicamento que se encuentra cubiertopor el FNR para enfermedad esoncol3gicas que es rechazado por motives formales .â€• (Original, page 5)

â€œWhen the treating physician, as in the case at hand, is of the opinion that the medicine that he or she prescribes is the best treatment and medicine for the patient, we are dealing with a technical and scientific decision that must be respected, and particularly in the case of a prescription for a medication authorized by the MSP (and included in the FTM), and which is also covered by the FNR.â€• (Translation, page 5)

â€œSi el m3dico tratante como sucede en autos, entiende que el mejor tratamiento y medicamento que debe tomar su paciente es el solicitado, se trata de una decisi3n t3cnica y cient3fica que debe respetarse m3xime cuando se trata de un medicamento que se encuentran autorizado por el MSP (incluido en el FTM) y que por cierto es cubierto por el FNR.â€• (Original, page 7)

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