

CONSTITUTIONAL JUDGMENT No. 687-2000-R

Subject: Constitutional *Amparo* [an extraordinary remedy that offers immediate protection against illegal acts and omissions of authorities or individuals that restrict, deny or threaten to restrict or deny fundamental rights and guarantees of the person, as recognised by the Constitution and laws]

Filed: 2000-01326-03-RAC

District: La Paz

Parties: Ana María Romero de Campero, Ombudsman, representing without mandate Rocio Mercadeo Zimmerman, against Guillermo Ceentas and Jaime Gallo, Minter for Health and Social Welfare and President of the National Health Fund respectively.

Place and Date: Sucre, July 14, 2000

Reporting Judge: Dr. Wilman Ruperto Bank Durán

ISSUE: In review, the Ruling (at 140 to 141) issued on June 21, 2000 by the Social and Administrative Chamber of the Superior Court of the First District of Law Paz, the background of which is on the court file, and;

CONSIDERING: As per the records (at 46 to 59) of the documents, issued on June 19, 2000, the complainant states that the present claim is filed on behalf of, though without mandate from, Rocio Mercado Zimmerman, who suffers from secondary chronic renal failure, for which she requires hemodialysis treatment to survive.

The complainant states that her client, as an affiliate of the National Health Fund, commenced a hemodialysis treatment course with this entity on June 6, 1995. This occurred after her client underwent an unsuccessful kidney transplant, during which the kidney was rejected and removed. Moreover, the Fund authorized the extension of the hemodialysis treatment until June 6, 1996. However, the patient only received the medical treatment until May 18, 1996 because she received a second kidney transplant that stabilized her health until March 9, 2000, the date at which she once again required hemodialysis. This situation prompted a request to the National Health Fund for compensation for the costs incurred since 1996, but, by Administrative Order no. 114 of April 4, 2000, the National Commission for Benefits dismissed the petition and arranged the transfer of the patient to a specialized centre of the Ministry of Health and Social Welfare. Meanwhile, the patient was receiving a course of hemodialysis treatment as a private patient.

It is stated that the Administrative Ruling No. 114 does not take into account the nature of the patient's situation as an active contributor to the social security system, nor that the treatment of hemodialysis is essential for her to stay alive and that she cannot cover the costs, and, finally, that her transfer to the Ministry for Health and Social Welfare is merely an administrative formality, intended to limit their

responsibility to provide the necessary treatment, thereby denying the right to a system of social security as well as the rights to health and life.

Counsel for the complainant stated that articles 16 of the Social Security Code, 39 and 40 of its Regulations and 11 of the D.L. no. 14643 of June 3, 1977, on which the ruling referred to is based, constitute a death sentence for patients whose livelihood requires medical benefits for a period in excess of the timeframe stipulated. Furthermore, it is stated that the constitutionally mandated rights of the patients with terminal diseases do not differ from the rights of those with other diseases and, consequently, the National Health Fund should include mechanisms for special assistance for those cases that comply with arts. 7 and 158 of the Constitution, in accordance with art. 1 of the Social Security Code.

Counsel for the complainant reiterates that Ruling no. 114, which establishes the system of formal referral to the Ministry for Health and Social Welfare, is known to be non-operational in practice, thereby flagrantly violating and threatening the rights to life, health and security of their client. Similarly, the Ministry of Health and Social Welfare is, upon incorporating the patient into a private patient category, as an insured party and social security contributor, violating her rights to social security (sic).

Counsel for the complainant affirms that, based on this background and in the absence of another means to enforce primary rights infringed by the respondent authority, the claim is commenced and, pending a declaration of admissibility, requests the reinstatement of the hemodialysis treatment in favour of Rocio Mercado Zimmerman under social security coverage, as well as the cancellation and refund of the costs of dialysis treatment that she incurred as a private patient.

CONSIDERING: That the process of the claim confirms with the Law, the public hearing will take place on June 21, 2000, as noted in the minutes (at 138 and 139), in which the complainant confirms the extent of the claim.

In turn the respondent, Aydé Vásquez Jiménez, as a Member of the National Commission of Benefits of the National Health Fund, proceeded to read the written report submitted (at 129 to 134). The report provides an account of the hemodialysis treatment received by the insured Rocío Mercado Zimmerman and states that the request for compensation for unused benefits was rejected, and she was transferred to the Ministry of Health and Social Welfare, in accordance with the Law, per Ruling No 114, thereby evading the Fund's lack of infrastructure, equipment and mechanisms for special assistance for particular cases, as it is an entity separate from the institution. It is further clarified that the patient is a fund contributor and her transfer to the Ministry is only with a reference about the chronic illness is chronic and not any other conditions that she could suffer, thereby enforcing her rights to medical attention. It is the respondent requested that, should the remedy be allowed, it be clearly indicated who is to cover the costs, as the Fund has no budget allocated for free medical

attention. In conclusion, the respondent stated that it has been shown that the entity represented has not violated any laws, nor has it restricted the rights of the patient.

In addition, counsel for the Ministry of Health and Social Welfare reported that, based on the Law of the Organisation of Executive Power No. 1788, the responsibility for the direct provision of the health services is that of the Department of Prefectures. Counsel clarifies that the National Health Fund is an autonomous entity and, while it is a division of the Ministry of Health and Social Welfare, it has autonomous administrative management that prevents the Ministry from interfering in technical aspects, and that because of these circumstances, the Ministry itself has at no time denied the provision of health services.

Upon conclusion of the hearing, the Court of *Amparo* passed the Ruling (at 140 to 141), which allowed the remedy on the grounds that the National Health Fund is obliged to give effect to the provisions contained in arts. 158 of the Political Constitution of the State, 1 of the Social Security Code and 1 of their Regulations, which enshrine the protection of life and health of the people above those laws contrary to the spirit of these provisions. Accordingly, the discontinuation of the medical treatment required by the insured amounts an infringement on the rights to life, health and social security. It is held that, in turn, the respondent Ministry, as the highest authority responsible for the protection of public health, by failing to provide the benefits to those to whom they are obligated to by constitutional mandate and the laws of the Republic are also deemed to have made the infringements detailed above.

CONSIDERING: The analysis of the facts of the case and the right of the complainant, the above is apparent:

1. That Rocío Beatriz Mercado Zimmerman suffers from chronic renal failure and requires hemodialysis treatment to survive, and as a contributor to the National Health Fund received services from that institution and was in receipt of and extension of the services for an additional 26 weeks, namely from December 5, 1995 to May 18, 1996, when she received a kidney transplant in 1996, after which she recovered her health resulting in the cessation of her rights to the pending health services.
2. That the National Commission for benefits of the National Health Fund passed Ruling No. 114 on April 4, 2000, dismissing the application for compensation of services in favour of the patient, and providing for her transfer to the specialized centre of the Ministry of Health and Social Welfare, pursuant to art. 11 of the D.L. 14643 of June 3, 1977.
3. That on May 18, 2000, the patient signed an undertaking with the administrator and the Director General of the Hospital Workers, to receive the hemodialysis treatment in a private capacity.

CONSIDERING:

That the right to life is the most important legal entitlement of those enshrined in the Constitution, and it heads the list of fundamental rights stipulated in art. 7. It is the right of every person to be and exist. Its essential characteristic is that it is the basis for the exercise of other rights, as life itself is the indispensable prerequisite to possessing rights and obligations. The right to life is an inalienable right of the person that the State is obligated to respect and protect. The State authority is constitutionally barred from doing anything that may destroy or weaken the essential content of this right, and must implement conditions to ensure full observance and complete compliance. Similarly, the right to health and security is also recognised, as per arts. 7- a)k) and 185 of the Constitution.

The protection of these rights, the medical care of policy-holders with chronic illnesses, is, in the first phase, the responsibility of the National Health Fund, within the timeframe established by art. 16 of the Social Security Code, and 39 and 40 of its regulations, and the continuation of the treatment is the responsibility of the Ministry of Health and Social Welfare, in accordance with art. 11 of the D.L. 14643.

From the provisions referred to, it can be inferred that the treatment of the chronically ill requires the provision of immediate and continuing medical attention, and should not be interrupted by paperwork and administrative decisions that ultimately determine the transfer of responsibility for the supply and cost of treatment that passes from one public entity to the other, such as the National Health Fund to the Ministry of Health and Social Welfare. The Ministry is responsible for the protection of public health, and should provide adequate medical care by means of other health centres where this is the appropriate course of action, and only in this case can the National Health Fund suspend the treatment, regardless of the effect of any discontinuity of the treatment on the life and health of the patient.

The Ministry of Health and Social Welfare have not implemented the appropriate centres for the provision of hospital care, medications and pharmaceuticals to the chronically ill nor have they assumed the cost of the treatments on their behalf, as stipulated by art. 11 of D.L.14643. Conversely, they have attempted to evade liability for the wrongful omission that violates the fundamental rights to life and health of the patient, as enshrined in the Constitution.

In the case of the authorities, it appears that the respondent institutions have committed acts and omissions that are illegal, and violate Ms Rocío Mercado Zimmerman's rights to health and life. These violations correspond to the order of the Constitutional Court to grant the complainant immediate and effective health protection, which provided that the respondent Ministry provide the appropriate medical attention by means of the Medical Health Fund or other qualified health centre.

That the Court of *Amparo*, having allowed the remedy in respect of the two respondent institutions, has fully understood art. 19 of the Political Constitution of the State as well as the facts and rules applicable to this case.

THEREFORE: The Constitutional Court, by virtue of the jurisdiction vested in it by arts. 19-IV, 120-7 by the Political Constitution of the State, and arts.94 and 102-V of the Law No. 1836, APPROVES the revised RULING.

No involvement by the dean René Baldivieso Guzmán because he is on annual leave.

Mag. Pablo Dermizaky Peredo Dr. Hugo de la Roche Navarro  
CHAIRMAN DEAN

Dr. Willman Ruperto Durán Ribera Dra. Elizabeth Iñiguez de Salinas  
MAGISTRATE MAGISTRATE