

CONSTITUTIONAL JUDGMENT 0026/2003-R

Sucre, January 8, 2003

Filed: 2002-05354-10-RAC

District: La Paz

Judge Reporting: Dra. Elizabeth Iñiguez de Salinas

In review of the judgement 406/2002 of October 7, 2002 (at 104 and 105 of the judgment), issued by the Second Civil Chamber of the Supreme Court in the Judicial District of La Paz, within the constitutional complaint filed by Ana Maria Romero de Campero, Ombudsman, representing N.N. (*) against Jorge Moereira Rojas, Nestor Burgoa Perez, President and General Auditor of the Supreme Court of Military Justice, Maximo Garcia Jaime Bonilla and Jaime Zambrana, General Manager and Manager of Health, respectively, of Military Social Security Corporation (COSSMIL), alleging infringements of the rights to life, health and social security.

1. BACKGROUND WITH LEGAL RELEVANCE

1.1 Contents of the appeal

1.1.1 Grounds for Appeal

In the lawsuit filed on October 3 2002 (at 68 to 78), the applicant alleged that N.N. (*) is a policyholder with COSSMIL and was diagnosed in October 1999 as a carrier of the human immunodeficiency virus (HIV) AIDS. For this reason, he received hospital medical treatment and pharmaceuticals from March 2000 until July 2002, which enabled him to stay alive. He received monthly medications administered by his treating physician, which covered 30 days of treatment and required the consumption of sixteen capsules per day. However, since September 2002, he has not been receiving the indicated treatment.

It is asserted that, per Resolution 020/00 of January 18, 2000, the COSSMIL Benefits Committee decided the merits of the application for the purchase of antiretroviral medications (AZT, DDI and Saquinavir) in favour of the patient, and by Resolution 129/2000 of November 8, provided for the extension of care, treatment and acquisition of these medications for a further 26 weeks. However, in response to a request for the provision of medical treatment and medications for an indefinite period, the Committee issued Resolution 023/2001 of April 17, declaring this to be supported by arts. 16 and 17 of the Social Security Code (CSS) and art. 14 of the Health Benefits Regulations. On appeal, the COSSMIL Supreme Board of Decisions overturned this decision and, by Resolution 123 of July 3, 2001 authorised the purchase of medications for a further thirty days. The appeal was upheld by the Supreme Tribunal of Military Justice, by means of the Supreme Order 005/2001 of November 26, 2001. Finally, the Manager of Health, in a memo dated September 3, 2002, informed the applicant that the request had been denied, thereby causing an interruption to the antiretroviral medication that the applicant requires in order to maintain his rights to life and health.

It is affirmed that the monthly cost of medication amounts to Bs7.383, a sum that significantly exceeds the salary earned by the applicant. This factor has not been

taken into account by the respondents, nor have they considered the medical reports indicating the critical state of the patient's health, or that the patient is an active contributor to the military pension scheme and has the right to receive compensation when his health is, like now, seriously affected. The defendants cannot rely on arts. 73 of DL 11901, which is known as Law of Military Social Security, 14 of the Health Benefits Regulation, that is derived from arts. 16 CSS and 39 of the rules. These rules constitute a death sentence for the policyholder or beneficiary that requires, in order to survive, a treatment for a longer period than specified.

I.1.2 Rights and guarantees allegedly violated

The applicant alleges that the rights to life, health and social security have been violated.

I.1.3 Authorities the subject of appeal and petition

According to the above, an *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] was issued against Jorge Moereira Rojas, Nestor Burgoa Perez, President and General Auditor of the Supreme Court of Military Justice, Maximo Garcia Jaime Bonilla and Jaime Zambrana, General Manager and Manager of Health of COSSMIL respectively, pending a ruling of admissibility and ordering the reinstatement of the provision of antiretroviral medication in favour of the applicant, to be covered by COSSMIL for the duration of his requirements.

I.2 Hearing and resolution by the Court in relation to the *amparo*.

On October 7, 2002, a public hearing was held, as noted at 102 and 103, in the presence of both parties.

I.2.1 Confirmation and expansion of appeal

Counsel for the applicant confirmed and reiterated the terms of the appeal.

I.2.2 Respondent's brief

In the written brief (at 83 to 86) the co-respondents Maximo Garcia Jaime Bonilla and Jaime Zambrana, General Manager and Manager of Health of COSSMIL respectively, stated the following: a) COSSMIL is a decentralised public entity that provides health cover to more than one hundred thousand people, whose benefits are funded by contributions from two sources: the active services, 10% of the monthly salary of the Armed Forces, and the passive services, 5% of the income of retirees; b) the Health Benefits Regulations are applied in accordance with the regulatory framework for all policyholders and beneficiaries, and it is not permitted to provide benefits outside of the regulatory rules, as this may otherwise create liability for public officials and force the agency to restrict the supply of pharmaceuticals, supplies and other rights to other policyholders, who also need healthcare and have the same rights as recognised by the constitution and general laws; c) the State, as the embodiment of public law, must set health policy for patients with catastrophic

illnesses like HIV/AIDS, similar to those of other countries like Uruguay, Argentina, Peru; d) since November 1999, when the illness was detected in the applicant, COSSMIL has provided the necessary care and treatment of the multidrug antiretroviral, until, in accordance with the rules and regulations of the Institute and the Social Security Code, they became unable to do so, and despite this, continued to supply the medications required; e) in a humanitarian act, on June 12, 2002, the COSSMIL Supreme Board of Decisions passed resolution 1298 by which, in an exceptional and one-off action, they resolved to pay 50% of the pension payments which were cancelled when the policy holder became unemployed; f) similarly, for humanitarian reasons, they continued to provide the medications until the middle of this year, despite this being technically, economically and juridically inappropriate, according to the stipulations in arts. 17 and 18 CSS, 72, 72, 74 of the DL 11901 of October 21 1974, 13 and 14 of the COSSMIL Health Benefits Regulations; g) the cost of the healthcare of a patient with HIV/AIDS is in excess of Bs8.000.0- per month, and in the present case, since October 1999 to date it has cost Bs250.000.-; h) the awards issued by the Constitutional Court referring to cases of hemodialysis were against the State, through the National Health Fund, as it financed this type of care for policyholders, unlike COSSMIL, that “does not receive a single Boliviano” from the National General Treasury. Counsel for the above respondents sought a dismissal of the appeal.

In turn, the counsel and attorney for Jorge Moreira Rojas stated that: a) after diagnosing the applicant as a carrier of HIV/AIDS, Resolution 020/00 provided for the purchase of the medications D4T, Stavudine, Saquinavir, Didanosina, that were administered to the policyholder; b) “unfortunately because of limitations of law and current economic conditions, the healthcare cannot be for an indefinite period as required in this case, namely treating the terminal sufferers of HIV/AIDS that is a product of sexual relations unless otherwise proved”, in recognition of the ruling of the Supreme Court of Military Justice, by Supreme Order 05/2001 confirming Resolution 1239 subject to the national laws of social security; c) according to art.184 of the “Law of Military Social Security”, the judgments handed down on appeal are irreversible. Counsel sought a declaration of invalidity of the constitutional *amparo*.

I.2.3 Resolution

Judgment 406/2002 of October 7 2002 (at 104 and 105), issued by the Second Civil Court of the Supreme Chamber of the Judicial District of La Paz, declared the appeal to be admissible, and that “the authorities must restore the supply of medications in favour of N.N. (*) by means of the Ombudsman”, with the assessment of damages once the matter has been returned by the Constitutional Court, on these grounds: 1) “while the appeal authority correctly applied the laws cited, including the regulations and provision of military insurance, you cannot ignore that the State Constitution (CPE) in art. 258 stipulates that: “The State has an obligation to defend humankind...’ a precept founded on the principle of solidarity and opportunity, related to art. 7 inc. and k) of the cited Constitution”; 2) as provided by art. 228 CPE, the Basic Law of the country applies in preference to its other laws, i.e., in preference to the Social Security Code and its regulations, so that “the willingness to discontinue with the administration of the medication will result in illegal acts that threaten the

fundamental right to life and health”; 3) stating that they will continue to supply the medications only 30 days more implied a failure of the right to life of the applicant.

II. CONCLUSIONS

Upon a proper review and examination of the background, the following conclusions are reached:

II.1 N.N. (*), a policyholder with COSSMIL, was diagnosed as infected with HIV (a virus of human immunodeficiency inducing AIDS) in October 1999, received multidrug antiretroviral treatment with Saquinavir, Didanosina, Stavudine, according to certificates at 10, 11 and 12.

II.2 The COSSMIL Benefits Committee on January 11, 2000 (at 19to21) issued Resolution 020/00, which stated that the request to purchase drugs AZT, DDI and Saquinavir for NN (*), “must comply with the provisions in art. 16 in accordance with art. 14 of the Rules of Benefits.” Resolution 129/2000 of November 8, 2000 (at 22 and 23), complemented the previous resolution, extending the healthcare and medical treatment of the applicant for a period of 26 weeks, and authorising the purchase of antiretroviral extravademecum pharmaceuticals, in accordance with the prescribed medical treatment.

II.3 According to Resolution 023/2001 of April 17 2001 (at 24 and 25), the COSSMIL Committee for Health Benefits dismissed the request for healthcare and purchase of medications made by the policyholder N.N (*), “in recognition of the provisions in art. 14 of the Health Benefits Regulations consistent with arts. 16 and 17 of the Social Security Code”.

II.4 The applicant filed an appeal claim against the cited Resolution, which was settled by the passage of Resolution 1239 of July 3 2001 (at 26 and 27) by the COSSMIL Honourable Supreme Board of Decisions. This Resolution reversed the Resolution appealed, authorising the General Manager of the entity to “purchase the medication for 30 days”.

II.5 N.N(*) lodged an appeal against the determination of the Supreme Board of Decisions (at 28), which was settled by the passage of the Supreme Order 005/2001 of November 26, 2001 (at 29) by the Plenary Social and Administrative Tribunal for Military Justice. This confirmed in its entirety that the Resolution the subject of appeal, “must remain uncompromised in all of its parts, in recognition of the provisions in art. 73 of DL 11901 and art. 14 of the Health Benefits Regulations.

II.6 On June 12, 2002 the COSSMIL Supreme Board of Decisions passed Resolution 1298 (at 94 and 95). Considering that the applicant, on May 13, 2002 appealed to the Board against the Resolution of the Commission of Benefits for Policyholders of 24 April 2002, the board should have known “it required an exceptional form of social security payments for the 15 years of service with the Armed Forces. This amount of money would serve to generate some income to allow his family a modest subsistence since given his positive diagnosis for HIV, they found it necessary to make loans . . . that they cannot honour . . . Accordingly, the board “reversed the appealed resolution and authorised a “one-time payment of 50% of the pension payment, in consideration

of his serious and deteriorating state of health and the economic contingency in his family”.

11.7 As the respondents argued at the hearing of the appeal, the applicant continued to receive the medications until mid this year, but on September 3 (at 30), he was referred to the statement GSL/2243/02 by which the COSSMIL Manager of Health communicated to him that his request for the administrations of antiretroviral medication was dismissed.

III. LEGAL GROUNDS OF JUDGMENT

The present *amparo* is raised by the Ombudsman alleging that COSSMIL, by means of its Health Benefits Committee, the Supreme Board of Decisions, and the Supreme Court of Military Justice, declared inadmissible the application for the applicant to continue with the course of antiretroviral medications, essential for the treatment of AIDS from which he is suffering, in violation of his rights to life, health and social security. This requires examination as to whether such extremes form a basis for the granting of protection that is provided by such an extraordinary measure.

III.1 In order to comprehend the issues raised, it is necessary to define certain concepts.

AIDS stands for Acquire Immune Deficiency Syndrome, a disease that is so far incurable, progressive and fatal, whose appearance and outbreak is explained below. The immune system is the body's defence system against foreign and harmful organisms. It consists of different groups of cells (lymphocytes), among which are CD4, which are the cells that direct the body's defence system, sending chemical signals to other lymphatic groups in order to exterminate the harmful agents (antigen).

The human immunodeficiency virus specifically attacks the CD4 cells, introducing its genetic code in them and forcing them to reproduce the virus, at the same time as destroying them. When the virus has managed to considerably destroy the immune system immunodeficiency occurs. It is acquired because it is not congenital, and it is said that is it not hereditary, although some are born with it because their mother is infected. The human immunodeficiency virus belongs to the family of lentiviruses, which means that it can remain dormant in the body during long periods, and can be activated when there are favourable conditions for it. However, HIV is never inactive, in that from its arrival in the body it starts to reproduce itself in the lymph nodes, causing the death of thousands of millions of cells each day.

When the immune system have been considerably weakened by HIV, what are known as opportunistic infections and cancers appear, so named because they taken advantage of the body's condition to attack and develop.

Antiretroviral medications stop viral replication and combat the manifestation of AIDS.

From the above it can be concluded that AIDS is a very serious illness that causes gradual and inexorable deterioration of the body that carries it. At this point there is no remedy in existence that guarantees the elimination of the virus in itself, although

medications are provided to those affected that aim to combat the ravages to different bodily systems. It is considered a “catastrophic” illness given the personal, family and economic consequences that it causes, as well as the irreparable damage to health, psychological problems suffered by the patient, the breakdown in employment, social and family relations and the high cost of treatment.

III.2 “The right to life, as proclaimed in SC 687.2000-R, 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”.

As stated by this Court in SC 411/2000-R, the right to life is the origin from which the other rights stem, so that its exercise cannot be hindered by bureaucratic procedures or subject to appeals, especially when the possessor of the right is at a serious risk of dying. For this reason, in addition to proclaiming the right, the Basic Law institutes mechanisms to protect the real and effective exercise of the right to life. Specifically, art. 158 requires the State to defend humankind, by protecting the health of the population, ensuring the continuity of livelihood and rehabilitation of disabled people, requiring as well that the State establish a “social security system” based on the principles of universality, solidarity, unity of management, economics, opportunity and effectiveness.

The right to health is the right by virtue of which individuals and social groups - specifically the family- as holders of this right, can demand, as taxpayers, that the organs of the State establish adequate conditions so that they can achieve an optimal state of physical, mental and social wellbeing, and ensure that these conditions are maintained. The right to health does not just mean the right to be free of disease, but also the right to an existence with quality of life.

In our legal system, the right to health is a fundamental right, that must be subject to even greater protection when it is linked to the primary right to health or human dignity, especially in the case of vulnerable members of the population, such as children, people with disabilities, seniors, and the terminally ill.

The right to social security as a constitutional right derives its fundamentality when it concerns persons with manifested disabilities in need of support to stay alive, including those suffering from chronic or incurable illnesses. Accordingly, when a public or private entity is responsible for providing social security and health services to a person in these situations, violations have severe consequences. It is because of the special protection required by these people that the right to social security is a fundamental right, because failure to observe this right endangers other fundamental rights, like right to life, human dignity, and physical integrity.

III.3 In the case under consideration COSSMIL and the Supreme Court of Military Justice have rejected the request by the applicant for the provision of antiretroviral medications that are urgently required in order to continue the treatment for AIDS. According to the medical certification (at 10 to 14), it is essential for the continuation of the said treatment, since the suspension of medications puts the patient at risk of

the development of opportunistic infections and in imminent danger of losing his life, as well as the possibility of developing a resistance to the treatment.

Accordingly, in refusing the request mentioned, the respondents are violating the rights to life, health and social security of N.N (*), since without the requested medications he is at serious risk of further deterioration of his health and risk of losing his life. The illegal act cannot be supported as being in accordance with provisions in articles 73 of DL 11901, which states that “the medical services will be granted for a maximum of 6 months for the same disease unless it is clinically proven that there is a chance of recovery, in which case the Benefits Commission may extend benefits for an additional 6 months. The period includes both outpatient and hospital care. The treatment of Tuberculosis may be extended by the Benefits Commission for an additional 6 months” – and 14 of the COSSMIL Health Benefits Regulations which states that “the health services for outpatient and hospital care, will have a duration of 26 weeks for the same illness in a period of 12 consecutive months. The extension of this term will only be considered by the Technical Health Committee where there is a report by a Board of Medical Services in which it is demonstrated that the patient has the possibility of making a recovery during the requested extension period” – as although these provisions extend the period for patients that have a possibility of recovery, in the case at hand it is not permissible to suspend the medical treatment of the applicant as he is a person with an incurable illness, and, as has been recognised by the COSSMIL Supreme Board of Decisions in Resolution 1298 of 12 July of this year, he is a person in a “serious and deteriorating state of health”, which determines the need to provide the protection sought.

In this sense, the Court has ruled in the favour of persons with chronic diseases that, as in this case, require expensive treatments in order to conserve life. (SSCC 411/2000-R, 433/2000-R, 530/2000-R, 687/2000-R, 1052/2001-R, 392/2002-R). Although AIDS is not a chronic disease, it is a disease that causes gradual deterioration of the organs of a person, and when they don't receive treatment, the cost of which is considerably high, they will not have to wait long for a fatal outcome. Accordingly, it is necessary to uphold the Constitutional order in order to safeguard this the provision in art. 158 CPE and give preference to this ahead of other laws.

III.4 Given that COSSMIL is part of the Bolivian System of Social Security, the financial liability attaching to first six months of the illness, with the possibility of a further six-month extension, is their responsibility. However, the State, by means of the Ministry of Health and Social Welfare, is obligated to continue the treatment after that period of time has lapsed, in accordance with the provisions of art. 11 of the D.L. 14643, as has been established by this Tribunal in the jurisprudence cited in the preceding paragraph.

It is logical that when, as a result of the disease, the patient is rendered unable to continue with his daily tasks, the respective instances of COSSMIL will evaluate the situation and will make a determination, if the case warrants it, for a declaration for disability, to which end they will award the amounts due, like other social security payments that the law stipulates is to be awarded to unemployed parties.

III.5 From the completed analysis, it can be concluded that the Court, having declared admissible the appeal, has correctly evaluated the rules and process applicable. However, the provision relating to the administration of the medications was made by the Ombudsman, which may result in some delay in the delivery so it is imperative to change that decision.

Also, it must be clarified that the cost of further benefits will be assumed by the State, through the Ministry of Health and Social Welfare.

Finally, given that there is no evidence of bad faith in the appeal, it is not necessary to qualify damages in favour of the applicant.

THEREFORE

The Constitutional Court, by virtue of the jurisdiction exercised by order of the arts. 19-IV, 120-7th) CPE, 7.8th and 102-V of the 1836 Act, the Constitutional Court by the following reasoning:

1. APPROVES the Judgement 406/2002 of October 7 2002, at 104 and 105, dictated by the Second Civil Chamber of the Superior Court in the Judicial District of La Paz, with the modification that the medications are to be administered to the patient directly, as COSSMIL had been doing before these services were suspended;
2. ORDERS THAT COSSMIL must continue to provide the benefits that the applicant requires, with the financial liability assumed by the Ministry of Health and Social Welfare;
3. OVERTURNS the decision of the Court of *amparo* with respect to the quantification of damages against the respondents.

Registered, reported and published in the Constitutional Gazette.

No involvement by the President Dr. René Baldivieso Guzman, as he was on annual leave.

Dr. Willman Ruperto Durán Ribera
ACTING CHAIRMAN

Dra. Elizabeth Iñiguez de Salinas
ACTING DEAN

Dr. Felipe Tredinnick Abasto
MAGISTRATE