

CONSTITUTIONAL JUDGMENT 1294/2004-R

Sucre, August 12th, 2004

File: 2004-09190-19-RAC

District: La Paz

Court Reporter: Dr. Willman Ruperto Durán Ribera

Reviewing Resolution 268/2004 of May 28th, from pages 111 to 112 reverse side, decided by the Third Civil Division of the Superior Court of the Judicial District of La Paz, in the complaint of constitutional “amparo” initiated by Waldo Albarracín Sánchez in representation of Alejandro Cuba Plaza against Fernando Antezana Aranibar, Minister of Health and Sports, Carmen Ovando Polo, Director of the Clinical Hospital, Víctor Barrios, Director of the Obrero Hospital, Fernando Aguirre, José Carlos Romero, Milán Ugrinovic, René Córdova, Aydee Vásquez and Jorge Palacios, President, Secretary, and members of the National Commission on Benefits of the National Health Treasury (“CNS”), alleging violation of the rights to life, to health, to legal certainty, and to social security, proclaimed in article 7 paragraphs a) and k) of the National Political Constitution (“CPE”).

I. FINDINGS OF LEGAL RELEVANCE

I.1. Contents of the petition

I.1.1. Facts leading to the petition

From the complaint presented May 25th, 2004, petitioner asserts that his principal, affiliated with “CNS” by way of free medical insurance for the elderly, was diagnosed with terminal chronic kidney failure, for which he was interned in February 2003 in Obrero Hospital “Number” 1 of La Paz to receive hemodialysis sessions in the specialized Ward of that hospital, having to date completed fifty two weeks of medical attention for terminal patients, provided in articles 16 and 17 of the Social Security Code (“CSS”). On April 12th, 2004, the National Commission on Benefits of the CNS ordered respondent Director of the Obrero Hospital to transfer the principal over to the specialized services at the Ministry of Health and Social Prevention as provided by article 11 of the Legal Decree (DL) 14643 and the Ministerial Resolution (RM) 0030/2004, of February 4th; said order was carried out by notice 70/04 of April 26th, 2004, for which the principal was transferred to the hemodialysis services at the Clinical Hospital, undergoing one last session on April 28th, 2004, CNS denying future treatments.

On May 6th, 2004, the principal presented himself at the Clinical Hospital and its director- now respondent-, rejected the possibility of treating him for insufficient facilities to provide the mentioned treatment by reason of a machine being out of order and the existence of other affected patients. As a result of that interruption in his treatment, the principal finds himself in a depressed renal state and by cause of his economic situation cannot access other hemodialysis services in private hospital facilities and cover the costs of necessary medications. Due to these limitations, the principal and family are making the effort to obtain the necessary means for a kidney transplant, requiring two weekly hemodialysis sessions to maintain his life.

Additionally, the principal by notice on May 17th, 2004 requested to respondent Director of Obrero Hospital that he provide him with a certification of the state of his health, which was rejected for the reason that he was not a patient of said hospital.

By transmitting the notice of April 12th, 2004, the National Commission on Benefits of the CNS justified itself in RM 0030/2004, which while it permits the transfer of patients from CNS to the Ministry of Health and Sports, the same had to comply with the condition of guaranteeing the continuation and effectiveness of the hemodialysis services for the patient, which did not occur in the case at bar, therefore said transfer did not consider the impossibility of the Ministry of Health and Sports to provide continuous and effective attention to the patient, limiting itself to declining all responsibility for the required treatment, denying the right to life of the patient, who never ceased to be insured under the social security system and therefore has a right to receive the necessary treatment for his health.

Additionally, the Ministry of Health and Sports also is responsible for emitting RM 0030/2004 and not complying with its obligations for conduct and for outcome therein provided, such as coordination with CNS in the transfer of patients and effective and continuous provision of hemodialysis services.

Finally, he indicates that the situation of his principal is critical because of the physical effects resulting from the suspension of the provision of the only existing procedure to maintain his life, justified by administrative and financial problems put before the necessity of the treatment and before the life of his principal, therefore considering the necessity to reestablish the medical attention for his principal under the CNS insurance coverage as long as there is no possibility that the specialized services of the Ministry of Health and Sports can provide effective and continuous treatment, he presents the complaint at bar.

I.1.2. Rights and guarantees allegedly violated

He alleges the violation of his principal's rights to life, to health, to legal certainty, and to social security, provided in article 7 paragraphs a) and k) of the CPE.

I.1.3. Authorities resorted to and relief sought

In accordance with the foregoing, he lodges a constitutional "amparo" petition against Fernando Antezana Aranibar, Minister of Health and Sports, Carmen Ovando Polo, Director of the Clinical Hospital, Víctor Barrios, Director of Obrero Hospital, Fernando Aguirre, José Carlos Romero, Milán Ugrinovic, René Córdova, Aydee Vásquez y Jorge Palacios, President, Secretary and Members of the National Commission on Benefits of the CNS, entreating it be declared admissible, therefore be ordered the reestablishment of the medical treatments of hemodialysis in favor of his principal under the social security coverage of the CNS and the Ministry of Health and Sports be ordered to establish the mechanism of coordination with same entity to assure the effective treatment of his principal.

I.2. Public Hearing and Resolution of the Court of constitutional "amparo"

Holding the hearing May 28th, 2004, without the presence of the representative of the Public Ministry, as recorded in the act from pages 103 to 110, the following findings were made:

I.2.1. Ratification and expansion of the petition

Petitioner ratified his complaint and amplified it indicating that his principal went thirty three days without the hemodialysis sessions, receiving one session as a result of the emergency measure put forth by the “amparo” Court.

I.2.2. Brief by the respondent authorities

The representative of the Ministry of Health and Sports reported that to ensure the integrity of human life the Ministerial Resolution of May 12th, 2004 was emitted, for which reason it did not violate article 7 paragraphs a) and k) of the CPE.

The respondent, Director General of Obrero Hospital “No.” 1, Victor Barrios Meave, through written report on p. 62 and reverse side, indicated that the principal suffering from chronic terminal kidney failure began the hemodialysis treatment March 6th 2003 and completed the fifty two weeks on March 6th 2004. Observing the instructions of the National Commission on Benefits according to notice 303/04 from February 17th, on April 26th, 2004, it proceeded to transfer the patient to the Clinical Hospital of La Paz in accordance with articles 16 of the CSS and 39 of its Regulations; it being inexplicable that the patient has been referred to a private clinic for new tests.

He affirmed that after the transfer the responsibility for the effectiveness and continuation of the hemodialysis sessions corresponded to SEDES La Paz, considering that Obrero Hospital even extended the services to February 1, 2004, per RM 0030/2004, of February 4th 2004, therefore it requested that the petition be dismissed.

At the public hearing he clarified that the principal of the petitioner is not directly affiliated with the National Health System, but rather is the beneficiary of the Health Insurance for the Elderly, therefore at no time was he discriminated against; furthermore there exist affiliates and insureds who have contributed all of their labor and suffer from the same illness and find themselves waiting for treatment, which would suffice for treatment to extend all day long.

He added that the Hospital as an autarkic institution receives from the National Commission on Benefits instructions that it must meet as an administrative responsibility, and that the Ministry of Health has other systems under its rule, therefore the problem should be resolved through another type of policy that permits providing the required treatment.

The co-defendant Director of the Clinical Hospital Carmen Ovando Polo, through written report from p. 83, indicated that when the principal of the petitioner presented himself at the Hospital, he was informed that there was no possibility of providing to him the treatment that he required because the hemodialysis equipment was not working, for which reason he should go to CNS to get Obrero Hospital to provide said treatment in observance of RM 0030/2004 that says that patient transfer should be gradual and assure the effective provision of medical attention. She

added that the Clinical Hospital operates to preserve the right to health and assistance that each person has, providing medical and hospital attention to an important societal contingent. She added that the hemodialysis treatment requires specialized equipment, such that the state of disrepair of one of its machines does not constitute a simple technical excuse but rather a real and legitimate reason; consequently, it did not violate any right or constitutional guarantee, nor did it violate the CSS regulations, nor did it ignore the RA “No.” 300/2004 of January 17th, 2004, requesting in short that the petition be dismissed.

Aydee C. Vásquez Jiménez, José Carlos Romero Vera, members of the National Commission on Benefits, per report on pages 89 to 91, expressed that the principal of the petitioner is affiliated with the Free Health Insurance for the Elderly, and was given the treatments for terminal chronic kidney failure for the time established in article 16 of the CSS. In compliance with articles 11 of DL 14643 and 16 of the CSS, the CNS decided to transfer the patient to the Ministry of Health and Sports after having provided him with medical attention for 52 weeks, and effective and timely transfer was carried out April 26th, 2004, as indicated by the SSCC 411/2000-R of April 28th, 2000 and 687/2000-R of July 14th.

Additionally, it mentioned that before constant constitutional “amparo” petitions brought by the Public Defender, the Ministry of Health and Social Welfare put out RM 0578 of November 1st 2000 that authorized the CNS to provide hemodialysis services to active and inactive insureds that have completed fifty two weeks of treatment, which costs would be absorbed by the Ministry of Health and Social Welfare, notwithstanding which when CNS requested payment for these services, the Ministry of Health overrode that Resolution for number 0013 of January 6th 2003, arguing that there was no budgetary allowance for payment for these services, leaving neglected the patients that required those services, given that the Ministry knowing the Constitutional Judgment of the 1998 administration had to foresee the budget and corresponding allocation for the payments to CNS and budget an allocation for implementing the hemodialysis service. Notwithstanding, the Ministry of Health by Resolution 0010/03, of January 17th 2003 made a free transfer of hemodialysis equipment to other hospitals when those could have been used in the Clinical Hospital, for which reason the Ministry cannot allege lack of capacity to treat these patients, since it can order the treatment in those hospitals that received the equipment transfer.

Facing threats from patients, the Ministry of Health published RM 0030/2004, admitting again the gradual transfer to the Ministry of insured and beneficiaries who had completed the fifty two weeks of medical treatment in CNS, ensuring the effective provision of hemodialysis sessions. It is in fulfillment of that Resolution that seven patients were transferred, among them the principal of the petitioner, who currently are being treated in the Clinical Hospital of La Paz, institution that while accepting the transfer refuses to provide the respective treatment.

Finally it added that the CNS does not have the capacity to continue treating the patients who received the fifty two weeks of treatment, and it is making efforts to do so including improvising inadequate timetables. For the forgoing, they solicited the dismissal of the complaint with respect to the members of the Benefits Commission of the National System and require the Ministry of Health and Sports to ensure the effective and continuous treatment to the principal of the petitioner.

I.2.3. Resolution

The Resolution 268/2004, of May 28th, from pages 111 to 112 reverse side, declared admissible the petition without costs for being excusable, therefore, it ordered the immediate reposition of the medical attention of the principal of the petitioner in his hemodialysis treatment in the Obrero Hospital “No.” 1 or the Clinical Hospital, for the following reasons:

- a) The Obrero “No.” 1 and the Clinical Hospitals, denied unlawfully attention to the principal of the petitioner to consecutive and permanent hemodialysis treatment required in twice weekly sessions as he suffers with terminal chronic kidney failure.
- b) The suspension of treatment originated in the instructions from the National Commission on Benefits of the National Health System through a notice directed to the Director General of Obrero Hospital.
- c) As a consequence of the interruption of treatment, the principal of the petitioner is in a weakened renal state, and for his economic condition cannot pay for a private treatment.
- d) The attitude of the leadership at Obrero Hospital and Clinical Hospital and members of the National Commission on Benefits of the National Health System contravenes articles 7 paragraphs a) and k), 158 of the CPE, 1, 14, 20, and 33 of the CSS, 33 of their Regulations and 6 of the Civil Code (“CC”), rules that establish the framework of protection of the right to life and to health of persons.

II. CONCLUSIONS

That, after the analysis of findings, the following conclusions are established:

II.1. The principal of the petitioner, is on a program of thrice-weekly hemodialysis as he suffers with terminal chronic kidney failure (p. 3), having begun hemodialysis service on March 6th, 2003 completing the fifty two weeks on March 6th, 2004 (p. 79).

II.2. By notice on April 12th, 2004, the respondent secretary of the National Commission on Benefits, reiterated the content of the notice 303/2004 (p. 72), that as indicated by the petitioner- and not distorted by the respondent- ordered the transfer of the patient to the specialized services of the Ministry of Health and Social Welfare (p. 42).

III.3. On April 26th, 2004, the respondent Director General of Obrero Hospital “No.” 1 and other functionaries of that hospital communicated to the Director of the Clinical Hospital the transfer of the principal of the petitioner, arguing his having completed fifty two weeks of treatment, according to articles 16 of the CSS and 39 of the Regulation and according to the order emitted from the Commission on Benefits of April 12th, 2004 (p. 10).

II.4. On May 11th, 2004, the respondent Director of the Clinical Hospital communicated to respondent Director General of Obrero Hospital “No.” 1 the impossibility of providing the

hemodialysis service to the principal of the petitioner, for problems with one of its machines to the detriment of various patients (p. 9). A similar explanation was given to the petitioner (p. 6).

II.5. In the clinical and laboratory exam on May 3rd, 2004, the principal of petitioner demonstrated terminal chronic kidney failure in weakened renal state, caused by the suspension of hemodialysis sessions since April 28th, 2004, requiring said treatment urgently (p. 5).

II.6. By notice on May 17th, 2004, the principal of petitioner solicited to respondent Director of the Obrero Hospital an extension of “epicrisis form,” notice that was received (p. 7), but to which there is no reply.

III. LEGAL FINDINGS OF THE MATTER

The petitioner maintains that the respondent authorities violated the rights of his principal to life, health, legal certainty, and social security; given that a) the National Commission on Benefits ordered his transfer to the specialized services of the Ministry of Health and Social Welfare, b) the Director of Obrero Hospital carried out said order and denied him a certification with the argument that he was not a patient of the hospital, c) the Director of the Clinical Hospital denied him the possibility of treatment for not having sufficient capacity to perform the required treatment; d) the Ministry of Health did not coordinate with the CNS the transfer of patients who needed hemodialysis services. Therefore, it is necessary to analyze whether the denounced actions are within the framework protection provided by article 19 of the CPE.

III.1. This Court with respect to persons affected by chronic illnesses needing periodic hemodialysis treatment, has indicated that the National Health System is obligated to give preferred application to that contained in articles 158 of the CPE, 1 of the CSS, 1 of its Rules, and 1 of the San Jose Pact, that establish the protection of the life and health of persons, before any other rules that may be contrary to the spirit of those announced; understanding assumed in the SSCC 433/2000-R and 530/2000-R.

Furthermore, it indicated that the right to life is the most important legal right of all those that the constitutional order establishes; for it is the highest of the catalogue of the fundamental rights provided in article 7 of the CPE. It is the right of every person to being and existence, its essential character being the basis for exercising all other rights. Life itself is the indispensable prerequisite for the existence of the other titular rights and obligations. It is an inalienable right of the person that obligates the State in two ways: respect of it and protection of it. The state authority is constitutionally impeded from doing anything that destroys or weakens the essential content of those rights, having to create the indispensable conditions so that they have worthy observance and full compliance. The rights to health and to social security contained in articles 7 paragraphs a) and k) and 185 of the Constitution are likewise recognized in the same manner.

In protecting these rights, the treatment for insureds with chronic illness, in the first instance, is charged to the CNS, within the periods established by article 16 of the CSS, 39 and 40 of its Regulation, corresponding to the Ministry of Health and Social Welfare the continuation of the treatment according to article 11 of the DL 14643.

That from the dispositions signaled, it is inferred that the treatment of the chronically ill supposes an attention that shall be provided in immediate and continuous form, not to be interrupted by administrative processes and resolutions, that in essence determine only the transfer of responsibility for the provision and cost of treatment, that passes from one State entity to another, such as from the National Health System to the Ministry of Health and Social Welfare; responsible for the protection of the health of persons, said Ministry having the obligation to provide the adequate medical attention through other health centers, if it found that convenient, and only in that case could the National Health System suspend treatment; every interruption in treatment having the affect of an affront to the life and the health of the patient.

The Ministry of Health and Social Welfare by not putting in place the appropriate centers to provide hospitalization, medical treatment, and pharmaceutical treatment to the chronically ill nor absorbing the cost of those treatments in their absence, as article 11 of the D.L. 14643 provides; and, on the contrary, pretending to evade that responsibility, has incurred in an unlawful omission that attacks the fundamental rights of life and of health of the patient guaranteed in the Constitution.

Criteria contained in the SSSC 687/2000-R, 1052/2001-R and 392/2002-R.

III.2. In the complaint presented the principal of the petitioner suffers from terminal chronic kidney failure, requiring hemodialysis sessions, and having completed the fifty two weeks of medical attention, on February 17th, 2004, the National Commission on Benefits ordered his transfer to the specialized services of the Ministry of Health and Social Welfare, which order was carried out by respondent, Director General of the Obrero Hospital “No.” 1 of La Paz, notwithstanding on May 11th, 2004, respondent, Director of the Clinical Hospital, refused the treatment required by the principal of the petitioner alleging mechanical limitations, which supposes that if the transfer has a legal basis, the respondent had to comply with the condition of assuring the continuity and effectiveness of the hemodialysis services for the principal of the petitioner, which did not happen in the case at bar, and as a consequence of the interruption in treatment, his health moved into a weakened renal state, which means that the respondent institutions have committed illegal acts and omissions that transgress the rights to health and to life as denounced in the present constitutional petition.

III.3. With respect to the behavior of the respondent Ministry, if by Resolution 295 of May 12th, 2004, it authorized the CNS to provide hemodialysis service for insured and beneficiaries who have completed the fifty two weeks of medical treatment up to February 1st, 2004, said determination shall be accompanied by actions tending to make it practically operable, since otherwise it is reduced to a simple pronouncement as it is in the case at bar; therefore, it corresponds to the Constitutional Court to provide immediate and effective protection for the principal of the petitioner.

From the analysis completed, it is concluded that the Court of constitutional “amparo,” though having correctly declared the petition admissible, has made an incorrect evaluation of the facts.

THEREFORE

The Constitutional Tribunal, in virtue of the jurisdiction that it exercises by warrant of articles 19.IV and 120.7th of the CPE and articles 7 paragraph 8 and 102.V of the Law of the Constitutional Tribunal, with the facts established, in review it resolves:

1st To APPROVE the Resolution 268/2004 of May 28th, from pages 111 to 112 reverse side, pronounced by the Third Civil Division of the Superior Court of the Judicial District of La Paz.

2nd It orders that the CNS through the Obrero Hospital “No.” 1, continues to provide the treatment that Alejandro Cuba Plaza needs, with the Ministry of Health and Social Welfare absorbing the costs that that demands, because it is this State Department that should take responsibility for said treatment.

Let it be registered, notified, and published in the Constitutional Reporter.