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Constitutional Judgment 0108/2010-R
Sucre, May 10th, 2010

File: 2006-14391-29-RAC
District: Santa Cruz
Magistrate Reporter: Dr. Ernesto Félix Mur

Reviewing Resolution 23 of August 23rd, 2006, from pages 101 reverse side to 104, pronounced by the First Penal Division of the Superior Court of the Judicial District of Santa Cruz, within the constitutional “amparo” petition brought by Juan Carlos Quipildor Uslar on behalf of his minor daughter, M.F.Q.P., against Jorge Omar Cueto Iglesias, Department Director of the Sexually Transmitted Infections/A.I.D.S. (“STI/AIDS”) Program, Santa Cruz department, alleging violations of his client’s rights to life, to health, to “legal certainty,” and to petition, guaranteed in articles 7 paragraphs a) and h) of the abrogated Political Constitution of the State (“CPEabrg”); now articles 15.I, 18.I and 24 of the current Political Constitution of the State (“CPE”).

I. ANTECEDENTS OF LEGAL RELEVANCE

I.1. Contents of the petition

From the complaint dated July 14th, 2006, petitioner argues the following factual and legal grounds:

I.1.1. Facts leading to the petition

Petitioner’s principal and daughter M.F.Q.P. lives with the illness HIV/AIDS, contracted through vertical transmission, from mother to daughter during childbirth, for which reason she requires special care to carry on a normal life, that she is subjected to pediatric antiretroviral treatment, which means that the child depends on life-long access to the medications that are provided by the State, through the Departmental STI/AIDS Program, which are not provided out of good will or philanthropy, but because it is its obligation, insofar as his daughter is part of a complaint made in 2001 before the Inter-American Court of Human Rights, the Bolivian State having obligated itself to comply with the commitments that it acquired internationally, specifically to provide the antiretroviral medications to the infected persons who signed the “provisional measures,” of which his young daughter was part.

Petitioner manifests that in spite of the foregoing, the provision of said medications for his daughter was always irregular, on many occasions lacking for a long time or on some occasions not providing the required dosage, which ends up being worse, because when the virus does not receive the complete treatment it develops a resistance and the affected person has to change schemes, and it could be that the new medications do not exist in the country. He indicates that currently, the medications that his daughter takes are: Estavudina, DDI, and Kaletra, which were not provided to them, which means that his young daughter is at risk of dying as this situation causes her health to deteriorate and various so-called “opportunistic” diseases to develop at the

same time; a clear indication of what the fault of medications causes is the death of his wife María Luisa, the mother of the child.

He goes on to point out that he appealed several times to the Departmental STI/AIDS Program, but in that organization the only thing that they tell him is that the medications have not been sent; similarly, he sent formal letters requesting the provision of the antiretrovirals, but he did not receive any answer, for which reason he does not have another option besides asserting the present writ for the protection of the constitutional rights of his daughter, given that the STI/AIDS Program forms part and is representative of the National STI/AIDS Program, which itself is part of the Ministry of Health, charged with the integral attention to persons affected with HIV and AIDS, that implicates the distribution of antiretroviral medications, in accordance with Articles 3, 4, and 5 of the Ministerial Resolution 0711 of November 27th, 2002, “For the prevention and oversight of HIV/AIDS in Bolivia.”

Petitioner ends by indicating that with the failure to supply the medications in a continuous manner, the fundamental rights of his daughter are violated, since having access to them is the obligation of the State, shaping the human right to life, as understood in the Constitutional Judgment 0401/2006-R of April 27th.

I.1.2. Rights allegedly violated

The petitioner alleges the violation of the rights of his principal to life, to health, to “legal certainty,” and to petition, guaranteed in articles 15.I, 18.I and 24 of the current Political Constitution of the State.

I.1.3. Authority resorted to and relief sought

With those antecedents, he seeks injunctive relief (a writ of “amparo”) against Jorge Omar Cueto Iglesias, Department Director of the STI/AIDS Program in the Department of Santa Cruz, requesting the grant of the protection of constitutional rights and an order that said Program: a) continuously provide the antiretroviral medications: Estavudina, DDI, and Kaletra, minimum supply of one month; and b) when the minor needs another scheme of medications, provide it to her immediately, with the corresponding clinical analyses.

I.2. Hearing and Resolution by the Court of constitutional “amparo”

The public hearing carried out on August 8th, 2006, the following proceedings took place:

I.2.1. Ratification and elaboration of the petition:

Counsel for the petitioner ratified the grounds of the petition in their entirety.

Subsequently, under the right to answer, counsel asserted the following: a) the system itself is that which is failed, given that if the respondent alleges the problem of the centralization of the country, there cannot be a failure to provide medications to persons affected with AIDS, since their lives depend on the same; b) his client had to “beg” to sister organizations, like the

PanAmerican Health Organization (PHO) and the United Nations Childhood Education Fund (UNICEF), for the medications that his daughter needed, and he even carried out massive television campaigns to raise funds and buy the medications; c) constitutional jurisprudence holds that attention to the chronically ill should be immediate and opportune, without being interrupted by administrative processes and resolutions, which in the end only determine the responsibility for the provision and the cost of the treatment; therefore, its discontinuance is an attack on the life and health of the patient, in addition, in terms of these rights, immediate writ of “amparo” must be granted, exhaustion of other recourses may not be required for the type of right that is protected, and d) articles 13 and 14 of the Child and Adolescent Code (“CNNA”) require compliance with the obligations of the State to provide immediate attention to economically disadvantaged minors, which is what this case presents.

I.2.2. Brief by authorities respondents

The petitioned Departmental Chief of the STI/AIDS program presented a written report, ratified at the public hearing, alleging the following: i) As the head of the STI/AIDS Program in Santa Cruz, he makes the requests of medications to treat sexually transmitted infections to the National STI/AIDS Program in La Paz, including the antiretrovirals, always requesting them promptly and on time; nevertheless, in that process there are difficulties with patients due to delays in supplying the antiretrovirals, which is beyond his responsibility; ii) petitioner receives for his daughter the antiretroviral medications in a regular manner; iii) it is not possible to do follow up with the patient given only verbal or telephoned information from her father, since as the patient grows in weight and height the medication should change; iv) petitioner does not pick up the medication Didanosina (DDI), alleging that it should be in syrup and not in tablet form, but the doctors who have attended to the girl explained to him that the tablets are appropriate for her size and weight; v) the letters presented by the petitioner were not answered, because none of them included a return address; and vi) the constitutional writ of “amparo” is a subsidiary recourse, without in this case presenting evidence that the petitioner exhausted the administrative avenues before the superior authorities of the Prefecture and the Ministry of Health, which is responsible for the provision of medications and in charge of the National STI/AIDS Program. Therefore, he requested that the petition be declared inadmissible.

I.2.3. Disposition

After the public hearing, the Court of constitutional “amparo,” constituted by the First Penal Division of the Superior Court of the Judicial District of Santa Cruz, pronounced the Resolution of August 8th, 2006 that granted the requested injunctive relief and declared the petition “admissible,” ordering that the respondent authority promptly, immediately, and efficiently provide the daughter of the petitioner the necessary antiretrovirals, as well as the treatments and clinical analyses required for the preservation of her life, without costs or damages, upon the following findings: 1) the daughter and principal of petitioner, M.F.Q.P., requires the antiretroviral medications to ease somewhat the effects of the disease from which she suffers, being the State’s obligation to provide the same, and not by its own determination but rather by obligation imposed by the Inter-American Court of Human Rights, of which Bolivia is a member and party, in virtue of its signing various international treaties; 2) the right to life was defined by the Constitutional Court as that from which all other rights emerge and obliges the State to

respect and protect it, and its exercise cannot be impinged on by bureaucratic processes, and it follows that it is also not subject to exhaustion of recourses, even more so when the possessor of the right faces a grave risk of death; 3) article 158 of the CPEabrg commands that the State has the obligation to defend the physical integrity of its citizens and inhabitants, protecting the health of the population; in this case, evidence demonstrates the violation of the fundamental rights of the minor, as the medications that she requires for the preservation of her life, are not always supplied and delivered in a punctual, timely, and immediate fashion; and 4) it is evident that the petitioner did not exhaust administrative avenues before seeking injunctive relief, but because of the importance of the case, it deserves an earlier special decision, the principle of subsidiarity not being applicable since that would be counter to the right to life and to health of the minor who suffers from a serious illness, deserving immediate protection.

I.3. Procedural process in the Constitutional Tribunal (this section not translated b/c not relevant to the right to health)

II. CONCLUSIONS

Having reviewed the findings, the following conclusions are reached:

II.1. By notices presented July 15th and October 11th 2005; January 17th and 30th 2006; July 4th and 10th 2006, petitioner solicited to the Departmental Chief of the STI/AIDS Program in Santa Cruz, respondent, the provision of antiretroviral medications for his nine-year-old daughter, M.F.Q.P., complaining of the delay in the supply of them, and of the partial provision of them on some occasions (pp. 2, 3, 4, 5, 6, and 24). From the review of the findings, there is no evidence on file of any reply to said solicitations.

II.2 By notices presented September 28th and November 28th 2005; January 20th and 27th 2006; February 8th and 20th 2006; June 1st and 2nd 2006, the Departmental Chief of the STI/AIDS Program of Santa Cruz, respondent, solicited to the Coordinating Manager of the Global AIDS Fund and to the Chief of the National STI/AIDS Program, the supply of the antiretroviral medications for the daughter and principal of the petitioner, with the end that she continue with her treatment (pp. 25 to 26, 27, 28, 31, 33, 45, 48 to 49 and 50.)

III. LEGAL FINDINGS OF THE RULING

Petitioner requests injunctive relief for the rights of his principal to life, to health, to “judicial certainty,” and to petition, claiming that they were violated by the respondent-authority by providing in an irregular manner the medications for his principal and daughter who suffers from HIV AIDS, in spite of his repeated complaints, a situation which puts her at risk for death, being dependent on the pediatric antiretroviral treatments; which is to say that her existence depends on life-long access to the medications supplied by the State. He petitioned various times to the Departmental STI/AIDS Program, but that organization told him that the medications were not sent; he also made written request for the provision of antiretroviral medications but did not receive any reply. Consequently, it is necessary to determine if those arguments are admissible and if they constitute illegal acts harmful to the fundamental rights of the principal of the petitioner, in order to grant or deny the requested injunctive relief.

III.1. Operation of the National Political Constitution at the time (not translated b/c not relevant to the right to health)

III.2. Harmonization of the terminology used (not translated b/c not relevant to the right to health)

III.3 The legal nature of the constitutional writ of “amparo,” its subsidiary character, and the protection of the right to life and to health

The petition of constitutional “amparo” provided in article 19 of the CPEabrg, guaranteed now as the constitutional “amparo” action in article 128 of the CPE was instituted by the Fundamental Law as a tutelary action of defense against illegal or undue acts or omissions of public servants, individually or collectively, that restrained, suppressed, or threatened to restrain or suppress the rights recognized by the Constitution or the law.

Now, the regulation provided by article 94 of the LTC and the constitutional jurisprudence establish the subsidiarity of the constitutional “amparo,” which is now currently recognized as the constitutional “amparo” action, as provided in article 129 of the CPE, which provides that the tutelary action will be imposed whenever there is no other means or legal recourse for the immediate protection of the restricted, suppressed, or threatened rights and guarantees, from which it follows that the constitutional “amparo” has a subsidiary character.

From the foregoing, the subsidiarity of this tutelary action cannot be invoked nor applied in the present case, because it has an exceptional character for the rights invoked, and given the nature of the question planted, it turns on immediate and urgent protection of the health and life of the principal and daughter of petitioner, for which the principle of subsidiarity must be abstracted from, through this tutelary action, since the use of other mediums and instances, like complaints before the Prefecture and the Ministry of Health would be late and therefore ineffective attention; this exception has clear justification in the safety and protection of the rights to life and to physical integrity, guaranteed in article 15.1 of the CPE; to health, provided in article 18 of the Fundamental Law and its subsequent development through defense actions like this one.

III.4 The injunctive relief for the rights to life and health in the Political Constitution of the State and for those ill with HIV/AIDS in the legal order

As referred to previously, the first order fundamental rights, such as life and physical integrity and health, are guaranteed in articles 15.1 and 18.1 of the CPE; but in addition to that protection which already is essential, the CPE in certain determined circumstances, like the present, expands its sphere of injunctive protection through imperative dispositions, like that provided in its article 37, that imposes on the State the indelible obligation to guarantee and sustain the right to health that is constituted in a supreme function; likewise, article 41.1 of the CPE establishes that the public’s access to medications is guaranteed. These rights also entail a special protection in the case of children and adolescents, as set forth in article 60 of the Fundamental Law when it indicates that it is the duty of the State, the society, and the family to guarantee the priority of the superior interest of the same, that includes the preeminence of their

rights, the privilege to receive protection and help in any circumstance, the priority in attention of public and private services, and access to swift, opportune administration of justice with the assistance of specialized personnel.

Furthermore, the referenced constitutional protection corresponds to what is provided in articles 13 and 14 of the CNNA that establish that the State has the obligation to guarantee and protect their rights to life and to health, also corresponding to the State to assure through the pertinent organisms universal and equal access to health promotion, prevention, protection, and recuperation services, plus the free provision for minors without sufficient financial abilities to obtain medicines, prostheses, and other components of medical treatment, facilitation, or rehabilitation that were necessary.

With respect to the concrete dispositions pertinent to the topic under analysis, the RM 0711 of November 27th, 2002, "For the prevention and oversight of HIV/AIDS in Bolivia" establishes in its article 1 that the dispositions contemplated therein apply to all public and private institutions that provide preventative, integral, and monitoring attention for HIV and for AIDS, forming the Ministry of Health and Sport, according to article 3 of the same law, as the maximum organizing body, that regulates and coordinates the activities inherent in this illness through the National STI/AIDS Program, including advising, psychosocial support and monitoring of all health services and other institutions pertaining to Social Security, non-governmental organizations, scientific associations, educational systems, religious and other entities that carry out actions for the prevention and control of STI/HIV/AIDS.

The Ministry of Health and Sports, through its National STI/AIDS Program, coordinates its activities in the field with the Departmental Services of Health ("SEDES"), and it in turn with the specific departmental programs, in accordance with the regulation of article 4 of the cited Ministerial Resolution, which establishes: "The National STI/AIDS Program, of the Ministry of Health and Sports, shall coordinate actions with the Management of Control and Prevention of Illnesses, National Blood Program, National STI/AIDS Laboratories Network, SEDES, and Departmental STI/AIDS Programs to expand the Network of Regional Laboratories, to aid control at Blood Banks, to provide chemical options, to strengthen national reference laboratories, and to develop lookout sites and integral treatment systems for People who live with HIV or AIDS ("PVVS"), coordination of the education and investigation activities," which disposition concurs with the regulation provided for in article 22 paragraph d) of the same Ministerial Resolution. Chapter IV of said Ministerial Resolution, entitled "Of integral treatment," establishes that it is the responsibility of the Ministry of Health and Sports, through the National STI/AIDS Program, to coordinate the activities of integral treatment to the PVVS, whose organization and functioning is shared with institutions and organizations of other sectors; in addition, the National Program establishes that integral treatment includes all persons who live with HIV/AIDS (PVVS), including antiretroviral treatment and laboratory follow up with CD4-CD8, viral load, and complete blood count every four months free of charge.

From analysis the relationship of the regulations, it is concluded that the prevention, attention, and rehabilitation of HIV/AIDS and the protection of the rights of people who suffer from that disease is an obligation of the State, which must develop policies of prevention, attention, and rehabilitation to make them effective through specialized bodies and along with the active

participation of society, taking into account that at the moment the Law for the Prevention of HIV-AIDS, Protection of Human Rights and Multidiscipline Integral Assistance for Persons who live with HIV-AIDS is in force, notwithstanding that the regulation came into force after the present claim, its content develops more fully and precisely the aims of the Ministerial Resolution summarized in this decision.

Having weighed those legal considerations, with the purpose of underlining the importance of the protection of the constitutional rights of those ill with HIV/AIDS, it is pertinent to point out the constitutional jurisprudence relating to AIDS; thus, the SC 0026/2003-R of January 8th explains that: "...AIDS is a very grave illness that gives rise to the gradual and inexorable deterioration of the organism that suffers with it, and up until now there still does not exist a remedy that guarantees the elimination of the malady itself, since the medications given to the affected are intended to combat the effects that appear in different bodily systems. It is considered a "catastrophic" illness for the personal, familial, and economic consequences that it brings, for the irreparable harm to health, the psychological problems in the patient, the destruction of their work, social, and family relationships, and the extremely high cost of treatment."

Finally, it is worth referring to the constitutional doctrinal jurisprudence compared in reference to this illness and the actuation of justice in relation to the protection of rights; in that sense, the Constitutional Court of Colombia, in its decision T-505 of August 28th 1992 establishes: "...AIDS constitutes an ill of immeasurable proportions that threatens the existence of the human species, before which the law should not remain impassive, but rather offer solutions.

(...)

...The infected or sick person with AIDS enjoys the same rights as all other persons. Nevertheless, due to the character of the illness, authorities are obligated to give these persons special protection aimed at guaranteeing their human rights and their dignity. In particular, the State should avoid any discriminating or stigmatizing method against these persons in the provision of services, in employment, and in freedom of movement.

The rights to equality, intimacy, free development of personality, work, and health, among others, can be vulnerable or threatened by authorities or other parties, in many cases as a sole consequence of the fear that AIDS awakens. This negative reaction should be counteracted with efficient state action intended to give rise to comprehension and solidarity, avoiding the spread of the disease..."

III.5. The case under analysis

In the present case, the petitioner denounces that in spite of his repeated solicitations to the Departmental STI/AIDS Program to provide medications for his young daughter who suffers with HIV AIDS, the provision is irregular, putting the life of the girl at risk, who depends on permanent access to the supply of medications provided by the State; additionally, the repeated written demands were never answered.

From the presented findings, it is evident that the principal and daughter of petitioner, M.F.Q.P. suffers from acquired auto immunodeficiency syndrome, illness contracted from her mother at the moment of birth, for which reason she requires antiretroviral medications to maintain her life and health; the supply by the Departmental HIV/AIDS Program was irregular, despite repeated complaints by petitioner, which supply cannot be deferred, postponed, nor delayed under any circumstance for any reason, being indispensable medications for her subsistence and carrying on of her daily activities with certain normalcy, which are already limited by the illness from which she suffers.

From the analysis carried out, we conclude that the fundamental rights of life and health, invoked by petitioner in favor of his daughter, were affected, which is the underlying right whose essential characteristic constitutes the basis for exercising the remaining rights and assuming obligations of one's own existence; for that, the State is obligated to its protection without interference nor hindrance through bureaucratic procedures nor subject to exhaustion of recourses, as already pointed to in the Legal Finding III.4. In the same way, health is a fundamental right that shall be protected, with all the more reason when it is linked to the primordial right to life and to physical integrity, especially in the case of vulnerable persons, such as children, and more still when the possessor of those rights faces grave risk of death. It is for this reason that the Fundamental Law institutes protection mechanisms for the real and effective exercise of the right to life and to health and institutes connected regulations for its effective application, stipulating the compulsory obligation of the State to guarantee and sustain the right to health, which is a supreme function; also, to assure the access of the public to medications. These rights also carry a special protection in the case of minors, which is their priority in receiving protection and help under any circumstance, in accordance with the Code of the Child and Adolescent that provides the benefit of services of promotion, prevention, protection, and recuperation of health, plus the supply free of charge, for children with insufficient recourses, to medications among other things, relative to the medical treatment, facilitation, or rehabilitation that were necessary.

As a consequence, the authority-respondent incurred a wrongful and unlawful omission in not carrying out, in his condition of Departmental Chief of the STI/AIDS Program of Santa Cruz, all actions to secure the antiretroviral medications in a timely manner and provide them immediately in the dosage, form, and quantity that the principal of the petitioner requires, the excuse referred to by the respondent being invalid, in the sense that it requested the medications but there is a delay in the supply of the same that is beyond its responsibility; displaying a passive and conformist attitude that is not consistent with the responsibility and compliance of the functions of respondent, violating by that action the rights to life and health of the principal of petitioner.

With respect to the invoked right to petition, denouncing its transgression in not receiving an answer from the respondent-authority to his complaints, it is useful to remember that the constitutional jurisprudence established that it is a fundamental right: "...whose essential nucleus consists of a prompt and timely reply, resolving when possible the complaint itself, which is to say resolving the matter that is the subject of the petition" (SC 0275/2003-R of March 11th), "the exercise of the right supposes that once a petition is made, whatever be the motivation for it, the person acquires the right to obtain prompt resolution, which means that the State is obligated to resolve the complaint. Notwithstanding this, the orientation of the decision will depend on the

circumstances in each case in particular, and in that way it may be positive or negative (...) the obligation of the State is not to grant the complaint but rather to resolve it...” (SC 0189/2001-R of March 7th); this reasoning agrees with the protection provided in article 24 of the CPE that provides: “Every person has the right to petition individually or collectively, orally or in writing, and to obtain a formal and prompt reply...”.

In the present case, the right to formulate petitions was also violated, insofar as the respondent himself expressly recognized it in its reply, the written complaints made by the petitioner for the supply of medications that his daughter and principal required, did not merit any reply by reasoning that there was no address to which to send the replies; circumstance that does not justify the omitted reply, since alluding to not knowing the residence of the then complainant, now petitioner, does not invalidate the obligation to reply, especially if one considers that the STI/AIDS Program possesses a registry with the residences of the patients, and even in the case of not having it, the replies should have been presented personally at the time of his appearance at said institution; consequently the respondent-authority also violated the right to petition.

For the findings expressed, the Court of constitutional “amparo”, having granted the requested protection of constitutional rights and declared “admissible” the petition, carried out an adequate certification of the findings and correctly applied the applicable regulations to the case; although in the use of the correct terminology, it should have only conceded the same.

THEREFORE

The Constitutional Court, in virtue of the jurisdiction and competence conferred on it by articles 4 and 6 of the Law 003 of February 2010, Law of Necessity of Transaction of the New Bodies of the Judicial Branch and Public Ministry; 7 paragraph 8) and 102.V of the LTC, under revision, resolves to APPROVE the Resolution 23 of August 8th, 2006, pronounced by the First Penal Division of the Superior Court of the Judicial District of Santa Cruz, and consequently, GRANT the requested injunctive protection of constitutional rights.

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