C 823 XXXV R H - "CAMPODONICO DE BEVIACQUA, ANA CARINA V. MINISTERIO DE SALUD Y ACCION SOCIAL - SECRETARIA DE PROGRAMAS DE SALUD Y BANCO DE DROGAS NEOPLASICAS" - CSJN - 24/10/2000

REPORT OF THE ATTORNEY GENERAL

Supreme Court:

In opposition to the judgment of Civil Secretary Chamber B, No. 2 of the Federal Court of Appeals of Córdoba, appearing at pages 82-84 of the principal proceedings (pagination to which the following citations refer), confirming the judgment by the Federal Judge of the First Instance of Río Cuarto at pages 51-57, the Attorney General lodged before the cited tribunal, as representative of the National Government, the special petition added at pages 85-90, reverse side. The denial of the petition led to this direct submission.

By virtue of the Attorney General assuming the role of the defendant (Ministry of Health and Social Welfare – Secretary of Health Programs and Bank of Antineoplastic Drugs), acting in defense of the defendant in two previous instances and lodging in its name the special petition previously mentioned, I believe that it is appropriate to extend to the case at hand, as pertinent, the reasons expressed in the decisions of the cases: S.C. P.475,XXXIII, "Prodelco v. Poder Ejecutivo Nacional on amparo" (ítem X), of 5 November 1997 (Judgments: 321-1252); S.C. M.148, L.XXXII "Instituto Nac. de Obras Soc. y de la Administración Nac. del Seguro de Salud, appeal in case entitled: Mutual del Personal de Agua y Energía v/ Adm. Nac. del Seguro de Salud, et al.", 29 May 1998 (with judgment of Your Excellency on 23 February 1999); and S.C. A. 138, L.XXXIV, "Agropecuaria Ayui S.A. on amparo" 16 November 1998 (with judgment of Your Excellency on 30 June 1999);

among others.

The indicated circumstances condition my intervention in this hearing because, as was pointed out in the precedent "Prodelco", to rule in favor of the matter on appeal would mean duplicating the appeals work on behalf of the State, undermining the procedural equality of the parties; and to rule in a manner contrary to the state's interests would imply ignoring the legal mandate granted to this Public Ministry (see Judgments: 321, page 1285).

For the reasons expressed, with the goal of maintaining the principle of unity of action of this institution and not causing the deterioration of the opposing party's right to defend itself, I will limit myself to addressing the special petition filed by Mr. Attorney General before the Federal Court of Appeals of Córdoba, and the complaint that gave rise to its denial.

Buenos Aires, 11 April 2000

SIGNED BY: FELIPE DANIEL OBARRIO

Buenos Aires, 24 October 2000

Regarding the proceeding: "Appeal submitted by the defendant in the case Campodónico de Beviacqua, Ana Carina v. Ministry of Health and Social Welfare – Secretary of Health Programs and Bank of Antineoplastic Drugs", to come to a decision on the merits.

Considering:

1) That the child Adelqui Santiago Beviacqua was born on 26 June 1996 with a serious defect in his bone marrow that reduced his immunological defenses – Kostman Disease, or severe congenital neutropenia – whose treatment depends on a special medicine (whose

commercial name is "Neutromax 300") that was provided without charge by the National Bank of Antineoplastic Drugs, under the Ministry of Health and Social Welfare, until 2 December 1998, the date on which this organization made clear to his parents that it was giving the medicine "for the last time" (p. 2-9 and 11).

2) That in light of the imminent danger of interruption of said treatment, the mother of the minor – with the legal support of the official public defender before the Federal Court of Río Cuarto – filed a special amparo action against the Ministry of Health and Social Welfare, the Secretary of Health Programs and the referenced Bank of Antineoplastic Drugs, in order to halt the injurious act that would deprive the child of the necessary assistance, a violation the rights to life and to health guaranteed by the National Constitution and the international human rights treaties (pages 20-22).

3) That in answering the report envisaged in art. 8 of Law 16.986, the Attorney General, in representing the defendant, argued before the Federal Court of Appeals of Córdoba that the son of the plaintiff suffered from a non-oncological illness, and thus it was not the obligation of the Bank of Antineoplastic Drugs to provide the required medicine; that its provision was made purely for humanitarian reasons, and that the interested party should turn to the social welfare services, the responsibility of the Obligatory Medical Program for the protection of people dependent on the use of drugs, according to the provisions of Law 24.455 and Resolution 247/96 MS and AS, or should request a subsidy from the Secretary of Social Development, as the Federal Government only has subsidiary responsibility in this matter (p. 46-49).

4) That the judge accepted the special action and ordered the Ministry of Health and Social

Welfare to supply the necessary dose of the prescribed remedy, without prejudice to negotiations that it could conduct so that its provision would be carried out by the organizations referenced by the defendant. To this end, it considered the official reports regarding the characteristics of the illness and the impossibility that the family could pay the high cost of the medicine, the certificate of disability issued by the National Center of Medical Examinations and the diagnosis of the hematology and oncology specialists of the Regional Hospital of Río Cuarto and the Italian Hospital of Córdoba, that demonstrated the seriousness of the pathology as well as the urgency of maintaining the child's treatment permanently and without interruption (pages 3-10, 13-14, 16-19, 42 and 51-57).

5) That the judge concluded that the reasons given to suspend the assistance to the patient and shift the responsibility to social welfare or to the local public authority were incompatible with the primary obligations charged to the Federal Government as a guarantor of the health system and that the act violated the rights of life, personal dignity and the general welfare protected by the preamble and by arts. 33 and 42 of the National Constitution, the American Convention of Human Rights, the UN International Covenant of Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights.

6) That said holding was confirmed by Chamber B of the federal court already mentioned (pages 82-84). To the bases given in the prior proceeding, the higher court added that: a) The rights to life and to the preservation of health recognized by arts. 14, 14 *bis*, 18, 19 and 33 of the Fundamental Law and the international treaties of constitutional rank, carry with them corresponding duties that the State must assume in the organization of health services.

b) The principle of subsidiary performance that governs in this matter is articulated in the rule of social solidarity, that the State must guarantee welfare coverage to all citizens, without social, economic, cultural or geographic discrimination (art. 1, Law 23.661), and that it intervene when the foreseeable capacity of individuals or small communities is overwhelmed. c) The social welfare project for the Personnel of Sports and Civil Entities (OSPEDYC), of which the plaintiff is a member, is not in a condition to assume the regular coverage of necessary medicine for child's treatment, considering that the Association of Clinics and Sanatoriums of Southern Córdoba (ACLISA) has suspended the agreement with said social welfare project due to lack of payment of benefits, and the entity "Córdoba Pharmaceutical Coop. Ltd." has rescinded the contract commencing 11 March 1999; as a result, the members of the cooperative find themselves without the medical and welfare assistance owed to them.

d) Faced with the deficient performance of the unionized medical entity, the precarious work and economic situation of the family and the extremely urgent need for the required remedy, it is the Federal Government – through the defendant ministry – that must intervene secondarily to give adequate protection to the rights of the minor, without prejudice to its ability to create the necessary procedures to achieve that assistance in a regular and effective manner by the appropriate organizations.

7) That in opposition to that decision, the non-prevailing party submitted the special petition that, when denied, gave rise to the present complaint. The principal injury claimed is that the judgment has improperly shifted the responsibility to attend to the minor's ailments to the State, and has freed the social welfare agency and the local authority of their legal obligations, which contradicts the principle that the State only has a duty of subsidiary

performance, the rights of property and to defense at trial, and the reserved powers of the provinces in matters of health (arts. 17, 18 and 121 of the National Constitution; p. 85-90 reverse side).

8) That, in this regard, the appellant asserts that the ruling neglected to consider the validity of federal Law 24.455 and the duty of the social welfare agency to comply with the Obligatory Medical Program (Resolution 247/96 MS and AS); that there is no legal support to obligate the Federal Government to act when that entity fails to act, and that the responsibility imposed by the lower court compromises the economic resources available to organize the health plans in accordance with that envisaged by Law 24.156 (financial administration) to the detriment of the population lacking medical coverage that the ministry must protect.

9) That the appellant requests also the vacating of the judgment due to its lack of a regulatory basis and arbitrariness in the consideration of relevant aspects of the case, such as not adequately appreciating that attention to the child had been given only for humanitarian, not legal, reasons, and that the social welfare agency had expressed willingness to provide the medicine, which implied having stabilized its relationship with the plaintiff.

10) That the complaints of arbitrariness in considering the case's evidence only reflect mere discrepancies with the court's criteria based on the examination of factual and proof questions that have nothing to do, as a rule and by their nature, with the authority of art. 14 of Law 48, apart from the fact that they do not detract from the lower court ruling relating to the state of neglect in which the minor was left due to the decision to stop providing the

medication because the social welfare agency could not be counted on to provide effective coverage.

11) That above and beyond the objections that the submitted statements raise with respect to the mentioned syndicate entity having assumed responsibility for the provision of the medicine (Court Reporter p. 36-41, 65-67, 70-71 and 87), which appear to contradict the appellant's position of trying to avoid its obligations when faced with the failure to make said provisions (p. 87-88 reverse side), the decision on this issue was based on the documentary proof that described the lack of medical and pharmacological attention in which the minor found himself as a result of the agreements binding the welfare agency with the local health associations (p. 73-75) having been suspended or rescinded since 1999. The defendant overlooked this issue in its criticism of the judgment as it has limited itself to denying the deficient state of that organization without accounting for, as is appropriate, the results of the referenced evidence.

12) That, furthermore, it is implausible to believe that reasons of "convenience" interceded in the proceedings that the plaintiff pursued in protecting her child's health because if she had secured the required assistance, as the defendant assumes, she would not have resorted to a special amparo petition to ensure provision of the medicines that she could obtain regularly from her own social welfare agency.

13) That the objections related to the failure of the higher court to consider federal Law 24.455, which added coverage for medical, psychological and pharmacological treatments arising from acquired immune deficiency syndrome (AIDS) and drug addiction to the services that the social welfare agencies must give their members, were also inadmissible.

The medicine suitable to treat children's immune system deficiencies has nothing to do with the aspects to which that legislation refers when it includes, in the required program, the rehabilitation of people who depend physically or psychologically on the use of narcotics (art. 1, sections b and c), as the applicable area of the invoked norm has nothing to do with the case at hand.

14) That, on the other hand, the special petition is formally admitted with respect to the complaints that question the responsibility assigned to the Federal Government in light of the situation that compromises the life and health of the child, which involves the interpretation of federal rules and the decision is contrary to the rights established in these rules by the appellant. It is appropriate to point out that this Court, in the task of clarifying the wisdom of the important regulations at stake, is not limited by the positions of the lower courts nor of the appellant, but rather it is incumbent on the Court to resolve the issue (Judgments: 308-647; 314-1834; 318-1269, among others).

15) That the Tribunal has considered the right to life as the first right of human beings recognized and guaranteed by the National Constitution (Judgments: 302-1284; 310-112). The Tribunal has also said that man is the core and center of the entire justice system and an end in itself, beyond one's transcendental nature, one's body is sacred and constitutes a fundamental value with respect to which the remaining rights always have an instrumental nature (Judgments: 316:479, concurring opinions).

16) That from the provisions of international treaties of constitutional rank (art. 75, sec. 22, Supreme Law), the right to preservation of health, understood within the right to life, has been reaffirmed in recent rulings and the urgent obligation that the public authority has to

guarantee that right with affirmative actions has been emphasized, without prejudice to the obligations that the local jurisdictions, the social welfare agencies or the prepaid medicine entities must assume (Judgments: 321:1684 and case A.186 XXXIV "Asociación Benghalensis y otros v. Ministerio de Salud y Acción Social – Estado Nacional on amparo Law 16.986" 1 June 2000, majority and concurring opinions and report of Mr. Attorney General of the Nation to which we refer).

17) That the international agreements alluded to contain specific clauses that protect the life and health of children, in accordance with Art. VII of the American Declaration of the Rights and Duties of Man, Art. 25, with Art. 25, sec. 2, of the Universal Declaration of Human Rights, with Art. 4, secs. 1 and 19 of the American Convention on Human Rights – Pact of San José, Cost Rica, with Art. 24, sec. 1 of the International Covenant on Civil and Political Rights and with Art. 10, sec. 3 of the International Covenant on Economic, Social and Cultural Rights, related to the assistance and special care that they must assure.

18) That that final treaty recognizes, likewise, the right of all people to enjoy the highest level of physical and mental health attainable, and the duty of the state parties to secure it. Among the measures that must be adopted to guarantee that right is the development of a plan of action to reduce infant mortality, achieve the health development of children and assure medical service and medical attention in the event of sickness (art. 12, International Covenant on Economic, Social and Cultural Rights).

19) That the states parties are obligated to use “the maximum of its available resources” to progressively achieve full implementation of the rights recognized in said treaty (art. 2, sec. 1). Regarding the mode of implementation in federal states, the United Nations Committee

of Economic, Social and Cultural Rights has recognized that said structure requires that the districts are responsible for certain rights, but it has also reaffirmed that the federal government has the legal responsibility to guarantee the implementation of the agreement (conf. United Nations. Social Economic Council. Application of the International Covenant of Economic, Social and Cultural Rights. Initial reports presented by the states parties in accordance with arts. 16 and 17 of the Covenant. Switzerland -E/1990/5/Add.33-, 20 and 23 November 1998, published by the Secretary of Investigation of Comparative Right of this Court in "investigations" 1 (1999), pages 180-181).

20) That, similarly, the "federal clause" envisaged in the American Convention on Human Rights requires the national government to fulfill all the obligations related to matters over which it exercises legislative and judicial jurisdiction, and the task of "immediately" taking the pertinent measures, consistent with its constitution and laws, so that the constituencies of the federal State are able to comply with the requirements of that treaty (art. 28, sec. 1 and 2). The Convention on the Rights of the Child includes, moreover, the obligation of the states to encourage and guarantee effective access to health and rehabilitation services for children with physical impediments, to take measures to prevent these services from becoming private and to achieve full realization of the right to receive social security benefits, keeping in mind national legislation, the resources and situation of each infant, and the people responsible for their care (arts. 23, 24 y 26).

21) That the Federal Government has assumed, therefore, international responsibilities explicitly designed to promote and facilitate health benefits that the minority require and that it cannot validly avoid those duties under the pretext of other public or private entities'

failure to act, especially when they participate in the same health system and what is at stake is the critical interest of the child, which should be taken care of before other considerations by all governmental departments (art. 3, Convention on the Rights of the Child, previously cited).

22) That, in this regard, Law 23.661 instituted the national system of health, with the scope of social security "for the purpose of procuring the full enjoyment of the right to health of all the nation's residents without social, economic, cultural or geographic discrimination." With such purpose, said social security has been organized within a framework of an "integral" understanding of the health sector, in which the public authority reaffirms its role as general leader of the system and the intermediate companies consolidate "their participation in the direct management of the actions" (art. 1). Its fundamental objective is "to administrate the granting of equal, comprehensive and humane health benefits, aimed at the promotion, protection, recuperation and rehabilitation of health that correspond to the best level of quality available and guarantee the beneficiaries the securing of the same type and level of benefits eliminating all forms of discrimination…" (art. 2).

23) That the Ministry of Health and Social Welfare, through the Secretary of Health, is the enforcement authority that establishes the health policies of the state health care system and is also the organization designated in Law 23.661 to carry out medicine policies. In such a role, it must "formulate and coordinate" the welfare services rendered by the social welfare agencies included in Law 23.660, the public establishments and the private providers "in a system of universal coverage, pluralistic and participative structure and decentralized administration that corresponds to the federal organization of our country" (arts. 3, 4, 7, 15,

28 and 36).

24) That the same law establishes that the benefits are to be granted in accordance with the national health plans, which must secure "the full utilization of the existing established services and capacity". The Solidarity Fund of Redistribution is the instrument designated to support the relevant agents and jurisdictions, equalize levels of required coverage and ensure the financing of programs in the interests of its beneficiaries (arts. 24 and 25).

25) That the Social Program for Personnel of Sports and Civil Entities, of which the plaintiff is a member, is considered among the syndicate agents that make up the referenced National Health Care System and, in such capacity, its activity is subject to the supervision of the current Superintendent of National Health Services, under the purview of the defendant ministry, which must implement concrete measures to guarantee the continuity and standardization of health benefits for which social welfare agencies are responsible and, in particular, compliance with the Obligatory Medical Program (Reporter arts. 1, sec. a, 3, 15, and 28, Law 23.660; 2, 9, 15, 19, 21, 28 y 40, *in fine*, Law 23.661; Decrees 492/95, arts. 1, 2 and 4, and 1615/96, arts. 1, 2 and 5; Resolution 247/96 MS and AS).

26) That, furthermore, the Constitution of the Province of Córdoba guarantees for all its inhabitants the right to live, attributes to the local government power to regulate and supervise the health system, integrate all resources and coordinate health policy with the federal government, the provinces, its municipalities and other public and private social institutions, and retain the legal authority of provincial police power in matters of legislation and administration pertaining to said system (arts. 19, sec. 1, and 59).

27) That the above-expressed places in evidence the governing function that the Federal

Government exercises in this area and the work over which the Ministry of Health and Social Welfare is responsible, as enforcement authority, to guarantee the regularity of health treatments coordinating its actions with the social welfare agencies and the provinces, without deterioration of the federal and decentralized administration that is necessary to carry out these services (see, similarly, in this regard, the "Substantive and Instrumental Policies" of the Secretary of Health, approved by decree 1269/92).

28) That the decision to assist the minor, appropriately made by the national authority until it decided to interrupt the provision of medication (p. 11), had alleviated the urgent situation and extreme necessity that the minor had for the prescribed treatment to save his life and health, which complied with the constitutional principles that govern this matter and the corresponding laws that have been analyzed above.

29) That the evidence of the proceedings indicates that the National Bank of Antineoplastic Drugs provided the medicine, upon request of the Secretary of Social Social Development of the President – Coordination Córdoba – who appreciated the seriousness of the case and the lack of protection in which the minor's family found itself, which gave rise to the coverage decision until the member's assistance through the appropriate social welfare agency regularized (p. 10-12, 42, 46-46 reverse side and 67).

30) That the prolongation of that state, manifest in the proceedings that led the lower court to conclude that the member had not received effective health treatment by that entity, undermines the arguments that attempt to deny an obligation to help the minor in light of the social welfare agency's failure to do so, as the "exclusively" humanitarian reasons that gave rise to providing the assistance still exist, which, furthermore, cannot be understood

other than as recognition of the defendant's responsibility to protect the life of the child.

31) That the existence of a social security system that must comply with the Obligatory Medical Program – Resolution 247/96, MS and A, already cited – cannot lead to harm for the member and even less the child, because if we were to accept the appellant's criteria that attempt to justify the interruption of its assistance due to the obligations given to that entity, we would establish an assumption of reverse discrimination with respect to the mother of the minor that, in addition to not being able to rely on the timely benefits of the organization with which it is associated, would absolutely fail the right to public health service, putting the Federal Government in flagrant violation of its assumed health care agreements.

32) That, furthermore, the child is protected by Law 24.431 which provides "comprehensive protection for disabled persons", and to which the Province of Córdoba adhered, and which also requires the guarantee of medical treatments insofar as the people upon who they depend or the social welfare agencies of which they are members cannot afford them (conf. certificate from p. 6; arts. 1, 3 y 4, Law 22.431 and provincial Law 7008), which adds to the injustice of the public authority's act that seriously threatened his rights to life and health.

33) That Law 24.901 has created a benefit system based on "comprehensive treatment for the disabled" and has given to the social programs defined in Law 23.660 the obligation to provide coverage (arts. 1 and 2). Nevertheless, in light of the emphasis in international treaties on preserving the life of children, the State cannot avoid its duties by causing the large burden of creating this health service to fall on the entities that, as in this case, have

not given adequate welfare protection, a conclusion that caused the court in this case to give preferential attention to the needs derived from the minor's disability and reevaluate the work that the enforcement authority must develop toward this end.

34) That the resolution of the higher court has been sufficiently explicit in that it has assigned subsidiary responsibility to the defendant and has left in place its powers to guide the provision of medicine with the urgency and appropriateness that the case demands, without freeing the provincial government or the social welfare agency of their legal obligations, and it is inconceivable that they can claim harm from the transactions entrusted in the judgment, when it is the Federal Government that is responsible for monitoring the faithful implementation of the constitutional rights that protect the life and health of the child and ensure the continuity of treatment.

35) That, finally, in regard to the objection based on art. 121 of the National Constitution, apart from the fact that that basis means invoking grievances of third parties, the appellant has not demonstrated that the decision to maintain the treatment affects the principle of federalism or puts into crisis the reserved powers of the local governments in the organization of their health system. Nevertheless, this pronouncement has established that the provincial jurisdictions are responsible for this matter.

Therefore, having heard from Mr. Public Defender and Mr. Attorney General, the special petition is upheld with the scope established in the prior recitals and the appealed judgment is confirmed. Join the complaint to the matter. Notify the parties and return the files.

SIGNED BY: JULIO S. NAZARENO - EDUARDO MOLINE O'CONNOR - CARLOS S. FAYT - AUGUSTO CESAR BELLUSCIO (in dissent)- ENRIQUE SANTIAGO

PETRACCHI - ANTONIO BOGGIANO - GUILLERMO A. F. LOPEZ - ADOLFO ROBERTO VAZQUEZ

DISSENT OF MR. MINISTER DOCTOR DON AUGUSTO CESAR BELLUSCIO

Considering:

That the special petition, whose denial gave rise to the current complaint, is inadmissible (art. 280 of the National Code of Civil and Commercial Procedure).

Therefore, and having received the report of Mr. Attorney General, this direct filing is rejected. The appellant is called upon so that, in the corresponding financial year, it cashes the deposit anticipated in art. 286 of the cited code, in accordance with the prescriptions of the agreed 47/91. Notify the parties, have the Registry Office take note, and, in due time, file the proceedings, after having first returned the main files.

SIGNED BY: AUGUSTO CESAR BELLUSCIO