

Case No. T-484/92

RIGHT TO HEALTH/RIGHT TO LIFE/FUNDAMENTAL RIGHTS/AIDS/SOCIAL SECURITY INSTITUTE

The right to health comprises, in its legal nature, a group of elements that can be aggregated into two main groups: first, it is identified as an immediate predicate of the right to life, therefore attacking the health of a person is equivalent to attacking his/her own life. Taking the latter into account, the right to health is a fundamental right. The second group gives to the right to health a welfare character, by reference to the welfare state since it imposes concrete actions. The line between the right to health as fundamental and as a welfare right is vague and above all changing in accordance with the circumstances of each case, but in principle, it can be stated that the right to health is a fundamental right when it is related to protecting life. Fundamental rights only retain their nature in its primary manifestation and can be subject to protection by "tutela". Since it is necessary to protect the right to health of the plaintiff, there is no doubt that he can demand it from any welfare institution, in which services are provided, free of charge, by virtue of the duty of the State to guarantee the health of this kind of patient.

Selection Chamber No. 5

Reference No. 2130

Right to Health

Plaintiff:

ALONSO MUÑOZ CEBALLOS

Magistrates:

FABIO MORON DIAZ (reporting magistrate)

SIMON RODRIGUEZ RODRIGUEZ

JAIME SANIN GREFFENSTEIN

Santafé de Bogotá D.C., eleven (11) of August of nineteen ninety-two (1992)

The Constitutional Court, Chamber of Revision of *Tutela*, adjudicates in the action referenced, in the Judicial Level of Review, whereas:

BACKGROUND

Mr. ALONSO MUÑOZ CEBALLOS, filed a *tutela* for the protection of fundamental rights before the Fourth Superior Judge of Tuluá Valle, against the Institute of Social Security, to demand the provision of all medical services that he has been receiving, services which have been threatened by the occupational physician of the Institute of Social Security of Cali, who said that he will give the plaintiff an extension of only 30 days. The plaintiff clarifies that the

directors of the Institute of Social Security of Tuluá gave him an extension of 180 days, and from then on, he requests that his situation be defined, by stating if he does or does not have a right to the protection of his health. The physician of the institution of Tuluá said that the plaintiff has the right to be indemnified and to the provision of health care services by the Institute of Social Security, due to the seriousness of the illness of which he is affected.

The plaintiff, states that when he got the illness (HIV positive) he was already covered by Social Security.

Likewise, he stated that he has not filed other *tutela* based on the same facts and rights requested to be protected.

JUDICIAL DETERMINATIONS

The Fourth Superior Judge of Tuluá Valle, in a ruling of March twenty five (25) of nineteen ninety-two (1992), ruled in the *tutela* filed by Mr. ALONSO MUÑOZ CEBALLOS by adjudicating: "FIRST. TO ORDER the Institute of Social Security to continue to provide to Mr. ALONSO MUÑOZ CEBALLOS the health care services that he has been receiving to date, while this entity or the competent authority decides the substantive issues of the action to be filed by the plaintiff." "SECOND. To prevent the plaintiff ALONSO MUÑOZ CEBALLOS from filing a corresponding action of particular interest before the Institute of Social Security and/or the administrative action before the ADMINISTRATIVE COURT OF VALLE, within the next four (4) months counted from the notification of this ruling. The plaintiff must prove that he has complied with this legal requirement by submitting the recognition of his legal right to the disability pension duly sealed by the competent authority. On the contrary, if the lawsuit is not filed within the abovementioned term, the effects of the first point will cease, this is the provision of the health care services by the Institute of Social Services (Decree 2591 of 1991, article 8)", subject to the following reasons:

- That he is competent to revise the *tutela* "taking into account that the threat to the provision of the health care service stated by the plaintiff, it has been providing in the city of Tuluá".
- That in the "*tutela* as a transitory mechanism is not controverting fundamental rights but rights with origin or legal rank arising from the contractual relation between Mr. ALONSO MUÑOZ CEBALLOS as user and the public entity, meaning the Institute of Social Security".
- That the "judge of *tutela* cannot declare rights or obligations arising from positive law, as in this case, since for that the competent authority is the Administrative Court, but from the evidence provided, it is deducted a threat to the provision of the health care services that are still provided to the plaintiff by the Institute of Social Security (see page 8 of the principal book about the extension of services). This means that the judge of *tutela* must consider the request as a transitory mechanism to prevent an

irreparable harm that will lead to the full stop of the provision of the health care services that the plaintiff requires, while it is defined by the competent judicial or administrative authority if the premises established by the law for declaring in his favor the disability pension stated in the Decree 758 of April 11, 1990, in accordance with the origin of the illness, type of disability and number of weeks contributed by the plaintiff”.

- That “it is imperative that the court fully protects the right to health care assistance that the plaintiff has been enjoying (articles 13 and 49 of the National Constitution) temporary protecting him until he files the action of particular interest before the Institute of Social Security and/or the administrative action for annulment and restoration of rights before the administrative court, competent authorities to decide about the legitimacy of the interests of the plaintiff as a possible disability pensioner”.

The earlier judgment was not contested.

WHEREAS

a. Competence

The Chamber is competent to hear the *tutela* filed by Mr. ALONSO MUÑOZ CEBALLOS, as established in articles 86 clause 2 and 241, paragraph 9 of the Constitution, further developed in articles 33 and 34 of Decree 2591 of 1991.

b. Matter

The review of the judgment issued by the Fourth Superior Judge of Tuluá Valle, in the matter of reference, in order to prevent a serious harm, additionally establishing the scope of the right to health in this matter.

THE REVIEWED JUDGEMENT

The judgment protects the constitutional rights set forth in articles 13 and 49 of the Constitution. The first is contained in the chapter that the Constitution named “fundamentals”, while the second is in Chapter 2 of Title II “Social, Economic and Cultural Rights.” Health is one of those goods that, by means of its character, is inherent to the dignified existence of men, is protected, especially in people who because of their social, physical or mental condition are in vulnerable circumstances. (Article 12 National Constitution).

This right, understood like this, seeks the assurance of the fundamental right to life (article 11 National Constitution), therefore, its welfare nature imposes priority and preferential treatment by the government and the legislator, in order to secure its effective protection. This favorable treatment allows the reestablishment of the equal status of a group or people that are in adverse situations due to vulnerable circumstances. In a further development of the legal rule, by marking its welfare character, the system established in article

49 of the Fundamental Statute, that health is a public service for which the State is responsible, guaranteeing all people access, promotion, protection and recovery of this right. It is added that the government is in charge of directing, regulating, and establishing policies aimed at the provision of services by private entities, and defining the competences assigned to national, local and private entities, in order to guarantee that the provision of services is made in a decentralized and participatory manner. The regulation also defers to the law defining the circumstances in which health care services will be free and mandatory. Likewise, there is established an obligation by all people to seek the improvement, maintenance and recovery of their health and their community's health, by avoiding harmful actions or omissions and disobedience of the public health authorities.

This right was not expressly enshrined in the Constitution of 1886. Addressing its essential character, the International Covenant on Rights of the United Nations, establishes it by setting forth "the right of everyone to the enjoyment of the highest attainable standard of physical and mental health" (article 12).

The constitutional declaration (articles 13 and 49) is a response to the urgency of finding a solution to the complex difficulties that have arisen from the provision of public health care services. This declaration shows the orientation of the State to provide those needs and to commit actions by the State to address it.

The right to health comprises, in its legal nature, a group of elements that can be grouped into two main groups: the first one identifies the right as an immediate expression of the right to life, therefore attacking the health of a person is equivalent to attacking his or her own life, therefore behaviors that attack the environment (numeral 1. Article 49 National Constitution) are treated concurrently with health issues; this is in addition to the fact that the recognition of the right to health prohibits willful or negligent conduct that harms others, by imposing on the wrongdoer criminal or civil liabilities, in accordance with the circumstances. For these aspects, the right to health is a fundamental right. The second group of elements gives the right to health an assistance character, by reference to the welfare state since it imposes concrete actions, as a result of regulations, aimed at the provision of the corresponding public services, in order to assure the enjoyment not only of health care assistance, but additionally hospital, laboratory and pharmaceutical services. The line between the right to health as fundamental and as a welfare right is vague and, most importantly, changes in accordance with the circumstances of each case (article 13 National Constitution), but in principle, it can be stated that the right to health is a fundamental right when it is related to protecting life.

This topic allows pointing out that, regarding judicial regimes of Human Rights, the first one being fundamental rights, the exercise of such rights is the base of all rights included in the legal framework. Therefore, it is imperative to state that fundamental rights only retain their nature in its primary manifestation

and can be the subject of protection by *tutela*. Notwithstanding the foregoing, general circumstances of economic and social development allow broadening the space of liberty and of other rights inherent to a person, or individual circumstances may allow so for in special cases.

In this specific case, the plaintiff is affected by a serious illness (AIDS), has been receiving health care services provided by the Institute of Social Security, in recognition of his right to health, and the preservation of this right depends on the statement made by an occupational physician of the Institute of Social Security of Cali that he only "gave him an extension of 30 days," while the physicians of the same institute in Tuluá gave him an extension of 180 days of health care services, with the possibility to extend it in successive periods.

The decision of the Court of First Instance is right because it guarantees the right to health of the plaintiff, which is the focus of his action, as a temporary protection order mechanism, while the administrative authority declares the possibility to continue receive services, which, in the case that it is a negative decision for the plaintiff, will be subject to judicial debate. Additionally, because is necessary to protect the right to health of the plaintiff, there is no doubt that he can demand it from any welfare institution, where such services are provided free of charge, by virtue of the duty of the State to guarantee the health of this kind of patient; however, because of their special circumstances and as the Institute of Social Security is only a social security entity subject to regulations and legal proceedings that must be taken into account, and not a welfare public institution, it should be subject to its own regime, but it is relevant, in order to protect an irrefutable fundamental right, that this Court order that entity to define the health care rights or those related to the disability pension or other of which the plaintiff could be a beneficiary, within a period of fifteen (15) business days, counted from the notification of this decision and that in the meantime continue providing the services.

Accordingly, the Court will partially confirm the decision under review in order to guarantee the right to health, based on the considerations and circumstances mentioned in this document (article 2 Decree 2591/1991) and will add to the decision in order to protect such right.

The Constitutional Court, Chamber of Revision of *Tutela*, taking into account the above mentioned considerations, administering justice, on behalf of the People and by the authority provided by the Constitution,

RESOLVES:

First. TO PARTIALLY CONFIRM the decision of the Fourth Superior Judge of Tuluá Valle, of March 25 of 1992, regarding the referenced action.

Second. To order to the Institute of Social Security to define the health care rights or those related to the disability pension or other of which the plaintiff

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could be a beneficiary, within a period of 15 business days counted from the notification of this decision.

Third. This decision shall be communicated to the Fourth Superior Judge of Tuluá Valle in order to notify the parties as ordered by article 36 of Decree 2591 of 1991, and in order to inform this Court about the compliance of the order to which the previous paragraph refers, within five (5) days counted from the decision of the Institute of Social Security.

To be copied, published, communicated, included in the Gazette of the Constitutional Court and complied.

FABIO MORON DIAZ

SIMON RODRIGUEZ RODRIGUEZ

JAIME SANIN GREIFFENSTEIN

MARTHA VICTORIA SACHICA DE MONCALEANO
General Secretary