

**No:** 179/11

**Office:** Civil Appeals Court, 4<sup>th</sup> District

Redactor: Dr. Ana M. Maggi

Signatories: Dr. Juan P. Tobía Fernández  
Dr. Eduardo J. Turell

Case: “Hernandez Gonzalez, Eliu Aquiliano vs. Executive State Power of the Ministry of Public Health- writ of amparo”

Case No: 2-13.991/2011

Montevideo, 7 June 2011

- (I) The object of this instance is delimited by the appeal launched by the representative of the Ministry of Public Health (MSP) against the final judgment of Case No. 45/2011 issued by the Judge of the First Administrative Court of the Second District, Dr Loreley Pera, who upheld the writ of amparo and imposed upon the State/MSP—the delivery of the medicine CETUXIMAB to the complainant—within three working days and until the moment in which the MSP decided to include it or not in the Therapeutic Drug Form. The Judge ordered in case of the failure to comply by MSP, a fine of UR 100 per day be paid without special penalties as to costs.
- (II) The defendant argued in its appeal, that in this case the elements of admissibility of the amparo set by the law have not been met. In all instances, the MSP acted with full legitimacy as prescribed by the Constitution and the Law, so its actions cannot be classified as manifestly illegitimate or omissive. In the circumstances, it cannot be fully ascertained which is the alleged manifestly illegitimate act from the MSP; we are not facing an administrative action manifestly illegitimate from the MSP. In light of all the legal rules invoked, the MSP did not proceed with manifest illegitimacy or with omission or delay.

Given that illegitimacy exists every time that an act or event goes against the legal framework, the most important admissibility requirement of the action requested, is not fulfilled. The decision manifestly violates the constitutional provisions established in articles 44, 168, 181 and the provisions of the law 9.202 as well as the separation of powers and the autonomy of the Executive Power. The Constitution and the other rules cited make the duty of the MSP to ensure hygiene and public health, but they have never placed on it a legal obligation or power to dispense medication directly to the population, such function is not within its jurisdiction. It is clear and evident that our legal system does not place the MSP as a drugs distribution body, but rather it gives the MSP exclusive responsibility to adopt the necessary steps in order to maintain the collective health. The actions of the MSP are consistent with the rule of law that verifies that it complies with the utmost care with its sanitary policy responsibility, according to strict, technical criteria because the inclusion or not of a medication in the Therapeutic Drug Form (FTM) is not arbitrary. The incorporation of drugs to the FTM must be updated annually and this update must be preceded by the requirements of the decree that was recently approved by the Executive.

As the action against the MSP lacks an object, as the claimed provision of health services has been fulfilled, it is appropriate by right to revoke the judgment appealed. On the other hand, it has not been shown that the medication required by the plaintiff has proven effective in his circumstances or have lowered his tumor count; that is because the plaintiff has never been treated with Cetuimax. The State entity has complied fully with its duties and the requirements laid down, so there were no omissions by the MSP as provided by the Constitution or the Law. Being the right to protection of health and to the provision of health services in Article 44 of the Constitution regulated by law that complies with international treaties, it is not unlawful for a judge in an action like the amparo summary judgment to refuse to apply the legislation, claiming the direct application of the Constitution, setting the health policy of the State.

- (III) Substantiated service of these proceedings, the plaintiff argued that the defendant voluntarily provides the same drug that is claimed by the plaintiff to another patient who suffers the same illness. This fact was expressly raised in the statement of claim and in the submissions, and it was not disputed by the defendant. There is a violation, then, of the principle of equality

It is requested the confirmation of the decision appealed.

- (IV) The grievances expressed in the appeal filed by the MSP are dismissed and therefore we will confirm the decision of the first instance in virtue of the reasons that shall be explained below.
- (V) It should be noted that in order for amparo to prosper, the objective and subjective elements stated in Articles 1 and 2 of Law 16.011 must concur.

The amparo action is a procedural means reserved for cases in which due to the lack of other legal remedies fundamental rights are endangered.

Véscovi states that “in general, the authors and the very laws that have regulated the amparo make it a prompt and easy procedure as a quick way to accomplish the end purpose (prevention) of the protection of fundamental human rights. For this, the procedure is assimilated to the injunction...” (“Main Profiles of Amparo under Uruguayan Law”. RUDP, 4/1986, p. 487).

While there is no express constitutional provision related to the process of amparo, it has been interpreted as an implied guarantee under Articles 7, 72, and 332 of the Constitution.

Law No. 16011 regulates the amparo action with a comprehensive protection insofar as it protects all rights or freedoms expressly or impliedly recognized by the Constitution; it refers to all acts, events or omissions.

There are no limitations of standing to initiate the action: it can be promoted by any natural or legal person, public or private holder of a right (it has been understood by the doctrine that the holder of an legitimate interest protected by the Constitution is also legitimated); as

to the standing to be sued, it is also permitted against individuals; it proceeds not only in the case of injury, alteration or restriction of a right or freedom, but also in case of actual or future threat of irreparable damage.

There must be a manifest illegitimacy, which has been interpreted as meaning that the illegitimacy must emerge clearly, from the act itself.

This is a contentious summary process, in which a limitation period of 30 days from the occurrence of the act, event or omission applies, (Viera, Luis Alberto, *The action of Amparo*, Ed. Idea).

Although, as stated above, the writ of amparo provides a broad protection for constitutional rights, it has been criticized doctrinally that some of the requirements of the Act limit the protection established by the Constitution (e.g.: the time limitation).

- (VI) In the case under examination, it is claimed the effective protection of rights recognized in the Constitution as the right to life and to health.

In Judgment No. 169/2011, the Court has ruled on another process of amparo, which raises the same claim that the one of this case so we will reproduce what was expressed there with corresponding references to this case. In essence, the appellants estimate, as noted similarly by the sixth district judge (Sentence No. 36/2001 in fs. 131-141), “..that the health is a legally-protected right intimately linked to life, to the physical, moral and psychological integrity of a subject, to her/his quality of life, and to the development of his/her individuality. Before all, the right to health implies that a human being has a right to an adequate professional care, to care for it, to prevent illnesses, to find a place to be treated and to receive the necessary treatment for their recovery (cf. Bidart Campos, *The socioeconomic order in the Constitution*, p. 306). The right to health is, therefore, a human right and, as such, it is internationally and constitutionally protected, which enables the writ of amparo.”

It is in this respect, according to the Redactor, that the appellant’s argument –based on the fact that because the drug “Cetuximab” was not included in the FTM, the appellant should not be compelled to supply it through an amparo and that there was not actually unlawful action on the appellant’s part– should be dismissed.

In the first place, because it was proved extensively in the proceedings that “Cetuximab” is the only medicine that the plaintiff needed to mitigate and contain the disease, as resulting from the testimony of her treating physician, Dr. Araceli Ferrari (fs. 287-288) and the expert evidence tendered from Dr. Lyber Alejandro Saldombide Mauad that was not observed or challenged by the interested parties (Articles 183 and conc. CGP; Véscovi et al., *General Code Poces*, T. 5, p. 344 et seq.) and in relation to which there are no elements available that could enable to set it aside based on criteria about the evaluation of the evidence (arts. 140, 184, and conc. CGP; Véscovi et al., *op. cit.* pg. 352 et seq., from Court Judgment Nos. 80/04, 304/05; 87/07, 20/08, 286/10 and others cited therein).

In the second place, because this is a drug endorsed both internationally (see fs. 77-85, 660-661) and nationally (see fs. 89-100, 169-443) according to the guidelines developed by the Service of Clinical Oncology (Faculty of Medicine-UDELAR) and elevated to the National Cancer Program, dated 2 February 2010. Besides, the MSP approved its commercialization on 5 March 2009 and it entered the market on 20 March 2009.

Based upon such antecedents, the Redactor concludes that the MSP should provide the medication to the claimant, even if it is not included in the FTM, and this because that Ministry is responsible for preserving the health of the inhabitants, a fundamental good that cannot be subject to the contingencies of a bureaucratic application process; so it must be inferred that by meeting the formal requirements on which the appellant claims to base its refusal to supply the drug (inclusion in the FTM, as well as the need to comply with the technical and scientific procedures for its inclusion), the fundamental rights recognized in the Constitution are, strictly speaking, being ignored.

It is worth noting, in particular, and with relation to welfare rights, that Article 44 inc. 2 of the Constitution is clear in saying that the State shall provide without charge means of prevention and care to “people with insufficient resources,” which is the case in this case taking into account the high cost of the recommended medications.

For their parts, Ministers Dr. Turell and Dr. Tobia concluded that the decision confirming the first instance judgment is correct, even when they believe that manifest illegitimacy cannot be determined in the actions of the MSP for not including the drug in the FTM, as argued in similar cases (TAC 5<sup>th</sup> in Judgment Nos. 108/09 and others cited therein, etc.), according to the particular details of the scientific and technical procedures for the FTM inclusion and current update system (Decree Nos. 265/2006 and 4/2010 and other applicable provisions); and that, in principle, the obligation to supply the medication to the plaintiff, enabled in the judgment questioned, goes well beyond the functions of the MSP related to health policy, as well it has also been determined in decisions in similar cases, to which we remit to for the sake of brevity (widely TAC 5<sup>th</sup>, in Judgment Nos. 107/09, etc.; TAC 6<sup>th</sup>, Judgment Nos. 209/09, etc.).

In this case, pursuant to the contents of the claim (fs. 47-58) and of the defense filed (fs. 277-285), it must be necessarily agreed that it is an admitted fact that the MSP has been found to be supplying the same drug to other patients who suffer from the same disease as the plaintiff, as appears precisely proven in the proceedings (treating physician in fs. 286-288; expert opinion in fs. 271-272, according to Ruling No. 2-55.702/2010, according to Ruling No. 2-55.702/2010 in fs. 148-149, 156, 232-246). The convictive elements above leads the Court to conclude that the refusal of the MSP to provide the medicine in this case is a flagrant violation of the principle of equality laid down in Articles 8 and 72 of the Constitution, derived from the basic principle of respect for human dignity, which imposes equal treatment to every person. This does not assume absolute equality as a concept of perfect equivalence, but rather to treat equals equally and different, differently in

proportion to their inequality; which is to say, that while the principle of equality does not prevent the establishment of differences in treatment inasmuch as there exist significant differences, the existence and relevance of these differences must be duly justified, noting points of fact and according to reasonable criteria (cf. TAC 6<sup>th</sup>, in Judgment No. 36/11 in fs 131-141; TAC 1<sup>st</sup> in Judgment No 93/10, TAC 3<sup>rd</sup> Judgment No. 3/11; of the Court Judgment Nos. 38/11, etc.) to treat persons equally.

The conduct of the MSP amounts to a manifest illegitimacy, I in delivering the drug to other patients and refusing to provide it to the plaintiff who suffers the same disease and who is credited with the urgent need to count with it for an adequate treatment of his sufferings, because there are no differences according to the factual aspects and reasonable criteria which justify unequal treatment. iWhat comprehensively weakens the defense based on the fact that the MSP primary obligation is to serve the public interest and it is not its role to provide drugs in particular situations, since it cannot not exempt itself from supplying the drug in this case, is that in parallel with its own behavior, it exceeds and surpasses what it defines as its own essential aim (Articles 160, 168 no. 4, 181 inc. 8 and conc. of the Charter; Laws Nos. 9.202, 15.181, 17.930, 18.211, 18.355, and other applicable clauses) in simple performance of the so-called “estoppel doctrine” (Judgment cit. etc); which is shared by the other member of the Court.

(VII) There are no merits to impose special procedural penalties (arts. 688 CC; 56, 261 CGP).

For the reasons stated and applicable provisions set forth, the Court...

**FINDS:**

To confirm the appealed judgment, without any special condemnation proceedings.

In due course, be returned