

NEUQUEN, 19 May 1997

DR. NORMA M. AZPARREN

WHEREAS,

CLERK OF THE COURT

In accordance with this record of proceedings entitled: "MINORS IN THE COMMUNITY OF PAYNEMIL RE: PROTECTION ACTION (Case File No. 311-CA-1997), brought on appeal from the lower court, the Third Civil Court, to this, the Second Chamber, with presiding judges Dr. Federico GIGENA BASOMBRIO and Lorenzo W. GARCIA, who will sign this resolution in accordance with Administrative Agreement No. 25 / 96, in the presence of the acting Clerk of the Court, Dr. Norma AZPARREN. In accordance with the order of voting determined under the lottery system, Dr. Gigena Basombrio stated that:

I. The Public Defender for the First Circuit, Dr. Nara Oses, brought a protection action in favor of the children and adolescents of the community in Paynemil who were poisoned after consuming water that contained lead and mercury, as per the presentation of the claim at pages 29 to 35 of the record of the proceedings, in which the claimant plead that the failure of the Executive Branch of the Provincial Government to comply with its obligation to protect the public health be remedied through its provision of the necessary potable water for the survival of area inhabitants, and that such diagnostic measures as may be necessary for the treatment of the children affected be adopted, as well as the relevant measures necessary to prevent the contamination of the water and the soil.

All interested parties having been duly notified of the claim, as per the order appearing at page 36 of the record of the proceedings, and the claim having been admitted and the evidentiary proceedings opened (page 58 of the record of the proceedings), upon the petition of the parties for the court to rule on the claim (pages 85 et seq. of the record of the proceedings), the lower court issued its resolution, which appears at pages 86 to 89 of the record of the proceedings.

In its resolution, the court granted the protection action, and, as a result, ordered the Executive Branch of the Provincial Government to make use of the relevant resources at its disposal in order to take the following measures: a) to provide, within a period of

two days, 250 liters of potable water per inhabitant, b) to ensure, within a period of 45 days, the provision of potable water to the affected persons by any means appropriate to such purpose, c) to institute, within a period of seven days, such measures necessary as to determine if harm had been caused to area inhabitants due to poisoning from heavy metals in the environment, and, if this were found to be the case, to undertake the necessary measures to treat and cure the affected persons, and d) to take all necessary measures in order to ensure the protection of the environment from such contamination.

The respondent appealed this decision, in the terms set forth in its appellate brief, which appears at pages 92 to 99 of the record of the proceedings, and which the claimant responded to in its brief, appearing at pages 101 to 104 of the record of the proceedings.

II. In the first place, it should be noted that, as the Court would hold, the protection action must be reserved for those delicate and extreme situations in which, due to the lack of other legal measures, the protection of fundamental rights is endangered. The protection action cannot be used to circumvent issues of jurisdiction or to allow the Judicial Branch to interfere in any area that pertains to another branch of government of the State. In addition, it is an exceptional remedy, and should be applied to a limited set of circumstances. (Rivas, “The Protection Action” (El amparo), p. 156) (PS. 95 – IV – 637 – 639, Second Chamber) (JUBA 7 – NQN – Q00000361).

In this respect, notwithstanding the claimants’ allegations, and keeping in mind the information set forth in the preceding paragraph, it should be noted that, in the case before the Court, there is no indication that there is any possibility for the Judicial Branch to configure or develop those policies pertaining to the Executive Branch. In reality, and according to the extreme situation described in the claim, and which was proven through not only the testimonial declarations found in the record of the proceedings, but also through documentary evidence that was timely submitted upon this Court’s request, what we have here is a serious situation of persons having been poisoned, specifically minor children who are members of the community in Paynemil. This is a shocking violation of not only the constitutional, but also the basic human rights, of these persons. I must make it clear that, based on the aforementioned evidence, the representatives of the Executive Branch and of its various bodies and institutions who have been involved in this issue are

aware of the problem. It is clear, then, that we are not dealing with an undue interference by one branch of government into the activities of another, but with the examination, in the case before the Court, of whether the elements of the claim under applicable law have been met.

Regarding an alternative remedy, I will highlight that, in accordance with Article 43 of the National Constitution, any person has the right to bring an expedited and rapid protection action, as long as there is no other judicial remedy that is more appropriate, against any action or omission of the public authorities that, in an actual or imminent manner, harms, restricts, alters or threatens, in an arbitrary or manifestly unlawful way, those rights and guarantees recognized by the Constitution, treaties, or the law (JUBA 7 – NQN – Q0001772). According to the record of the proceedings, there is no indication that there is a more appropriate judicial remedy than the protection action to resolve the present conflict, and I will highlight that this point was not even mentioned by the appellant, who limited itself to arguing that there could be another more appropriate judicial remedy, but without indicating what that other remedy might be.

In respect of the situation of fact that justifies the protection action as the chosen remedy, I am in agreement with the analysis that [*missing text*] ... of the contamination of water that the community uses for its consumption, which has been acknowledged and has not been questioned. I note that despite the time that has passed since this evidence was brought to light, as of today, the situation has not been resolved in a satisfactory way. To reach this conclusion, it is enough to look to the testimonial declarations that were presented during the proceedings, and, especially, that of Hector [*surname obscured*], Sanitation Chief of the area in question, who stated that no analysis of blood or urine samples had yet been carried out in the lab in Bariloche, or that of Delio Gabriel Lanchas, Director of Environment, who stated that it would be necessary to undertake a new study in order to determine if local water sources are contaminated, given that the prior studies used detection limits that were not sufficient for these purposes.

In my opinion, the evidence that was presented shows that although the Executive Branch has engaged in some activities with respect to the situation that has been created by this pollution, in reality, what the Court observes is that there is a lack of timely action

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with respect to the serious circumstances that we are faced with in this case, as shown by the testimonial declarations that are cited herein, and the available documentary evidence.

This being the case, and keeping in mind the seriousness and the consequences of a contaminated water supply, the delay in providing the needed resources and adopting the necessary measures in order to remedy the situation has resulted in a continuing violation of a right that is clearly protected under the Constitution. I am led to the conclusion that there has been an omission on the part of the respondent that can be deemed arbitrary under the terms of Art. 43 of the National Constitution.

In respect of the formal requirements—that is, the standing of the Public Defender to bring the case and the time period for bringing the claim, it must be taken into account that these requirements are a function of the application of justice in the present case.

As such, and in reference to the term, I would highlight that although it is true that the problem of the contamination has existed over a long period, in truth and in respect of the representation that is being carried out by the Public Defender, the matter was brought to that office's attention at a later time, and certainly as a result of the attention that the case was receiving in the media. At any rate, and given the special characteristics of the case, it is my opinion that the issue of the statute of limitations is not enough to justify a dismissal of the case due to this mere procedural formality, given the fact that the health of the children of this community has been gravely affected, which obliges the State to quickly adopt measures that will guarantee that the protection of their aforementioned constitutional rights.

With respect to the standing of Dr. Oses, I want to make it clear that the appellant has not challenged the legal standards and principles based on which the lower court allowed her to participate in the proceedings, and as a result, this matter is firmly settled. In respect of the reluctance of the parents of the children to participate in these proceedings, I understand that this is due to a lack of awareness about the judicial remedies that are available to guarantee their children's rights.

III. For the reasons set forth herein, and the lower court's analysis of and basis for the decision, with which I am in agreement, I propose that the decision of the lower court, appearing at pages 86 to 89 of the record of the proceedings, be upheld. With costs.

This is my vote.

Dr. Garcia stated that:

I present my opinion, which is favorable to the [*missing text*] ... arguments of the appellant, which, in light of this serious and urgent factual situation, which was denounced through the claim presented before the Court, in respect of the fact that [the contamination of the water supply] is actually and evidently affecting the health of a portion of the population of the province, it would seem trivial and [*missing text*] ... to insist upon procedural issues such as the standing of the claimant, the presentation of the claim within the legally prescribed period, or the semantic difference between omission and delay.

With respect to this last point, I understand that between omission and delay there is a relationship analogous to that of genus to species, and that the concept of delay necessarily implies that an omission has occurred, given that any delay in the enforcement of an action or positive obligation implies an omission on the part of the party that should have acted in due time.

The objection to the election of the protection action in order to “get around the hypothesis that we are dealing with a duty imposed on the State in a generic or global manner,” is also worthy of a reply. The protection action is not meant to correct or restrain the State or society's authority to carry out their primary purposes and objectives, and the judicial remedy in question is also not meant to oblige the Executive Branch to govern or to compliment, in sum, those obligations that it has in its institutional or political capacity.

In my understanding, the aforementioned concepts are generally correct, but are not particularly relevant to the objective of this particular protection action. It is clear that constitutions tend to contain programmatic standards, which are directed to establishing

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objectives for State action, but due to the limitations of the form, cannot be considered as directly operative. As such, the right to health or to one's own dwelling cannot be interpreted in the sense that would permit a claim directly to the State to guarantee to an individual that he or she would not fall ill, or that the State would provide him or her with free housing. But these concepts can be interpreted in such a way as to give force to programmatic assumptions, in order to determine the duties and obligations of specific government employees or institutions, in relation to the courses of action that are appropriate to a given situation, in which those fundamental rights set forth in and guaranteed by the Constitution are endangered or threatened. And it is clear that if the Executive Branch does not comply with the possible courses of action in exercise of the material powers that are available to it, it is none other than the Judicial Branch which has the jurisdiction to hear and rule on such a case, without this resulting in anything more than the execution of its own specific powers, and without prejudice to those powers that pertain to the appellant authority, subject in all cases to the principle of legality, and without prejudice to the technical discretionary authority that must be exercised in respect of the convenience and timeliness of the administration of such powers.

I conclude, then, that in the case of manmade contamination of water tables, to the extent that such contamination affects the health of specific citizens, then these citizens—or those who may represent them—have the right to bring correct and remedial action in order to restore the legal right affected, as a clearly justiciable presumption.

As such, in deciding a case of a minor effect on a legal right in question, as was the case of the refusal to allow a patient the free choice of his or her medical service provider, the C. Civil Federal Commission has stated, in *In Re Marengo Noelia Emilia v. I.O.S.*, registered in LD text, that “Within the order of the verisimilitude of the law, this case puts into question both the right to health, and [missing text] ... social and cultural, adopted by the United Nations and ratified by Law 23.313), according to the cited jurisprudence. The same court also stated, in *In Re Gonzalez v. I.O.S.*, in the same registry, that the Supreme Court of Justice implicitly accepted the protection action as an adequate remedy in those cases in which [the claimant] sought for the government

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authority to provide the experimental drug “crotoxina” (In Re C.M. v. National Government, ED 122 - 584), an opinion shared by SC Mendoza in Fundacion Cardiovascular de Mendoza ... In Re Protection Action, ED 153 – 164 et seq., with a note by Susana Albanese, “The protection action and the right to health (“El amparo y el derecho a la salud”).

Being concurrent, then, evident reasons of urgency in the case at hand, the lack of other appropriate procedural remedies, and an effect on the constitutional right to the protection of health and to a clean environment, I concur with the foregoing vote, and vote the same way.

In light of the foregoing, this Second Chamber,

RESOLVES

- I. The resolution of the lower court, appearing at pages 86 – 89 of the record of the proceedings, is hereby upheld, in all respects of the matters in the claim and the harm alleged.
- II. The appellant is hereby ordered to pay costs (Art. 68 of the Code of Civil Procedure).
- III. Case file to be registered and timely returned to the lower court. So notified.

[SIGNATURE]

Federico GIGENA BASOMBRIO

JUDGE

[SIGNATURE]

Lorenzo W. GARCIA

JUDGE [ILLEGIBLE TEXT]

[SIGNATURE]

DR. NORMA M. AZPARREN

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CLERK OF THE COURT

20 May 1997 [ILLEGIBLE HANDWRITTEN TEXT]