M. XXXVI - Monteserin, Marcelino vs. the National State – Ministry of Health and Social Action - National Advisory Commission for the Integration of Disabled People - National Service of Rehabilitation and Promotion of the Disabled People – National Supreme Court of Justice - 16/10/2001

-I-

On page 13/15, Marcelio Orlando Monteserin, on behalf of his son Nahuel Santiago, filed an action of *amparo* against the National State, with the aim of ensuring the compliance of the provision included in articles 3, paragraph 2; 4 and related articles in law 24.901 and 23 of the Convention on the Rights of the Child, included in the National Constitution, and ordering the registration of the child to the corresponding health insurance in order to receive the benefits provided by the current legislation.

According to Mr. Monteserin, in 1993 he adopted the child, who suffers from brain paralysis with psychomotor impediments and mental retardation, and currently his economic situation is extremely difficult, due to the fact that he is unemployed and his wife is a homemaker.

From the moment law 24.901 was passed, he started the proceedings before municipal, provincial and national authorities in order to gain access to its benefits, without receiving a positive answer, and, in view of such conditions, he was forced to resort to justice to claim what legitimate right belong to his son, as his health and integrity can no longer stand delays.

He supported his presentation on the provisions of the abovementioned law and its regulatory decree (1193/98), which, in his opinion, hold the National State accountable for the provision of services stated in law 22.431 to disabled people who are outside the health insurance system when they or the people in charge of them cannot afford such insurance.

-II-

On page 119/120, the Federal Chamber of Appeals from Rosario (Room B, Civil Chamber), ratified the ruling of the previous stage, which accepted the action of *amparo* and ordered the National Service of Rehabilitation and Promotion of the Disabled People to provide the comprehensive care provided by law 24.901 and decree 1193/98, not only regarding the basic benefits listed therein, but also the specific and family group alternative services or complementary benefit needs that may arise from certain situations, after carrying out the evaluation provided by article 10 of the regulation, and it rejected the complaint regarding the National Ministry of Health and Social Action, notwithstanding its mandatory participation in what is legally forecast (see pages 95/99).

They determined, first, that the action of *amparo* was the wise path to solve the problem affecting the child in view of the inexplicable behavior of the representatives of the different national governmental bodies. Regarding the background of the issue, they shared

the foundations of the first instance sentence and estimated the case was analogous to another one previously resolved, in which they examined laws 23.661, regulating the Social Security National System, and 24.901, which established the system of basic comprehensive rehabilitation benefits in favor of disabled people. On such basis, they pointed out that the letter and spirit of the law are clear in determining that the benefits provided by the single system for uncovered people will be financed with the resources allocated to the National Service of Rehabilitation and Promotion of the Disabled People by the National Government for such aim.

-III-

Against the ruling, the above mentioned national service submitted the extraordinary appeal recorded on pages 125/138, and its rejection on page 145, gave place to the current complaint.

It claims the existence of a federal issue because the interpretation of a federal law is at stake, as well as the fact that the questioned issues exceed the interest of the parties and are extended to the whole community and because the sentence is arbitrary due to the dogmatic statements contained therein.

The main grievances are:

a) The chamber ordered them to take actions which are not their duty and for which they do not have resources, in spite of the fact that it was acknowledge that the body in charge of providing care is the Directory of the System of Comprehensive Care Basic Benefits for Disabled People.

b) The foundations of the ruling are vague and lack reference to this cause, because the grievance alleged could not be proved and the interested party does not have the certification stipulated in article 3 of law 22.431, required to delimit the obligations of the State to provide care in the rehabilitation of the beneficiaries of the system. In effect, such certificate determines the disability condition as well as the benefits that should be provided if required by the condition, and in the records, although the complaint did not require it, the lower court requested the provision of the benefit stated under law 24.091.

c) The lower court also omitted consideration of other determining elements for the adequate resolution of the case, such as resolution 3 of October 5, 1999, from the President of the single system created by law 24.901, which provides for the implementation of the Coverage Programme for Poor Disabled People, as well as the establishment of the National Register of Care Providers for People with Disabilities by the Directory of the System of Comprehensive Care Basic Benefits for Disabled People- until the Service Evaluation Commissions are set up in each jurisdiction-, which will be temporarily formed by the already-categorized institutions by the National Institute of Social Services for Retired People and Pensioners.

d) The sentence does not even make reference correctly to the right in which its decision is based because it wrongly quotes decree 762/92 as 792/97 and, moreover, because it is qualified as part of the regulation of law 24.901, when in fact it was issued before the passing of the legal norm. In this regard, it affirms that, due to the similarities between the provisions and the fact that it is hierarchically inferior to the law, such decree was derogated. It also claims that decree 1193/98 is part of the regulation of the above mentioned law. –

-IV-

The extraordinary appeal is formally admissible, if by its intermediary, the scope and interpretation of a federal norm (law 24.901) has been questioned and the definite decision of the lower court has been against the right the appellant has claimed on it (article14, item 3 of law 48).-

-V-

Regarding the merits of the case, it is worth mentioning that by discussing the content and scope of a federal norm, the Court is not limited by the arguments of the parties involved or the lower court but it has to make a statement on the disputed issues (Rulings: 319:2886; 320:1602; 323:1406 y 1605, among many others).-

In the light of such principle, it is worth mentioning that law 24.901 provides for the establishment of a basic service system of comprehensive care for people with disabilities, which includes prevention, care, promotion and protection actions with the aim of providing comprehensive coverage for their needs and requirements (art.1) and states that health insurance companies must cover such benefits. When the first paragraph of art. 4 of the law 22.431 was modified, it was clarified that the State, through its institutions, will provide the benefits of the system to people with disabilities who are not covered by the health insurance system, as long as they or the people in charge of them cannot afford such benefits (art. 3) and it also states that: people with disabilities who are not covered by health insurance are entitled to access all the basic benefits comprised in the current law through the State institutions (art. 4).-

Article 7 states how the benefits provided by the law will be financed and it provides that: (item e) beneficiaries of non-contributory and/or ex-gratia pensions in cases of handicapped people, veterans under law 24.310 and all other people with disabilities not included in the preceding items that are not covered by health insurance, as long as they or the people in charge of them cannot afford the benefits, will be covered with the funds annually determined in the general budget for such aim by the national government.

Regulation of law 24.901, passed by decree 1193/98, determines that disabled people not covered by health insurance system and who do not have adequate and enough funds will be able to access basic benefits through governmental intuitions, at national, provincial and municipal level and the City of Buenos Aires, comprised in the system, as well as the

authorities at provincial, municipal and Buenos Aires City level will be able to sign agreements of technical, scientific and financial assistance with the corresponding national authority with the aim of implementing and financing the basic benefits provided by the legal norm (art.4 annex I).

-VI-

In my opinion, the mere description of how the system is legally regulated leads to the rejection of the grievances claimed by the National State, in both its extraordinary appeal and the direct presentation, because the law provides that the care of disabled people will be covered by the health insurance system or in the cases above mentioned, by the State through its institutions.-

I support my opinion on the fact that it is out of the discussion that the child suffers from a disability (brain paralysis), that he does not have health insurance and that his family cannot afford his treatment, because the verification of these questions --of facts and evidence-- is the role of the trial court and, therefore, they are not subjected to revision in this instance, especially, when on the other hand, there is no evidence that these questions have been arbitrarily resolved.

Moreover, the behavior of the defendant State also confirms such conclusions every time it rejected the provision of the care requested. In fact, even when the child was suffering from a disability which gave him the right to request the legal benefits, it said it was not its duty to assist him because such duty was the responsibility of some other institution or the provincial authorities, or even a contradictory position, because the claimant did not provide the corresponding certificate required by the law and its regulation that proves his disability. –

From this perspective, it is not relevant which institution of the National State is responsible for the provision of the requested assistance by the claimant for his child, because what is important is the fact that the national State should provide this care and in order to do it, the law sets out how to finance such activities (in this case, the one provided by art.7, item e), and it is not acceptable to allege lack of resources, which, besides, was not proven.-

It is clear that the abovementioned does not impede the National State, if it applies, from reimbursing the costs for the care of the child to the person whom is obliged to incur them.-

-VII-

Finally, it is worth stating that the right to life is implicated herein, which is more than a right not listed in the terms of article 33 of the National Constitution, it is an implicit right because the exercise of the remaining rights depends on it (according to the judgment by the undersigned in the case Asociación Benghalensis, to which its foundations and conclusions were referred to by your Excellency in its ruling published in Ruling: 323:1339).-

In this same regard, the Court emphatically remembered that such is the first right of a person which is recognized and guaranteed by the National Constitution and that the human being is the axis and core of the entire legal system, and as a means in its own –beyond its transcendent nature- its person is inviolable and is a key value to which the rest of the values are always instrumental in character (C.823XXXV. Campodónico de Beviacqua, Ana Carina vs. Ministerio de Salud y Acción Social. Secretaría de Programas de Salud y Banco de Drogas Neoplásicas, decided on October 24, 2000, with its quotes).-
In the above mentioned case, which is similar to the one herein, the Court also recalled that according to the international agreements with constitution status (art.75, item 22 of the National Constitution), the right to the preservation of heath –understood within the right to life- was reaffirmed and it was stated that the public authority must guarantee that right with positive actions, without interfering the obligations of the local jurisdictions (according to the vote of the majority).-

After considering the different international agreements that relate to the subject matter, among which the Convention on the Rights of the Child must be highlighted, because it includes the duty of the States to promote and guarantee children with physical or mental disabilities the effective access to health and rehabilitation services, and to make the efforts to avoid that such services are neglected and to achieve the full realization of the right to benefit form social security for which the national legislation, the resources and the situation of each child and the people in charge of them should be taken into account (art. 23, 24 and 26), the Court concluded that the National State has committed to international agreements that aim at promoting and facilitating the health benefits required by children and cannot exempt itself from those duties under the pretext of inaction by other public or private entities, mainly when they are part of the same health system and the child is at stake, who should be looked after above all by all the governmental bodies (art.3, of the above mentioned convention).-

-VIII-

In view of the points cited above, I think the extraordinary appeal submitted by the National State is admissible and I confirm the sentence on the subject matter.-

Buenos Aires, March 30th 2011.-

NICOLAS EDUARDO BECERRA.-

Buenos Aires, October 16th 2011.-

In view of the records herein: "Appeal on points of fact filed by the National Service of Rehabilitation and Promotion of Disabled People in the case Monteserin, Marcelino vs. the National State –Ministry of Health and Social Action- National Advisory Committee for the Integration of People with Disabilities –National Service of rehabilitation and Promotion of Disabled People", to decide on its appropriateness.

Considering:

1) That the foster father of a child suffering from brain paralysis, living in the province of Santa Fe, requested –sponsored by the public defender before the federal courts in Rosario- that the National Executive Power and its depending bodies be encouraged to comply with articles 3, paragraph 2, and 4 of law 24.901, and 23 of the Convention on the Rights of the Child and to provide the basic services for rehabilitation described in such law in favor of people with disabilities, who are not covered by health insurance and whose financial resources are not enough to afford them (on pages 13/15 on the back of the main file).-

2) That after having given the pending petition for *amparo*, having had an audience in which an official of the defendant offered the services of PAMI to assist the child, a proposal which finally was not carried out because it was unauthorized by the representative of the National State (on pages 33/33 on the back and 37/39), and having answered the report provided in article 8 of law 16.986, the first instance judge granted the petition requested and ordered the National Service of Rehabilitation and Promotion of Disabled People to provide the health services the child's condition would demand and for such matter it ordered a disability assessment (according to law 24.901 and article 10 of the regulatory decree 1193/98; pages 95/99).-

3) That the judge considered that laws 22.431, 23.661, 24.452, 24.901 and decree 1193/98 designated the cited organism the responsibility and the economic resources to provide in throughout the country the medical and rehabilitation services recognized for people with disabilities who lack economic resources and the protection of health insurance, independently from the action of the provincial jurisdictions in such matter. On that basis, he considered that the evidence showed the disability of the child, the harm caused to his rights and the arbitrariness of the public authority in the neglecting the provision of the benefits needed to improve the life quality of the child, which could not be justified acknowledging a lack of tax assets. –

4) That such judgment was ratified by Room B of the Federal Chamber of Appeal in Rosario, which mentioned the special circumstances of the case and regretted the inexplicable position of the different National State-dependent bodies in view of the situation of the child (on pages 33 and 37), when the required assistance that should be provided had specific resources allocated for such purpose in the budget of the National Service of Rehabilitation and Promotion of Disabled People (according to art. 11, decree 762/97; pages 119/120 on the back).-

5) That regarding such decision, the losing party filed the extraordinary appeal and its rejection gives way to the current complaint. It claims that the lower court has made an incorrect interpretation of the federal norms at stake because it has imposed child support duties that are not the responsibility of the cited national service and that should be demanded of the Directory of the System of Basic Benefits of Comprehensive Care in favor of People with Disabilities, according to resolution 3/99, established by the presidency of such body, which was not considered in the ruling despite the fact that it was explicitly referred to in the chamber (on pages 132/138).-

6) That the appellant also affirms that the application of law 24.901 without the submission of a disability certificate required in articles 3, law 22.431 proving the existence of a disability and the need to receive the benefits claimed of the National State is arbitrary; that the judicial sentence is impossible to be fulfilled because the defendant does not have the resources to cover the required benefit; and that the mention of the provisions of decree 762/97 in the sentence –wrongly cited by the court as regulatory of law 24.901- has been implicitly derogated with the passing of a new legal regime for basic health care benefits (law 24.901 and regulatory decree 1193/98).-

7) That the way in which the matter has been developed, it is worth mentioning that during the complaint proceeding before this court, the cited National Service of Rehabilitation and Promotion of Disabled People formed a medical jury which verified the brain paralysis of the child and issued the disability certificate required by laws 22.431 and 24.901, articles 3 and 10 respectively, enabling the child to receive health care and services specifically detailed therein which should be provided for his treatment (on pages 156, 159/160). –

8) That such circumstances make inappropriate the complaint of arbitrariness based on the lack of valid evidence in respect to the alleged disability and the legitimacy of requesting an action of *amparo* without a medical certificate, an argument which the appellant insists on even after having submitted the certification –issued by the same party- that officially admitted the disability of the child, the need for treatment and the rehabilitation possibilities through the therapies provided by law 24.901, which clearly shows unscrupulousness in the defense and an unjustified disinterest to solve the situation which puts the health of the child at risk (on pages 63/66 on the back of the complaint).-

9) That being that recorded, the criticism regarding the responsibility assigned to the appellant to make the required benefits effective is linked to the application and interpretation of the federal norms on the rights of life and health of children; therefore –with that scope- the extraordinary appeal is formally appropriate (Rulings: 323:3229). It is worth recalling that in the task of establishing the intelligence of the superior provisions, the Court is not limited by the positions of the chamber and the appellant, but it has to issue a judgment on the subject in question (Rulings: 308:647; 310:2682; 314:1834; 318:1269, among others).-

10) That this court has already expressed that the right to life is the first right of a human being which is recognized and guaranteed by the National Constitution (Rulings: 302:1284; 310:112). It has also said that human beings are the axis and core of the legal system and as a mean in itself –beyond its transcendent nature- its person in inviolable and it is a core value to which the rest of the values have only an instrumental character (Rulings: 316:479, concurrent votes).-

11) That from the international treaties that have constitutional status (listed in art.75, item 22, of the Supreme Law), this Court has reaffirmed in later judgments the right to preserve health – understood as the right to life- and it has highlighted the unavoidable obligation of

the pubic authority in guaranteeing this right with positive actions, without affecting the obligations of the local jurisdictions, the health insurance companies and the entities of prepaid health care services (Ruling: 321:1684 and 323:1339).-

12) That in the cited Rulings: 323:3229, the Court sentenced the National State to guarantee the regular provision of drugs needed by a disabled child -living in Córdoba and who did not have health insurance. For such purpose, it emphasized the explicit commitments assumed by the government before the international community to promote and facilitate the effective access to medical and rehabilitation services required by children, especially those with physical and mental impairments; to make efforts to ensure that they not be deprived of such services and to aim at the fulfillment of the right to benefit from social security (according to articles 23, 24 and 26 of the Convention on the Rights of the Child, among other international treaties examined under item 17, 18, 19, 20 and 21 of the cited ruling).-

13) That the Court remarked in such precedent that the National State cannot avoid such obligation under the pretext of the lack of inactivity by other entities –public or private- because it is responsible for ensuring the full accomplishment of the constitutional rights that protect life and health of children and for ensuring the continuity of treatment they may need, due to governing function also given by the national legislation on such matter and the faculties to coordinate and integrate its actions with the provincial authorities and the different bodies that make up the heath system in the country in order to achieve the fulfillment of the right to health (according to items 22, 23, 24, 27, 32, 33 and 34).-

14) That in the this case, the National Service of Rehabilitation and Promotion of Disabled People, dependent on the National Ministry of Health, seeks to be exempted from paying the assistance for the child alleging a lack of resources and making another department which works in the same field –the Directory of the System of Basic Benefits of Comprehensive Care in favor of People with Disabilities- responsible for the assistance of the child, which performs similar functions and with which is part of other entities in the health care system; therefore, the considerations of the preceding Rulings: 323:3229 apply and should be referred to immediately.-

15) That this is as such because law 24.901 gave the National State and its dependent entities the care of the system of basic health benefits provided by it to people with disabilities who do not have health insurance coverage and who lack their own resources to cover their needs (according to articles 1, 2, 3 and 4 of cited law), conditions which have been credited in the current case. The National Service of Rehabilitation and Promotion of Disabled People –sentenced in these acts- is part of the directory created, precisely, to manage the benefit system, guarantee universal care and coordinate the economic and institutional resources affected by that field (according to regulatory decree 1193/98, articles 1 and 6, of annex 1, and articles 1 and 5, of annex A).-

16) That the cited directory of the system of basic benefits, to which the appellant entity belongs to, is responsible not only for the execution of the health protection program

provided by law 24.901, but also of making the necessary decisions for the immediate implementation of the program in the provincial jurisdictions, according to the documents provided by the appellant (on pages 101/107). In this regard, the argument based on resolution 3/99, passed by the presidency of such directory with the powers conferred by decree 1193/99, article 5, annex A, is not valid because its dispositions do not exempt the defendant from its obligation to assist the disabled child according to the legal system and the cited regulation.-

17) That also the benefits established in favor of people with disabilities not covered by health insurance are financed by the resources allocated in the National general budget for such aim (art. 7, item e, at the end, law 24.901) and the fund specially set for similar programs in law 24.452 (according to art.7, paragraph two and annex II, specially items 23 and 24). Without affecting it, the provinces and the City of Buenos Aires can opt for their incorporation to the system through the corresponding membership agreements, which has not yet happened in the province of Santa Fe (according to pages 8 and 32 in the main file).-

18) That in such conditions, the claim filed by the lower court regarding the behavior of the appellant, in view of the responsibility that the National State must assume for the assistance and care of the disabled child, from which it is not exempted on the basis of the delay in the implementation of the health system in the provinces; therefore, the sentence against the National Service of Rehabilitation by which it must provide the required health benefits, beyond its role to provide for the adequate participation of the local authority in such matter (according to laws 9325 and 11.518, especially art. 4, items a and e, of the Province of Santa Fe) remains valid.-

For these reasons and according to the arguments that agree with the judgment of the National General Defender, the extraordinary appeal is appropriate with the scope fixed in the above mentioned consideration items and the appealed sentence is confirmed. It is ordered to add the complaint to main file and communicate it to the Treasury Procurer for the aims of art. 6 of law 25.344.-

Let it be notified and returned back.-
JULIO S. NAZARENO – EDUARDO MOLINE O'CONNOR – CARLOS S. FAYT – AUGUSTO CESAR BELLUSCIO - ENRIQUE SANTIAGO PETRACCHI – ANTONIO BOGGIANO – GUILLERMO A. F. LOPEZ – ADOLFO ROBERTO VAZQUEZ.//-