M. 3226. XXXVIII.
Martín, Sergio Gustavo et al vs. Dir. Gen.
Air Force Personal Welfare, Argentinian Air Force re: Amparo or relief proceeding.

Office of the Attorney General

S u p r e m e C o u r t :

-I-

The National Chamber of Civil and Commercial Appeals (Court 1) revoked the trial court decision to admit the writ of amparo or relief proceeding filed by the parents of a disabled minor against the Argentine Air Force for the purposes of the latter taking responsibility for the comprehensive treatment of said minor (pp. 108/113). In reaching its decision in the matter, the Chamber deemed that: a) the assertion that the General Directorate of Air Force Personnel Welfare was affiliated with the Basic Benefits Scheme for Persons with Disabilities (Article 1, Law 24,901) has not been made, and; b) for access to public health, the benefits granted by the State under Decree 762/97 and concordant provisions (pp. 129/130) must be arranged.

The petitioner filed a special appeal against this ruling (see pp. 138/152), which was answered by the defendant (pp. 157/159) and partially granted on p. 160.

-II-

In short, the appellant believes that the solution provided by the trial court wrongly interprets various precepts of Laws 22,431 and 24,901, as well as Decrees 762/97 and 1193/98, and that it breaches Articles 14, 16, 18, 28, 31, 33, 42, 75, Subsections 19, 22 and 23, and 99, Subsection 2, of the National Constitution and concordant provisions of international treaties, in particular Article 23, Subsections 1 and 2 of the International Convention on the Rights of the Child, since her disabled daughter’s right

to receive comprehensive care for her condition was ignored. She also reproaches the arbitrary nature of the decision.

-III-

First of all, it is important to note that, when judgment was passed in relation to the admissibility of the remedy, the appeal was only granted - as was anticipated - with the scope conferred in Law 24,901 and Decrees 762/97 and 1193/98 (pp. 161 back), whereas no provision was granted in relation to the perceived arbitrariness. Since the appeal was not filed by the plaintiff on points of fact, the jurisdiction is only authorized to pass judgment insofar as the complaint has been granted by the court (legal doctrine of Rulings: 318:1246 and citations, etc.).

-IV-

The counter claim of the appellant regards the application and wisdom of federal provisions that protect minors' right to life and health, and the special appeal is therefore admissible (see Rulings: 323:3229; 324:3569; etc.). In this respect, Your Honor is not restricted by the arguments of the parties or the court, but rather it is incumbent upon you to make a statement on the matter in question (see Rulings: 320:1602; 323:1656, etc.).

It must not be ignored that, as the appeal refers - in relation to access to public health care - to the regime provided for in Decree 762/97, this resolution may be held as lacking the definitive nature mentioned in Article 14 of Law 48. Nevertheless, given the nature of the interests under discussion and the statements of the petitioner with regard to the preference for care treatment to continue in

its current form, I deem this to be the most correct moment to interpret the legal precepts involved in order to properly protect the rights compromised in the case (legal doctrine of Rulings: 318:1246, etc.).

-V-

It is worth stating that the nature of the relationship between the parties and the condition afflicting the minor in this case are not up for debate, and, instead, we are dealing with the obligation of the defendant to cover the basic disability benefits claimed by the petitioner in full.

The statements made by Your Honor, in particular Rulings: 323:3229 and 324:3569, not only stress the constitutional aspect of the matter, but they also make clear the nature of the obligations concerning the State in its capacity as principal guarantor of the health system

- including in the international order - regardless of any obligations that may correspond to local jurisdictions, prepaid health care providers and medical bodies is also made clear (see Rulings: 321:1684 and 323:1339, as well as other case law in the matter).

Thus, in the precedents of Rulings: 323:3229, Your Honor clearly stressed that the obligations for which an intermediate body is responsible do not impede those obligations that correspond to public health care (see Cons. 31), further stressing that Law 22,431 obliges the State to guarantee medical treatment to disabled minors in the event that the parties on whom they are dependent or the health care providers to which they are affiliated are unable to shoulder the burden (Cons. 32). A similar conclusion was

reached in Rulings 324:3569, considering Clause 15 et seq.

It is important to note that, in the precedent registered in Rulings 313:579, Your Honor previously referred to the purpose of protection inherent to the system established by Law 22,431, which intends to satisfy all aspects of the social situation of disabled parties (Cons. 5).

-VI-

Having stated the above, it is first of all appropriate to determine whether the defendant can be held as one of the agencies of the State referred to in Article 4 of Laws 22,431 and 24,901, as asserted by the petitioner in his plea, and, if appropriate, what is the precise nature or scope of its obligations within the strict terms of the regulations under discussion.

It is my understanding that we can begin to answer these questions by referring to the above mentioned Article 4 of Law 22,431, which establishes that the State, through its government agencies, shall provide the services listed therein to disabled parties not included in the health care system in the event that they or the persons on whom are dependent are unable to provide these services.

Moreover, Article 2 of Decree 762/97 deems that all disabled parties, affiliated or otherwise with the social security system, who prove their condition through the certification stipulated in Article 3 of Law 22,431, and who require the basic benefits listed in Exhibit I shall be held as beneficiaries of the Basic Benefits Scheme for Persons with Disabilities.

Article 2 of Law 24,901, on the other hand,

establishes that it is the obligation of the health care providers listed in Article 1 of Law 23,660 to comprehensively provide the basic benefits included in this regulation, Article 4 of which stipulates the right of disabled parties not covered by a health care provider to the benefits recognized in the health system through dependent agencies of the State.

The legal precept of Law 24,901 - Dec. 1193/98 - specifically outlines the situation for health care providers not included in the above mentioned Article 1 of Law 23,660, stipulating that these may join the Basic Benefits Comprehensive Scheme for Persons with Disabilities (Article 2); this regulation also provides that disabled parties that do not have health care coverage with any one agency or enterprise, and that lack the financial resources to receive treatment, shall be able to obtain benefits through system-affiliated government agencies of the State at the national, provincial or municipal level, and of the City of Buenos Aires, as appropriate.

Finally, this regulation stipulates that government agencies that provide health care coverage to military and civil personnel - active or passive - of the Armed or Security Forces may choose to join the above mentioned benefits system by entering into an affiliation agreement (see Article 8, Dec. 1193/98).

Publicly, and without prejudice to the liability attributed to the respective Ministries in each matter, the regulation exonerates the actions of a group of government agencies with specific jurisdictions, which are referred to in legal precepts including Article 14 of Decree 762/97, and

Article 1 of Exhibit B: Exhibit I, of Decree 1193/98.

-VII-

It is firstly evident from the summary above that the State agencies referenced are primarily, based on the regulation mentioned, those listed in Article 14 of Decree 762/97 and concordant articles of Decree 1193/98 (see, in particular, Article 1, Exhibit B: Exhibit I), in view of the principal activities of the Ministry of Health and Social Action, as stated in Rulings 323:3229 and 324:3569. Such agencies must have the funds established in Article 11, Subsection f) of Decree 762/97, and Article 7, Subsection e) of Law 24,901, for the purposes of carrying out their activities.

Secondly, agencies such as the defendant are expressly mentioned in the above mentioned regulation, under Article 2 of Law 24,901, and Articles 2 and 8 of Decree 1193/98. I therefore deem that the General Directorate of Air Force Personnel Welfare (DIBPFA) is one of the agencies referenced in Article 1, Subsection g) of Law 23,660, whose inclusion in said regulation is on the condition that "... it adheres to the terms set forth in the regulations..." (see p. 61: Res. FAA 682/98).

Moreover, 24,901, concerning those health care providers not included in Article 1 of Law 23,660, also provides that such agencies may join the Basic Benefit Scheme (Article 2), further specifying that "...agencies that provide benefits to military and civil personnel of the Armed and Security Forces... and to retired and pensioned individuals of said forces, as well as any other health care provider... may choose to join the health care system by

entering into an affiliation agreement...” (Article 8).

By my understanding, it is clear, given that there is no dispute over the fact that the Argentine Air Force was not affiliated to the system provided for in Laws 23,660 and 23,661, and since it has not been attested herein - as stressed by the trial court - that the Institution was affiliated to the system established in Law 24,901 (see p. 130), that the precepts in question are - *prima facie* - inadmissible in relation to the agency defending, particularly as the benefits funding regime established for health care providers, as regulated by Article 11, Subsection a) of Decree 762/97, and Article 7, Subsection a) of Law 24,901, is dependent on such an agency belonging to the system provided for in Laws 23,660 and 23,661.

-VIII-

In view of the foregoing, it is my understanding that the objections of the plaintiff in relation to the optative nature of the defendant’s affiliation to the system provided for in Law 24,901, and the failure to recognize the right of its affiliates to choose other providers, are admissible, since such any criticism to the contrary, which would lack the constitutional basis necessary, would merely constitute a statement of discord in relation to the characteristics of the above mentioned health care regime and the administrators of the agency accused.

That said, however, we cannot ignore the fact that, first of all, the comprehensive protection and care of disabled parties - as stipulated in Laws 22,431 and 24,901, and in Your Honor’s case law, which places strong emphasis on the international undertakings assumed by the State in

this matter- represents a stated public policy of our country, and secondly, such a decision compromises the "best interests..." of a minor, the protection of whom is enshrined as a principle in the Convention on the Rights of the Child (see Rulings: 318:1269; 322:2701; 323:854, 2021; 2388; 3229; 324:122, 908, 1672) and therefore has a constitutional value pursuant to Article 75, Subsection 22, of the Argentine Constitution (see Rulings: 318:1269; 319:3370; 320:1292; 322:328; 323:854, 2021; 324:908; and, recently, S.C. M. 1116, L. XXXVI, AM., "et al re: criminal sexual contact", passed on June 27, 2002, by this court, and S.C. P. 709, L. XXXVI, "Portal de Belén - Non-profit association vs. Ministry of Health and Social Action re: amparo", of March 05, 2002).

In this respect, it is worth remembering that, as stated by Justices Fayt and O'Connor in Rulings: 318:1269 - and supported by Justice López in Rulings: 318:1269 - minors, particularly in circumstances where their health and normal development are compromised, in addition to the special care required from those directly obligated to provide it, also require the protection of judges and society as a whole; given the insistence by the above mentioned Convention that the State authority place the child's interests first in all matters that may concern them - as per Rulings 322:2701 and 324:122, and the opinion of Justices Moliné O'Conner and López in Rulings: 324:975 - and given that this consideration guides and determines the decision of Judges called to make a judgment on such cases, it is inadmissible that this should be so evidently ignored by an government agency such as the General Directorate of

Air Force Personnel Welfare, which belongs to the Ministry of Defense and therefore the Executive Branch of the State.

Therefore, it is not in vain that Your Honor has stressed the pressing obligation of the government authority to take positive actions in this respect, particularly in relation to the promotion and facilitation of access to the medical and rehabilitation services required by children, with particular emphasis on those afflicted by physical or mental impediments (see Rulings: 324:3569), whose best interests must be protected above other considerations by government departments (Rulings: 323:3229).

It is on this particular point that I deem the petitioner to be in the right, since, in my view, the above circumstances required the defendant to behave differently towards an affiliate that requested the full recognition, partial until then, of the medical treatment appropriate for his disabled daughter. In fact, the defendant did not assert before the proper courts that it had even effected any procedure intended to channeling the petitioner’s request, and instead repeatedly denied any liability on the grounds of various budgetary restrictions that, according to the defendant, it is subject to; under these circumstances, the defendant cannot be held as having been unaware of its responsibility to adopt all reasonable measures necessary, within its means, to fully satisfy the disabled minor’s right to social security benefits (see Rulings: 321:1684; 324:3569), with the entire scope established in the protective legislation to which several references have been made in the matter (see Rulings: 313:579).

In view of the above, and the special urgency pleaded

in the case, I do not deem it as fair to oblige the petitioner herein to attend the government agencies referred to in Laws 22,431 and 24,901; furthermore, I do not deem it implausible for the defendant to arrange compensation for the costs of the minor's treatment with the competent government agencies or, more broadly, to arrange a mechanism whereby the child can receive the necessary treatment and services for her rehabilitation without going through the measures referred to in Article 8 of Decree 1193/98.

In consideration of the above, and in reference to a claim relating to the alimentary benefits due to a minor, Your Honor's interpretation suggests that it is incumbent upon judges to find solutions that accommodate the urgency present in claims of this type, and that said judges must therefore channel procedures through prompt legal avenues to prevent judicial rigor from frustrating the rights protected by the constitution, which would otherwise be the case if the petitioner had to wait for the new trial against the government agencies referred to in the previous paragraph to begin before presenting his claim; during such a period, the interests that need to be satisfied would be unprotected (see Rulings 324:122, etc.), and such a suspension - as Justices López and Moliné O'Connor indicate, citing legal precepts from the American Convention on Human Rights, by Justices López and Moliné O'Connor - cannot be deemed admissible under any circumstances (see Rulings: 324:975).

-IX-

In view of the foregoing, I hereby deem it appropriate to admit the appeal and revoke the original judgment.

M. 3226. XXXVIII.
Martín, Sergio Gustavo et al vs. Dir. Gen.
Air Force Personal Welfare, Argentinian Air Force re: Amparo or relief proceeding.

Office of the Attorney General

Buenos Aires, October 31, 2002.

NICOLÁS EDUARDO BECERRA

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Office of the Attorney General

Buenos Aires, June 8th, 2004.

Having reviewed the record of proceedings: "Martín, Sergio Gustavo et al vs. Dir. Gen. Air Force Per. Welfare of the Arg. Air Force re: Amparo."

Whereas:

This Court shares the legal basis and conclusions provided in the decision of the Attorney General, the terms of which are remitted for reasons of brevity.

Therefore, the special appeal is hereby declared as admissible and the resolution appealed is declared null and void. Order coverage of the costs (Article 68 of the Code of Civil and Commercial Procedure). It is ordered that the record of proceedings be returned to the originating court in order that a new judgment be rendered through the appropriate person, in accordance with the foregoing. It is ordered that notice be given and that it be remitted. ENRIQUE SANTIAGO PETRACCHI (dissenting)- AUGUSTO CESAR BELLUSCIO (dissenting)- CARLOS S. FAYT - ANTONIO BOGGIANO (dissenting)- ADOLFO ROBERTO VÁZQUEZ - JUAN CARLOS MAQUEDA - E. RAÚL ZAFFARONI - MARINA COSSIO DE MERCAU - JORGE OSCAR MORALES.

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DISS-//-

Supreme Court of Justice of the Nation

-//-ENT OF PRESIDENT OF THE SUPREME COURT ENRIQUE SANTIAGO PETRACCHI, DEPUTY PRESIDENT AUGUSTO CESAR BELLUSCIO AND JUSTICE ANTONIO BOGGIANO

Whereas:

1°) By revoking the decision of the trial court, Court I of the National Chamber of Civil and Commercial Appeals has rejected the writ of amparo or relief proceeding filed by the parents of a disabled minor for the purposes of the defendant taking responsibility of her comprehensive treatment. The petitioner filed a special appeal against this ruling (pp. 138/152), which was partially granted on p. 160.

2°) In relation to the formal admissibility of the special appeal and the interpretation and enforcement of the federal laws at issue, this Court shares the judgment of the Attorney General of the Nation (Chapters III and VII), the legal basis and conclusions of which are remitted for reasons of brevity.

3°) This rules that the writ of amparo or relief proceeding is inadmissible in view of the inexistence of evident arbitrariness or illegality on the part of the defendant, whose actions were in conformance with the legislation applicable in the case (Rulings: 310:567, 311:133; 313:101, etc.).

4°) Furthermore, it is of note that the premises of Rulings 323:3229 and 324:3569 are not analogous to the present judgment.

Therefore, following the ruling of the Attorney General, the special appeal is hereby deemed applicable with the scope granted therein, and the contested judgment is hereby

confirmed. Order for costs given the nature of the matter at hand (Article 68, Second Paragraph of the Code of Civil and Commercial Procedure). It is ordered that notice be given and that it be returned. ENRIQUE SANTIAGO PETRACCHI - AUGUSTO CESAR BELLUSCIO - ANTONIO BOGGIANO.

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Special appeal filed by **Martín, Sergio Gustavo and Palumbo, Mónica Mabel on behalf of Martín, Micaela Agustina,** represented by Dr. **Diego Leandro Agüero.**
Summons answered by the **State (Air Force General Staff Office),** represented by Dr. **Luis R. Carranza Torres.**
Originating court: **Civil and Commercial Court of Appeals, Court I.**
Previous processing courts: **Fourth National Federal Court for Civil and Commercial Matters**