Decision STS 6501/2007
Supreme Court

In Madrid, July 17 2007

Considering the pending requests before this Chamber, and under an appeal for unification of the doctrine filed by Attorney Mr. Agustin, in his own behalf, against decision dated November 23 2005, of the Social Chamber of the Superior Court of Justice of Andalusia, seated in Granada, after the appeal number 1152/05 filed against decision dated January 31 2005, issued by the Social Court number 4 of Granada, in file number 594/04 at the request of Mr. Agustín against the Andalusian Health Service for the reimbursement of medical expenses.

Attorney Mr. Juan Carreras Egaña on behalf of The Andalusian Health Service appeared before the court.

The issuing judge, his honor, Justice José Manuel López García de la Serrana.

Factual Background

First.- The Social Court number 4 of Granada delivered its decision on January 31 2005. Thereby, the following were declared as proved facts: "1. – In the middle of June 2002 (day 25), Mr. Jose María (deceased today), entered into the Clinic Hospital San Cecilio of Granada, with a diagnosis of rough neck swelling or edema, jugular ingurgitation, palpebral edema and collateral circulation. After a thorax radiography and CAT, an adenopathic mass on mediastinum of 6x8 centimeters and mediastinum enlargements that were compressing the right superior vena cava were detected. The patient was submitted to the Virgen de las Nieves Hospital, where in July 2002, he was treated with 20Gy photons ALE 5x4Gy, and to which he responded well. This started 2 cycles of chemotherapy out of the six scheduled. Concomitant with the third cycle of chemotherapy, an external radiotherapy is undertaken on: - Holocraneal, receiving 30Gy at 10x3 Gy/s, lateral fields and tumor dose at the isodose of reference. – Lung and miastinum receiving 2520cGy at 5x1.8 Gy/s are AP/PA fields, oblique anterior and posterior to protect the bone marrow. Radiotherapy finished on October 2. The patient did not get more than 4 cycles of chemotherapy for his lung abscess and hematological toxicity (the abscess decreased completely after 3 months of anti-biotherapy and antifungal medication). 2 .- By May 14 2003: The patient presented a complete lung remission, thorax CAT and presents slight hand paresthesia (more in right hand) for which he requested brain NMR that evidenced a progression in tree spots but with six lessons all below 2 centimeters. After commenting on the case in a clinical session, it is decided to undertake radio surgery under micromultilaminas and a stereotaxic technique, considering the size, localization and disposition of the lessons. The hospital did not have such technology, for now, so its personel contacted the Teknon Clinic of Barcelona, since the patient has family in that city. 3. – After two days of the

previous report, on May 16 2003, the patient went to the Teknon Clinic of Barcelona, where a MRA was undertaken, showing 7 brain metastases, 3 on the temporal right lobe, 3 on the temporal left lobe and one in the front right lobe. – On May 22 and 23 2003, a RM and a TAX image are taken altogether with a cranial thermoplastic mask under the technique of multilayers diamond mask. 4.- Dated July 9 2993, Mr. Jose María presented before the SAS a request for reimbursement of all expenses for Health Care, that was urgent, immediate and of vital character, delivered at outside the national health system. He requested an amount up to Euros 12.102,93, as was charged by the Teknon Clinic and as seen in the invoices he presented. Mr. José María passed away on January 21 2004. 5.- By resolution of the Management Direction of the SAS, dated April 22 2004, the petition of Mr. Jose Maria was denied. 6.- Certification of a copy of the letter of wishes given in Granada on January 8, 2003 by Jose María before a Notary Public is added to this file. Mr. Luis Enrique appears as holder of all his rights alongside with his brother. 7.- The claim was presented on October 7 2004.

In the aforementioned decision, it is stated: "After dismissing the allegation of the SAS, this is the exception to lack of standing to file a suit, we uphold the claim filed by Mister Agustín as the heir of the deceased, Mr. Jose María. We declare in favor of the deceased's estate, for the amount of TWELVE THOUSAND ONE HUNDRED TWO EUROS WITH NINETY TREE CENTS (12,102.93)"

Second. – The quoted decision was appealed by the Health Service of Andalusia (SAS), before the Social Chamber of the Superior Court of Justice of Andalusia, seated in Granada. The chamber gave its ruling on November 23 2005, and stated: "Considering the appeal before us filed by the Health Service of Health of Andalusia (SAS), against decision dated January 31 2005, of the Social Court number 4 of Granada, after a claim filed by Mr. Agustín against the SAS, we shall revoke such decision and acquit the defendant".

Third. – Mr. Agustín's representation filed this appeal for unification of the doctrine, and entered the General Registry of this Court on February 7 2006. In the appeal it is pleaded that there was an infraction of article 5.3 of the Decree 63/95 of January 20 1995. As a decision contradictory to the appealed decision, it was presented for decision before the Social Chamber of the Superior Court of Andalusia, seated in Granada, dated June 9 2003.

Fourth. – This Chamber admitted to review appealed decision on September 13, 2006, giving notice to the other interested parties in the appeal, allowing, therefore, their opposition.

Fifth . – After revision by the Public Prosecutor, an issued report considered that the appeal should be dismissed. His Excellency being designated as reporting Justice, the voting and ruling was established to take place on April 25 2007. It was

suspended that day, and rescheduled for a new vote and ruling on June 13 2007, on which took place.

Legal Rationale

First. - 1. The decision herein appealed, dated November 23 2005, issued by the Social Chamber of the Superior Court of Justice of Andalusia, seated in Granada, in appeal number 1152/2005, considers the reimbursement of medical expenses burdened for having to go to private medicine. The case was about an insured man that suffered from pulmonary adenoma. He was treated with chemotherapy and radiotherapy by the public health system at Granada, during 10 months, with apparent success. By May 14 2003 six metastasis in a range of 2 centimeters each, were detected, all of them in the brain, lessons that according to the physicians attending the patient should be treated with radio-surgery, a micro-multi-laminated and stereotactic techniques, technology that the public health service did not have, which is the reason why the Teknon Clinic of Barcelona was contacted and the patient was admitted there. After two days, the patient got to the Clinic, and after two MRAs, interventions for the seven brain metastasis were undertaken on May 22 and 23 2003. The patient bore the expenses up to 12,109.93 euros, for the health assistance. He requested the Andalusian Health Services to reimburse the amount, but unsuccessfully.. This motivated, therefore, the judicial claim, which although was considered in the first instance, was denied by the decision herein appealed. The holding therein stated that there was no vital urgency neither authorization given by the public health service to access the private health services, as required by Law, so the patient could get a medical assistance using techniques that the public health services lacked off. Against this decision the appeal for unification of the doctrine was filed.

2. As a contrast decision, the ruling of the same Court dated June 9 2003 over appeal number 40/2003 is brought before this Court. In the referred decision, the Court dealt with a case in which a man in the very same Hospital as the abovementioned case, was diagnosed with fibrillar diffuse astrocytoma of second grade, for which he was referred to the radiotherapy service, where, considering that the brain tumor was greater than 3 centimeters in diameter as well as other concurrent problems, it was concluded that the treatment should be done with a technique that the hospital lacked. Days after, the patient went to the Ruber Clinic where he received the recommended treatment and paid 2.200.000 pesetas, requesting afterwards, but without success, reimbursement from the Andalusian Health Services. After a judicial claim he obtained a favorable decision. The decision considered that there was a situation of vital urgency because any delay in being treated would have risked the healing of the patient, and such a situation was an exception to the requirement of previous authorization by the public health services in order to go before the private health services.

3. The decisions compared herein go over substantially identical situations. However they are resolved in different ways. The identity of the facts coincide, as the reasons and pretensions as is required by article 217 of the Labour Procedural Law, in order for the appeal for unification of the doctrine to be accepted. The pathological situation of the patients in both cases was similar; in the appealed decision, herein a lung cancer with brain metastasis that required treatment, and a brain tumor in the compared case. In neither of the cases did the public health services have the proper techniques for treatment. This was the reason to access private health services and the claims of reimbursement, with different success in the two cases. After considering the same situation and before the same claims, the decision herein appealed dismissed the claim since there was no vital urgency and a previous administrative authorization was needed. Meanwhile the other decision the claim was awarded, under the reasoning that it was a case of vital urgency and the previous authorization was not required. The fact that in the contrasted decision it is expressly stated that the technique needed was not available in any other hospital of the public health, is not a relevant difference in the situation herein evaluated. The similarity of the situations and the contradictory solution must be appreciated terms in which the debate is settled must be paid close attention to. In the decision herein appealed it is not proven that the public health services had hospitals where the special technique was available, and that is what can be concluded from the third legal rationale of the decision and from the second point of the reasoning of the appeal made by the Andalusian Health Services, accepting that the techniques were not available, but arguing that in those cases a previous administrative authorization is necessary, as well as it is not an obligation of the public health services to provide assistance with the most advance techniques.

Second. – The appeal claims a breach of articles 102.3 of the General Law of Social Security of 1974 in relation to article 5.3 of the Decree 63/1995, of January 20. Essentially, it sustains that the reimbursement claimed is in order because this is a case of vital urgency and therefore the previous administrative authorization from the public health services was not required.

Article 102.3 of the General Law of Social Security, as written in the Decree 2065/1974, May 30, and still in force, states: “The entities obliged to provide health assistance shall not pay for the expenses that may be incurred when the patient (beneficiary) uses different medical services than those assigned. The cases determined by regulations are excluded”. The regulations’ development of this rule may be found in articles 5.3 of the Royal Decree 63/1995, of January 20, that establishes: “In cases of urgent, immediate and health assistance of vital character, given outside of the National Health System, the expenses shall be reimbursed. The reimbursement will apply only if it is proved that the National Health System services couldn’t be used opportunely and when the utilization of the other services does not constitute a deviation or abuse of this exception. As stated by our decision on December 19 2003 (REC. 63/2003): according to the regulation, for the reimbursement to proceed, the requirements are: a) that the health assistance is

urgent, immediate and of vital character; b) that the beneficiary has tried to get assistance by the National Health System and did not have the chance to use opportunely the services of the public system, and; c) that this does not constitute an abuse of the exception.

In order to comply with the requirement of urgent, immediate and health assistance being of vital character, it has been understood that it occurred when the health assistance was necessary to preserve life or obtain the actual healing (STS October 22 1987 and December 21 1988). This doctrine has recently been reiterated in decisions March 21 2002 (appeal 2872/01) and October 2003 (appeal 3043/02), among others. These decisions established that the necessity of urgent health assistance and of vital character exists when it is indispensable to preserve life, systems and organs of the human body, improving their functionality or to achieve a better standard of living of less pain and suffering. On the other hand, our previous decisions of May 26 1994 (appeal 1937/93) and June 5 2006 (appeal 1447/05), stated: "the health services and pharmaceutical services are ruled by the universal coverage principle, with the limitation or exclusion established by law", resulting from articles 103, 105-1 and 106 of the aforementioned law. However, as stated before by this Chamber in decisions dated October 31, 1988, April 14, 1993 (appeal 1446/92), October 13 1994 (appeal 1141/94), November 30 1994 (appeal 293/94), February 8 1995 (appeal 2392/94) December 21 1991 (appeal 1967/95) March 8 1996 (appeal 2637/95) April 26 1996 (appeal 2110/95), December 20 2001 (appeal 1661/01), that integral coverage is not absolute since the system goes for health assistance that is not inferior to the best that can be obtained within our borders, including private health. This is why, techniques that are only accessible and available in more advanced countries that have a superior scientific level and technical development, are excluded. Those other techniques that may be available in our country although provided by private hospitals, as long as the techniques have been approved by the State's Health Administration, as requires the Royal Decree 63/1995 in relation to article 110 of the General Law of Health 14/1986.

As we stated in our decision dated December 20 2001, after a *sensu contrario* interpretation of article 2.3 of Royal Decree 63/95, it can be concluded that the public health services are obliged to provide health assistance for which "there is enough scientific evidence about its safety and clinical efficacy, or that it proves its contribution to the prevention, treatment and healing of diseases, conservation or improvement of life expectancy, and elimination of pain and suffering. On the other hand, such obligation cannot be held when the circumstances aforementioned occur or when, as stated by this Chamber in its decision of October 31 1998, the situation is related to the special services of a physician (or health center) only accessible to some and not to the whole collective which the public health system protection covers".

The application of the aforementioned doctrine forces us to dismiss the appellant's petition. This cannot be considered as a case of vital urgency because we are not

before a case where the necessity of urgent, immediate and vital health assistance existed. The time between leaving the public hospital and going to the private clinic (two days), and the medical intervention therein (eight days). Also the doctrine of this Chamber in decisions dated October 7 1996 (Appeal 109/06), October 25 1999 (Appeal 760/99), understands that the "necessity of urgent assistance" may be defined not by the mere urgency of the intervention but by the fact that such urgency determines an impossibility to access the public health services. The problem herein is not about the existence of such vital urgency. It is about if the required assistance was proper or not, since the patient was being treated by a public health facility which did not have the techniques used by facilities in private health. The issue then is to determine if the public health system was obliged to provide medical assistance using the aforementioned technique. The answer must be negative since it cannot be stated that such new technique was approved by the State's Administration, as required by article 109 of the Law 14/1986 and the First Additional Clause of the Royal Decree 63/95. Neither has the scientific expertise of such technique, its safety nor its efficacy regarding prevention, treatment and healing of the disease, as is demanded by article 2.3 of the Royal Decree 63/95 been asserted. The deficiency of the data provided as well as the availability or not of the technique in the hospitals of other Autonomous Communities, leads us to the conclusion that according to the legislation and jurisprudence referred to above is not a case of due assistance. We shall not forget that this Chamber in decisions dated October 31 1998, October 13, 1994, December 20 2001 (appeal 1661/01) and March 25 2004 (appeal 1773/03), has stated that "the health assistance due from the Social Security has limits. The protective action of the system cannot be construed by the application of those means that are neither accessible nor available in the Spanish health system, considering the limited character of the means of the Social Security as well as its projection towards a universal coverage". For all this reasons, we confirm the herein appealed decision and dismiss the appeal. There will be no trial costs.

For all the herein stated, in the name of His Majesty the King and by the authority conferred by the Spanish people

WE DECIDE

To dismiss the appeal for the unification of the doctrine filed by Attorney Mr. Agustin, in his own behalf, against decision dated November 23 2005, of the Social Chamber of the Superior Court of Justice of Andalusia, seated in Granada, after the appeal number 1152/05 filed against decision dated January 31 2005, issued by the Social Court number 4 of Granada, in file number 594/04 at the request of Mr. Agustín against the Andalusian Health Service for the reimbursement of medical expenses. There are no costs.

Return all the documentation to the lower Court with this resolution certified.

By this decision, that shall be included in the Legislative Collection, we declare, rule and sign.

PUBLICATION.- In this very same day, the afore decision was read and published by his Excellency Justice José Manuel López García de la Serrrana, in public hearing at the Social Chamber of the Supreme Court, which as Secretary of the Chamber I herein certify.