

538-2000

Constitutional Chamber of the Supreme Court: San Salvador, on February 4th, 2002 at 4:00 pm.

The present constitutional *amparo* proceeding has been initiated by application lodged at ten hours and thirty minutes of the 25th day of September day of the year two thousand, by Mr. Oscar Ovidio Sánchez, adult, student and resident in Zacatecoluca, against acts taken by the Minister of Public Health and Social Assistance which he alleges are a violation of the right to petition, right to health and right to life enshrined in Article 2, 3 and 65 of the Constitution.

I.- The plaintiff has based its *amparo* request basically on the fact that the Minister of Public Health and Social Assistance has violated the right to life, to health and the right to petition to his detriment, as yet he was infected with the Human Immunodeficiency Virus and has already developed the disease to stage three, the Minister has refused to provide him with access to the necessary antiviral medication called triple therapy or antiretroviral therapy.

It turns out – he says – that dated May 23rd of the year two thousand, he asked the Minister to provide him a treatment that included the provision of 400mg. of CRIVAN, 100mg. of VIDEZ and 100mg. of AZT, which had been diagnosed for his specific case by FUNDASIDA. However, the official did not respond to his request, which is why he made a new request dated July 20th of that year, but again no response was given to this request.

This situation – he continues – violates his rights to life, health and petition inasmuch as the State has the obligation to protect the right of every person to lead a life of dignity, since it is such a fundamental right upon which the exercise of others depends.

He bases his arguments on Article 10 of the Additional Protocol to the American Convention on Human Rights in the matter of Economic, Social and Cultural Rights, Article 12 of the International Covenant on Economic, Social and Cultural Rights and Article 65 of the Constitution, because he alleges that not supplying the required therapy should be considered inconsistent with the obligations of El Salvador with regard to the right to health, life and free medical care.

Therefore, he has requested in his action that an injunction be issued so that, while the present proceedings take place, he will be provided with the triple therapy or associated antiretroviral therapy, inasmuch as he faces the immediate danger of losing his life. In addition, he requested that a final judgment declaring that there has been a violation of his constitutional rights be delivered.

By resolution dated at the eleven hours and twenty minutes on October 6 of the year two thousand, the demand was admitted, the injunction requested was dismissed and a

report was requested from the Minister of Public Health and Social Assistance, which the record shows was not produced.

In accordance with Article 23 of the Ley de Procedimientos Constitucionales, it was ordered to hear the Prosecutor of the Court, for the next hearing, which did not use it and a new report was requested from the defendant, who basically said that the facts attributed to him were not certain since, notwithstanding the State's obligation to ensure the inhabitants the enjoyment of health, all of this material ends were limited. Furthermore, "(...) Regarding the existence of the alleged act of deprivation of the right to health by the plaintiff, it is totally false, as the applicant himself acknowledges in a letter to the Secretary of the State, dated December 15th of the year two thousand (...) – which he attaches – that Dr. Gladys Bonilla, head of the AIDS unit of the Ministry, referred the applicant to Dr. Rolando Cedillos (...) in order to be subjected to the respective medical treatment (...)”.

The transfers pursuant to Article 27 of the Ley de Procedimientos Constitucionales were conferred to the Prosecutor of the Court and the plaintiff and it was ordered to open tests for proof in this process; within this period the defendant authority emphatically stated that the claim made by the applicant no longer had a reason to be since, at that date, the therapy requested was being provided to him. In order to prove that, he attached documents signed by the plaintiff in this case, which state that on January 19th of the year two thousand and one, he and others agreed to undergo the associated antiretroviral therapy which is what it is ultimately argued here that no one wants to provide.

Finally, all the stages envisaged to comply with the Ley de Procedimientos Constitucionales regarding the *amparo* process culminated.

II.- After analyzing the claim of the plaintiff and the defendant authority, it must be assessed with regard to the self-attribution and constitutional rights allegedly violated.

The foundation of fact and law of his statement is centered, from a constitutional point of view, in the refusal carried out by the Minister of Public Health and Social Assistance to provide the triple therapy or the associated antiretroviral therapy, which has been diagnosed for his specific case by FUNDASIDA, since he is infected with the Human Immunodeficiency Virus and has developed the disease to stage three.

However, as stated in the foregoing, it is imperative before any substantive analysis is performed to take a closer look at the basis of the resistance of the defendant, since it not only denied the existence of the contested act, but also has said that it is already providing therapy to the applicant, which it proved with attached documentation.

For that reason, the need to make a brief consideration of what is happening arises, procedurally speaking, after the analysis that this Court makes in the proceedings' crucial stage of any process of *amparo*.

From a constitutional procedural standpoint, we recognize that in a process of *amparo* there are normal ways to culminate it. By definition, there are judgments upholding and judgments rejecting. Each of these are contingent upon the existence of a claim – *queja social* – which gather the information needed for the admission and processing, in which case through the arguments of the defendant the terms of debate shall be set, generating the possibility for the Court to learn about the alleged constitutional violation. In that sense, any judgment on constitutionality to be made implies that there are some facts upon which the legal analysis is fit; that is to say, certain true facts and certain facts disputed by the parties.

There are some cases in which the claim that is presented to this Court is manifestly appropriate, since the self-attribution made by the plaintiff of the right or rights violated, so determines. In addition, in some cases during the conduct of the process, it is noticed that the plaintiff indeed has reason on his side and that it is imperative to enforce the protection through a judgment upholding the claim. Nonetheless, there are other cases in which, although the first of the aforementioned cases is given and still pending to address the second, the effects of the contested act stop. In this case, the law provides that the case should be dismissed.

The idea behind this is that this Court prosecutes the materialization of unconstitutional acts that certain authorities or individuals perform, provided it produces harmful direct effects on the legal sphere of the litigants. Thus, in addition to examining the standing of the passive subject of the claim, it is noted that the act of authority should produce a grievance and that it should have an effect of successive chain. This implies that if this Court at the moment of delivering the final decision estimated that the constitutional violation has ceased, then it cannot make the relevant judgment on the merits and, under the law, is forced to dismiss the claim.

This is so because, given the disappearance of the grievance and the constitutional violation, which are subjective parameters to hear any constitutional claim, it would be meaningless to continue with a process whose only purpose is to stop the act against which it is claimed.

III.- In this case, it is apparent from the file that the core of the disagreement of the plaintiff lies in the lack of response from the Minister of Public Health and Social Assistance to a request that he made so that he was provided with the antiviral – triple therapy or associated antiretroviral therapy –. Such omission, he stated, not only violates his right to petition, but to health and to life.

However, as it was delimited above, it has been proven that the therapy is now being provided to him, as it is accredited on page 65 of the file. In addition, it is also evidenced by the fact that the applicant, at the moment of the hearing, did not express that he was not receiving the therapy. Far from it, he tried at all costs to reduce his complaint to the fact that even though he was receiving the therapy, there was no document, given the

lack of response from the Minister, which would ensure that in the future he will continue to receive treatment.

In this sense, the alleged lack of formal response, as indeed had been the case under study, should be understood to be supplied by the effective conclusion or realization of what is incorporated into the content of the request, that is to say, it must be concluded that with the tacit, but real, answer, the effects of the contested act have ceased.

That said, despite the foregoing and in view of the uncertainty that lies in the applicant of this *amparo*, on completing the treatment in the coming days, it should be reiterated in this decision that the right to life is enshrined in our legal system as a fundamental right that by its own connotation is an essential material prerequisite upon which the development of all other rights recognized by the Constitution depends.

In that regard, as this Court noted in its judgment in the case 348-9 of April 4th of the year thousand and one “(...) if a person to be addressed in a particular way is not given appropriate care, which generates an undignified life and even death, it would frontally be violating the right to health supervised by the Constitution and further, to life (...)”. In addition that “(...) this obligation in the Constitution is general in the sense that it – must be ensured – the protection tools, that is to say, that a mechanism may be effective and suitable today and another tomorrow, existing always hence the obligation to renew, change or create what is deemed constitutionally appropriate. In this case it is an associated antiretroviral therapy or triple therapy, which does not prevent another at which it can subsequently be directed (...)”.

For that reason, this resolution which is constituted as an interlocutory decision which brings to an end the present process of *amparo*, which in turn does not allow prosecuting the merits, should be assessed from the strictly procedural point of view and not as an obstacle for the defendant to continue to provide indefinitely, as long as it is the ideal, the triple therapy or antiretroviral therapy associated with Mr. Oscar Ovidio Sánchez.

Thus, it is found that even though there was no express response by the defendant to requests made by the complainant dated May 23rd and July 20th, both of the year two thousand, in the sense that it would provide antiviral therapy, the realization and implementation of their content cannot be prosecuted as such action, having stopped the material harmful effects of possible alteration of the substance of the constitutional rights invoked as violated.

Therefore, what is present in this case is what is provided in Article 31, paragraph 5 of the Ley de Procedimientos Constitucionales, which is that this Court notices in the substantiation of this process of *amparo* that the effects of the act claimed by the plaintiff against the Minister of Public Health and Social Assistance have ceased.

Translation provided by the Lawyers Collective (New Delhi, India) and partners for the Global Health and Human Rights Database

In view of the foregoing, this Chamber decides hereby: a) to dismiss this process due to cessation of the effects of the contested act, in accordance with Article 31, paragraph 5 of the Ley de Procedimientos Constitucionales, and b) let it be notified. ---A. G.CALDERON---J. E. TENORIO---MARIO SOLANO---F. R. GUERRERO---by Judges who sign---S. RIVAS AVENDAÑO---Initialed.