

Quito, DM, October 8, 2009

Case No. 0012-09 CASE -CC - No. 0007-09 -IS

Opining Constitutional Judge: Hon. Patricio Pazmiño Freire

CONSTITUTIONAL COURT, for the transitional period

I. FACTUAL AND LEGAL BACKGROUND

On May 21, 2009, Mr. Miguel Páez Elicio Arroba filed a lawsuit for noncompliance against defendant Econ Pebble Fernando Guijarro Cabezas, Director General of Ecuadorian Institute of Social Security (IESS.)

The complaint requested a declaration of noncompliance with Resolution No 0244-2008-RA on 14 July 2008 of the Third Chamber of the former Constitutional Tribunal, which accepted the constitutional writ for the protection of fundamental rights that was filed and invalidated the unlawful administrative acts issued by IESS officers, which deprived the plaintiff from benefits and services that were rightfully his as a retiree and revoked the resolution issued by the Second Chamber of the Contentious Administrative District Court of Quito No. 1.

The Board of Admissions of the Constitutional Court, for the transitional period, on May 21, 2009 at 11h08, approved case No. 0007-09 -IS. In accordance with the provisions of Section 7 of the Rules of Procedure, the Secretary-General certifies that no other complaint has been filed with identity of subject, object and cause of action.

The First Board of Proceedings of the Constitutional Court, for the transitional period, on June 2, 2009, acknowledged receipt of the case and, pursuant to a judicial lottery in accordance with the requirements of Art. 436, Section 9 of the Constitution of the Republic of Ecuador, and art. 10, as well as the sixth and seventh paragraphs of art. 84 of the Rules of Procedure for the Exercise of Powers of the Constitutional Court, for the transitional period, Constitutional Judge Hon. Patricio Pazmiño Freire assumed jurisdiction as substantiating justice.

II. LEGAL REASONING

Jurisdiction of the Court

Prior to ruling on this action of Noncompliance over Constitutional Judgments and Resolutions, the Bench of the Constitutional Court, for the transitional period, must address its jurisdiction to hear and resolve [the action]. Art. 429 of the Constitution of the Republic referred to the Constitutional Court as the highest body for the control, constitutional interpretation and administration of justice in this matter; art. 436, paragraph 9 id., determined the following, attributions of the Court:

9 -. To hear and punish violations of constitutional judgments and opinions.

In that same vein, the fifth paragraph of Art. 84 of the Rules of Procedure for the exercise of the powers of the Constitutional Court, for the period of transition, provides that:

In the event of a failure to comply with the judgments and opinions issued by the Constitutional Court, *ex officio* or upon request, the Bench shall assign, by judicial lottery, a Substantiating Chamber to prepare a draft judgment.

Thus the Bench of the Constitutional Court, for the transitional period is competent to hear and rule on the actions of non-compliance with the judgment rendered by the Third Chamber of the former- Constitutional Court, issued on July 14, 2008, revoking the decision of the Second Chamber of the Contentious Administrative District Court # 1 of Quito and restoring the IESS Social Security benefits, including the Special Reduced Retirement and Magisterium, accepting the constitutional protection proposed by the plaintiff.

Standing

The petitioner is entitled to file the present action for non-compliance of constitutional judgments and opinions, because he meets all the requirements established in Article 439 of the Constitution of the Republic, which states:

Article 439 -. Any citizen or individual citizen, independently or collectively, may initiate constitutional actions, when he or she meets the provisions of paragraph five of Article 84 of the Rules of Procedure for the Exercise of Powers of the Constitutional Court, for the transitional period referenced above.

Considerations of the Constitutional Court

Statement of the Legal Problem

Nature of the action for non-compliance of constitutional judgments or opinions

The Constitutional Court, for the transitional period, must ensure that the action for breach of constitutional rulings and opinions is a power inherent in its own nature as the highest organ of control, interpretation and administration of constitutional justice¹.

It is in this vein that the action for breach of constitutional rulings and opinions fulfills two functions: the first is to ensure an effective remedy for the protection of constitutional and fundamental rights through the enforcement of the

¹ Article 436 of the Constitution of the Republic of Ecuador establishes the powers of the Constitutional Court, in its Section 9, it ensures compliance with its judgments and opinions by assigning the power to hear and punish noncompliance.

judgment. The second objective is to give primacy to the rules and rights in the Constitution².

In this sense, the Inter-American Court of Human Rights has ruled that the right to effective judicial protection not only entails an existence of resources geared towards redressing the harm caused by a breach or violation of a fundamental right³ but these resources should give results or responses to the above-referenced violations of rights⁴, especially when those rights arise from the Constitution⁵.

Thus, the action raised by the petitioner is linked to the existence of means to ensure an effective protection of the rights enshrined in the Constitution. Based on this need, the Constitution of the Republic has raised the existence of the designated "open jurisdiction," according to which, judicial proceedings only end with the full implementation of the judgment or redress; in other words "the cause of action does not end with an issuance of the judgment until all the acts leading to full compensation have been met"⁶ thus, the action for breach of judgment or constitutional rulings, is not only an allocation of the Constitutional Court, it is a fundamental right of all people to actually access effective judicial protection that enables him or her to assert his or her rights and avoid producing a state of complete helplessness for those who have been affected.

The realization or execution of justice is an integral part of reparation⁷. This should be understood as the most effective means of the state to achieve its mission in search of true protection and guarantee of constitutional rights. In the instant case, the petitioner claims that Resolution No. 0244-2008 -RA of July 14, 2008, issued by the Third Chamber of the former Constitutional Court, which accepted the constitutional writ for the protection of fundamental rights on his behalf and invalidated the illegal administrative acts performed by IESS officials

² Constitutional Rights are also fundamental rights espoused in international Human Rights Treaties, that, without being recognized in the Constitution, are strictly enforced by the State that adopts them and also are in the same range as the Constitution (Constitutional Block).

³ *Castañeda Gutman v. Mexico*. Preliminary Objections, Merits, Reparations and Costs. Judgment of August 6, 2008 and *Aceveda Buendia and others ("Discharged and Retired Employees of the Comptroller") v. Peru*. Preliminary Objections, Merits, Reparations and Costs. Judgment of July 1, 2009.

⁴ *Case of the Constitutional Tribunal v. Peru*. Merits, Reparations and Costs. Judgment of January 31, 2001 and *Judicial Guarantees in States of Emergency* (Arts. 27.2, 25 and 8 of the American Convention on Human Rights). Advisory Opinion OC-9/87 October 6, 1987).

⁵ Article 172 of the Constitution of the Republic of Ecuador, in its second clause guarantees the principle of due diligence in the process of administration of justice, also, in its third paragraph, it generates responsibility for judges regarding injury to the parties for a delay, neglect, denial of justice or violation of the law in a judicial process.

⁶ Avila Santamaría, R., *Las Garantías: Herramientas imprescindibles para el cumplimiento de los derechos. Avances conceptuales en la Constitución del 2008, en Desafíos Constitucionales, Serie Justicia y Derecho Humano - Neoconstitucionalismo y Sociedad*, Ministry of Justice of Ecuador, first edition, October 2009, p. 106.

⁷ Fröling, Michel, *Derechos a la verdad, justicia y reparación integral en caso de graves violaciones a los derechos humanos, intervención en: Encuentro para las regiones de Bogotá y Cundinamarca del grupo de trabajo que propende al esclarecimiento del caso de la Unión Patriótica ante la Comisión Interamericana de Derechos Humanos (...)*, Bogotá D.C., February 10, 2004.

depriving him of the benefits and services that were rightfully his as a retiree, besides deciding to revoke the decision of the Second Chamber of the Contentious Administrative District Court No. 1 of Quito was breached because the plaintiff, via official communication no. 12000000-96, reported that his request for compensation or payment of medical expenses at the General Hospital of the Armed Forces does not apply with respect to an extemporaneous submission of relevant documentation for said study.

For this reason, the Court proceeds to conduct a study on compliance or otherwise of the above resolution in relation to the parameters set in the conclusive portion of the ruling, as well as the allegations made in this case.

In this context, this Court should note that full compensation is a form of recourse and guarantees the rights contained in the Constitution; its breach gives way to the actions of secondary guarantees, to ensure that its provisions are observed⁸, thus the State obligation **is not limited to remedying the immediate harm; on the contrary, it must repair the full damage, even such that is not part of the plaintiff's claim, but that is caused based on the violation of the fundamental right.** This Court agrees with the State's real commitment to providing complete redress, for the official recognition of a violation is not sufficient for fundamental or constitutional rights, but there should be compensation for damages in an exemplary manner to ensure that there is no recurrence of such harm. Thus, full compensation must be effective, efficient and quick; it must also be proportionate and sufficient. For this reason, it is coherent that the State is obligated not only to ensure compliance with constitutional rights, but to propose the means necessary so that its resolutions and reparations are actually completed. It is not enough for fundamental rights to be established in constitutional rules, since, their preeminence would be worthless if they are not actionable; on the contrary, constitutional guarantees must be understood as a right linked to the effective protection and redress of a mandatory conditioning of the State in search of compliance, so that these are rights that are fully actionable and not merely programmatic.

It is for this reason that this Court ensures that the right to health is a fundamental and comprehensive right that cannot be denied under any circumstance, even when such refusal stems from a resolution that it itself has violated any other attached fundamental rights. Through this law, the State is obligated to ensure ongoing, timely access to health programs without exclusion⁹

⁸ Professor Luigi Ferrajoli, in his treatise "*Derechos y garantías. La ley del más débil*" (Trotta, 2001), unlike the fundamental rights guarantees, exposing the existence of two main types of guarantees. The first of these are the primary collateral, and they aim to serve as a complaint of breach of public authorities in the attainment of these fundamental rights, the latter is called secondary guarantees, encompass the processes by which one is able to fulfill these obligations. established in the fundamental constitutional norms because of the predominance of no use if they are not justiciable; On the contrary, constitutional guarantees are to be understood as a right linked to the effective protection and repair of state conditioning compulsory seeking compliance to be fully justiciable rights and not merely programmatic.

⁹ Article 32 of the Constitution of the Republic of Ecuador, published in Official Gazette No. 449 of October 20, 2008.

which also implies a major struggle against inequalities in society; thus, not providing this care would generate its breach; further, in this manner, one would acquire a commitment to respect fundamental and constitutional rights, that implies protecting, guaranteeing, both real and effectively, these rights according to their sense, spirit, nature and scope, and thus no limitations to the reparations can be established, even more so when these restrictions can violate other types of fundamental or constitutional rights and therefore, it is not conceivable for institutions that provide such attention to refuse to accept a person who urgently requires it.

Resolution-0244-2008-RA of the Third Chamber of the Constitutional Court decided to grant a writ of protection of fundamental rights filed by Mr. Miguel Páez Elicio Arroba by which the decision of the Second Chamber of the Contentious Administrative District Court No. 1 is revoked in Quito. This resolution proposes that the existence of a serious injury caused by the agreements issued by the IESS Direction, which invalidate the benefits granted to the petitioner by reason of retirement and severance; it also says that "*there is no reason to strip him of this benefit, which in turn **would cause an affectation of the plaintiff's quality of life that ensures health, nutrition, recreation, housing and other social services, the right recognized in Article 23 is affected, Clause 20 [1998 Constitution of Ecuador]***" (bold added).

From these ideas it follows that the Ecuadorian Social Security Institute, through agreement 2008-3090 dated September 18, 2008, restores a special reduced retirement income and additional income for petitioners and magistrates; however, resolutions Nos. 0244-2008 -RA dated July 14, 2008 of the Third Chamber of the former Constitutional Court, generated the obligation to grant the plaintiff all benefits and services that belong to him as a retiree. Thus, the benefits which retirees should enjoy do not only cover those that emanate from cash benefits, i.e. retirement pension and unemployment, but also other services, particularly health. For this reason, resolution No. 2006 -1614 dated May 8, 2006 issued by the Provincial Assistant Direction of the Pension System of Pichincha, ratified by the IESS Committee on Services and Disputes of Pichincha and the National Commission for Social Security Appeals¹⁰, deprived the plaintiff not only of his cash benefits but health benefits as well. For this reason, the relief should be raised by IESS and should contain not only the return of the former, but the latter as well.

Report CCGM - 21301700 - 0358 dated November 10, 2008 and submitted by the Medical Expenses Compensation Committee, mistakenly states that one cannot perform a study of medical expenses incurred by the plaintiff, because the request was presented extemporaneously, citing art. 5 of Resolution N.º C. I. 009 issued by the Intervening Commission of the Ecuadorian Social Security Institute, which provides:

¹⁰ Reference to resolutions No. 32001700-0856 June 23, 2006 and Resolution No. 06-0439 of October 17, 2006 respectively.

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Art. 5. - Reimbursement of expenses incurred in cases of grave emergency outlined in this Regulation shall apply if the insured or beneficiary has met the following requirements:

1. Submission, by itself or through third parties, to the nearest Headquarters, Inspector, or Delegation of IESS, within EIGHT (8) BUSINESS days from the day of the containment of the serious emergency, a written communication addressed to the Regional Director in which he or she reports the emergency occurred.

2. Submission, within EIGHT (8) BUSINESS DAYS from the date of submission of the communication referenced in paragraph 1, the following documents (...)

The Compensation Commission for Medical Expenditure performed a successful study on the application of this article in general cases; however, it should be noted that from the date of discharge (March 2006) to date of compliance with the decision of the Third Chamber of the Constitutional Court, the applicant did not have access to the benefits provided by IESS, including those relating to the provision of health care by Social Security, a fundamental right that no person can be deprived of, and for this reason, he was not admitted at the Social Security Hospital Carlos Andrade Marín, despite having submitted a "clinical pathological report of a sudden and serious occurrence"¹¹ regarding severe pneumonia acquired in the community, and acute myocardial infarction¹², which led him to be admitted to the General Hospital of the Armed Forces for a period running from March 14 to April 23 2007, as well as being forced to pay the amount of USD 26,862.

The Court has a duty to ensure fulfillment of its resolutions and avoid them from causing, via an unrestrictive and mistaken interpretation of the bodies with no jurisdiction over these, a violation of constitutional rights.

This Court does not deny the good will of the Ecuadorian Institute of Social Security in complying with constitutional mandates, particularly, the judgment that has allegedly been breached, however, it believes it must draw attention to fulfillment of this restitution. While the concept of redress is linked to reparation for gross violations of human rights and international humanitarian law, it is also true that the concept of full compensation is generated from the violation of any fundamental right, without prejudice to its severity or importance, because all violations of human rights are serious.

Total and proportionate as a preeminent element of full compensation, in order to restore the situation to its original state, i.e. restore the petitioner's situation to the condition in which he was before the violation of the fundamental right, which involves avoiding unreasonably delay in the administration of justice by any authority, erroneously ordering fulfillment of certain normative

¹¹ Resolution C. I. 009 of the Intervening Commission of IESS, Article 4, second paragraph.

¹² This is set forth in this manner by the medical certificate issued by the General Hospital of the Armed Forces (page 11).

requirements for the exercise of a right, despite the fact that for fulfillment, one must be in possession of said rights.

Resolution No. 21301700 - CCGM - 0358 dated November 10, 2008, by the Medical Expenses Committee on Compensation, denies the study of medical expenses incurred by the plaintiff because the application was submitted extemporaneously, even when it was submitted within the stipulated time, i.e., EIGHT days after admission of the petitioner to the General Hospital of the Armed Forces, nor could it have been studied, since the rights, benefits and entitlements of Mr. Miguel Elicio Arroba Páez had been suspended by the decisions contested by the constitutional complaint before the Third Chamber of the former Constitutional Court; the harm must be repaired in accordance with Resolution No. 0244-2008 -RA of July 14, 2008 of the Third Chamber of the Constitutional Court, as it is paradoxical that the same authority which suspended his rights is now forced to fulfill these requirements (requirements that are impossible to fulfill if one is not in possession of his or her rights) resulting in serious breach of a constitutional right such health.

III. DECISION

In light of the foregoing, administering justice and pursuant to the constitutional mandate of the Constitution of the Republic of Ecuador, the Constitutional Court, for the transitional period, issues the following:

JUDGMENT:

1. Declare the partial breach of Resolution No. 0244-2008 -RA of 14 July 2008 issued by the former Third Chamber of the Constitutional Court, in denying access to compensation for expenses.

13 While it is true that the concept of restitution is linked to reparation for gross violations of human rights and international humanitarian law, it is also true that the concept of full compensation is generated from the violation of any fundamental right, without prejudice to severity or importance, as all human rights violation is serious.

Incurred by serious illness of Mr. Miguel Paez Elicio Arroba at the General Hospital of the Armed Forces.

2. We hereby order full implementation of Resolution No. 0244-2008 -RA of 14 July 2008 issued by the Third Chamber of the former Constitutional Court - through the comprehensive repair of the damage caused by IESS to prevent access to the required treatment for Mr. Miguel Paez Elicio Arroba at the Insurance Hospital Carlos Andrade Marín, regarding Resolution No. 2006-1614 dated 8 May 2006 of the Provincial Branch of the Pension System of Pichincha, ratified by the Commission on Benefits and Disputes of Pichincha and the National Commission on Social Security Appeals.

3. We hereby order the Board of Directors of IESS, and/or the authority with legal and regulatory power to payment of the quantity of US \$26,862.53 to the General Hospital of the Armed Forces, for the expenses incurred in favor of Mr.

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Miguel Elicio Arroba Páez, due to a serious illness, in a term no greater than 30 business days.

4. We hereby order that IESS exercise the right to seek compensation from the officers or dependencies that, upon the respective legal and management process, are determined as responsible, by action or omission, of compliance with the resolutions of this action.

5. Once the reparation term of 30 days has expired, the General Direction of IESS shall inform this Constitutional Court on the fulfillment of this Judgment.

6. We hereby order notice, publication and fulfillment.

s./ Dr. Patricio Pazmiño Freire, President.

s./ Dr. Arturo Larrea Jijón, Secretary General

Confirmation: As such, the above Judgment was approved by the Bench of the Constitutional Court for the period of transition, with eight votes in favor, of Messrs.: Roberto Bhrunis Lemarie, Patricio Herrera Betancourt, Alfonso Luz Yunes, Hernando Morales Vinuesa, Ruth Seni Pinoargote, Nina Pacari Vega, Edgar Zárate Zárate y Patricio Pazmiño Freire; without counting with the presence of Hon. Manuel Viteri Olvera, in session on Thursday, October eight of two thousand and nine. I hereby certify.

s.) Dr. Arturo Jijón Larrea, Secretary General