

Ruling T-095/04

NON-APPLICATION OF THE MANDATORY HEALTH PLAN NORMS- Cases in which the exclusion of high cost treatments and medications proceeds.

RIGHT TO HEALTH AND LIFE – Protection/RIGHT TO HEALTH AND LIFE- Performing a diagnostic exam by EPS¹

RIGHT TO HEALTH – Includes the right to a diagnosis

Reiteration of Jurisprudence

Reference: Dossier T-795497

Constitutional Rights Action initiated by Luz Osmany Torres Puerta against Coomenva E.P.S.

Presiding Judge:
DR. JAIME ARAUJO RENTERIA

Bogota D.C., February nine (9), Two Thousand and Four (2004).

The First Revision Chamber of the Constitutional Court, in exercise of its constitutional and legal faculties, in particular those contained in articles 86 and 241 numeral 9 of The Political Constitution and Decree 2591 of 1991, has issued the following

RULING

within the revision process of the rulings issued by the Thirty-three Municipal Criminal Judge and the Twenty-two Criminal Judge of the Medellin Circuit in the proceeding of the constitutional right action initiated by Luz Osmany Torres Puerta against Coomenva E.P.S.

I. PRECEDENT

1. Facts and claims

Ms. Torres Puerta initiates the constitutional rights action against Coomeva E.P.S. since she considers that her fundamental right to health in connection to her right to life has been violated. She states that the grounds of her claim are the following facts:

¹ EPS stands for “Empresa Promotora de Salud” (Health Promoting Company)

Since the month of September 1998 she has been affiliated to the E.P.S. Coomeva. In July 2002, the breakdown of her health started, due to which the doctor ordered on two occasions the practice of two exams that are of prime importance for diagnosing the origin of the disease that she might be suffering.

Despite the fact that the prescribing doctor filled the form that justifies the practice of the tests PH levels and esophageal manometry, the health promoting entity has been reluctant to deliver the authorization, indicating that it is a procedure that is not covered by the P.O.S.²

She consequently requests, that her right to health and life are recognized, and that the legal representative of the E.P.S. Coomeva be ordered to practice the ordered exams.

2. Intervention of defendant

COOMEVA E.P.S. in communication subscribed by the Medical Auditor and the Quality Director, inform the ruling judge that according to the pertinent norms, specifically Resolution 5261 of 1994, the exam that the plaintiff requires is not included within said resolution thus there is no legal obligation for said E.P.S. to practice it.

3. Relevant evidence placed on file

-on page 4, the request of the plaintiff filed before the Scientific Committee in which she requests that the PH levels and esophageal manometry exams, ordered by the surgeon Floriberto Marin of the ESE Hospital San Vicente de Paul de Caldas (Antioquia) are practiced.

-on pages 5 and 6, service order dated July 2002, of the E.S.E. Hospital San Vicente de Paul de Caldas – Antioquia, in which one can read: *“patient with multiple medical appointments for gastritis and reflux G- E., no improvement. Evaluated by doctor Marin, suggests better study for reflux.”*

-on page 8, copy of the citizenship ID of the plaintiff and her COOMEVA ID.

-on page 14, expansion of the constitutional rights action filed by Ms. Luz Osmany Torres Puerta in which she confirms the facts of the constitutional rights action and she also states that she has an income of \$818,000, has a son whom she provides for and has a house of her property. She manifests that the costs of the two ordered exams is of \$714.000 and her salary and obligations do not allow her to have that expense.

-On page 28, statement rendered before the judge of the first instance by Mrs. Rubiela de los Angeles Ocampo, a friend of the plaintiff, in which she states that Mrs. Luz Osmany Torres Puerta does not have the means to afford on her own the exams that were prescribed.

-On page 29, of the report of the judge of the first instance, in which it is described the inquiries made regarding the costs of the medical exams that plaintiff requires, concluding that the

² P.O.S. stands for “Plan Obligatorio de Salud” (Mandatory Health Plan)

manometry has a cost of \$284,200 and the PH levels would cost \$366,000 at the Hospital Pablo Tobon Uribe.

-On pages 31 and 34, of the report of the Caldas, Antioquia educational corporation "Ciro Mencia" in which it is stated that the student Andres Felipe Torres Puerta was in Grade 8 on the year 2003.

II. JUDICIAL DECISIONS THAT ARE BEING REVIEWED

This case was presented before the Thirty-three Municipal Criminal Judge and the Twenty-two Criminal Judge of the Medellin Circuit, whom, in rulings issued on June 11 and July 21, 2003, respectively, denied the claims. They considered that the life and integrity of the patient are not at risk; in a part that is highlighted from the ruling one can read: *"The judiciary does not see an imminent danger of violating the constitutional rights, nor one can deduce that the patient has been at a risk of death. What is true is that the medical orders have not stated that the medical attention must be urgent, and her health state is stable despite the delay in the medical attention"*.

Likewise, they argued that the plaintiff's economical insolvency was not fully proven and *"considering the legal limitations of the E.P.S., and the economic possibilities that plaintiff has to cover the costs of the required exams, the protection of the constitutional right in this case could threaten the equality right considering that the solidarity fund that supports the social security system in health, would cover issues that plaintiff can afford and eventually, the same fund would abstain from assuming the costs of the attention that is required by a person that does not have the resources"*.

III. CONSIDERATIONS AND COURT'S GROUNDS

1. Competency

This Court is competent to hear the rulings that are subject to revision, according to that which is established in articles 86 and 2419 of the Political Constitution and articles 31 to 36 of Decree 2591 of 1991, and due to the choosing of the case by the Chamber of Selection.

2. Requirements for the non-application of the norms that exclude certain medications and treatments from the P.O.S.

The Constitutional jurisprudence has established certain requirements that make possible the non-application of the norms which exclude certain medications and treatments from the P.O.S.,³ with the objective of allowing the right to health, in connection to the right to life, to prevail when said rights have been subordinated to economic considerations.

The Corporation has understood the scope of the contributive regime in the health system, given that a fair compensation exists between the rendered service and the cost of same, with the objective of allowing the viability and continuity of the system. However, it has been conscious of

³ The jurisprudential development can be analyzed in Rulings T-491 of 1992, M.P. Dr. Eduardo Cifuentes Muñoz, T-576 of 1994, M.P. Jose Gregorio Hernandez Galindo and T-329 of 2002, M.P. Rodrigo Escobar Gil, amongst others.

certain people's limited capacity to pay, and of the need for certain treatments and medications for preserving their health and not putting at risk the patient's life. This is why there has been an effort to establish an equilibrium between the economic aspect and the constitutional guarantee of the right to health in connection with the right to life.

In view of the above, it is possible to verify the effective fulfillment of the requirements for the non-application of the legal norms and regulations cited by Coomeva E.P.S., for refusing to carry out the prescribed medical exam to Mrs. Luz Osmany Torres Puerta, namely:

1. "That the lack of the medication or treatment threatens or violates the fundamental rights to life or personal integrity of the affiliated person, which must be understood not only when there is an "imminent risk of death but also when the absence of the medicine or treatment alters the conditions for an existence with dignity"⁴;

"2) That the excluded medication, treatment, clinical test or diagnostic exam cannot be replaced by another one that is included in the P.O.S.;

"3) That the patient does not have the capacity to pay and defray the cost of the respective medication or the treatment;

"4) That the medication or treatment has been prescribed by a doctor who belongs to the Promoting Health Company to which the affiliated persons is affiliated. Consequently, the Court after verifying the fulfillment of the abovementioned requirements, orders the defendant to carry out the omitted conduct, which is the delivery of the medication or the carrying out of the surgical intervention ordered by the treating doctor of the EPS. In this way, the defendant has the right to a refund of the paid sums, through the Solidarity and Guarantee Fund FOSYGA, with the aim of preserving the financial equilibrium of the Health Social Security General System."⁵

3. Particular case

In view of the requirements signaled by the jurisprudence of this Corporation, and the evidentiary material placed on file, this Revision Chamber observes the following:

a) The lack of the procedures prescribed by the treating doctor with regards to the possible pathology suffered by the plaintiff puts at risk her health and her life. The aforementioned, according to the evaluation issued by the treating doctor in the medical justification form, filled in for the application of the referred diagnosed test.

b) In an identical manner, it can be observed in the abovementioned medical justification form, that there is no substitute exam within the P.O.S.

⁴ Ruling T-757 of 1998, M.P. Alejandro Martinez Caballero.

⁵ See Rulings T-884 and T-1032 of 2001. M.P. Eduardo Montealegre Lopez.

c) It is said in the dossier, that the economic inability of the plaintiff which impedes her payment of the indicated medication was largely questioned by the judge of the first instance, who denied the Constitutional Rights Action with a ruling that was later confirmed with identical arguments. The first instance decision-maker, in exercise of its legal powers to boost the evidentiary activity, indeed requested the required evidence to verify the fulfillment or non-fulfillment of this jurisprudential requirement and concluded that the financial status of Mrs. Luz Osmany Torres Puerta is not precarious, and at the same time asked himself the following: *“if the need of the exams was such so as to resort to the constitutional action, with all due respect it is questioned, why instead of paying monthly installments for clothing articles, she did not procure the payment of the exams? Why were such sums not assumed by charging a credit card that it is known to be active?”*.

This Chamber differs from this conclusion, considering that this is not the result shown by the evidentiary data placed on this cause. Indeed, for this Chamber, the economic inability of plaintiff does not warrant a discussion, since if her income is really \$818,000 and the sum of the two ordered exams oscillates between \$650,000 and \$700,000, with the residual, which is minimum, she must attend to other expenses that are far away from being sumptuary: food, son’s schooling and the payment of the installments for certain appliances and clothing, which instead of indicating the great solvency that pertains to the other instances, denotes that the plaintiff cannot assume the payment in full of her basic expenses. This is why, it is reiterated, the requirement of economic inability has also been proven.

d) The specialist that treats the pathology suffered by the plaintiff is attached to Coomeva E.P.S. according to the justification form for the execution of the exam, which exam was excluded from the P.O.S.

From what has been said, it can be inferred that in this case all the jurisprudential conditions set forth by the Constitutional Court for protecting the right to health in connection to the right to life of the plaintiff have been fulfilled.

The aforementioned would suffice to grant the claimed protection. However, it is not inane to insist in the constitutional jurisprudence which dictates that diagnostic tests cannot be dismissed by entities that are in charge of all the country’s inhabitants, given that the success or failure of the treatments and procedures for recovering the patients’ health depends on such tests.

Consequently, the Constitution will be directly enforced, the Constitutional Rights Action will be granted and the defendant will be ordered to carry out the requested diagnosing exams.

4. DECISION

For all the foregoing reasons, the First Revision Chamber of the Constitutional Court, administering justice in the name of the people and mandated by the Constitution,

RESOLVES

First. REVOKE the ruling issued on July 21, 2003 by Judge 22 of the Criminal Circuit of Medellin, within the Constitutional Rights Action initiated by Luz Osmany Torres Puerta against Coomeva E.P.S. Instead, **GRANT** the requested protection.

Second. ORDER the E.P.S. Coomeva, within the forty eight (48) hours counted as of the notification of this ruling, to carry out the diagnostic tests requested for Mrs. Luz Osmany Torres Puerta, in the manner prescribed by the treating doctor.

Third. Point out that E.P.S. COOMEVA has the right to ask the FOSYGA to refund the expenses for the execution of the prescribed tests.

Fourth. By General Secretary, perform the communications set forth in article 36 of Decree 2591 of 1991, for the effects contained therein.

Notify, communicate, publish in the Gazette of the Constitutional Court and enforce.

JAIME ARAUJO RENTERIA
Presiding Judge

ALFREDO BELTRAN SIERRA
Judge

MANUEL JOSE CEPEDA ESPINOSA
Judge

IVAN HUMBERTO ESCRUCERIA MAYOLO
General Secretary (e)