

## APPEAL OF A JUDGMENT FOR A WRIT FOR PROTECTION OF FUNDAMENTAL RIGHTS (“AMPARO”)

CASE FILE 4448 – 2008

CONSTITUTIONAL COURT: Guatemala, February 26, 2009

In light of the appeal filed and its factual background, the judgment issued on October 26 2008, issued by the First Chamber of the Court of Appeals of Labor and Social Order Matters is hereby under review, when it constituted itself into a Tribunal<sup>1</sup> to determine Writs of Protection of Fundamental Rights (hereinafter, an “*Amparo*”), and decided the constitutional action filed by the Human Rights Ombudsman, acting in favor of the patients who suffer from vitiligo, psoriasis, fungoid mycosis, alopecia, lichen planus, uremic pruritus, and scleroderma, against the Board of Directors of the Guatemalan Social Security Institute. The applicant acted under the sponsorship of attorneys Alejandro Rodríguez Barillas and José Guillermo Rodríguez Arévalo.

### I. The Amparo

**A) Submission and authority:** filed on the twenty-fourth of July of two-thousand and seven, at the Center for Auxiliary Services of Administration of Justice and subsequently sent to the First Chamber of the Court of Appeals of Labor and Social Order Matters. **B) Claimed act:** certain and determined threat caused by the Guatemalan Social Security Institute suspending the medical services of patients who suffer from the following illnesses: vitiligo, psoriasis, fungoid mycosis, alopecia, lichen planus, uremic pruritus, and scleroderma. **C) Violations claimed:** rights to life, health, physical integrity and social security. **D) Facts that underlie the *amparo*:** the matters set forth by the claimant are summarized below: **D.1) Causation of the claimed act:** a) the certain and determined threat that the Guatemalan Social Security Institute suspends medical treatment and services to patients who suffer from the following illnesses: vitiligo, psoriasis, fungoid mycosis, alopecia, liquen planus, uremic pruritus and the rights to life, health, physical integrity and social security; and b) they were verbally informed that the company that was providing services to treat these types of illnesses would no longer provide them and that, furthermore, a special unit at the Hospital would be created in area nine, to treat these types of illnesses – a circumstance that has not occurred -the contested act-. All of the matters stated have left the patients unprotected, a situation that can cause irreparable harm to the health of the group of members. **D.2) Harm imputed to the claimed act:** the claimant claims that the fact that the challenged authority suspended medical treatment or services for the patients who suffer from vitiligo, psoriasis, fungoid mycosis, alopecia, lichen planus, uremic pruritus and sclerodermas, produces, as a result, a certain and determined threat to their lives. **D.3) Claim:** I request that the *amparo* be granted and that the patients who suffer from vitiligo, psoriasis, fungoid mycosis, alopecia, liquen planus, uremic pruritus and sclerodermas continue to fully enjoy the constitutional rights. **E) Use of its resources:** none. **F) Relevant cases:** I invoke the contents of subparagraphs a) and b) of article 10 of the Law of *Amparo*, Habeas Corpus and

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<sup>1</sup> Translator’s note: As in other Latin American Countries, a petitioner may file a petition for a writ of protection of fundamental rights, which is then, through a judicial draw, assigned to any judicial court, but that court must act as a constitutional Tribunal.

Constitutionality. **G) Violated laws:** I reference articles 3, 93, 94, 95 and 100 of the Political Constitution of the Republic of Guatemala.

## II. PROCEEDINGS OF THE AMPARO.

**A) Provisional amparo:** granted. **B) Third interested party:** a) Eugenia Samayoa de González, as a representative of the affiliated patients; and b) State of Guatemala. **C) Circumstantial report:** the challenged authority **informed a)** the Chief of the Department of Internal Medicine of the General Hospital of Illnesses stated that the treatment has not ceased to be given where it is necessary for patients who suffer from the referenced illnesses; and that the absence of the respective treatments are not a certain threat that determines the possibility that the death of the patients could be produced; and **b)** a patient has requested that he present cutaneous T cell lymphoma, and this disease does not appear in the list issued by the Human Rights Ombudsman: **c)** the illnesses indicated by the Human Rights Ombudsman cannot be treated via the therapies required and **d)** a patient has filed a request, informing that he presents cutaneous lymphoma of T cells, and that for this reason he seeks, from a private service, the company that performs these types of proceedings in the country, in order to hire it via a direct purchase, in order to treat the member's needs **D) Evidence:** **a)** simple copy of case record ORD. GUA fifty eight – two thousand and seven / Desc., that contains the claim of the patients and a list with signatures of the patients who were affected and reports of the Guatemalan Social Security Institute; and **b)** diagnoses reports of each of the illnesses. **E) First instance judgment:** the Tribunal **considered:** *“In the present case, the Human Rights Ombudsman has requested an amparo for the protection of the right to health of the patients that suffer from the illnesses of: VITILIGO, PSORIASIS, MYCOSIS FUNGOIDE, ALOPECIA, LIQUEN PLANUS, UREMIC PRURITUS, AND SCLERODERMIAS, by virtue of the fact that the certain and determined threat of the Guatemalan Social Security Institutes' suspension of treatment that they require consists of: Phototherapy (Narrow ultraviolet A and B light and narrow spectrum of B ultraviolet light), photo-chemotherapy, psolaren medication, and rheumatologic treatments, which constitute a certain and determined threat of death. In this regard, it is worth considering that the right to life is enshrined in article 3 of the Political Constitutional of the Republic of Guatemala ,as a fundamental State obligation, as its preamble itself affirms the primacy of the human person as a subject and objective of social order and from that, the matrix law<sup>2</sup> also regulates that the Guatemalan State must organize itself to protect the human person, (article 1) and, for this reason, it must ensure that the inhabitants of the Republic (among other aspects) have the right to live and their comprehensive development (article 3), because this right constitutes a supreme purpose and, as such, merits its protection. The honorable Constitutional Court, with respect to the right to life and health has settled: ‘The right to health carries with it, in this case, the real possibility that every human person must receive timely and effective medical care. Thus, this type of right shall be subject to protection, not only in the internal legislation of the Country (article 93 of the Political Constitution of the Republic of Guatemala as directly applicable primary norm, but also in the conventional human rights international framework (article 12 of the International Covenant of Economic, Social and Cultural Rights and XI of the American Declaration on the Rights and Duties of Man), to mention two examples, Therefore, if the right to health arises from the fundamental right to life, its affection, implies a violation of the most fundamental right*

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<sup>2</sup> Translator's note: the Constitution

*of all human rights, life. Thus, this Court's case law has considered that this right – the right to health- justified that every human being can enjoy a biological and social balance that constitutes a state of wellbeing with respect to the media that surrounds him or her, implies being able to have access to the services that allow keeping or restring a physical mental and social wellbeing (Judgment dated May twelfth of nineteen hundred ninety tree. Case records accumulated 355-92 and 359 – 92; gazette 28, pages 19 and 20). Given the above, this amparo is admissible clearly and patently because if it is not admitted, the affectation of fundamental rights and the harmful and irreparable harm would be manifest and the preventive effect of amparo would not be fulfilled. Given this, and the certain and determined threat of the Board of Directors of the Guatemalan Social Security Institute, which has not provided the phototherapy treatment (A and B ultraviolet light, narrow ultraviolet B light), photo chemotherapy, psolaren medication and rheumatologic treatments to patients who suffer from illnesses related to VITILIGO, PSORIASIS, MYCOSIS, FUNGOIDE, ALOPECIA, LIQUEN PLANUS, UREMIC PRURITUS AND ESCRELODERMIAS, exposing them to the risk of losing their lives or causing irreparable harm to their health, which consequently, violates their rights that are guaranteed by articles 3, 93, 95 and 100 of the Constitution, 4, numeral 1) of the American Convention on Human Rights; 6<sup>th</sup>, subparagraph 1) of the International Covenant of Civil and Political Rights; 12 of the International Covenant on Economic Social and Cultural rights (conventional rules applicable via the matters provided by article 46 of the Constitution). This Chamber, constituted into a Tribunal of Amparo concludes that the protection requested must be granted in order to reestablish the violation of the right to life, health and social security that belongs to all patients who suffer the referenced illnesses, as, if it is not adopted, the affectation to the fundamental rights and the serious and irreparable harm would be manifest and the preventive effect of the amparo would not be satisfied. In accordance with article 45 of the Law of Amparo, Habeas Corpus and Constitutionality, the judgment of damages shall be mandatory if the Amparo is declared admissible and the responsible party may only be exonerated when, in the judgment of the tribunal, it has acted with patent good faith. Given that the actions of the challenged authority fits into the last of the referenced elements, would apply and exonerate payment of the costs that were caused...” **And resolved:** “...I. GRANT the amparo requested by the Human Rights Ombudsman against certain an determined threats by the Guatemalan Social Security Institute to suspend the adequate medical treatment for patients who suffer from VITILIGO, PSORIASIS, FUNGOID MYCOSIS, ALOPECIA, LIQUEN PLANUS, UREMIC PRURITUS AND SCLERODERMA; II. We order keeping the full breadth of the constitutional rights for such persons who suffer from the referenced illnesses and as a result, the Guatemalan Social Security Institute must ensure the adequate treatment, through provision of the medications in the amount and quality required in accordance with the needs that the illness of the patients require. III. In light of the foregoing, no special judgment is made for fees. Notice is hereby ordered.*

### **III. APPEAL**

The Guatemalan Social Security Institute, challenged authority, appealed.

### **IV. ARGUMENTS ON THE DATE OF THE HEARING**

**A) The claimant** repeated the argument set forth in its initial brief of amparo and added that the amparo is the only means to ensure that the life and health of the patients who suffer from vitiligo, psoriasis, fungoid mycosis, alopecia, liquen planus, uremic pruritus and

sclerodermas, given the threat of the challenged authority of suspending the treatment and medical services that keep these illnesses under control. He further indicated, that we must confirm that, in the present case, the elements of applicability of the amparo concur, because a certain and determined threat exists that endangers the life of the affiliates who suffer the referenced illnesses. It states that the lower court's judgment complies with the law and procedural rules, and thus requested that the judgment be affirmed, thus definitively granting the *amparo*. **B) The Guatemalan Social Security Institute**, the challenged authority, stated that this constitutional action has been developed with clear procedural errors, which justify the invalidity of all matters set forth, including the appealed judgment. He noted, further, that this amparo no longer has a subject, because, as timely informed, there are no patients with the referenced illnesses. It requested that the appeal filed be declared admissible and, as a consequence, the appealed judgment should be revoked. **C) The State of Guatemala and Eugenia Samayoa de Gonzalez, in representation of member patients, third party interested, did not file any arguments.** **D) The Public Ministry** stated that it shares the view upheld by the Amparo Tribunal in first instance because there exists settled doctrine issued by the Constitutional Court that refers to the right to health and the State's obligation to use all means for its protection. It also indicates that the Guatemalan Constitutional Tribunal has noted that the right to health includes the real possibility that a human person would receive timely and effective medical treatment. If the fundamental right to health arises from the right life, its violation, also implies a violation of the most fundamental rights of all: life. I request that you declare that the filed appeal is inadmissible and, as a result, you affirm the lower judgment.

## WHEREAS

### -I-

The *amparo* operates as a constitutional instrument that can ensure the efficacy of fundamental human rights, whether to ensure their validity and respect or to restore their enjoyment when there is a threat to a violation or this has occurred as a consequence of improper decisions or acts. In this sense, the judgment of the amparo operates with reparatory effect for the harm that could result to the fundamental rights of a human being, derived from an act of power that threatens then in a certain and imminent manner.

### -II-

In the instant case, the Human Rights Ombudsman, filed an *amparo* against the Board of Directors of the Guatemalan Social Security Institute and notes, as the claimed act, the certain and determined threat that the challenged authority would suspend treatment and medical services to those persons who suffer from vitiligo, psoriasis, fungoid mycosis, alopecia, liquen planus, uremic pruritus, and sclerodermas, requiring phototherapy, photo-chemotherapy, Psoralen medication and rheumatologic treatments.

The claimant claims that because of the fact that the challenged authority suspends treatment or medical services to patients who suffer from vitiligo, psoriasis, fungoid mycosis, alopecia, liquen planus, uremic pruritus, and sclerodermas, produces, as a result, a certain and determined threat to their rights to life.

### -III-

The present action denounces the fact that the Guatemalan Social Security Institute has unilaterally ceased to provide medicine and medical services that are necessary for the

members who suffer from vitiligo, psoriasis, fungoid mycosis, alopecia, liquen planus, uremic pruritus, and sclerodermas. The challenged authority states that it has no patients under its care who suffer from the referenced illnesses. This Court, in analyzing the procedural record notices that a record has been processed at the Institute of the Human Rights Ombudsman, which commenced with a claim signed by a group of members of the Guatemalan Social Security Institute who suffer from the referenced illnesses, a situation that disproves the statement made by the challenged authority. It also verified, in the referenced record, the existence of a report of the Assistant Management of Provision of Health Services at the Guatemalan Social Security Institute, which includes a statement that the supplier PUVASA, S.A. has provided photo chemotherapy services for the referenced Institute over a series of years. By decision of the supplier, based on the increase of costs of accumulated inflation and modernization of its equipment, the cost of photo-chemotherapy sessions increased. Given this circumstance, and based on the financial analyses that were performed by the challenged Institution related to increases in costs, the acquisition of services from the supplier were suspended and other alternatives were sought in order to continue treating these types of dermatological pathologies. An adjudicative process was commenced for the service, and it was finally declared deserted, and thus, it was decided that the Institute itself would provide the services. The process for the purchase of equipment and installation of a photo-chemotherapy unit is under a technical study at the Assistant Management of Health Services and the Department of central Services, with the purpose to submit a plan with a final solution to this matter. Given the foregoing, we also note that the challenged authority suspended the service provided by a supplier company and intended to assume the responsibility of being the service provider required by patients who suffer from vitiligo, psoriasis, fungoid mycosis, alopecia, liquen planus, uremic pruritus, and sclerodermas.

#### -IV-

With respect to the rights that are considered violated by the referenced decision, this Court considers that health is fundamental, due to the fact that it arises from the right to life, which, as the most basic and fundamental of human rights, is displayed in all the others. Thus, it merits recognition among rules of international law, such as, *inter alia*, article 12 of the International Covenant on Economic Social and Cultural Rights and XI of the American Declaration of Rights and Duties of Man. However, aside from the protection that that level of Human Rights has given it, its development entails the real possibility of a person to receive timely and effective medical attention for the sole fact of being a human being, a right which includes the prevention of illnesses and the treatment and rehabilitation of these via the provision of hospital medical services or medical attention, all of this, so that the person who suffers from an illness has an additional possibility of preserving his or her life. In order to enforce the right to health and the State's obligation to protect a person and guarantee his or her life and comprehensive development in accordance with articles 1, 2, and 93 of the supreme text, further, the Political Constitution of the Republic of Guatemala contains, in its article 94, the State's obligation to safeguard the health and social treatment of all inhabitants, developing through its institutions -which includes the Guatemalan Social Security Institute- prevention, recovery and rehabilitation actions for illnesses in order to ensure the most complete physical, mental and social wellbeing for the country's inhabitants. The State develops this obligation, for the workers of the public and private sectors, through the Social Security regime, established in article 11 of the matrix law, which has, as one of its fundamental ends, the provision of the medical services that lead to preserving or restoring the health of its members and beneficiaries, from the time of diagnosis of the illness until the development of the treatment required for restoration. Thus, it is undeniable and unquestionable that the important social function that the Social Security regime exercises to

preserve or maintain the levels of health of the population in order to safeguard the health and security of person and make effective and guarantee the enjoyment of the right to life – rights that cannot be denied based on administrative decisions with inadequate legal support or, as in the instant case, that prioritize a financial analysis and the cost of services over the benefits that they must give to members, since this would constitute a violation of these human rights. This Court cannot disregard these estimates, as, the judgment dated September twenty-seventh of two thousand (File 459 – 2000) considered that *“The right to life is fundamental and, as such, subject to the State’s protection that, unless there is illegitimacy of the action, it has the duty to guarantee it by the means that it has at its disposal, constituting one of the primordial State ends.”*

In analyzing the specific case submitted for review, the following outer limits must be specified, based on the procedural records: **a)** the illnesses that the members of the Guatemalan Social Security Institute suffer who submitted the claim with the Institute of the Human Rights Ombudsman - vitiligo, psoriasis, mycosis, fungoid, alopecia, liquen planus, uremic pruritus, and sclerodermas-; **b)** the condition of members of the Social Security regime of the referenced persons; **c)** the threat of suspension of medical treatment and supply of medicines to the referenced patients, by the challenged authority, based on the fact that the medicine and treatment provided by a supplier of such has increased their cost, circumstances harmful to the interests of the Institute; and **d)** the urgency of medical treatment for these patients, since without these, they can lose the progress that they had obtained and risk their health, and, ultimately, the life of the parties affected.

Having situated the elements that are of interest in the instant case, this Tribunal considers that in Human Rights matters, when the application of a normative precept of a lower level - as, in the instant case, the rules that govern the bids and tenders of proceedings for acquisition of services-, could be subject, as to their interpretation, to the preeminence of a rule of superior degree that is more protectionist, the interpretation must be coherent with the spirit of the higher rule. In this order of ideas, if Decree 295 issued by Congress of the Republic – the Organic Law of the Guatemalan Social Security Institute – establishes receiving benefits for themselves and the relatives who depend economically from them, as a right for the inhabitants of the Republic of Guatemala, and primarily, for its members, the interpretation that is made from the matters in articles of a rule that is inferior in level, can never have priority over the rights contained in the referenced legal framework.

A correct interpretation for the present case, as a function of the Organic Law of said Institute, allows this Tribunal to determine that the referenced members benefit from the right to receive the effective medical treatment to handle the illness that they suffer, fundamentally because they are members of the Social Security regime. Thus, every refusal would be unfounded and aggravate the rights to life, health and social security of such, who find support in the matters contemplated by articles 93, 94 and 100 of the Political Constitution of the Republic of Guatemala. Thus, this Tribunal considers that the patients who suffer from vitiligo, psoriasis, mycosis, fungoid, alopecia, liquen planus, uremic pruritus, and sclerodermas must be subject to all the necessary medical tests to determine the degree of evolution of the specific illnesses and the treatments necessary to reduce or make its effects disappear.

The stated reasons allow for establishing that granting the constitutional protection requested is appropriate to safeguard the fundamental rights violated to the detriment of the group of members of the Guatemalan Social Security Institute who suffer from the referenced vitiligo,

psoriasis, mycosis, fungoid, alopecia, liquen planus, uremic pruritus, and sclerodermas and pursuant to the referenced case law; as a result, having resolved the trial – level judgment in this sense, we must now confirm the appealed judgment, so that the Guatemalan Social Security Institute restores the suspended services, recommences the medical studies necessary and provides medicine to the referenced members to determine what are the adequate treatments and medicines, and as a consequence, provide the referenced persons with the effective medical treatment to confront the illnesses that they suffer, as indicated in the resolutive part of this ruling.

### **APPLICABLE LAWS**

Articles 93, 100, 265, 268 and 272, subparagraph c), of the CPR; 1°, 2°, 3°, 4°, 7°, 8°, 10, 11, 42, 43, 44, 45, 46, 47, 57, 149, 163, subparagraph c), 185 and 186 of the Law of *Amparo*, Habeas Corpus and Constitutionality and 17 of Agreement 4-89 of the Constitutional Court.

### **THEREFORE**

The Constitutional Court, based on the matters considered above and the referenced laws, resolves to: **I) affirm** the grant of the amparo as per the first instance judgment with respect to the effective medical treatment that the challenged authority must continue to provide to the members of Social Security who suffer from vitiligo, psoriasis, mycosis, fungoid, alopecia, liquen planus, uremic pruritus, and sclerodermas. **III)** Service is hereby ordered and, with certification to the matters resolved, the file is remanded.

JUAN FRANCISCO FLORES JUAREZ  
PRESIDENT A.I.

ROBERTO MOLINA BARRETO  
MAGISTRATE

ALEJANDRO MALDONADO  
AGUIRRE  
MAGISTRATE

MARIO PÉREZ GUERRA  
MAGISTRATE

GLADYS CHACÓN CORADO  
MAGISTRATE

ANA MARGARITA MONZÓN DE VÁSQUEZ  
SECRETARY GENERAL A.I.

**CASE FILE 4448 – 2008**

**CONSTITUTIONAL COURT; GUATEMALA, January, twenty-third of March of two thousand and nine**

We are hereby reviewing the requests for clarification of the judgment issued by this Court on the twenty-sixth of February of two thousand and nine, filed by Luis Alberto Reyes Mayén, in his capacity as President of the Board of Directors of the Guatemalan Social Security Institute, in the record created for the appeal of the judgment, in the constitutional amparo that the Human Rights Ombudsman filed against the related Board of Directors.

## BACKGROUND

**I) REGARDING THE SUBMISSION OF THE AMPARO AND RESOLUTION IN FIRST INSTANCE:** In the First Chamber of the Court of Appeals of Labor and Social Organization Matters, constituted into a Tribunal of Amparo, the Human Rights Ombudsman, filed an action of amparo against the Board of Directors of the Guatemalan Social Security Institute, noting, as the claimed act, the certain and determined threat of the Guatemalan Social Security Institute suspending the medical treatment and services to the patients who suffer from the following illnesses: vitiligo, psoriasis, mycosis, fungoid, alopecia, liquen planus, uremic pruritus, and sclerodermas, which require phototherapy, photo-chemotherapy and psoralen medication and rheumatologic treatments.

The Trial level Amparo Tribunal, in a judgment dated October twenty-seven of two thousand and eight, granted the amparo requested by the Human Rights Ombudsman.

**II) OF THE APPEAL SET FORTH AND THE SECOND-LEVEL RESOLUTION:** the challenged authority, Guatemalan Social Security Institute, filed an appeal against the first instance ruling. Given the referenced situation, this Court, in hearing it on appeal, issued the judgment of February twenty-six, two thousand and nine, in which it confirmed the challenged ruling that granted the requested constitutional protection.

**III) OF THE CLARIFICATION AND EXPANSION ARGUMENTS:** the recurrent requests that the ruling on the merits be clarified because it contains ambiguous terms, concretely, in roman numeral I of the resolatory section, in stating that it "confirms the grant of the amparo provided in first instance, as to the effective medical treatment that the challenged authority must continue to provide to the members of Social Security who suffer vitiligo, psoriasis, mycosis, fungoid, alopecia, liquen planus, uremic pruritus, and sclerodermas, nonetheless, the report of this amparo shows that the term, UREMIC PRURITUS, does not classify as a pathology, but ANAL PRURITUS indeed is, and there is a medical treatment for it, which causes uncertainty for the purposes of the fulfillment of the judgment (...)."

## WHEREAS

### -I-

The first paragraph of Article 70 of the Law of *Amparo*, Habeas Corpus and Constitutionality establishes that when the concepts of a writ or judgment are obscure, ambiguous or contradictory, one can request a clarification.

### -II-

Based on the analysis of the judgment of this Court, subject to a clarification request, and considering the arguments set forth by the petitioner, we note that, they do not imply, in any manner, the existence of obscure, ambiguous or contradictory passages in the judgment of amparo of second instance that merit explanation in clear and precise terms, due to its conformity with the submission of the amparo, documents and reports produced by the recurrent, the vocabulary used in all of the referenced documents is uremic pruritus, and for this reason, given the principle of coherence, this Tribunal resolved as requested by the petitioner of the amparo, and as informed by the challenged authority, who also referred to this designation in the case file.

The referenced situation corroborates the decision that the clarification must be inadmissible, and thus, the request that has been set forth must be dismissed.



## APPLICABLE LAWS

Cited article 268 and 272, subparagraph i) of the Political Constitution of the Republic of Guatemala, 71, 149, 163, subparagraph i) and 185 of the Law of Amparo, Habeas Corpus and Constitutionality.

## RESOLVES TO

The Court of Constitutionality, based on the matters considered and referenced laws, resolves to: **I. Dismiss** the requests for clarification of the judgment of this Court dated the twenty-six of February of two-thousand and nine, filed by Luis Alberto Reyes Mayén. **II.** Service is hereby ordered

JUAN FRANCISCO FLORES JUAREZ  
PRESIDENT A.I.

ROBERTO MOLINA BARRETO  
MAGISTRATE

MARIO PÉREZ GUERRA  
MAGISTRATE

ALEJANDRO MALDONADO  
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MAGISTRATE

GLADYS CHACÓN CORADO  
MAGISTRATE

ANA MARGARITA MONZÓN DE VÁSQUEZ  
SECRETARY GENERAL A.I.