

APPEAL OF SENTENCE IN PROTECTION ACTION

FILE 2605-2009

CONSTITUTIONAL COURT: Guatemala, January 5, 2010.

On appeal and considering the prior procedural instances of the case, the Court will examine the sentence handed down on April 23, 2009, by the First Chamber of the Court of Appeals for Labor and Social Security, acting as a Protection Tribunal, in the constitutional action brought by the Public Defender for Human Rights on behalf of Luisa Fernanda Morales Tumax against the Board of Directors of the Social Security Administration of Guatemala. The claimant is represented by attorneys Alejandro Rodríguez Barillas and José Guillermo Rodríguez Arévalo.

PROCEDURAL HISTORY

I. THE PROTECTION ACTION

A) Presentation and jurisdiction: Presented on May 22, 2008, before the Center for Auxiliary Services of Judicial Administration, and later remitted to the First Chamber of the Court of Appeals for Labor and Social Security. **B) Act that is the subject of the protection action:** the direct and imminent threat of the suspension of medical treatment and attention, as well as the failure to resolve the appeal presented on September 25, 2007, challenging the decision to cease provision of the medical assistance requested for Luisa Fernanda Morales Tumax, a minor child, who suffers from chronic kidney failure and is a transplant patient. **C) Violation claimed:** the patient's rights to life, health and physical integrity. **D) Facts underlying the protection action:** The claimant's argument and the procedural facts of the case are summarized as follows: **D.1) Occurrence of the act complained of:** **a)** Luisa Fernanda Morales Tumax, a minor child, is a beneficiary of the Guatemalan Institute of Social Security, with patient affiliate number one – sixty-four – nine thousand sixteen – nine (1-64-09016-9); **b)** in the year two thousand she received a kidney transplant, and the aforementioned Institute provided her with medical assistance and medicine; the minor child's parents requested that the Board extend her medical treatment and attention, in response to which the Institution advised them that the patient's coverage would only last until her fifteenth birthday; **c)** an official letter sent on September 4, 2007, from Dr. Eduardo René Méndez Sosa, of the office of the Assistant Manager of the Department of Health Benefits, indicated that their daughter's medical assistance could not be extended, given that the Institute's internal regulations only provide for coverage up to the age of fifteen, and the beneficiary would turn fifteen on March 13, 2008; **d)** the family appealed this decision before the Board of Directors, requesting that the Institute continue to provide medical treatment and care necessary for the patient, which appeal had not been resolved as of the time that the protection action was presented; **e)** kidney failure is a fatal illness, and if the patient does not continue to receive adequate medical treatment and attention, her body would reject the transplanted kidney, and she would die immediately. **D.2) Damages caused as a result of the act complained of:** the claimant alleges that the refusal to extend the treatment and care necessary to maintain the health of the child, who suffers from chronic kidney failure for which she received a

kidney transplant, threatens the health of the beneficiary and consequently her life. This decision represents a direct and imminent threat to her rights, and requires that the protection action be granted in accordance with the constitutional jurisprudence cited to in such protection actions. The respondent Institution, in its zeal to uphold its regulations, has ignored the supreme guarantees that the Political Constitution of the Republic of Guatemala provides for the health of the State's inhabitants, and its corresponding preference to protect life as the highest priority of those rights. In addition, the issue that is the subject of the patient's appeal may not remain unresolved, due to which, having failed to follow procedure and resolve such appeal, the petitioner's rights were violated, and the protection action was imposed in order to guarantee her rights. **D.3) Petition:** the claimant requests that the protection action be granted, and the restitution of her rights that were violated. **E) Use of resources:** none. **F) Applicable law:** The claimant cites to paragraphs a) and b) of Article 10 of the Law of the Protection Action, Personal Liberties and Constitutionality. **G) Laws violated:** The claimant cites to Articles 3, 28, 93, 94 and 95 of the Political Constitution of the Republic of Guatemala, and Articles 24 and 26 of the Convention on the Rights of the Child.

II. PROCEDURE OF THE PROTECTION ACTION

A) Interim protective measures: Granted. **B) Interested third parties:** a) the State Attorney General and b) Roxana María Tumax Elías. **C) Respondent's evidence:** The respondent authority stated only that the minor child Luisa Fernanda Morales Tumax was referred to the Pediatric Unit of the General Hospital of the Guatemalan Institute of Social Security in September of the year nineteen ninety-nine, with a diagnosis of chronic kidney failure. She was initially treated by peritoneal dialysis but later received a kidney transplant from a living donor. The respondent authority added that from the year two thousand to the present date, the minor child has been treated in the aforementioned Unit on a periodic basis, and medical treatment has been provided to her as her case requires; she was additionally treated for some complications due to infections. **D) Remission of the case file:** a certified copy of the clinical case file of Luisa Fernanda Morales Tumax. **E) Evidence:** a) a certified copy of the clinical case file of Luisa Fernanda Morales Tumax, provided by the Guatemalan Institute of Social Security; b) uncertified copies of the following: i) act of petition of Rosa María Tumax Elías de Morales sworn before the Public Defender of Human Rights;¹ ii) a copy of the appeal presented to the respondent authority, whose failure to resolve forms part of the present protection action; iii) the official letter through which the Assistant Manager of Economic Health Benefit indicated to the patient's mother that it would be impossible to extend her medical treatment; and c) legal and human rights arguments. **E) Decision in the first instance:** The First Chamber of the Court of Appeals for Labor and Social Security, acting as a Protection Tribunal, **considered that:** *"...In the present case, the Public Defender of Human Rights has requested that a protection action be granted in respect to the right to health of Luisa Fernanda Morales Tumax, who suffers from chronic kidney failure, and who requires the necessary medicines for the treatment of her illness, such as Tacrolimus, one milligram, Micofenolato Mofetilo, two hundred and*

¹ Translator's note: The Human Rights Ombudsman of Guatemala

fifty milligrams, and Cilazapril, five milligrams. The direct and imminent threat of the Guatemalan Institute of Social Security to suspend the provision of medical services to this minor child would violate her constitutional right to health. In fact, having reviewed the case files provided by the Honorable Constitutional Court, nine hundred and fifty dash ninety-nine (950-99), one thousand two hundred and fifty dash two thousand two (1250-2002), three hundred and four dash two thousand one (304-2001), one thousand six hundred and thirty-five dash two thousand two (1635-2002), it is determined that the aforementioned honorable Court has granted protection in respect of the decisions of the Guatemalan Institute of Social Security in cases in which treatment and medicine have been denied to persons who are ill. The right to social security has been instituted as a mechanism for the protection of life, which has as its fundamental purpose the provision of leading medical and hospital services to preserve, protect or recover the health of the inhabitants of the country through medical treatment that necessarily must include coverage from the time of the patient's diagnosis until he or she has recovered his or her health. Such rights are guaranteed by Article 100 of the Political Constitution of the Republic of Guatemala, which guarantees the right to social security for the benefit of the nation's inhabitants, through an obligatory public service system. This right is to be enjoyed by all persons who are affiliated with the social security system configured by the Guatemalan Institute of Social Security, which establishes its own internal rules and regulations in respect of the system of authorizations of the provision of the Institute's medical and hospital services. In light of the foregoing, and considering the direct and imminent threat of the suspension of medical services to the minor patient Luisa Fernanda Morales Tumax by the Guatemalan Institute of Social Security, and the consequential violation of her rights as guaranteed by Articles 3, 93, 95 and 100 of the Constitution, and Article 4, numeral I) of the American Convention on Human Rights; this Court, acting as a Protection Tribunal, concludes that the protection requested by the petitioner should continue to be granted because failure to grant such protection would result in a violation of fundamental rights and serious and irreparable harm, and therefore the preventative nature of the protection action would be rendered ineffective. In accordance with Article 45 of the Law of the Protection Action, Personal Liberties and Constitutionality, payment of costs is obligatory in the event that a protection action is granted. However the Tribunal may exonerate the responsible party from such payment when in the opinion of the Court, such party has acted in good faith. Given that the actions of the respondent authority fall within this latter category, the Court exonerates it from payment of costs..." **The Court therefore resolved:** "...I) The protection action brought by the Public Defender for Human Rights in respect of the direct and imminent threat of the Guatemalan Institute of Social Security to suspend the provision of necessary medical treatment to Luisa Fernanda Morales Tumax is hereby granted; II) As a result of the foregoing, the Guatemalan Institute of Social Security is hereby ordered to take the necessary actions to ensure that the minor child Luisa Fernanda Morales Tumax is able to fully enjoy her constitutional rights, guaranteeing her the appropriate medical treatment that corresponds to her condition for so long as may be required to guarantee the life and health of the aforementioned minor patient, and the parents of the child Luisa Fernanda Morales Tumax are ordered to take the necessary steps to ensure that

she receives appropriate medical treatment within fifteen days counted as of the date of this sentence; III) It is hereby ordered that a certified copy of this sentence be served on the Guatemalan Institute of Social Security, for the corresponding legal purposes; IV) The respondent authority is hereby ordered to strictly comply with the orders established herein, on pain of a fine of one thousand quetzals payable by the responsible party of the respondent authority, without prejudice to any other civil or criminal penalties that may apply; V) For the foregoing reasons, the respondent authority is exempt from payment of costs. VI) So notified. (...)."

III. APPEAL

The respondent authority appealed.

IV. ARGUMENTS BEFORE THE COURT.

A) The claimant stated that the lower court's decision on the protection action in question is in keeping with the law and procedural requirements, and therefore requests that the lower court's sentence be upheld, and the constitutional protection requested be definitively ordered. **B) The Guatemalan Institute of Social Security, the respondent authority**, stated that the protection action cannot proceed given that the suspension of medical services to the minor child Luisa Fernanda Morales Tumax at no time is in violation of her rights, given that the Institute is an autonomous entity, with legal personhood and its own equity, in accordance with Article 100 of the Political Constitution of the Republic of Guatemala. No act of the Institute's constitutes a direct and imminent threat to the life or health of the minor patient, given that the issuance of the rules and regulations that govern the actions of the Institute in respect of the management of the social security administration are taken based on specialized studies based on its ability to collect funds from its contributing base, and as a result its capacity to provide benefits to its members. If the Institute does not comply with its internal regulations, it may act to the benefit of one member, but to the detriment of others, as a result of the financial and administrative imbalances that would result from the provision of services in excess of those agreed to under the respective agreements that govern the coverage that the Institute may provide. In addition, the lower court's decision violates the Institute's internal organization, without taking into account that the Institute in question is in the midst of an economic and administrative crisis, due to which it is impossible for the Institute to provide the medical services required. The respondent authority requests that its appeal be admitted, that the lower court's decision be overturned and that the protection action be granted.² **C) The State Attorney General's Office, an interested third party**, stated that the respondent authority, by issuing its decision not to continue providing medical services to the minor child Luisa Fernanda Morales Tumax, as well as by failing to respond to the appeal presented by the patient, violated Articles 1, 2, 3, 4, 28, 93, 94, 95 and 100 of the Political Constitution of the Republic of Guatemala, and Article 100 of the Organic Law of the aforementioned Institute. In accordance with Articles 2 and 3 of the Political Constitution of the Republic of Guatemala, the State is obligated to guarantee to the

² Translator's note: The word "no" was likely left out of the original sentence, and the sentence is meant to read "and that the protection action not be granted."

inhabitants of the Republic the right to life as of the moment of conception, as well as their physical integrity and security. In light of which, the State Attorney General is in agreement with the decision in the first instance, in respect of the fact that the right to social security is meant to act as a protection mechanism intended to conserve, protect or restore the health of the country's inhabitants through the provision of medical treatment, which necessarily must include coverage from the time of the patient's diagnosis until he or she has recovered his or her health. The State Attorney General therefore requested that the appeal be dismissed, and as a result, that the lower court's decision be upheld. **D) The Public Ministry**³ stated that it agrees with the Protection Tribunal's decision in the first instance to grant the protection requested, given that the respondent authority's planned course of action would otherwise have a direct and imminent effect on the life of the minor child Luisa Fernanda Morales Tumax. The Ministry therefore requested that the appeal be dismissed, and as a result, that the lower court's decision be upheld.

WHEREAS

- I -

This Court has considered that the protection action operates as a constitutional instrument designed to protect fundamental human rights, whether to ensure that such rights are enforced and respected, or to act as a remedy in the case of a threat of violation of, or an unlawful decision or action that actually violates such rights. The protection action is thus designed to provide a timely remedy that ensures the protection of a fundamental right. This is highly relevant in the context of the protection of the right to life, considered the most important in the hierarchy of fundamental rights, given that all other rights revolve around it. Hence, the right to health cannot be separated from the right to life, but is instead only justified as a manner of protecting the right to life. Given that these two are primary rights, and as such, subject to state protection, unless there is no standing to bring the protection action, the State has a duty to protect using all available means, as guaranteeing the enjoyment of an adequate quality of life must be one of its primary responsibilities.

- II -

In the case at hand, the Public Defender for Human Rights brought the protection action, acting in favor of Luisa Fernanda Morales Tumax, against the Board of Directors of the Guatemalan Institute of Social Security, indicating that the act complained of is the direct and imminent threat of the Institute to suspend the patient's medical treatment and attention, as well as the failure to resolve the administrative appeal brought in her case on the twenty-fifth of September of the year two thousand seven, challenging the denial of the request to extend the aforementioned medical assistance requested in favor of the minor child Luisa Fernanda Morales Tumax, who suffers from chronic kidney failure and is a transplant recipient.

The claimant argues that the failure to extend the medical treatment and attention necessary to maintain the health of the minor, who due to her chronic kidney

³ Translator's note: the Public Ministry is an auxiliary governmental institution that promotes investigation and prosecution of crimes and strict compliance of the laws of the country.

failure received a kidney transplant, threatens the health of the beneficiary, and in turn, her life, which represents a direct and imminent threat that requires that the protection action requested be granted, in accordance with the applicable constitutional jurisprudence. The respondent Institute, in its zeal to uphold its internal regulations, has disregarded the supreme guarantee of the Political Constitution of the Republic of Guatemala to protect the health of its inhabitants, and its corresponding preference to protect life as the primary right. As such, the petition under appeal cannot remain unresolved, and, having failed to properly proceed in respect thereof and resolve such petition, the Institute has violated the patient's right to petition, which additionally requires that her rights be protected through the authorization of the protection action.

- III -

This Court considers it relevant to take into account the following considerations, as a legal basis for its decision in this sentence:

A) The Constitution refers to the right to life and health of all persons as a fundamental obligation of the State. The preamble of the Constitution affirms the primacy of the person as the subject and purpose of the social order, and in this context, the Constitution provides that the State of Guatemala shall act to protect human life and therefore must guarantee to the inhabitants of the Republic (among other things) life and overall development, so that this right is the supreme purpose of the State, and as such they merit the State's protection. In the case at hand, the right to health in practical terms implies that a person receive timely and effective medical attention. In this context, the right is protected, not only in the country's domestic law (Article 93 of the Constitution being the primary norm that is directly applicable) but also under the law of international conventions on the protection of human rights (Article 12 of the International Convention on Economic, Social and Cultural Rights and Article XI of the American Declaration of the Rights and Duties of Man, to name two examples). It is worth recalling (as illogical as it may seem) that if the right to health arises from the fundamental right to life, any effect on the right to health in turn affects that most fundamental of all human rights: the right to life. Therefore, this Court has reiterated in its jurisprudence that this right—the right to health—is that *“so that all persons be able to enjoy a biological and social equilibrium that constitutes a state of well-being in relation to their surrounding environments, implies being able to access those services that enable the maintenance or recovery of physical, mental and social well-being.”* (Sentence of the twelfth of May of the year nineteen ninety-three, accumulated case files 355-92 and 359-92; Official Register No. 28, pages 19 and 20).

B) The right to social security, for its part, has been instituted as a mechanism for the protection of protect human life, which has as a fundamental purpose the provision of those medical and hospital services necessary to preserve, protect or recover the health of the inhabitants of the country, through medical treatment that necessarily must include coverage from the time of the patient's diagnosis until he or she has recovered his or her health. Such rights are guaranteed by Article 100 of the Political Constitution of the Republic of Guatemala, which guarantees, *“the right to social security for the benefit of the nation's inhabitants,”* through an obligatory public service system.

This right—which is not to be understood in a restrictive or discriminatory sense—is to be enjoyed by all persons who are affiliated with the social security system configured by the Guatemalan Institute of Social Security, which, in accordance with its own internal rules and regulations in respect of the system of authorizations of the provision of the Institute’s medical and hospital services, must provide general medical services, in accordance with Articles 28, paragraph d), and 31 of its organic law. In this respect, the members and his or her family members to whom his or her benefits extend, are guaranteed the right to the protection from sickness and to access medical assistance in the Institute’s outpatient facilities and hospitals.

Without prejudice to the exercise of this authority, it should be noted that in respect of basic humanism, in those exceptional cases in which what is being demanded is the preservation of the right to life, when such right is subject to a direct and imminent threat, due to a terminal illness or an unforeseeable event (such as a transit accident or injuries caused by firearms, to name two examples in which emergency medical attention may be a determinative factor in avoiding the death), the provision of medical services may not be suspended or denied if there is no judicial decision authorizing such suspension or denial. In such cases, a suspension or denial based on an (administrative) decision that is subject to appeal could result in the State’s failure to comply with its primary purposes.

C) In respect of the protection action’s preventative nature, this Court’s jurisprudence has considered that *“the protection action has two essential functions: one preventative and one reparative. In order for the protection action to proceed, when the threat of a violation of a right guaranteed by the Constitution and the law is alleged, the threat that is sought to be avoided by way of the protection action must be imminent and must arise from the act of an authority, for the protection action to be able to prevent it.”* (Sentence of the sixth of May of the year nineteen ninety-seven, case file 1351-96, Official Register No. 44, page 276.) In this sense, the protection action is appropriate in those cases in which there is a clear and manifest deprivation of fundamental rights, and the resulting harm that would be caused by such deprivation is of a grave and irreparable nature. If, in situations such as that in the case at hand, the violation in question is submitted for its resolution through ordinary procedural channels, which notoriously fail to provide the speedy resolutions that are desired, and such delay may have negative effects, the protection action is designed to provide an opportunity to prevent such detrimental effects. In exceptional cases, in which the preservation of a person’s life is at stake, and such person’s life may be threatened by the very deficiencies inherent in the due process of the judicial system, it is necessary that the case be heard on its merits, in order that, if necessary, the appropriate enjoyment of the fundamental right that is threatened be guaranteed through the expedited procedure of the protection action.

- IV -

Based on the foregoing considerations, and having proven that the threat that the Guatemalan Institute of Social Security may suspend the treatment and provision of medicines to the minor patient many times aforementioned exists, this Court has analyzed the content of Article 128 of Agreement 466 of the Board of Directors of the

Guatemalan Institute of Social Security, which establishes that: *“...When a child reaches the age of five years old and is under treatment by medical facilities of the Institute, such child’s right to such medical treatment shall be terminated, except if the child is found to be in a critical health condition, in which case, the child’s treatment shall continue until the critical condition is resolved. – In those cases of children who, upon reaching the age of five years old, require treatment for anomalous or congenital illnesses, including their rehabilitation, the right to the provision of medical services shall be extended for the necessary time period, not to exceed the date on which the child in question reaches the age of fifteen years old.”* This Court concludes that the Institute denied continuing the treatment due to this regulation, which contains three scenarios for implementation, as follows: **a)** the Institute will provide medical services to minor children until they reach the age of five years old; **b)** the Institute will provide medical services to minors, until they reach the age of fifteen years old, when suffering from an anomalous or congenital illness; and **c)** when a minor is in critical condition, medical treatment will continue to be provided until the end of that state. Keeping in mind these three scenarios from the aforementioned regulation, this Court concludes that the disease suffered by the minor, whose extension of medical treatment and attention is requested, puts her in a critical condition that puts her life at risk. It is necessary that the Guatemalan Institute of Social Security provide the appropriate medicines and treatment in order to preserve the state of her health. Such services may not be denied to her, nor suspended, without a final judicial resolution that authorizes such suspension or denial, or until her critical health condition is resolved.

In respect of the demand that the appeal brought against the denial to extend medical treatment and attention to the minor child Luisa Fernanda Morales Tumax, this Court considers that this question has been duly considered and resolved in this sentence, and therefore will not rule on this issue.

In respect of the foregoing, and considering that a negative decision from the respondent authority would violate those rights of the minor child guaranteed by the Constitution and applicable international law, the Court holds that the protection action must be granted in order to prevent a potential violation of such rights, and to ensure that the minor will continue to receive the medical and hospital services that her condition requires (which includes coverage of her hospital treatment, professional care, and, eventually, any surgeries, as such may be required), all of which services are to be covered under the social security administration. Therefore, the lower court’s decision is hereby confirmed, albeit, for the reasons set forth herein, with the modifications as specified in this sentence.

APPLICABLE LAW

Articles 93, 100, 265, 268, and 272, paragraph c), of the Political Constitution of the Republic of Guatemala, Articles 1, 2, 3, 4, 7, 8, 10, 11, 42, 43, 44, 45, 46, 47, 57, 149, 163, paragraph c), 185 and 186 of the Law of the Protection Action, Personal Liberties and Constitutionality; and Article 17 of Agreement 4-89 of the Constitutional Court.

THEREFORE

The Constitutional Court, based on the foregoing and cited legal provisions, orders that: **1)** The appealed sentence is hereby **confirmed**, in respect of its

authorization of the protection action sought by the Public Defender of Human Rights, in favor of the minor Luisa Fernanda Morales Tumax, with a modification in respect of the order in the lower court's decision, in respect of the fact that the Guatemalan Institute of Social Security is ordered to continue providing the necessary treatment and medicines as may be necessary in accordance with the principle of *lex artis*, for the time period that such treatment and medicines may be required, without limitation by reason of age. **II)** Numeral IV of the resolution of the decision under appeal is hereby modified, with the stipulation that this order applies to all members of the Board of Directors, and that failure to comply with this order will result in a fine of four thousand quetzals to be paid by each member of the Board, without prejudice to any other legal remedies that may be taken, as set forth in the lower court's decision. **III)** So notified, case files to be returned to the lower court with a certified copy of this decision.

JUAN FRANCISCO FLORES JUÁREZ
CHIEF JUSTICE

ROBERTO MOLINA BARRETO
JUSTICE

ALEJANDRO MALDONADO AGUIRRE
JUSTICE

MARIO PÉREZ GUERRA
JUSTICE

VINICIO RAFAEL GARCÍA PIMENTEL
JUSTICE

AYLÍN ORDÓÑEZ REYNA
CLERK OF THE COURT