

Protection of Constitutional Rights Ruling

T011 /2004. T-011-04

Right to social security, life, health and free will. Request for transfer and enrollment to a different health promotion organization-HPO (E.P.S [*Translator's note: for its acronym in Spanish*]). Continuity in the provision of the public service. Catastrophic illness. Efficiency and sustainability of the general social security system in health. Action for recovery is granted.

Ruling T-011/04

Reference: file T-783015

Writ for the protection of constitutional rights filed by José Vicente Moreno Cardona against Comfenalco Valle S.A. E.P.S.

Speaker Magistrate:

Dr. RODRIGO ESCOBAR GIL

Bogota, D. C., January sixteen (16) two thousand and four (2004).

The Fifth Revision Chamber of the Constitutional Court, pursuant to his legal powers, specifically provided in articles 86 and 241, numeral 9, of the Political Constitution and in Decree 2591 of 1991, issues the following,

RULING

Within the revision process of the judgments adopted by the Ninth Municipal Criminal Judge and the Fifteenth Criminal Judge of the Cali Circuit, upon solving the guardianship filed by José Vicente Moreno Cardona against Comfenalco Valle S.A. E.P.S.

I. BACKGROUND

Mr. José Vicente Moreno Cardona filed a writ for the protection of constitutional rights as a transitional mechanism against the E.P.S. Comfenalco in order to deem as violated his fundamental rights to health connected with the right to life and the access to social security, the latter appearing in the right of "free choice".

The facts of the writ for the protection of constitutional rights can be summarized in the following items:

1. The actor is linked to the Social Security E.P.S. of the Valle Regional. October 28, 2002. Due to the failure of the E.P.S. in providing the medical services required for the treatment of the catastrophic illness he suffers, he filed a transfer request at Comfenalco E.P.S.,

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relying on his right to “free choice” of the health promotion organization, as established in Article 153 of Act 100, 1993. Together with its transfer request, the applicant enclosed copy of a ruling for the protection of constitutional rights in which his right to health was protected.

2. He also states that through External Circular No. 003 of February 6, 2003, the National Superintendant of Health prohibits the E.P.S. from denying the transfer or members’ admission from other E.P.S. requests, because said conduct will violate the right to equality and the free choice of a health promotion organization.

3. Although the documents submitted by the actor were returned by the Comfenalco E.P.S. without any justification, he insisted again, on November 12, 2002, so that such E.P.S. to would accept his transfer, a request which was negatively resolved on November 20, with the rationale that there was lack of authorization by the S.S.I. E.P.S.

4. Having received this answer, the actor appealed the response to his request and applied for the intervention of the National Superintendant of Health. However, through an official letter of December 10, 2002, Comfenalco E.P.S. denied such remedy, providing him a corresponding explanation.

5. On December 30, 2002, the S.S.I., upon request of the National Superintendant of Health, indicated that it did not have any problem with accepting the disaffiliation of the actor and its transfer to the Comfenalco E.P.S. Once Comfenalco E.P.S. learned about this response, the latter persisted in its refusal to authorize his transfer.

6. Once again, on February 3 of such year, the actor insists before the Comfenalco E.P.S. that it accept its transfer, as the S.S.I. already had granted its authorization for it. Nonetheless, on February 24 of the same year, through official letter 4614, Comfenalco E.P.S. denied the transfer and to the contrary, orders the actor to start contempt proceedings against the S.S.I. for breaching the Protection of Constitutional Rights judgment that was issued against it.

In consideration of the facts above, the plaintiff finds that the attitude of Comfenalco E.P.S. is contrary to the spirit of Act 100, 1993 and to the freedom that individuals have to choose a health promotion organization. It also adds that the E.P.S. are accustomed to assist the users, provided that it mediates a Protection of Constitutional Rights judicial decision, deplorable behavior, which has been occurred repeatedly with complacency and complicity of the surveillance and control entities, particularly the National Superintendant of Health.

Therefore, the petitioner requests an order that the Comfenalco E.P.S. accept his transfer to such entity, and offer the health services required, particularly regarding the high cost treatment that has been provided to him. He also asks to be provided all the medical,

surgical, hospital, pharmaceutical and clinical laboratory assistance, regardless of whether they are outside the mandatory health plan (P.O.S. [*Translator's note: for its acronym in Spanish*])

II. ANSWER OF THE DEFENDANT ENTITY

In the brief received on May 6, 2003, by the presiding judge, the attorney for the Family Compensation Organization of Comfenalco Valle, stated the following:

1. That in Memorandum No. 29050 of November 20, 2002, the Comfenalco E.P.S. answered effectively and in a timely manner the petition filed by the plaintiff on November 13, of the same year.
2. That before the reconsideration of the petition filed by the petitioner on November 25, 2002, Comfenalco E.P.S. answered on December 10, through Memorandum No. 31097, in which it explains the reasons for the inadmissibility of such an action.
3. That on February 3, 2003, the defendant entity receives from the plaintiff a copy of several documents that give an account of the complaint filed by him at the National Superintendant of Health regarding the poor health service rendered by E.P.S. of the S.S.I. In relation to such briefs, they were answered through communication No. 04614 of February 24, 2003.
4. That regarding the issues that the actor currently has with respect to the health service rendered by the E.P.S. of the S.S.I., such entity and no other, will be the responsible for the gaps in the provision of the medical services claimed.
5. That in relation to the constant problems of the gaps in the provision of the health services by the E.P.S. of the S.S.I., and particularly in the cases of the high cost treatments, Comfenalco E.P.S., through communication No. 03348 of February 11, 2003, raised a formal complaint to the National Superintendant of Health regarding such irregularities. It indicated that it has been the poor provision of the health services by such E.P.S. that has forced its affiliates and members to transfer to other E.P.S., among which there is COMFENALCO. This complaint was accompanied with the relevant evidence and very concrete cases of patients who, due to the fact of having high cost pathologies were forced to transfer to Comfenalco E.P.S. in order to obtain an adequate medical care.
6. That the Ministry of Social Protection, through Agreement 000245 of January 31, 2003, established the Comprehensive Care Policies of high cost pathologies for the contributory and subsidized schemes. In relation to the HIV/AIDS and Chronic Kidney Disease patients, it indicated that there will be a redistribution of such patients for only one time, an action that had to be performed no later than June 30, 2003, thus complying with the provisions of Agreement 000245.

7. Finally, the attorney for the Comfenalco E.P.S. notes that the nature of the right to free choice of E.P.S. is not one of a fundamental right, which is the reason why it cannot be protected through the Protection of Constitutional Rights Channel. In addition, the fundamental right to health is not being infringed, because his life does not depend on the transfer. However, if the petitioner believes that its fundamental rights are effectively being violated, the S.S.I. E.P.S. must be the one responsible for such violation.

III. DECISIONS TO BE REVIEWED

In Ruling of May 15, 2003, the Ninth Municipal Criminal Judge of Cali denied the Protection of Constitutional Rights. It considered *a quo* that although the right to health care has been considered essential, particularly when the person sees his quality of life diminished due to poor medical care, in the instant case, the refusal of the defendant E.P.S. to accept the transfer of the petitioner adhered to the strict guidelines established by the National Social Security Council in Health in Agreement 000245 of January 31, of the this year. In such agreement the redistribution of all the high cost patients (HIV/AIDS and Chronic Kidney Disease) was established for only one time, a procedure that must be exhausted no later than June 30, 2003. As such, inasmuch as such term has not been met, it would not be appropriate to force the Comfenalco E.P.S. to receive the plaintiff. Therefore, if the petitioner claims the provision of a medical service, such requirement must be made by the S.S.I. E.P.S., an entity to which he is affiliated and in respect of which there is a court order that forces it to fully provide the medical services claimed by the actor.

Upon challenging the previous decision, the Fifteenth Criminal Judge of the Circuit of Cali, which through ruling of June 26, 2003, confirmed the decision issued in first instance.

The *ad quem* considered that in case of an existing violation of the fundamental rights of the actor, the S.S.I. E.P.S. will be the responsible for it and not Comfenalco, because the petitioner is still a member of the first of such E.P.S. This situation corroborates with the order issued by a Protection of Constitutional Rights judge in which he ordered that the E.P.S. of the S.S.I. provide the medical services required by the plaintiff. As such, if such order is being currently breached, one would be facing a contempt of court charge. Accordingly, the request and process of changing of health promotion organization, does not breach any of the fundamental rights of the actor.

The second instance judge also noted that although the actor is entitled to transfer from an E.P.S., as Act 100 of 1993 in article 153 states, one must also take into account that a subsequent rule, more exactly in Agreement No. 000245 of January 31, 2003, where it established as deadline for redistributing the patients with high cost treatment among all of the E.P.S., whereby the defendant E.P.S. has not violated any fundamental right.

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Finally, the Protection of Constitutional Rights concerned is not feasible as a transitional mechanism, because from the facts set forth, imminence of an irreparable harm is not seen.

IV. FILED EVIDENCE

- Folio 4, photocopy of the External Circular No. 003 of February 6, 2003, issued by the National Superintendant of Health, in which it emphasizes the principle of free choice that people have to choose the health promotion organization, as well as the rejection of authority of such policies or mechanisms developed by the entities to discriminate any person based on his/her previous or current health state in order to avoid or deny his/her transfer.
- Folio 5, photocopy of the right to petition filed by Mr. José Vicente Moreno Cardona to the E.P.S. Manager of Comfenalco Valle, dated November 12, 2002.
- Folio 6 and 7, answer of Comfenalco E.P.S. dated November 20, 2002 to the right to petition filed by Mr. Moreno Cardona.
- Folio 8, reconsideration petition filed by the Comfenalco petitioner dated November 28, 2002.
- Folio 9, brief from Mr. Moreno Cardona dated December 20, 2002, directed to the National Superintendant of Health in relation to the refusal of Comfenalco E.P.S. to accept his transfer.
- Folios 10 and 11, brief without a date, of the National Superintendant of Health directed to the Regional Manager of the S.S.I. of the Valle branch, in which he is requested to contact the plaintiff in order for him to present the reasons of his nonconformity with such E.P.S.
- Folios 12 and 13, answer dated December 10, 2002, submitted by Comfenalco E.P.S. to the right to petition raised on November 29, 2002 by Mr. Moreno Cardona.
- Folio 14, brief dated December 30, 2002, subscribed by the Manager Assistant of the S.S.I. E.P.S., in which it answers the National Superintendant of Health regarding the plaintiff's dissatisfaction in relation to the health services rendered by the S.S.I. In such brief, it notes that the actor's issue is that the Comfenalco E.P.S. does not accept his transfer to such E.P.S.
- Folio 15, plaintiff's brief dated February 3, 2003, requesting Comfenalco E.P.S. for his transfer to such E.P.S. again.

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- Folio 16, brief dated February 3, 2003, wherein the petitioner requests the National Superintendant of Health to inform him about the current situation regarding his transfer request to the Comfenalco E.P.S.
- Folio 17, brief dated February 3, 2003, subscribed by Mr. Cardona Moreno informing the Manager of the Comfenalco E.P.S. and encloses copy of the processes and communications carried out at the National Superintendant of Health.
- Folios 18 and 19, communication dated February 24, 2003, issued by the Comfenalco E.P.S. in which it answers the plaintiff in relation to his petition dated February 3 of the same year.
- Folios 20 to 22, brief of the National Superintendant of Health dated March 19, 2003 addressed to the Director of the Comfenalco E.P.S. Valle in relation to the denial from such entity to accept the transfer of Mr. Cardona Moreno to said E.P.S.
- Folios 26 and 27, new briefs from the plaintiff dated February 26 and April 10, 2003 in which it informs the National Superintendant of Health regarding the constant refusal of the Comfenalco E.P.S. to accept his transfer as user to such entity.
- Folios 31 to 48, answer to the Comfenalco E.P.S. regarding the requirement that the second instance Ninth Criminal Municipal Judge of Cali made in the proceeding of the instant Protection of Constitutional Rights action.
- Folios 69 to 74, briefs from the Comfenalco E.P.S. addressed to the Fifteenth Criminal Judge of the Cali Circuit, as second instant judge in the proceeding of the instant Protection of Constitutional Rights action.

V. CONSIDERATIONS AND GROUNDS.

1. Competence

In accordance to the provisions of articles 86 and 241-9 of the Political Constitution and in articles 31 and 36 of Decrees 2591 of 1991, the Constitutional Court is competent to review the judicial decisions referred.

2. Legal Issue

In accordance with the factual situation presented and with the decisions adopted in the different courts, on this occasion it is the Chamber's responsibility to establish whether the defendant entity does not recognize the actor's rights to access to social security and health in connection with life, upon refusing to accept his transfer from the Social Security E.P.S. to such E.P.S.

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In order to solve the abovementioned legal issue, and taking into account that the actor suffers from a disease classified as catastrophic, the Chamber must refer to the affiliates' transfer topic within the General Health Social Security System (SGSSS, [*Translator's note*: for its acronym in Spanish]).

3. Access to the General Health Social Security System and the freedom to choose the health promotion provider

As it is known, the Political Constitution of 1991, in its articles 48, 49 and 366, defines social security as an inalienable right for all people, and as a mandatory public service that must be provided under the direction, coordination and control of the State, subject to the principles of efficiency, universality, solidarity and progressive realization, and within the legal regime that is previously established by law. In this context, the constitutional provisions cited allow individuals to participate in the provision of social security service when they are legally authorized to do so, while maintaining the State as the leader that must guarantee the progressive access for all the community members.

Regarding the right to social security in health, the same Higher Code guarantees people access to the health promotion, protection, and recovery services, delegating to the Legislator the competence to highlight the terms in which the basic care will be free and compulsory, and thus organizing the health services in a decentralized manner by level of care, and with community participation. Also, it imposes on the State the obligation to organize, lead and regulate the provision of health services, to establish the policies for provision by private entities, to highlight the powers of the Nation, the territorial entities and the individuals in determining the contributions in their responsibility, and to exercise its supervision and control.

With grounding in these constitutional goals, the Social Security System was created through Act 100 of 1993, and, together with its regulations, the conditions of operation of the General Health Social Security System (SGSSS) were noted, thus regulating the way in which it had to be provided and highlighting the necessary conditions for all people to be able to access this public service.

Within the legal framework developed by Act 100 of 1993, and according to the general principles established in the Political Constitution, article 153 regulates the special principles governing the General Health Social Security System. One of such principles is the "free choice" one, by virtue of which the participation of different entities offering the administration and provision of health services is allowed,¹ which ensures users' freedom

¹ Mediante sentencia C-663 de 1996, la Corte Constitucional declaró exequible esta norma y el artículo 156 de la misma ley, excepción hecha de la expresión "*y deberán ser adoptadas por el Gobierno Nacional*", incluidas en el literal m) de éste último artículo. [*Translator's note: Footnotes left in original text*]

to choose between the health promotion organizations and the health service provider institutions, according to the service supply conditions with which, through said principle, the affiliates' right to SGSSS is guaranteed in order to freely choose the entity that will be responsible for assisting his/her health requirements.

In order for the "free choice" right of the user to be effective, the same article 153 states penalties for noncompliance, referring to the sanctioning system to which article 230 of same Act 100 of 1993 refers.²

It is important to note that this "free choice" right also constitutes a basic feature of the General Health Social Security Regime. In fact, article 156 of Act 100 of 1993, upon referring to the features that inform the health service, establishes in its literal text g) that: *"The system affiliates will freely choose the health promotion organization, within the conditions of the instant law. Also, they will choose the service provider institutions and/or the member professionals or with employment relationship to the health promotion organization, within the options offered by it"*.

In this regard, it is important to note that the fundamental right to social security access, specifically provided in articles 48 and 49 of the Letter, not only comprises the health system access as such and its coverage but also it projects the permanence and transfer guarantees of its members within the system. This explains why the right to "freedom of choice", to which it made express reference, constitutes a grounding principle of the Health Social Security System and also a basic feature of the same (Act 100, art. 153 and 156).

² Artículo 230 de la Ley 100 de 1993.

"Régimen Sancionatorio. La Superintendencia Nacional de Salud, previa solicitud de explicaciones, podrá imponer, en caso de violación a las normas contenidas en los artículos 161, 168, 178, 182, 183, 188, 204, 210, 225 y 227, por una sola vez, o en forma sucesiva, multas en cuantía hasta de 1.000 salarios mínimos legales mensuales vigentes a favor de la subcuenta de Solidaridad del Fondo de Solidaridad y Garantía.

"El certificado de autorización que se les otorgue a las Empresas Promotoras de Salud podrá ser revocado o suspendido por la Superintendencia mediante providencia debidamente motivada, en los siguientes casos:

"1. Petición de la Entidad Promotora de Salud.

"2. Cuando la entidad deje de cumplir cualquiera de los requisitos establecidos para el otorgamiento de la autorización.

"3. Cuando la entidad no haya iniciado su actividad en un plazo de 3 meses contados a partir de la fecha de otorgamiento del certificado de autorización.

"4. Cuando la entidad ejecute prácticas de selección adversa.

"5. Cuando se compruebe que no se prestan efectivamente los servicios previstos en el Plan de Salud Obligatorio.

"PARAGRAFO 1. El Gobierno reglamentará los procedimientos de fusión, adquisición, liquidación, cesión de activos, pasivos y contratos, toma de posesión para administrar o liquidar y otros mecanismos aplicables a las entidades promotoras y prestadoras que permitan garantizar la adecuada prestación del servicio de salud a que hace referencia la presente Ley, protegiendo la confianza pública en el sistema.

"PARAGRAFO 2. La Superintendencia Nacional de Salud ejercerá las funciones de inspección, control y vigilancia respecto de las Entidades Promotoras de Salud, cualquiera que sea su naturaleza jurídica."

Following the general principle according to which within a Rule of Law the rights and guarantees are not absolute, the “free choice” right has been subject to legal regulation that enforces certain conditions and requirements to be exercised in a reasonable manner. As such, Article 14 of Decree 1485 of 1994³ regulates the “free choice” right, initially providing that the health promotion organizations are obliged to provide the Mandatory Health Plan to all people desiring to affiliate and that it pay the cost or receive the corresponding compensation, also reiterating that the affiliates are entitled to freely choose among the different health promotion organizations the one which will manage the provision of its health services derived from the Mandatory Plan.

Within this context, the cited norm establishes two conditions for the right to “freely choose”. Firstly, numeral four (4°) establishes that the affiliates of the General Social Security System exercise their right to “choose freely” once a year; term which shall be counted as of the date on which they were affiliated to the SGSSS.⁴

Secondly, numeral nine (9°) imposes another limitation to the right of “freedom of choice”, which consists in the **obligation of staying at least two (2) years** in the same health promotion organization, when being subjected to a treatment classified as of high cost, a term which will start tolling *“after the corresponding treatment has finalized before the health promotion entity.”*⁵

Notwithstanding, even though the exercise of the freedom to choose right is limited to the accomplishment of the conditions provided in numeral four (4°) and nine (9°) of article 14 of Decree 1485 of 1994, such limitations are not required in those cases in which there is a **“*bad provision or suspension of the service*”**, thus generating these two situations as an

³ La Sección Primera del Consejo de Estado en sentencia del 20 de marzo de 2003, negó las pretensiones de la demanda de nulidad radicada bajo el No. 7933, interpuesta en contra del 14 del Decreto 1485 de 1994.

⁴ Artículo 14 del Decreto 1485 de 1994. Dicha norma señala lo siguiente:

“Art. 14. – Régimen general de la libre escogencia. El régimen de la libre escogencia estará regido por las siguientes reglas:

“1. Obligación de afiliación. (...).

“2. Configuración familiar de la afiliación. (...).

“3. Garantía de atención. (...).

“4. Libre escogencia de entidades promotoras de salud. Se entenderá como derecho a la libre escogencia, de acuerdo con la ley, la facultad que tiene un afiliado de escoger entre las diferentes entidades promotoras de salud, aquella que administrará la prestación de sus servicios de salud derivados del plan obligatorio.

“Del ejercicio de este derecho podrá hacerse uso una vez por año, contado a partir de la fecha de vinculación de la persona, salvo cuando se presenten casos de mala prestación o suspensión del servicio.”

⁵ *“Artículo 14 del Decreto 1485 de 1994.*

“9. Permanencia para atención de servicios sujetos a periodos mínimos de cotización. Una vez cumplidos los periodos mínimo de cotización, el afiliado que haga uso de los servicios organizados por las entidades promotoras de salud para atender esta clase de procedimientos de alto costo sujetos a periodos mínimos de cotización, deberá permanecer, salvo mala prestación del servicio, por lo menos dos años después de culminado el tratamiento en la respectiva entidad promotora de salud. (Subraya y negrilla fuera del texto original).

exception to the rule. Considering the aforementioned, even if the time frames required by the cited norm are not complied with, the inefficiency in the rendering of the health services required by the user or the unjustified suspension, will allow the user to legitimately exercise and without limitations, his freedom to choose right, that is, to make at any time a decision to change to another health promotion entity. The aforementioned, under the understanding that by using this prerogative one is seeking to preserve the life and health of the affiliate in decent and fair conditions, such as provided by article 49 of the Political Constitution which states that every person shall have the duty to ensure the complete care of his health and of the community's health.

It must be clarified that, outside the conditions established by numerals 4 and 9 of Decree 1485 of 1994, no limitations can be imposed on the exercise of the freedom of choice right; under the understanding that these regulated conditions can only be demanded by the E.P.S. and A.R.S., when they guarantee an efficient and adequate service to the user. Accordingly, such entities cannot develop behaviors or implement policies aimed at impeding, restricting or conditioning the will of the SGSSS users who wish to change to another E.P.S. or A.R.S.,⁶ since such behavior would moot the prerogative guaranteed by the law and sheltered by the Political Constitution.

Regarding this issue, in Ruling T-1029 of 2000 the Constitutional Court made reference to the freedom of choice right, in the following terms:

*"2. Articles 157 and 158 of Law 100 of 1993, guarantee the affiliates of the Social Security and Health Regime, the freedoms to choose the Health Promotion Company and to decide a change in the same, in accordance with the legal regulation thereof. In this same sense, article 45 of Decree 806 of 1998 points out that "the affiliation to any of the health promotion entities, EPS, in the contributive and subsidized regimes, is free and voluntary for the affiliates. Consequently, the change in EPS is not only authorized but also legally guaranteed."*⁷

This way, and as per the constitutional and legal lineaments, the exercise of the "freedom to choose" right is a basic guarantee to ensure the fundamental right to Social Security access, and to allow that the latter is materialized in a regular, continued, timely and

⁶ El artículo 14 del Decreto 1485 de 1994, es muy claro al señalar como prácticas no autorizadas para las E.P.S., aquellas que afecten la libre escogencia del afiliado, como la implementación de procedimientos o mecanismos de discriminación; por causa del estado previo, actual o potencial de salud del usuario; por no prestar los servicios de salud o negar la afiliación del particular aún cuando éste asegure el pago de las cotizaciones o subsidios correspondientes, salvo que se demuestre la mala fe del usuario, por el uso indebido del SGSSS en anteriores ocasiones, etc.

⁷ Magistrado Ponente Alejandro Martínez Caballero.

efficient rendering of the medical service that is required by the affiliates and that are included in the Mandatory Health Plan.

As it was mentioned, within the reasons a user of the system considers in changing its E.P.S. or A.R.S., is that of obtaining the rendering of a good health service, which guarantees his physical and mental well-being, and an existence in decent and fair conditions. When dealing with people whose health needs involve medical procedures classified as high cost, considering the grave pathologies with which they have been diagnosed, they have full cause to exercise the “freedom to choose” right, not only when they complete the long period of time demanded by the law, but also when the services rendered by the chosen E.P.S. or A.R.S., are neither efficient nor adequate for their health needs.

In this context, according to article 153 of Law 100 of 1993, those health promotion entities that fail to carry out their legal obligations and do not acknowledge the rights of their affiliates, either by not rightfully rendering the Mandatory Health Plan services or failing to guarantee the access and continuation in the system; shall be subjected to the corresponding administrative investigations that the National Superintendant may initiate, and to the sanctions that are provided in the cited law and the rest of regulation law.

4. Concrete case

As it has been established, the plaintiff is affiliated to the E.P.S. of the I.S.S., which provides him a high cost medical treatment that he considers is not being rendered in an efficient manner. In his view, the E.P.S. Comfenalco’s attitude of not accepting his E.P.S. transfer request infringes his fundamental rights to health in connection with life and the freedom to choose an E.P.S. On the other hand, Comfenalco E.P.S., states that considering that the plaintiff should have first initiated a constitutional rights claim against the E.P.S. of the I.S.S. in order to obtain the rendering of the required services, the breach of such service is in contempt of the judicial decision, thus the violation of his rights is attributable to the I.S.S. and not to them.

To the aforementioned, the defendant adds that there are not only legal reasons that protect its decision to deny the E.P.S. transfer of the plaintiff, such as that provided in numeral 9 of article 14 of Decree 1485 of 1994, but also, by virtue of Act 000245 of January 31 of this year issued by the Social Protection Ministry, there is a term which has not expired, that provides for persons subjected to high cost treatments to be re-distributed among several E.P.S.s.

Even though the defendant entity claims to support its conduct by some regulatory dispositions, it is this Revision Chamber’s opinion that there is one solid constitutional

and legal reason for providing the protection requested by the plaintiff, grounded in the fundamental right to social security access and, as a development of same, in the legal right of “freedom to choose” explicitly contained in articles 153 and 156 of Law 100 of 1993, and regulated in article 14 of Decree 1485 of 1994, by means of which the freedom to choose a health promotion entity is guaranteed to the affiliates of the general health system who want to be affiliated.

That is why, outside of the legally established conditions described in numerals 4° and 9° of article 14 of Decree 1485 of 1994, barring the users of the SGSSS from transferring from one E.P.S. to another, will lead to the imposition of an illegitimate limitation which affects full access to the health social security system and endangers the rights to dignity, health and even the life of the affiliates. This behavior leads to even more grave consequences when dealing with people that require urgent, timely, permanent and quality medical attention given their serious illness, as is the case of the plaintiff, who specifically, by the refusal of Comfenalco to accept his transfer, has been forced to remain in an E.P.S. where the required medical services are not offered in a complete manner and have been interrupted or suspended without just cause. This circumstance imposes on the plaintiff an additional unregulated burden that moots the full exercise of his rights to health and life in dignified conditions, especially if one considers that he suffers from a catastrophic illness not defined in the constitutional rights action, whose qualification is recognized by Comfenalco.

And the thing is, to the extent that the plaintiff claims that his transfer is subjugated to problems in the rendering of the health services by the E.P.S. of the Social Security, it is not possible for Comfenalco to demand that plaintiff comply with the condition provided in numeral 9° of article 14 of Decree 1485 of 1994, consisting in the obligation of staying in the initially chosen E.P.S. for a two-year period, when dealing with patients subjected to high cost treatments, given that such condition is not required when the transfer is justified by the deficient or poor rendering of the health service, considering that such circumstance is an exception to the rule. This way, considering that the plaintiff has put forward the problems that he has had with the E.P.S. of the I.S.S., in obtaining the continued and adequate treatment for the illness that he suffers; a situation which is recognized by the E.P.S. Comfenalco, the factual and legal premises are established in order to justify the need for the transfer required by the plaintiff.

In this respect, it is important to remember that the inefficient rendering of the medical services by the E.P.S. of the I.S.S., in view of the delay or lack of delivery on behalf of such E.P.S., of the medicines required by the plaintiff, led him to a first opportunity to initiate a constitutional rights action against the Social Security. And even though a ruling was issued which protected his fundamental rights, after such ruling, the quality of the health service rendered by the Social Security did not substantially improve. It is precisely this fact that shows that the plaintiff has been subjected to a poor rendering of the service by

the I.S.S., and as consequence, it justifies his decision to transfer to Comfenalco E.P.S., covered, as it has been said, by numeral (9°) nine of article 14 of Decree 1485 of 1994; an article which also, in ordinal (2°) second of numeral (7°) seven, qualifies as a non-authorized practice that affects the freedom to choose right and that leads to the imposition of the sanctions provided in article 230 of Law 100 of 1993; that of using affiliation mechanisms that discriminate any person, due to their previous, current or potential health state. In the same manner, numeral (9°) nine provides for the imposition of sanctions when a transfer due to poor rendering of health services, is denied.

These reasons lead this Chamber to consider that the decision of the E.P.S. Comfenalco, to deny the transfer of Mr. José Vicente Moreno Cardona from the E.P.S. of the I.S.S., to their institution, not only lacks an acknowledgment of the freedom that he has to choose the health promotion entity that renders him the medical services that he urgently requires, but also affects his right to effective access to the health system which, within a systematic interpretation of the Letter, gains a fundamental status. At this point, it is crucial to remember that the transfer from one E.P.S., to another cannot suppose the unjustified suspension or interruption of the rendering of the medical services, for health service is a public service that is ruled by the efficiency, universality and solidarity principles (C.P. art 49 and art. 2° of Law 100 of 1993), also having as one of its main characteristics, the continuity in the provision of same.⁸ Evidently when the transfer requested by the affiliate takes place, the same shall comply with that which is established in article 45 of Decree 806 of 1998.⁹ With regards to the continuity of the provision of the public service, this Corporation has pronounced itself in the following terms:

“One of the characteristics principles of the public service is that of efficiency. Within the efficiency is the continuity of the service, because the same must be rendered with no interruption. Marienhoff says that “the continuity contributes to the efficiency of the provision, given that only in such a way will it be opportune”. And, in the following line it repeats: “...it is clear that the one who renders or performs the service must not act in any way that might compromise not only the efficiency of the former, but also its continuity”. And then, it summarizes its reasoning in the following way: “...the continuity is integral of the legal system or “status” of the public service, anyone who threatens such legal system, or said status shall be considered as “illegal” or contrary to the law, without the need of a law that expressly establishes this, for it is a “principle” in this matter”, Jean Rivero reviews

⁸ Op cit.

⁹ Artículo 45 del Decreto 806 de 1998. **“Libertad de afiliación por parte del afiliado.** La afiliación a una cualquiera de las entidades promotoras de salud, EPS, en los regimens contributivos y subsidiado, es libre y voluntaria por parte del afiliado.

(...).

“Cuando el afiliado se traslada de entidad promotora de salud, en el formulario de registro de novedades y traslados definido por la Superintendencia Nacional de Salud, deberá consignarse que la decisión de traslado ha sido tomada de manera libre y espontánea.”

as one of the law's general principles in administrative jurisprudence that of continuity of public services and adds that the French Constitutional Council has been the theory of the general principles (Ruling of June 26, 1969)".¹⁰

Notwithstanding the aforementioned, this Chamber is aware that ordering the E.P.S. Comfenalco to admit the transfer of the plaintiff, and as a consequence, assuming the high cost treatment required by him, may generate an additional and unexpected economic burden, just as is claimed by this entity. This specific circumstance generates the need for this Office to refer to the subject of the economic equilibrium of the SGSSS, with the purpose of clarifying the legal policy in this matter.

5. Efficiency and sustainability of the Health Social Security General System. Legal regulation to avoid the concentration of patients subjected to high cost treatments in some health services providing entities.

As it has been explained, even when the Health Social Security General System guarantees its affiliate the "freedom to choose" right, it also establishes reasonable limits for its exercise, particularly, with respect to people who are subjected to high cost treatments. In this last case, the regulation on the matter pursues two fundamental objectives: (i) on one hand, to guarantee the affiliates more efficient and high quality service, (ii) and on the other, to ensure that the costs of such treatments are distributed in an equitable manner between the different entities that participate in the rendering of the health service, seeking to maintain equilibrium in the system.

In the search of such objectives, the Decree 1485 of 1994 regulates the "freedom to choose" right for high cost treatments; that is, the right of these patients to change from E.P.S. or A.R.S., limiting the exercise of such right to the fulfillment of two conditions, this is: (i) that two years have passed after the treatment has ended, or (ii) that the health entity of which the patient is a member has provided him a with bad service or has suspended it. In this sense, the norm seeks for the affiliate to stay in the chosen entity unless he sees that his rights are being affected or, otherwise, until the equilibrium of the system is reestablished to the benefit of the service promotion entity, by having the latter receive the contribution made by the same patient during the following two years after the treatment has ended.

Considering that the conditions established in Decree 1485 of 1994 have not succeeded in guaranteeing the system's equilibrium in an efficient manner, avoiding the clustering of patients subjected to high cost treatments in certain service promotion entities, the National Council on Health Social Security (CNSSS [*Translator's Note: for its acronym in Spanish*]), by means of Acts 217 of 2001 (for the contributive regime) and 227 of 2002

¹⁰ Sentencia SU-562 de 1999 M.P. Alejandro Martínez Caballero.

(for the subsidized regime), decided to adopt additional measures. This way, the Council proceeded to modify the calculations by means of which the contributions that must be paid to the E.P.S. and A.R.S., by each of the affiliated persons, contributors or beneficiaries are determined, taking into account the deviation from the epidemiological profile.

Owing to operational problems, the measure proposed in Acts 217 of 2001 and 227 of 2002 could not be put into action. For this reason, a new Act was issued, the 000245 of 2003, whose objectives are: (i) to establish a full policy for the management of high cost diseases; (ii) to guarantee adequate attention of the patients affiliated with the health system –contributive and subsidized regimes–; (iii) to carry out the epidemiological vigilance; and (iv) to look after the financial resources of the system (art 1°). As per these objectives, measures are adopted aimed at controlling and preventing the risk selection of patients with HIV/AIDS and kidney failure diagnosis, seeking to correct and prevent the gathering of these patients to avoid the financial imbalance of the E.P.S. and A.R.S. (arts. 1° and 2°).

As an immediate solution to the bad service and the financial disequilibrium generated by the concentration of high cost patients, a distribution process was implemented with regards to HIV/AIDS and kidney failure patients (exceptionally and on a one time basis), and at the same time a joint financing mechanism was implemented for the costs of care for the type of patients who transfer from one E.P.S. or A.R.S. to another. In light of this mechanism, explicitly mentioned in article 4° of Act 245 of 2003, the E.P.S. or A.R.S., which must provide a treatment to a patient with a high cost disease – HIV/AIDS or chronic kidney failure– transferred from another E.P.S. or A.R.S. *“will have the right during the next year, to demand the recognition and payment from the EPS or ARS from which the patient is coming from, the amount of the cost of the care”*.

The cited norm states that, the entity which receives the patient must assume the total cost of the care and then it must collect from the entity from which the patient has been transferred from, *“the amount that results from dividing the number of pending weeks to complete one year in the previous entity, by the total weeks in a year (52 weeks)”*. This percentage shall be applied to the total cost of the rendered services to the date in which same were provided to the patient, with respect to the high cost of the mentioned pathologies. In order to collect, the E.P.S. or A.R.S. which receives the patient must file before the previous entity the corresponding invoices, where the date and sum of the services are clearly stated, based on which the sum to be paid by each entity shall be calculated.

Apart from the measures that were previously adopted, with the implementation of this joint financing system a closer approach is made to the system’s economic disequilibrium. Precisely, seeking to neutralize the negative effect that the exercise of the “freedom to choose” right may generate, preventing the entities in the performance of their duties

from being obliged to assume an additional economic burden from the transfers that arise due to the poor rendering of a service, and preventing the irresponsible entities from being benefited by economic relief derived from the transfer of its affiliates to another entity. Under the new regulation, the entities of the health system that do not render good service, especially in high cost diseases, are not only subjected to the administrative sanctions provided in the law, but are also obliged to jointly finance the treatment of its affiliates when the latter transfer due to a bad service.

According to the aforementioned guidelines, whose objective is justified by the need to guarantee the economic equilibrium of the SGSSS and the ideal and continuous rendering of the service, this revision Chamber considers that the E.P.S. Comfenalco shall accept the request to transfer that on several occasions Mr. José Vicente Moreno Cardona has filed, so long as the latter maintains his interest in such transfer. If this should happen, in view of the high costs that the E.P.S. Comfenalco would have to assume to continue with the plaintiff's treatment, this E.P.S. will be able to demand from the E.P.S. of the I.S.S., the joint financing of the treatment in the terms provided in article 4° of Act 000215, that is, demand from the E.P.S. of the I.S.S. the proportional payment of the costs that are generated during the first year after the transfer of Mr. Moreno Cardona.

Likewise, and according to article 4 of Act 245 of 2003, the Social Protection Ministry must indicate in a precise manner to Comfenalco E.P.S., the percentage of the cost that the E.P.S. of the I.S.S. must assume, as well as the procedure that must be followed for the corresponding collection of the payment, if it has not done so in a general manner.

As a consequence, the rulings issued by the instance Judges, Ninth Municipal Criminal Judge and the Fifteenth Criminal Judge of the Cali Circuit shall be revoked, due to the violation of the rights to social security access, in connection to health and life of Mr. Cardona Moreno, and Comfenalco E.P.S. del Valle shall be ordered to, within the term of forty eight (48) hours counted as of the notification of this decision, if same has not been already done, to accept the transfer and resulting affiliation to said E.P.S. to Mr. José Vicente Moreno Cardona, as long as the latter still wishes such transfer.

Finally, even though the Constitutional Rights Action was not against the E.P.S. of the I.S.S., the inconsistencies on the rendering of the service required by Mr. Cardona Moreno, makes it necessary to send copies of this decision to the National Health Superintendant, in order for the latter to verify the possible lack of fulfillment incurred by the E.P.S. of the I.S.S., with respect to the treatment required in a timely manner by Mr. Cardona Moreno, and to which he had the right in his affiliate condition.

VI. DECISION

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

RESOLVES:

First. REVOKE the rulings issued by the instance Judges, Ninth Municipal Criminal Judge and the Fifteenth Criminal judge both in the city of Cali. And instead, **GRANT** the constitutional rights protection to Mr. José Vicente Moreno Cardona, for the violation of his rights to social security access, in connection with health and life.

Second. ORDER to Comfenalco E.P.S. del Valle, that within the term of forty eight (48) hours counted as of the notification of this decision, if same has not been already done, to accept the transfer and resulting affiliation to such E.P.S. of Mr. José Vicente Moreno Cardona, as long as the latter still wishes such transfer.

In view of the high costs that the E.P.S. Comfenalco would have to assume to continue with the plaintiff's treatment, this E.P.S. will be able to demand from the E.P.S. of the I.S.S., the joint financing of the treatment in the terms provided in article 4° of Act 000215, that is, demand from the E.P.S. of the I.S.S. the proportional payment of the costs that are generated during the first year after the transfer of Mr. Moreno Cardona.

Third. DECREE that in the term of one (1) month counted as of the notification of this ruling, and in accordance to article 4 of Act 245 of 2003 of the CNSSS, the Social Protection Ministry proceeds to indicate in a precise manner to the E.P.S. of the I.S.S., the percentage of the cost that it must pay to E.P.S. Comfenalco, as well as the procedure that must be followed for the corresponding collection of the payment, if it has not done so in a general manner.

Fourth: SEND copies of this decision to the National Health Superintendant, in order for the latter to verify the possible lack of fulfillment incurred by the E.P.S. of the I.S.S., with respect to the treatment required in a timely manner by Mr. Cardona Moreno.

Fifth. The noncompliance of the orders decreed hereto shall derive in the contempt sanctions imposed by article 52 of Decree 2591 of 1991.

Sixth: By General Secretary, perform the communications set forth in article 36 of Decree 2591 of 1991. In the same manner, communicate this ruling to Mr. José Vicente Moreno Cardona by certified mail and in the fastest manner as possible.

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

RODRIGO ESCOBAR GIL

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

Principal Magistrate

MARCO GERARDO MONROY CABRA

Magistrate

EDUARDO MONTEALEGRE LYNETT

Magistrate

IVÁN HUMBERTO ESCRUCERÍA MAYOLO

Secretary General (e)