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Decision STS 6066/2007
Supreme Court

In Madrid, September 24 2007

The Chamber, constituted by their Excellencies, the Justices referred to at the margin herein, reviewing the appeal number 7693/03 filed by the court agent Francisco José Abajo April, in behalf of the State's Convergence of Unions of Physicians (SCUP) against decision of the Chamber of Administrative Law, Second Section, of the Superior Court of Justice of the Community of Valencia, dated July 21 2003 (after appeal that followed the special proceeding for fundamental rights protection). The parties are the regional government of Valencia, represented by the Attorney of the regional government and by the Public Prosecutor's office.

Factual Background

First. – The State's Convergence of Unions of Physicians (SCUP), filed a appeal before the administrative court, under the special jurisdictional procedure for fundamental rights protection, against resolution of the Bureau of Economics and Treasury of the Community of Valencia dated January 31 2003, establishing the minimal health services of primary attention, specialized attention, training residents, medical inspection at in Valencia, Castelló and Alicante, for the strike convened for February 5 and 18, March 13 and 28, April 16 and May 2 and 21, 2003.

The Second Section of the Administrative Law Chamber of the Superior Court of Justice of the Community of Valencia, ruled its decision dated July 21, 2003 (appeal number 209/03 filed under the special jurisdictional procedure for fundamental rights protection) which holding states as follows:

<< WE RULE

1. – Dismiss the appeal before the administrative court filed under the special jurisdictional proceeding for fundamental rights protection by the State's Convergence of Unions of Physicians (SCUP), represented herein by court agent Mr. Rafael Francisco Alario Mont and assisted by attorney Mr. Guillermo Llago Navarro, against resolution of the Bureau of Economics and Treasury date January 31 2003.

2. Not to condemn for the costs of this trial … >>

Second. – Against the aforementioned decision, the State's Convergence of Unions of Physicians, prepared the appeal and afterwards actually filed it, under written appeal dated October 13 2003, in which adduces only one plea for revision, under article 88.1.d) of the Law of Jurisdiction, alleging the infraction of article 28.2 of the Constitution and the case law referred to it.

The appellant Union's written statement ends up requesting that the decision reverses and declares null the appealed decision and resolves in conformity with the requests of the appeal before the administrative court, declaring the radical nullity of the operating room minimal services scheduled in the morning, condemning the defendant for infringement of the right to strike, and to declare damages for the amount of 30.000 Euros for each day of strike called on.

Third. – Valencia's government opposed the appealing by written statement presented on July 13 2005, asserting that the appellants have not attacked the considerations made by the herein appealed decision, therefore requesting the dismissal of the appeal and the upholding of the appealed decision in all of its term, with imposition of costs on the appellant.

Fourth . – The Public Prosecutor's Office filed a written statement dated June 27 2005 in which, limiting itself to the reasoning of the appealed decision, manifests that the dismissal of the appeal proceeds.

Fifth. – Settling the date for pending proceedings, voting and decision, finally it was chosen September 19 of the present year, date in which the deliberation an vote took place.

Being the reporting judge, his Excellency, Mr. Eduardo Calvo Rojas,

Legal Rationale

First. – This appeal is filed by State's Convergence of Unions of Physicians against decision of the Chamber of Administrative Law, Second Section, of the Superior Court of Justice of the Community of Valencia, dated July 21 2003. The appealed decision dismissed an administrative appeal filed under the special procedure for fundamental rights protection (appeal number 209/03), against the resolution of the Bureau of Economics and Treasury of the Community of Valencia, dated January 31 2003, establishing the minimal health services, primary attention, specialized attention, training residents, medical inspection in Valencia, Castello and Alicante, for the strike convened for February 5 and 18, March 13 and 28, April 16 and May 2 and 21, 2003.

In the aforementioned instance, the appealing Union argued that the resolution harms the right to strike provided in article 28.2 of the Constitution, that establishes, among other extremes, that regarding the morning schedules of operating rooms "… the services provided will be the ones of a regular day", arguing the appealing Union that the essential character was not duly justified and that the minimal services established were out of proportion.

The appealed decision herein, reproduces the rationale of the Chamber of Valencia in previous cases where, as in this case, the interests in conflict are in one hand the right to strike and in the other the right to health and medical assistance. Therefore,

after doing a review about the need of justification by the Public Administration that shall be considered as essential, and the requirement that minimal services ought to be proportionate, the Chamber concludes that the determination adopted regarding the operating room's schedules is in accordance to Law, "because it understands that the conflict of interests must be resolved in favor of the health of patients in waiting list, since a person that has not entered through the emergency room, does not mean its operation is not essential".

The decision adds "… the minimal service herein disputed (operating room scheduled in the morning, as services of a regular day) is not out of proportion neither lacking sufficient reasons since in a conflict between the right to health and medical assistance of the patients with scheduled chirurgical interventions, and, the right to strike of the workers (health Union in this case) the first must prevail considering the essential character of the service herein discussed –what is at stake is the health and in some cases even the patients' lives. The essentiality, in other hand, is signed and publicly know (is of general knowledge of any average citizen, and of course of the public opinion) the problem of "waiting lists", thus any justification or reasoning about such circumstance is not necessary according to the constitutional doctrine aforementioned…"

Second. – The only reason alleged by the appealing Union is breach of article 28.2 of the Constitution and of the case law referred to that article, that establishes the requirement for administrative resolutions limiting the right to strike to include a specific reasoning justifying the minimal services established. We will therefore start with a synthesis of the case law.

Besides the cited in the rationale of the appealed decision, the case law referring to the necessity of reasoning of administrative agreements limiting essential services and setting the minimal services in case of strike, is condensed in several decisions of this Chamber dated January 19 2007 (appeal 7468/02) March 26 2007 (appeal 1619/03) April 30 2007 (appeal 3549/03) July 9 2007 (appeal 3995/03) where is reiterated our previous opinion from decision dated June 29, 2005, as fallows:

<<Before making an analysis of the reasoning herein exposed, we have to examine the different criteria extracted from the Constitutional case law and from this Chamber case Law, when analyzing the scope and substance of article 28.2 of the Constitution, outlining the fundamental characteristics of the reasoning and establishment of a cause in the setting of the minimal services and the adequate and proportionality of them to the ends provided, since this two elements constitute the fundamental aspects that shape the essential substance of article 28.2 of the Constitution:

a) The limits of the right to strike are not only a direct result of its accommodation to the exercise of other rights recognized and declared equally by the Constitution, but also may consist in other constitutional protected goods. The limits to the right to strike result not only from a

possible connection to other constitutional rights, but also to other good protected by the constitution (STC 11/1981, legal rationale 7th and 9th).

b) When article 28.2 of the Constitution makes reference to the precise guaranties that will assure the maintenance of the essential services for the community in a case of a strike, is meant to express that the workers' right to defend and promote their interests by such a pressure yields when the harm caused or that might be caused is more severe than the harm suffered by the strikers. If the recipient of those essential services is the entire community and the services are at the same time essential to it, the strike cannot impose a sacrifice of the interest of the recipients of the such services: "the community's right to this vital services is a priority in respect to the right to strike" (STC 11/1981, legal rationale 18).

c) The notion of essential services makes reference to the nature of interests that get satisfied in connection to fundamental rights, civil liberties and other rights constitutionally protected. Is this optic, that makes emphasis in the rights and interests of the individual, and not the first one, which keeps itself in the surface of the actual needs of the organizations providing the referred activities, the one that better concords with the principles that inspire our Constitution (STC 26/1981, legal rational 10) since those essential services are neither harmed or putted at risk by every single situation of strike, being therefore necessary to examine in each case the concurring circumstances (SSTC 26/1981, legal rational 10; 51/1986, legal rationale 2).

d) In the adoption of rules that guarantee the maintenance of essential services the governmental authority has to balance the extension –territorial and personal-, projected duration and all other concurring circumstances in the strike, as well as the concrete needs of the service and the nature of the rights and interests constitutionally protected over which the strike has en effect (SSTC 26/1981, legal rationale 10 and 15; 53/1986 legal rationale 3).

e) In the strikes produced at the essential community services there must exist a "reasonable proportion" between the sacrifices imposed to the strikers and those suffered by the users of those (STC 26/1981, legal rational 15). It is true that the measures must be set to "guarantee the minimum necessary" to hold the services (STC 33/1981, legal rationale 14), so such holding cannot mean in principle the normal functioning of the normal service (SSTC 5/1986, legal rational 5; 53/1986, legal rationale 3), and the interest of the community must be disrupted by the strike only until reasonable levels (STC 51/1985, legal rational 5). If the strike has to keep a pressure capacity big enough as to achieve its objectives before the enterprise, in the first part the addressee of the labor conflict, it should not be added to is the same "additional pressure

> of the unnecessary damage suffered by the community" (STC 51/1986, legal reasoning 5) increasing thus the pressure on the employer the one over the users of the public services of health care (STC 11/1981, legal rationale 18(…)>>".

Completing this exposition, the decision of this Chamber dated January 15 2007 (appeal 7145/02) states the scope of the requirement of reasoning of the resolution that establish the minimal services, stating that << … it is not enough to satisfy the constitutional requirement, to state before who calls on the strike what services are considered by the administration that must by guaranteed and the personnel called to provide it. The concretion required by the case law implies that the criterion, in virtue of which those services have been indentified as essential and to determine who is supposed to guarantee them considering the particular circumstances of the call to strike, needs to be reasoned. This is precisely the relevant information in order to examine if the necessary proportion between the sacrifices implied for the workers rights and the interest to be protected are actually complied with…>>

Then, it is relevant to emphasize herein what has been stated by Constitutional Court on its decision STC 183/2006, date June 19 2006, that in its legal rationale number 6, expresses itself in the following terms: <<… In the other hand, it must be said that the pre-constitutional rule that yet is being used as the basis for the establishment by the governmental authority of the limitations of the concrete exercise of the right to strike guaranteeing the preservation of the essential services, this is, article 10.2 of the Royal Law-Decree 17/1977, dated March 4, about working relations, that establishes forceful elements not always duly attended and, of course, disrespected in this case. Effectively, the case in which limitations may be imposed is constituted by two elements: one, the qualification of the service ("public servicies of recognizable and not postponable necessity") and other, of circumstantial character ("and concurring circumstances of special gravity") that must coincide with the second alternative of the first of the elements. Then, it is not enough the qualification of the service to justify the limitative measures, but this ones, given the case, must adjust to the circumstances, that shall be not only grave but of special gravity (In this sense the legal rationale of STC 11/1981 warned early that "in some sense, article 10 of the Royal Law-Decree 17/77 is more strict than article 28.2 of the Constitution")…>>

Third. – Translating this doctrine to the case that nowadays concerns us, we reach the conclusion that the reasoning requisite has not been complied, neither can be considered as duly justified the minimal services established in the specific section of the appealed resolution that states that regarding operating rooms scheduled in the morning " … the services to be undertaken are the proper ones of a regular day".

When resolving the conflict of interests referred to in the decision herein appealed between the right to strike, in one hand, and the right to health, in the other, is not ignorable that not all the scheduled surgeries are equally urgent, so establishing a minimal service of the operating rooms scheduled that reaches all the services of a

usual day, results disproportionate and constitutes an infringement of the right to strike. That has been the position of this Chamber before, in decision dated May 11, 2007 (appeal 1739/04) that offers the following reasoning: <<… Definitively, the appealed decision states that the setting up of surgeries scheduled in their totality as essential, supposes an infringement of the right to strike, since it is disproportionate, being necessary then to reduce such consideration of essential exclusively to those intervention that cannot be delayed after considering the risk that would imply for the patient. This Chamber must confirm this thesis, since it is evident that the non-urgent surgeries, can be suspended, creating off course a nuisance for the patients, that would see their surgeries postponed, but that does not endangers gravely their health, but only supposes an disruption in the normal functioning of the service, circumstance that is inevitable in any type of strike…>>.

In the same way made a statement in decision dated July 25 2007 (appeal 3856/02) where is said that: <<… the suspension of the non-urgent surgeries creates off course a nuisance for the patients, that would see their surgeries postponed, but that does not endangers gravely their health, but only supposes an disruption in the functioning of the service, and this last circumstance is inevitable in any type of strike and is precisely what gives the strike its efficacy as instrument of vindication>>.

Fourth. – What has been stated up until now is enough to conclude that an upholding of the appeal is in order, and to declare null and void the decision and uphold the appeal before the lower administrative court. But the upholding of this last appeal can only be done partially, since we accept the petition of declaring the right to strike infringed, but the pretension for damages up to the amount of 30,000 Euros for each day of strike called must be dismissed.

As we have stated before a similar claim of damages in our decision already quoted dated July 25 2007, (appeal 3856/03) the right for damages requires to specify and detail the harmful result and to evidence it, and what is allowed by article 71.1.d) of the Law regulating this jurisdiction is only to postpone the quantification of the corresponding damages to the harm that has been previously alleged and evidenced in the declarations part of the jurisdictional procedure. Well then, the claim presented by the claimant in the lower court does not indicate anything about it, does not describe nor even outlines the concepts or registries of which reparation is pretended through that generic award that is requested, which impedes the debate of the defense about its existence, amounts of the damages or if the quantification for the damages is adequate to award them.

Fifth. – In conformity with article 139, section 1 and 2 of the Law of Jurisdiction, it does not proceed to impose the costs of this appeal to any of the parties, therefore being the burden of each one to pay for their own costs derived from this appeal.

WE RULE

1. In favor of upholding the appeal filed the State's Convergence of Unions of Physicians (SCUP) against decision of the Chamber of Administrative Law, Second Section, of the Superior Court of Justice of the Community of Valencia, dated July 21 2003 (after appeal that followed the special proceeding for fundamental rights protection).

2. In favor of upholding partially the appeal before the administrative court filed by the State's Convergence of Unions of Physicians (SCUP), under the special jurisdictional procedure for fundamental rights protection, against resolution of the Bureau of Economics and Treasury of the Community of Valencia dated January 31 2003, establishing the minimal health services of primary attention, specialized attention, training residents, medical inspection at in Valencia, Castelló and Alicante, for the strike convened for February 5 and 18, March 13 and 28, April 16 and May 2 and 21, 2003, declaring null the minimal services relative to the operating room scheduled for the morning, for its infringement of the fundamental right recognized in article 28.2 of the Constitution, but dismissing the award pretended and requested in the claim.

3. We don't impose the burden of costs for the process before the lower court, having to carry each party with their own costs derived from the appeal.

Therefore, by this, our decision, we hold, order and sign. PUBLICATION. – The previous decision was read and published by the Reporting Judge, his Excellency Mr. Eduardo Calvo Rojas, in public hearing at the date herein, all of which, as Secretary I herein certify.