



Suprema Corte
de Justicia de la Nación



DERECHOS
HUMANOS

This summary contains the cover page, the synthesis, and the extract of a decision of Mexico's Supreme Court of Justice. Changes were made to its original text to facilitate the reading of the extract. This document has informative purposes, and therefore it is not binding.

**TIMELY SUPPLY OF MEDICINES TO PEOPLE WITH HIV
(SUMINISTRO OPORTUNO DE MEDICAMENTOS A PERSONAS CON VIH)**

CASE: *Amparo en Revision 226/2020*

REPORTING JUDGE: Juan Luis González Alcántara Carrancá

DECISION ISSUED BY: First Chamber of Mexico's Supreme Court of Justice

DATE OF THE DECISION: November 11, 2020

KEY WORDS: right to health, right to a dignified life, economic, social, cultural, and environmental rights, principle of progressivity, social security, timely, permanent, and constant supply of antiretroviral drugs, people living with HIV/AIDS.

CITATION OF THE DECISION: First Chamber of Mexico's Supreme Court of Justice, *Amparo en Revision 226/2020*. Juan Luis González Alcántara Carrancá, J., decision of November 11, 2020, Mexico.

The full text of the decision can be consulted at the following link:

<https://www.scjn.gob.mx/derechos-humanos/sites/default/files/sentencias-emplematicas/sentencia/2021-10/AR%20226-2020.pdf>

CITATION SUGGESTED FOR THIS DOCUMENT: Human Rights Office of Mexico's Supreme Court of Justice, *Extract of Amparo en Revision 226/2020*, Mexico.

SUMMARY THE *AMPARO EN REVISION* 226/2020

BACKGROUND: A person living with HIV/AIDS (victim) filed an *amparo indirecto* lawsuit against the Regional General Hospital Number 1 (HGR-1) in Querétaro, of the Mexican Social Security Institute (IMSS), for acts related to the failure to guarantee his human right to health, specifically, against the delay in the delivery of the antiretroviral drug that he required for the control of his condition, and the administrative omissions of the HGR-1 that prevented the timely supply of the drug. A district judge in the same entity considered that because the medicine had been provided, the lawsuit should be dismissed. The victim filed a *recurso de revisión* against this determination, and subsequently requested the Court to assert jurisdiction over the matter.

ISSUE PRESENTED TO THE COURT: Determining the standard of protection of the human right to health of HIV/AIDS patients and the related obligations of IMSS hospitals.

HOLDING: The *amparo* was essentially granted for the following reasons. The general scope of the right to health and for cases involving people with HIV/AIDS, specifically when people are beneficiaries of IMSS, were developed. As a result, it was determined that HGR-1 failed to comply with its obligation to guarantee the human right to health of the victim, as it failed to provide timely, constant, and permanent antiretrovirals. Particularly in view of having failed to comply with the obligation to take immediate measures, since medicines were essential in treating the victim's condition and avoiding complications. In addition, it was considered that HGR-1 failed to comply with its specific and constant obligation to make expeditious and effective progress in the realization of the victim's right to health, as it failed to demonstrate that it had taken the necessary measures to avoid breaching its obligation, or to exhaust all the resources at its disposal to ensure its fulfilment and to ensure his immunization. Therefore, it was decided to cover the victim, for the effect of receiving treatment without interruptions, using all the resources at the disposal of the authority.

VOTE: The First Chamber decided this case by a unanimous vote of five votes of judges Norma Lucía Piña Hernández (she reserved the right to issue a concurring opinion), Ana Margarita Ríos Farjat, Alfredo Gutiérrez Ortiz Mena, Jorge Mario Pardo Rebolledo, and Juan Luis González Alcántara Carrancá.

The votes may be consulted at the following link:

<https://www2.scjn.gob.mx/ConsultaTematica/PaginasPub/DetallePub.aspx?AsuntoID=270897>

EXTRACT OF THE *AMPARO EN REVISION* 226/2020

p. 1 Mexico City. The First Chamber of Mexico's Supreme Court of Justice (this Court), in session of November 11, 2020, issues the following decision.

BACKGROUND

p. 2-3 A person (victim) with Human Immunodeficiency Virus (HIV), through a filing in the common filing office of the district courts in the State of Querétaro, on June 19, 2019, requested the amparo and protection of the federal justice system against the Regional General Hospital Number 1 (HGR-1) in Queretaro, of the Mexican Institute of Social Security (IMSS); against which he claimed the non-delivery of the antiretrovirals drugs, specifically "Dolutegravir", and, as a result, the endangerment of his life, health and physical integrity; and the administrative deficiencies that prevent the timely supply of antiretroviral drugs.

p. 3 On July 26, 2019, a district judge in the State of Querétaro issued a decision dismissing the *amparo indirecto* lawsuit, for the failure to demonstrate of the acts claimed. In view of this, the victim filed a *recurso de revisión*, which was heard by a collegiate court in the same state.

p. 5-7 On October 1, 2019, the victim requested this Court to exercise its power to assert jurisdiction over the *amparo en revisión*. On January 22, 2020, this Court determined to assert jurisdiction and, by ruling of May 18, 2020, it turned the case over to Judge Juan Luis González Alcántara Carrancá.

PRELIMINARY STUDY

I. Accuracy of the act challenged

p. 9 The District Judge specified as the only act challenged, "the failure to deliver the antiretroviral drug" and decided to dismiss the *amparo* proceedings, given that the medicine had already been delivered before the respective lawsuit was filed.

- p. 10-11 However, this Court agrees with the appellant that the specification of acts carried out by the district judge was inaccurate because, from a careful analysis, what was actually raised and challenged in the filing was: 1) The delay in the delivery of the antiretroviral drug "Dolutegravir" that he needs to control his condition (HIV/AIDS); and, 2) The administrative omissions of the Hospital identified as responsible, which prevented the timely supply of that medicine. Both in relation to the obligation of the Mexican State to guarantee his human right to health.
- p. 12 In this regard, the specification of the acts carried out by the district court was inaccurate and this gives rise to the revocation of the declared dismissal.

II. Cessation of the effects of the act challenged

- p. 15 The HGR-1 director stated in his report that the cause of invalidity is applicable due to the cessation of effects of the challenged act. He considers that when the drug called "Dolutegravir" was delivered to the victim on June 18, 2019, the effects of the delay in supply were completely destroyed, so things returned to the state they had before, leaving no trace in the legal sphere of the victim.
- p. 16 The cause of invalidity invoked does not apply because, although the HGR-1 delivered to the victim the antiretroviral medication he requires, it did not do so with due timeliness, since there was a duty of action as of the previous 6th of June, which implies that the antiretroviral treatment that was prescribed to him was interrupted for 12 days, with the consequent impact on his legal sphere, when he was exposed to contracting opportunistic diseases and developing human immunodeficiency syndrome, as well as the possibility of generating resistance to the medication, aspects that do not disappear with the delivery of the drug at the wrong time.

III. The status of responsible authority for purposes of the *amparo* lawsuit of HGR-

- p. 20 The HGR-1 stated in its report that it does not have the status of responsible authority for purposes of the *amparo* proceeding, insofar as it acted as an insurance entity toward the victim, and therefore the act that is challenged does not have the nature of an act of authority.
- p. 21-22 The Plenary of this Court established the criterion that, for the purposes of the *amparo* proceedings, the persons who, on the basis of a legal norm may issue unilateral determinations through which they create, modify or extinguish legal situations that affect the legal sphere of the governed, without the need to go to the judicial bodies, or take into consideration the consent of the affected party, must be considered responsible authorities and, therefore, as issuers of acts of authority. In addition, it specified that the *amparo* judge, in order to establish whether the person to whom the act is attributed is an authority, must comply with the legal norm and examine the particularities of the act.
- p. 23-24 The right to health, recognized at the constitutional level, represents for the State the obligation to guarantee the enjoyment of health services to all persons. To comply with this obligation, the National Health System (SNS) was established. The IMSS is part of the SNS, and therefore it is obligated in terms of article 4 of the Federal Constitution to guarantee the right to health, through preventive, curative, rehabilitative or palliative medical care, as a basic health service, to persons who are beneficiaries, in terms of the law.
- p. 24 It is true that this Court has established criteria according to which the IMSS is not considered an authority when it acts toward the insured or its beneficiaries; however, it cannot be ignored that when the failure to comply with the obligation to provide medical care is claimed, which constitutes a basic service of the right to health protection, recognized at the constitutional level, it does have the status of authority for the purposes of the *amparo* proceedings, because precisely the State, through social security institutions, fulfils its constitutional obligation to guarantee the right to health, through the enjoyment of health services.

In other words, it is part of the state structure that makes up the SNS and thus it participates in the obligation to guarantee the right to health; hence, acts related to the provision of basic health services, such as medical care for certain conditions that due to their characteristics are considered autoimmune and that require antiretrovirals for their treatment, have a direct impact on the fundamental right to health protection and, of course, on the legal sphere of the beneficiaries.

- p. 27 In accordance with the foregoing, IMSS not only acts as an insurance entity in coordination with its beneficiaries, it also, as part of the state institutions, is responsible for the promotion, respect, protection and guarantee of human rights, within the scope of its powers, in terms of article 1, third paragraph, of the Federal Constitution, among which is of course, the right to health protection. In this regard, when the act challenged in the *amparo* proceedings is linked to the obligation of the Mexican Social Security Institute to supply medicine to its beneficiaries, it has the status of authority for purposes of the *amparo* proceedings. Accordingly, this Court considers that the cause of invalidity is not applicable.

STUDY OF THE MERITS

I. What is the general standard of protection of the human right to health?

- p. 32 The right to health is considered to be an economic, social, cultural, and environmental right, which is recognized and guaranteed by our constitutional and conventional regime.
- p. 46 The human right to health has been the subject of definition by this Court, specifically, in the *Amparo en Revision* 378/2014 decided by the Second Chamber. This Court shares the view that the right to health is not limited to preventing and treating a disease, but includes external and internal aspects, such as the good mental and emotional state of the individual; in other words, it translates into the achievement of a certain general well-being composed of the physical, mental, emotional, and social state of the person, from which one more fundamental right is derived, consisting of the right to physical and psychological integrity.

This Court has even ruled on the international obligations that derive from the importance of guaranteeing the highest level of claims related to the enjoyment of the right to health, based on a series of legal standards and the progressive realization of the right to health; stressing the concrete and constant duty to move as expeditiously and effectively as possible towards its full realization.

p. 47-48 Specifically, with regard to the obligation of the Mexican State to create conditions that ensure medical assistance and services for all in the event of illness, this Court has held that measures must be adopted -both separately and through international assistance and cooperation, especially economic and technical- to the maximum of the resources at its disposal to achieve progressively, by all appropriate means, full realization.

p. 48 Furthermore, in adherence to the Universal and Inter-American criterion, this Court has considered that the right to health must be guaranteed in terms of its availability, accessibility, non-discrimination, acceptability, and quality.

p. 49-50 This Court shares the view that, when the State claims lack of resources, and thus fails to fully realize the right to the highest attainable standard of health, or fails to ensure the essential levels thereof, it must not only verify this situation, but also prove that it has made every effort to use the resources at its disposal, given that in the use of its discretion for the development of public policies, and for decisions relating to the distribution or redistribution of resources, it must take into account vulnerable groups, as well as situations of risk, on the understanding that it is prohibited from making arbitrary or discriminatory decisions.

a) The criterion for complying with the State's obligation to ensure appropriate treatment for diseases

p. 50-51 Since the matter disputed in this lawsuit deals with the guarantee of the human right to health, specifically in relation to the guarantee of the treatment of people who have been diagnosed with some disease or condition, this Court finds useful the criterion of the Inter-American Court of Human Rights, held in the case *Cuscul Pivaral and Others Vs. Guatemala*, in terms of the way in which it should be provided.

p. 51-52 Thus, when it comes to providing medical assistance and treatment to patients, the responsible authorities must satisfy it in a timely, permanent, and constant manner; in addition, by assessing the following criteria: 1) subjective; 2) objective; 3) temporary; and 4) institutional.

II. What is the standard of protection of the human right to health of HIV/AIDS patients?

p. 58 This Court recognizes that HIV is a disease that attacks the immune system and weakens vigilance and defense systems against infections, and some types of cancer. And, as the virus destroys immune cells and alters their function, the infected person gradually becomes immunodeficient, and even though there is no cure for the infection, patients can keep the virus under control and lead a healthy and productive life by undergoing effective treatment with antiretroviral drugs.

It also recognizes that as the infection weakens their immune system, the subject may present other signs and symptoms. So, in the absence of treatment, serious illnesses could also appear.

For that reason, this Court recognizes the obligation of the State to prevent these diseases as far as possible, as well as to combat them. Thus, HIV/AIDS can be treated with antiretrovirals that, although they do not cure the infection, do control the replication of the virus within the person's body, and contribute to strengthening their immune system, thus restoring their ability to fight infections. So, ultimately, antiretroviral therapy enables people affected by HIV to lead healthy and productive lives.

p. 59 In this regard, the recognition and guarantee of the right to health of patients with HIV/AIDS are interrelated with the recognition and guarantee, in turn, of the right to a dignified life. This is because, for this Court, the right to life recognizes (among other meanings) the right of people to have access to the conditions that guarantee a dignified existence, including health care.

a) The criterion for complying with the State's obligation to ensure antiretroviral treatment for people with HIV/AIDS

p. 60 The State is obligated to provide antiretroviral treatment in a timely, permanent, and constant manner; and, in addition, it must be delivered considering the patient's state of health, as well as their medical and clinical requirements.

In order to ensure medical treatment for patients infected with HIV/AIDS, this Court considers that the authority responsible for its guarantee must meet the following assessment criteria:

1) Subjective. The State shall act with the aim of seeking the therapeutic and pharmaceutical treatment necessary for the control of the symptomatology and the control of the deterioration in physical and mental integrity, considering the patient's state of health and his or her clinical and medical requirements, including antiretroviral treatment.

2) Objective. The State shall ensure that the treatment is appropriate so that, if the patient requires any medication, including antiretroviral, it contains the original or generic salts that preserve the bioavailability and bioequivalence of the original salts for its effectiveness.

p. 60-61 3) Temporary. The State shall ensure that the treatment needed by the patient, including antiretroviral medication, is guaranteed and delivered in a timely, permanent, and constant manner.

p. 61 4) Institutional. The State must ensure that the medical units or health institutions responsible for ensuring treatment, including antiretroviral treatment, provide that treatment in accordance with the highest standards of medical technology and expertise.

III. What are the obligations of IMSS hospitals to guarantee the human right to health in general, and that of patients with HIV/AIDS?

a) Guarantee of medical-surgical, pharmaceutical and hospital care of the Mexican Social Security Institute

p. 63 The SNS contains the social security system which, in accordance with the Social Security Law (LSS), aims to guarantee the right to health, medical care, the protection of livelihoods and the social services necessary for the individual and collective well-being, among others, of its beneficiaries.

In order to guarantee these rights, social security is provided by public, federal or local entities or agencies and decentralized agencies, in accordance with the provisions of the LSS and other applicable legislation.

Its basic guarantee instrument is "Social Security", which is a national public service comprising, on the one hand, a compulsory scheme and, on the other, a voluntary one; and IMSS is responsible for its organization and administration.

p. 63-64 Moreover, the insurance includes "illness insurance", which provides benefits in kind and cash for those who are insured or its beneficiaries. Specifically, the benefits in kind consist of the Institute granting the insured person the surgical, pharmaceutical and hospital medical assistance that is necessary for the treatment of a disease from the moment it has been diagnosed.

p. 65 In the course of treatment it may be necessary to provide the insured person with pharmaceutical assistance, which consists of the Institute's obligation to guarantee to the beneficiaries the supply of medicinal products, which must be prescribed in the official prescription books, by the Institute's doctors, and supplied by the institute's pharmacies.

b) The delay in the delivery to the victim of the antiretroviral drug "Dolutegravir" that he requires for the control of his condition (HIV/AIDS)

p. 68 The victim is a beneficiary of IMSS and is subject to treatment for HIV/AIDS; this is given within the HGR-1, which not only grants the provision of antiretroviral medication, but also ensures the treatment of his disease.

However, the HGZ-1 has failed to provide it in accordance with national and international standards and guidelines, especially since, due to the obligations of the right to health, it had the burden of proof to prove the satisfaction of the said human right.

p. 68-69 In this regard, this Court finds that the grounds for violation raised are well founded, which, in short, consist of the fact that the HGZ-1 violated his right to health, in relation to life and personal integrity. In effect, the HGZ-1 failed to comply with various guarantees of the standard of protection of the human right to health, related to the timely, constant, and permanent supply of medicines.

p. 69 As for the "availability", HGZ-1 did not ensure that it had a medicine that is essential for the treatment of the victim with HIV/AIDS, since it was delivered 12 days after the date on which it was medically due; which antiretroviral medicine must always be supplied without interruption, constantly and permanently, since the deficient adherence in taking it represents a danger to his human right to life and personal integrity.

The HGZ-1 failed to comply with its obligation to take immediate measures, since it was responsible for providing the victim -who suffers from HIV/AIDS- with the medicine with the name "Dolutegravir", which is essential for his treatment and daily consumption, which is a minimum obligation essential for the guarantee of his human right to health.

This is especially so since the HGZ-1 is bound by the normative content of the Official Mexican Standard NOM-010-SSA2-2010 "For the prevention and control of infection by the Human Immunodeficiency Virus", which establishes a guarantee of the uninterrupted supply of drugs for the antiretroviral treatment of this type of patient.

p. 70 This Court should emphasize that the antiretroviral treatment should have been provided to the victim by the HGZ-1 (institutional criterion), taking special account of the fact that he is a person infected with HIV/AIDS (subjective criterion); in which case he must seek the guarantee of the treatment essential for the control of his symptomatology, as well as for the control of the deterioration of his physical and mental integrity (medical and clinical requirements) on a constant and permanent basis (temporary criterion); either with original antiretroviral drugs (in the case, "Dolutegravir") or generic ones that preserve the

bioavailability and bioequivalence of the original salts for their effectiveness (objective criterion).

For these reasons, this Court considers that the arguments relating to the claim of the constitutionality of this act are well founded, since they violate the standard of protection of the human right to health, recognized in Articles 1 and 4 of the Federal Constitution; 26 of the American Convention on Human Rights (CADH); 10 of the Additional Protocol to the Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador); and 12 of the International Covenant on Economic, Social and Cultural Rights (PIDESC).

c) The administrative omissions, attributed to the Hospital indicated as responsible, which prevented the timely supply of the medicine to the affected person

This Court finds that the victim is also right that HGZ-1 is guilty of an administrative failure regarding its obligation to guarantee his human right to health.

p. 71 In this situation, this Court considers that HGZ-1 failed to comply with its specific and constant obligation to move as expeditiously and effectively as possible towards the realization of the patient's right to health — measures of a progressive nature — since it did not demonstrate that it had adopted the necessary measures, to the maximum of the resources at its disposal, to achieve its effectiveness.

Thus, it violated the human right to health in that it not only suspended the supply of antiretroviral drugs to the victim, but also failed to demonstrate in court the adoption of the necessary measures to prevent the breach of its obligation, or that it had exhausted all its remedies to ensure compliance.

p. 71-72 Similarly, this Court considers that HGZ-1 failed to demonstrate that it promoted total immunization against HIV/AIDS, a condition that is considered one of the main infectious diseases in the world; or that it took the necessary measures to guarantee the treatment of the victim and meet his medical needs, who is in a condition of high risk.

- p. 72 In addition, and with regard to persons suffering from HIV/AIDS, this is part of the State's obligation to prevent, treat and control epidemic diseases, as well as to create the necessary conditions to ensure that these patients are provided with medical care and medical services for the control of their illness. This is in addition to the fact that the guarantee and treatment of the appropriate medicines for the control of infection not only represents the protection and guarantee of their health, but of public health in general.
- p. 72-73 In this situation, this Court considers that the HGZ-1 of IMSS failed to fulfil its obligation to guarantee the human right to health of the victim, since it did not prove that it had adopted measures or exhausted its available resources in order to satisfy this obligation, thus violating Articles 1 and 4 of the Federal Constitution, Article 26 of the CADH; Article 10 of the Protocol of San Salvador; and Article 12 of the PIDESC.

DECISION

- p. 73-74 The protection of the victim is granted in order that HGZ-1: i) provides in a timely, permanent and constant manner to the victim, as long as he is a beneficiary, without interruption, the medicines for antiretroviral treatment (including "Dolutegravir"), this in accordance with his state of health, as well as his medical and clinical requirements; by giving him the appropriate medicines, whether original or generic, that preserve the bioavailability and bioequivalence of the original salts for their effectiveness. This is in view of the fact that, if it does not have the necessary resources for its delivery, it must demonstrate that it has made every effort to use all the resources at its disposal to achieve this supply; ii) guarantee, as a matter of priority, the human right to health of the aggrieved person, in such a way as to comply with the continuous sequence of prevention, treatment, care and support in function of the illness, HIV/AIDS, in accordance with the rulings of this decision (that is, with preferential treatment and a comprehensive approach to his protection, precisely in accordance with his vulnerable situation); justifying, at all times, having exhausted all the resources available to it in order to achieve its effectiveness. Consequently, the Court revokes the decision under appeal and covers and protects the victim.