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.

UNCONSTITUTIONALITY OF THE DECLARATION OF UNFITNESS OF THE ARMED FORCES DUE TO SEROPOSITIVITY (*INCONSTITUCIONALIDAD DE LA DECLARACIÓN DE INUTILIDAD DE LAS FUERZAS ARMADAS POR SEROPOSITIVIDAD*)

CASE: *Amparo en Revisión 2146/2005*

REPORTING JUSTICE: Mariano Azuela Güitrón

DECISION ISSUED BY: Plenary of Mexico's Supreme Court of Justice

DATE OF THE DECISION: February 27, 2007

KEY WORDS: right to equal treatment and non-discrimination, military law, right to health, HIV/AIDS, soldier, unfitness, retirement, social security.

CITATION OF THE DECISION: Supreme Court of Justice of the Nation, *Amparo en Revisión 2146/2005*, First Chamber, Mariano Azuela Güitrón, J., decision of February 27, 2007, Mexico.

The full text of the decision may be consulted at the following link:
https://www.scjn.gob.mx/derechos-humanos/sites/default/files/sentencias-emblematicas/sentencia/2022-02/AR%202146-2005.pdf

CITATION SUGGESTED FOR THIS DOCUMENT: Center for Constitutional Studies of Mexico's Supreme Court of Justice, Excerpt from the *Amparo en Revisión 2146/2005*, Mexico.

SUMMARY OF *AMPARO EN REVISION* 2146/2005

BACKGROUND: A soldier went to the Regional Military Hospital sick with a fever. While he was there, they performed medical tests without his informed consent and HIV was detected, an infection that was later confirmed. For that reason, they declared him unfit in the first category and left him in the custody of his family while the retirement process was carried out. Later, they notified him of the provisional declaration of retirement for unfitness contracted outside the performance of duties. The man filed an objection, so he was called for a medical assessment to determine his fitness or his level of unfitness. Following this medical examination, he was declared unfit in the second category and the final declaration of retirement for unfitness was made. The man filed an *amparo indirecto* against this determination, which was denied because, in the consideration of the judge, the rule that established seropositivity as a cause of unfitness was not discriminatory. The man filed a *recurso de revisión*. The Collegiate Circuit Court that heard the matter decided to submit it to Mexico's Supreme Court of Justice (this Court).

ISSUE PRESENTED TO THE COURT: Whether article 226, second category, section 45 of the Law of the Social Security Institute for the Mexican Armed Forces (ISSFAM Law), published in the Federal Official Gazette on July 9, 2003, is unconstitutional.

HOLDING: The decision under appeal was amended, dismissed in part and granted in part, essentially, for the following reasons. It was determined that article 226, second category, section 45 of the ISSFAM Law is unconstitutional because it is contrary to the right to equal treatment and non-discrimination of the affected person, since it is disproportionate for achieving the constitutionally legitimate purpose of guaranteeing the effectiveness of the armed forces and lacks legal reasonableness because it equates illness with unfitness. The declaration of unfitness solely because of seropositivity leads to the social isolation of people with HIV.

VOTE: The Plenary decided not to dismiss the *amparo* lawsuit by the nine votes of justices Margarita Beatriz Luna Ramos, Olga Sánchez Cordero, José Ramón Cossío Díaz, José

Fernando Franco González Salas, Genaro Góngora Pimentel, Sergio Valls Hernández, Juan N. Silva Meza, José de Jesús Gudiño Pelayo, and Guillermo I. Ortiz Mayagoitia. Justices Sergio Salvador Aguirre Anguiano and Mariano Azuela Güitrón voted against. On the other hand, the approval of the second and third rulings of the decision was unanimously decided by eleven votes of justices Margarita Beatriz Luna Ramos, Olga Sánchez Córdero, Sergio Salvador Aguirre Anguiano, José Ramón Cossío Díaz, José Fernando Franco González Salas, Genaro Góngora Pimentel, José de Jesús Gudiño Pelayo, Mariano Azuela Güitrón, Sergio Valls Hernández, Juan N. Silva Meza and Guillermo I. Ortiz Mayagoitia; and the approval of the fourth ruling of the decision by a majority of eight votes of justices Margarita Beatriz Luna Ramos, Olga Sánchez Córdero, José Ramón Cossío Díaz, José Fernando Franco González Salas, José de Jesús Gudiño Pelayo, Sergio Valls Hernández, Juan N. Silva Meza and Guillermo I. Ortiz Mayagoitia. Justices Sergio Salvador Aguirre Anguiano, Genaro Góngora Pimentel and Mariano Azuela Güitrón voted against and reserved their right to issue a minority opinion.

The votes may be consulted at the following link:
https://www2.scjn.gob.mx/ConsultaTematica/PaginasPub/DetallePub.aspx?AsuntoID=79101

EXTRACT FROM THE *AMPARO EN REVISION* 2146/2005

p.1 Mexico City. The Plenary of Mexico's Supreme Court of Justice (this Court), in session of February 27, 2007, issued the following decision.

BACKGROUND

On April 30, 2004, a member of the military requested the protection of the Federal Courts.

p.4 The affected soldier narrated the following background of the matter:

On January 16, 1992, the affected party was admitted to the Ministry of National Defense (SEDENA) as a soldier, having undergone a medical examination whose result was "healthy and suitable for military service".

In mid-December 2001, he went to the Regional Military Hospital of Acapulco, Guerrero, because he was sick (he had a fever), and was admitted for a short period of time, during which, without his prior informed consent, the human immunodeficiency virus (HIV), which is the causative agent of AIDS (acquired immunodeficiency syndrome), was detected through the application of the corresponding detection tests.

p.5 As a result, on December 28, 2001, the affected party was at the Central Military Hospital, where, without his prior informed consent, confirmatory tests for the HIV infection were carried out.

On August 27, 2002, he was given the official notice SGB-II-33202 of July 23, 2002 (the challenged official notice), by which his retirement was provisionally declared for unfitness contracted outside the performance of his duties.

p.6 The affected party objected to the resolution contained in the challenged official notice.

Therefore, the affected party was notified that he should go to the Central Military Hospital for a medical assessment to determine his fitness or level of unfitness.

On August 30, 2003, the affected party was issued a new medical certificate by the Central Military Hospital, in which he was declared unfit in the second category for service in the armed forces due to suffering from seropositivity to HIV antibodies, confirmed by supplementary tests.

p.6-7 On April 9, 2004, he was notified of the resolution ordering initiation of the process of retirement for unfitness and issuing the final declaration of retirement, as well as copy of the official notice number SGB-II-6410 dated March 16, 2004, with the final declaration of retirement for unfitness in acts unrelated to the service of the complainant, which implied that he had been discharged from the Mexican Army, and that he would not be paid the benefits to which he was entitled, and that he would also no longer receive the medical service and medications that are essential for his health given his HIV infection, all acts considered unconstitutional.

p.7 In the *amparo*, the affected party claimed that article 226, second category, section 45 of the ISSFAM Law, published in the Federal Official Gazette on July 9, 2003, which came into force on August 8, 2003, is unconstitutional.

p.10-12 A District Judge issued a decision on April 25, 2005, in which she dismissed the *amparo* in part, denied it regarding articles 21, 22 section I, 24 section IV, 36 and 226 of the ISSFAM Law, but granted the *amparo* against the challenged official notice that provisionally declared his retirement for unfitness.

p.13 SEDENA and the affected party both filed a *recurso de revisión*.

p.15 The Collegiate Circuit Court that heard the case ordered its referral to this Court.

p.28 On February 16, 2007, SEDENA requested the dismissal of the *amparo* lawsuit because on January 9, 2006 the affected party died.

p.32 This Court has ruled for decades that the death of the affected party leads to the dismissal of the *amparo* lawsuit when –and only when– the challenged act affects exclusively the person involved.

p.34 Therefore, if the challenged act may eventually have legal consequences in relation to his successors, by not only affecting personal rights, but other transferable rights, such as, those of his estate, the cause for dismissal does not apply.

p.53 In this specific case, if the date of the issuance of the final declaration of retirement for unfitness caused by acts unrelated to his service (March 16, 2004) is used for the purposes of granting the compensation to which the affected party was entitled, the

amount of compensation will be lower than what he would be entitled to if he obtains the protection of the Federal Courts, since if this determination were to be voided the effect would be to consider him an active member with the rank of infantry corporal in the army until the day of his death on January 9, 2006, accumulating a longer period of service that would result in a higher compensation for his relatives.

For all the foregoing, the cause of invalidity raised by SEDENA must be considered unfounded.

STUDY OF THE MERITS

p.72 The proposition that article 226, second category, section 45 of the ISSFAM Law violates the individual rights of equal treatment and non-discrimination on the grounds of health, established in article 1, in conjunction with article 4 of the Constitution, is well founded and sufficient to declare the unconstitutionality of that article and, with that favorable constitutional decision, the beneficiaries of the deceased petitioner will obtain the maximum possible benefits from such law.

I. Constitutional recognition of an exception regime in the armed forces

p.81 From articles 13, 31, 32, 123, part B, section XIII and 129 of the Constitution, it is possible to infer the intention of the Congress and the Reviewing Branch to establish an exception regime for the armed forces, due to the importance of their effective functioning for Mexican society.

p.84 In this regard, it should be emphasized that such special regime constitutes a legitimizing basis for limiting –to a certain extent– the constitutional rights of individuals for reasons of a functional nature in cases where their institutional position within the State apparatus so warrants.

II. Applicability of individual rights of equal treatment and non-discrimination on grounds of health for the legislator on military matters

p.85 The starting point of this Court has been that soldiers enjoy the individual rights enshrined in the Constitution.

p.86 In this regard, this Court observes that the legislation relating to the military does not constitute an external or superior sphere to the Constitution. The validity of the legislation in military matters is therefore conditioned on its respect for the content of the rights to equal treatment and non-discrimination of article 1 of the Constitution.

p.87 The Constitution has not only recognized the right to equal treatment as a principle but has also provided for a precise rule to prohibit any discrimination based, *inter alia*, on people's health; a constitutional rule whose specific structure leaves the legislator a very narrow margin of discretion when establishing differentiations in the laws it is responsible for issuing for that purpose. Despite the applicability of the rights to equal treatment and non-discrimination for the military in respect to the legislator, the military sphere —as an exception regime— justifies a different intensity of the exercise of those constitutional rights for members who have chosen to belong to the armed forces, which in fact authorizes the requirement of certain conditions and physical and mental aptitudes, for the military personnel to remain in the institution.

p.88 Consequently, the right to equal treatment is violated when a legal differentiation is made without an adequate reason arising from the nature of the regulated matter; i.e., when the differentiation is disproportionate, unjustified or arbitrary, which applies even to legislation issued to regulate the armed forces.

III. Treatment of the matter as a collision between constitutional principles (Effectiveness of the armed forces and protection of the integrity of their members in relation to the rights to equal treatment and non-discrimination on grounds of health)

p.89 On the one hand, the principle of protecting and safeguarding the effectiveness of the Army requires the preservation of military discipline and the establishment of certain security measures, and certain physical, mental and health conditions for members of the army (articles 4, 13, 31, 32, 123, B, XIII, 129 of the Constitution), while, on the other hand, the rights to equal treatment and non-discrimination on grounds of health require that all subjects of the law, including members of the army, be protected against measures that

involve disproportionate, arbitrary and/or unjustified differentiated treatment based exclusively on those grounds (articles 1 and 4 of the Constitution).

p.91 In the challenged law, the legislator in regulating retirement due to unfitness of members of the army for health reasons has tipped the balance between the constitutional principles in conflict too far by considering soldiers to be unfit and retiring them from service simply because they are seropositive to antibodies against HIV, as is clear from the reading of article 226, second category, section 45 of the ISSFAM Law.

IV. Criteria for the resolution of conflicts between constitutional principles: applicability of the principles of proportionality and legal reasonableness.

p.92 While individual rights are sometimes limited by the public interest and the constitutional rights of others, this does not lead to the conclusion that individual rights must always yield –at all times and in relation to all their content– to the public interest or the constitutional interests of third parties determined by the legislator.

p.93 Indeed, one of the essential characteristics of individual rights is their ability to operate as a limit on majority decisions (whether in the name of the public interest or constitutional rights of third parties): the constitutional rights are not subject to waiver –in their essential core– for all public powers, including the legislator.

p.93-94 In this context, the concepts of essential content and constitutional proportionality become relevant. These concepts imply that the legislator may limit individual rights based on the Constitution, provided the limitation is justified; i.e., by establishing a relationship of proportionality between the means and the ends sought through the respective intervention measure.

p.94 The Constitution, while allowing the legislative restriction of constitutional rights in order to safeguard other constitutional interests, also allows judicial control of laws, from which it follows, on the one hand, that the Constitution prevents the legislator from exceeding its powers to develop such rights and, on the other hand, that the Constitution recognizes in all of those rights an inherent essential content that no constituted power (including the legislator) can destroy.

p.100 It is clear from the precedents of this Court that compliance with the constitutional principles of reasonableness and legal proportionality implies that the limitation of a constitutional right by the legislator: a) must pursue a constitutionally legitimate purpose; (b) must be adequate, suitable, apt and capable of achieving the constitutional purpose pursued by the legislator through the respective limitation; c) must be necessary, that is, sufficient to achieve the constitutionally legitimate purpose without imposing an excessive and unjustified burden on the respective civilian; and d) must be reasonable, so that the more intense the limit of the individual right is, the greater the weight or rank of the constitutional reasons justifying such intervention must be.

p.104 Therefore, this Court will examine the constitutionality of the law in question, based on this standard.

V. Examination of the constitutionality of the legal cause for retirement for unfitness based on HIV antibody seropositivity

p.105 The legal differentiation provided for in article 226, second category, section 45 of the ISSFAM Law seeks, in principle, to pursue a constitutionally legitimate purpose, which is to guarantee the effectiveness of the armed forces as well as the protection of the integrity of their members and third parties.

p.106 However, the legal differentiation is inadequate to achieve this legitimate constitutional purpose because medical science, reflected in different national norms and international guidelines, has demonstrated the inaccuracy of the assumption –when it is automatic and imposed by law– that soldiers are unfit and are incapacitated *per se* to be part of the Military simply for being seropositive to antibodies against HIV. Medical science, also reflected in various national and international standards, has established that there is no public health benefit to isolating a person who has HIV or AIDS simply because of the infection, since this condition cannot be transmitted through casual contact nor is airborne.

p.112 The legislator overlooked that between the time when the HIV infection occurs and the moment when symptoms of AIDS manifest itself, a large number of years may elapse in which the affected serviceman or woman may be able to continue serving within the armed

forces, especially since with the drugs currently available life expectancy can be prolonged for a considerable period of time.

p.112-113 Likewise, if the protection of the health of other members of the army and society is sought, the legislator can establish the bases for the military institution to complement the preventive measures (educational, for example) and the objective, reasonable and balanced mechanisms aimed at avoiding risks of contagion, without affecting individual rights.

p.113 In addition, the legal differentiation challenged is disproportionate because it is unnecessary to achieve the legitimate purpose pursued. There are alternatives available to the legislator that would have less impact on the rights to equal treatment and non-discrimination on the grounds of health, which shows that the challenged legislative provision is unjustified.

p.113-114 The transfer to a different area, and not retirement with the subtraction of health benefit rights that correspond to active service, would be a less burdensome alternative for the individual in relation to the enjoyment and exercise of their individual rights. This shows that imposing automatic retirement for unfitness when a soldier suffers from HIV is a disproportionate measure that, therefore, is contrary to the constitutionally recognized principles of equal treatment and non-discrimination on grounds of health.

p.115-116 Finally, the challenged legislative differentiation lacks legal reasonableness, since illness or, in this case, seropositivity to antibodies against HIV, cannot be considered equivalent to unfitness because that condition does not necessarily imply incapacity or danger of contagion in the exercise of the different functions of the armed forces.

p.116-117 To state in the text of the law that the mere existence of a positive diagnosis of an illness invariably leads to the inability to adequately perform all types of work activity in a public institution constitutes a legislative decision without logic or reason, because under that argument the clinical identification of a disease would justify the immediate separation from work, without first analyzing whether the effects of the illness prevent the person suffering from it from successfully performing the activity for which they had been hired, appointed or recruited.

p.117-118 It is not the absence of health that empowers the employer to separate workers from their jobs, but the inability generated by the illness to carry out the tasks entrusted to them. Illnesses may produce few unfavorable alterations or their progression may be gradual so they cannot constitute a reason to automatically terminate the person who suffers them. Only when the damage to their health is of such magnitude that they cannot carry out the specific activity for which they were hired or the hazards of transmission of the malady are potentially high according to the function the worker has been assigned may termination be considered.

p.118 While military life requires individuals suitable for service, which implies enjoying adequate health to perform their duties, this does not mean that the positive diagnosis of a disease invariably leads to the retirement of a soldier, since it may not render them unfit for service when the condition is just beginning, or when it has been clinically controlled, including through the medical staff and pharmaceuticals the military provides to its forces. Thus, it is equally reasonable in these cases to provide health support and alternate jobs so that the men and women in those forces can remain active, and only have to leave the ranks when they cannot continue to work even under those conditions.

p.120 It must also be recognized that the declaration of unfitness solely based on seropositivity propitiates the social isolation of HIV patients and, consequently, erodes the State's contribution to the formation of a culture of non-discrimination for health reasons, especially when the disease that afflicted the plaintiff has been considered a global epidemic, whose carriers should not be treated with prejudice, but with absolute respect for their human dignity, the bedrock of every legal order.

DECISION

p.120-121 The *amparo* is granted. Article 226, second category, section 45 of the ISSFAM Law must be declared unconstitutional as contrary to the rights of equal treatment and non-discrimination on grounds of health, and the granting of the *amparo* must be extended to the procedure that culminated in the resolution contained in the official notice number SGB-II-6410 of March 16, 2004, declaring the retirement for unfitness in acts unrelated to

the service of the complainant, issued by SEDENA, as well as with respect to the legal consequences of that act.

p.121 It is unnecessary to review the other questions of unconstitutionality raised, since the declaration of unconstitutionality of the mentioned legal provision is sufficient for this favorable constitutional decision to ensure that the family of the deceased complainant will obtain the maximum possible employee benefits provided for in the legal framework.

This is so because the effect of the declaration of unconstitutionality of the article of the ISSFAM Law is to return things to where they were before the violation occurred, in accordance with article 80 of the *Amparo* Law, so it must be considered that the affected party was active until the day of his death, which implies that the employee benefit rights established in the relevant law and which correspond in this case to the relatives of the complainant will be those established in the event of discharge due to the death of the active soldier.