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| Decided by: | Chairman: Dr. César Sepúlveda Members: Andrés Aguilar; Marco Gerardo Monroy Cabra; Gilda M. Russomano; Bruce McColm |
| Dated: | 05 March 1985 |
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CONSIDERING:

1. The complaint received by the Inter-American Commission on Human Rights on April 9, 1984, which reports the arrest and subsequent expulsion from Chile of Messrs Jaime Insunza Becker and Leopoldo Ortega Rodriguez, the Secretary General of the Movimiento Democrático Popular and the physician of the Chilean Commission of Human Rights, respectively.
2. The reply of the Government of Chile dated May 24, 1984, which informs the Commission that Messrs Insunza and Ortega were expelled from the national territory pursuant to the provisions of Transitory Provision 24 of the National Constitution, against which an appeal for reconsideration to the authority that ordered it is in order and because of which three applications for amparo to the respective Appeal Court are being processed.
3. The judgment of the Santiago Appeal Court of June 26, 1984, in which it accepts the remedy of amparo lodged on behalf of Messrs Insunza and Ortega and recognizes the right of both to return to Chile.
4. The appeal against the judgment mentioned in the foregoing paragraph by the Director of Public Prosecutions (Ministerio Público).
5. The return to Chile of Messrs Insunza and Ortega, their arrest by the Chilean authorities as they disembarked from the aircraft which took them to Chile and their subsequent provisional release while the Supreme Court was deciding on the remedy of appeal submitted to it.
6. The judgment of the Supreme Court of Justice of Chile dated July 9, 1984, which quashes the judgment of the Santiago Appeal Court on the grounds that the expulsion from the country of the persons affected was carried out in accordance with the law by the pertinent authorities.

WHEREAS:

1. Messrs Insunza and Ortega were arrested in Santiago, Chile, on April 6, 1984 and expelled from the country on the following day, under the provisions of Exempt Decrees No. 4542 and 4546 dated April 5 and 6, respectively, of the same year.

2. The two Exempt Decrees ordered the expulsion of Messrs Insunza and Ortega on the grounds that they constitute a danger to the internal peace of the country, "in accordance with reliable information in the possession of the authority".

3. According to the Executive Power of Chile, the measure of expulsion is in order in accordance with Transitory Provision 24 of the Constitution that stipulates in its pertinent part:

Without prejudice to what is prescribed for in Article 39 et seq. the states of exception contemplated by this Constitution, if during the period referred to in the Thirteenth Transitory Provision acts of violence, designed to alter public order, occur, or should there be danger of disturbance of internal peace, the President of the Republic shall so declare and he shall have the following powers for a renewable period of six months:

...

c. To prohibit the entry into the national territory or to expel therefrom those who propagate doctrines alluded to in Article 8 of the Constitution, those accused of being or have reputed to be activists for such doctrines, as well as those who act contrary to the interests of Chile or constitute a danger for internal peace;

...

The President of the Republic shall exercise the powers provided for herein through a Decree signed by the Minister of the Interior in the form of "by order of the President of the Republic". The measures adopted by virtue of this provision shall not be subject to any recourse whatsoever, except that for reconsideration thereof by the authority who ordered them.

4. Supreme Decree No. 263 of March 6, 1984 had declared a state of emergency because of the danger of disturbance of the peace.

5. In accordance with subsequent information furnished by the authorities the judgment of the Santiago Appeal Court summarizes in the following terms the charges on which the expulsions are based:

- a. Leopoldo Ortega Rodriguez and Jaime Gonzalo Insunza Becker are members of the Communist Party;
- b. The petitioners (amparados) committed acts very harmful to the internal peace of the country;
- c. Both constitute a danger to the internal peace of the Republic, and
- d. Reliable information on all these facts is in the possession of the authorities.

6. The interpretation of the Santiago Appeal Court is that the Judiciary of Chile is empowered to accept remedies of amparo filed with it in the case of measures adopted pursuant to Transitory Provision 24, basing itself on Article 41 (3) of the Constitution which stipulates that the remedy of amparo shall be invalid only when a state of siege or alert has been declared.

7. The Santiago Appeal Court, basing itself on the interpretation set forth in the foregoing paragraph and on the case law of the Supreme Court of Justice, was of the opinion that the Judiciary, when accepting remedies of amparo, is empowered to determine the factual bases of the measure that is the subject matter of the remedy.

8. The Appeal Court, when determining the factual bases of the expulsions in question, found that only the membership of the two persons affected in the Communist Party was proven, which " is not

sufficient in and of itself to support the belief that Ortega Rodriguez and Insunza Becker are a danger to the internal peace of the country and, in addition, does not lead to the conclusion that the above-mentioned decrees have been issued on a sound basis...".

9. That, in determining the factual bases mentioned, the Appeal Court also stated:

that it has not been proven in the proceedings in any legal way that Insunza Becker and Ortega Rodriguez have committed acts seriously harmful to the internal peace of the country since no evidence to that effect was produced nor were the alleged reliable information in the possession of the authority provided and that they should indicate accurately and on a substantiated and clear basis each one of those acts that have allegedly occurred and the way in which each one of the accused committed them;

That in addition no evidence whatsoever has been provided in the proceedings tending to prove the fact that the petitioners are a danger to the internal peace of the country, as stated in the expulsion orders...

10. The Santiago Appeal Court concluded by accepting the remedies of amparo filed on behalf of Messrs Insunza and Ortega and declared that they were entitled to enter the national territory.

11. When the judgment of the Appeal Court was submitted on appeal to the Supreme Court of Justice, the highest court, by a judgement dated July 9, 1984, quashed the judgment of the Appeal Court on the grounds that, according to the wording of the Transitory Provision 24, in the case of Messrs. Insunza and Ortega

...it was not in order to verify ... whether or not the activities of the above-mentioned persons constitute a danger to the internal peace. Of course, the way in which this ground for expulsion is drafted gives it a clear content of relative and subjective appreciation. In which cases the conduct of the agent reveals a danger to the internal peace depends exclusively on the criterion of the person who is to make the evaluation. It is for this reason that, the adoption of the measure being also an exclusive and excluding administrative act, the study and determination of the factors that make up the grounds for danger belong solely to the President of the Republic.

12. The interpretation of the Supreme Court of Justice is that, in the case of the measures adopted under Transitory Provision 24, the Judiciary may accept a remedy of amparo but it limits itself to verifying whether the measure appealed has complied with the formal requirements stipulated by that Transitory Provision. In the cases of Messrs Insunza and Ortega, the Supreme Court points out in its judgment that "the factual circumstances on which they may base themselves are all of subjective appreciation and depend on the criterion of the Government authority", therefore it must be concluded that the measure of expulsion that motivated the remedies of amparo on behalf of the above-mentioned Ortega and Insunza, has come from an authority with legal power to order it in the cases characteristic of its competence and, that being so, it is incumbent to reject the above-mentioned remedies.

13. The American Declaration of the Rights and Duties of Man embodies the right of residence and movement in Article VIII in the following terms:

Every person has the right to fix his residence within the territory of the State of which he is a national, to move about freely within such territory, and not to leave it except by his own will.

14. The Inter-American Commission on Human Rights, in its Annual Report 1980-1981 (page 119) stated:

...in the last few years some states of the hemisphere have expelled nationals--something that was conceivable until very recently only as a penalty for a very serious crime and after due process--as a

means of eliminating those political dissidents that the Government considers a threat to its internal security.

These expulsions have been administratively decreed, without any type of due process, and generally for indefinite periods of time, which further increase the cruelty and irrationality of the measures, by making this punishment even more onerous than that which applies to the commission of a crime, which is usually a specific penalty in its temporal application. Likewise, on some occasions these expulsions have been carried out without the approval of the State to which those expelled have been transferred, which is a violation of International Law.

15. The American Declaration of the Rights and Duties of Man embodies the right to due process in Article XXVI, which stipulates that:

Every accused person is presumed to be innocent until proved guilty.

Every person accused of an offense has the right to be given an impartial and public hearing, and to be tried by courts previously established in accordance with preexisting laws and not to receive cruel, infamous or unusual punishment.

16. The American Declaration of the Rights and Duties of Man recognizes the right to a fair trial in Article XVIII, which stipulates:

Every person may resort to the Courts to ensure respect for his legal rights. They should likewise be available to him a simple, brief procedure whereby the Courts will protect him from acts of authority that, to his prejudice, violate any fundamental constitutional rights.

17. The right to residence and movement is recognized by Article 19 (7) (a) of the Constitution of Chile.

18. The Inter-American Commission on Human Rights, in its Report on the Situation of Human Rights in Paraguay, 1978, when referring to the states of emergency and examining their pertinence in justified situations, stated:

What the Commission contends is that it cannot be admitted, for any reason, that during disturbances of the public order while one of those exceptional measures is in effect, the rights of the individual can be left without legal protection, in the face of the omnipotence of the authorities (page 18).

19. In its Annual Report, 1980-1981, the Inter-American Commission on Human Rights again referred to states of emergency, stating that:

Even more serious is the enactment of these states of emergency for indefinite or prolonged periods of time, above all when they grant the chief of state a broad concentration of power, including the inhibition of the Judiciary concerning the measures enacted by the executive, which may lead, in certain cases, to the denial itself of the existence of the rule of law (p.115).

20. The records of the case of Messrs Jaime Insunza Becker and Leopoldo Ortega Rodriguez reveal the extent to which the powers concentrated in the Executive Power of Chile may be exercised pursuant to Transitory Provision 24 of the Constitution.

21. Those records also show that the procedure instituted for reviewing the measures adopted by the President under the above-mentioned Transitory Provision converts the Executive Power into the sole authority for the appeal of revision, which thus violates the rules that regulate the exercise of the right to due process.

22. The records of the case of Messrs Insunza and Ortega show that the powers granted by Transitory Provision 24 to the President of Chile may be used, without any control, against the political opponents to the present Government of that country, which are clearly defenseless before the political power, in open violation of the civil and political rights embodied in the American Declaration of the Rights and Duties of Man.

THE INTER-AMERICAN COMMISSION OF HUMAN RIGHTS, RESOLVES:

1. To declare that the Government of Chile has violated the right to residence and movement embodied in Article VIII of the American Declaration of the Rights and Duties of Man by expelling Messrs Jaime Insunza Becker and Leopoldo Ortega Rodriguez from the national territory.
2. To declare that the Government of Chile has violated the right to due process and the right to a fair trial of Messrs Jaime Insunza Becker and Leopoldo Ortega Rodriguez, embodied in Article XXVI and XVIII of the American Declaration of the Rights and Duties of Man.
3. To recommend to the Government of Chile that in a period of 60 days it rescind the measure of expulsion affecting Messrs Jaime Insunza Becker and Leopoldo Ortega Rodriguez and that, if it believes that sufficient grounds exist, it submit them to a judicial proceeding in which the rules of due process are observed, such as those stipulated by the international instruments to which Chile is a party.
4. To communicate this resolution to the Government of Chile.
5. If after the period of 60 days has elapsed, the Government of Chile has not fulfilled the recommendation made in paragraph 4 above, the Commission will include this resolution in the report it is to submit to the General Assembly, in accordance with the provisions of Article 59 (g) of the Regulations of the Commission.