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Title/Style of Cause:	Simone Andre Diniz v. Brazil
Doc. Type:	Decision
Decided by:	President: Juan Mendez; First Vice-President: Marta Altolaguirre; Commissioners: Robert K. Goldman, Julio Prado Vallejo, Clare K. Roberts.
Dated:	9 October 2002
Citation:	Andre Diniz v. Brazil, Petition 12.001, Inter-Am. C.H.R., Report No. 37/02, OEA/Ser.L/V/II.117, doc. 1 rev. 1 (2002)
Represented by:	APPLICANTS: the Center for Justice and International Law and the Subcommittee on Blacks of the Human Rights Commission of the Ordem dos Advogados do Brasil
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I. SUMMARY

1. On October 7 and 10, 1997, the Center for Justice and International Law (CEJIL) and the Subcommittee on Blacks of the Human Rights Commission of the Ordem dos Advogados do Brasil (OAB/SP) filed a petition against the Federative Republic of Brazil (hereinafter “Brazil” or “the State” or “the Brazilian State”) before the Inter-American Commission on Human Rights (hereinafter “the Commission” or “the IACHR”). The petition alleged violations of Articles 1, 8, 24, and 25 of the American Convention on Human Rights (hereinafter “the Convention” or “the American Convention”), and, in light of Article 29 of the Convention, Articles 1, 2(a), 5(a)(I), and 6 of the International Convention on the Elimination of All Forms of Racial Discrimination (hereinafter “the Convention on Racial Discrimination”), to the detriment of Mrs. Simone André Diniz.

2. The petitioners allege that the State did not guarantee the full exercise of the right to justice and due process of law, erred in respect of the domestic remedies to investigate the racial discrimination suffered by Mrs. Simone André Diniz, and accordingly breached the obligation to ensure the exercise of the rights provided for in the American Convention.

3. The State provided information alleging that the Judiciary had already handed down a judgment on the matter that is the subject of the present complaint, and that, according to the Government, the case submitted did not involve any human rights violation.

4. After analyzing the petition, and in keeping with Articles 46 and 47 of the American Convention, the Commission decided to declare the admissibility of the petition, with respect to possible violations of Articles 1, 8, 24, and 25 of the American Convention.

II. PROCESSING BEFORE THE COMMISSION

5. On October 7 and 10, 1997, the IACHR received a complaint against the Brazilian State. On April 10, 1998, the IACHR notified the State and gave it 90 days to respond. On May 12, 1998, the State sent a note setting forth considerations on the case, and committing itself to sending information pertinent to the case in timely fashion. On October 2, 1998, the petitioners sent a fax requesting that the Instituto do Negro Padre Batista be included as a co-petitioner in the complaint analyzed herein. On November 3, 1998, the IACHR sent the Government a note in which it reiterated the request for information made on April 10, 1998, and gave the State 30 days to respond. On December 9, 1998, the Brazilian Government presented its observations on the complaint.

III. THE PARTIES' POSITIONS

A. Position of the petitioners

6. In their complaint brief the petitioners alleged that the Brazilian State violated the rights of Mrs. Simone André Diniz set forth at Articles 1(1), 8, 24, and 25 of the American Convention, and, in light of Article 29 of the Convention, Articles 1, 2(a), 5(a)(I), and 6 of the International Convention on the Elimination of All Forms of Racial Discrimination. Accordingly, the petitioners requested that Brazil be found responsible for violating the above-noted rights, that a recommendation be made to the State to proceed to investigate the facts, to make compensation to the victim, and to give publicity to the resolution in this case in order to prevent future incidents of discrimination based on color or race.

7. According to the petitioners, on March 2, 1997, Mrs. Aparecida Gisele Mota da Silva took out a classified ad in A Folha de São Paulo, a large-circulation newspaper in the state of São Paulo, in which she communicated her interest in hiring a domestic employee in which noted, among other things, her preference for a white person.[FN1] Student and domestic employee Simone André Diniz, upon seeing the ad, called the phone number indicated, and introduced herself as a candidate for the job. Received by Mrs. Maria Tereza, the person entrusted by Dona Aparecida to receive the candidates' phone calls, she was asked about the color of her skin, and she immediately answered that she is Black, and was then informed that she didn't meet the requirements for the job.

[FN1] The ad in question stated as follows: "domestic (female). Home. Live-in. W/ exp. All routine, care for children, with documentation. And ref.; Pref. White, without children, single, over 21. Gisele" ("doméstica. Lar. P/ morar no empr. C/ exp. Toda rotina, cuidar de crianças, c/docum. E ref.; Pref. Branca, s/filhos, solteira, maior de 21a. Gisele").

8. Mrs. Simone Diniz immediately reported the racial discrimination she suffered and the racist ad to the Ordem dos Advogados do Brasil, São Paulo Section, in particular the Subcommittee on Blacks, and, accompanied by an attorney, she lodged a criminal complaint with the then-Special Division for Racial Crimes (Delegacia de Crimes Raciais). On March 5, 1997, a police inquiry was opened, number 10,541/97-4, to investigate the violation of Article 20 of Law 7716/89, which defines the practice of racial discrimination or prejudice as a crime.[FN2] The police officer responsible for the inquiry took sworn statements from all of the persons involved: the alleged perpetrator of the violation and her husband, the alleged victim, and the woman who received the phone call from Mrs. Simone Diniz.

[FN2] Law 7716/89 Art. 20 Practicing, inducing, or inciting racial discrimination or prejudice. Penalty: imprisonment for 1 to 3 years and fine.... Paragraph 2 If any of the crimes provided for in the caption is committed through the communications media or a publication whatever the type: Penalty: imprisonment for 2 to 5 years and fine.

9. According to the petitioners, on March 19, 1997, the police officer prepared a report on the criminal complaint and forwarded it to the judge. The Public Ministry was informed of the inquiry—only the Public Ministry has standing to initiate a public criminal action—it stated its position on April 2, 1997, ordering that the proceeding be archived, arguing that “... it was not found in the record that Aparecida Gisele had committed any act that could constitute the crime of racism, provided for in Law 7716/89...” and that the record reflected “... no basis for filing charges.”

10. The petitioners reported that the judge rendered a judgment to archive the case on April 7, based on the reasons set forth by the member of the Public Ministry.

11. The petitioners alleged that the police inquiry had sufficient and adequate indicia of evidence for the criminal complaint based on the violation of Article 20, caption, of Law 7716/89, i.e., the identity of the perpetrators and materiality of the criminal offense was proven. In addition, they reported that the mere publication of the discriminatory classified ad had itself constituted the punishable crime, under paragraph 2 of Article 20 of the same law; these facts suffice for the Public Ministry to have filed criminal charges.

12. Moreover, according to petitioners, the Public Ministry could not have based its line of argument on the alleged and not proven fact that Mrs. Aparecida had had a negative experience with a Black employee who mistreated her children. Those facts, according to the petitioners, did not authorize Mrs. Aparecida to discriminate against any other Black domestic employee. In addition, the mere fact of being married to a Black man does not release her from liability or make her less guilty of the offense.

13. Finally, they adduced that “even though the Public Ministry issues its opinion in favor of archiving the police inquiry, the judge was not under an obligation to accept it. If he did so, it was because he was not diligent in looking into the facts.”

14. The petitioners alleged that the Brazilian State undertook to comply with the provisions of the Convention on Racial Discrimination, and consequently to “condemn racial discrimination” and “to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation.” Moreover, they reported that pursuant to the Convention on Racial Discrimination, Brazil undertook to “guarantee the right of everyone, without distinction as to race, color, ... ” ... “the right to equal treatment before the tribunals and all other organs administering justice.”

15. In addition, they reported that Brazil undertook to ensure “to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.”

16. The petitioners alleged that in Brazilian criminal procedure, no appeal can be taken from a judgment to archive a police inquiry, unless new facts arise that justify opening a new investigation. According to the petitioners, that decision kept Mrs. Simone from proving, in a criminal proceeding, that Mrs. Aparecida Gisele engaged in racial discrimination; moreover, the possibility of a civil action for moral damages, in the event that she had been held criminally liable, was also precluded. These acts violated her right of access to justice. At the same time, Mrs. Simone was denied the right to equal treatment by the justice system, in relation to those victims whose complaints had been investigated and reported by the Public Ministry so that liability could be determined.

B. The State’s position

17. The State, in a brief dated May 12, 1998, provided clarifications, reserving the right to transmit pertinent information, in due course, that it might receive on the case. Nonetheless, it declared that “based on a reading of the petition, it does not perforce lead to the perception that in their communication to the Commission the petitioners have clearly laid the foundation for the alleged violation of the American Convention on Human Rights and of the Convention on the Elimination of All Forms of Racial Discrimination.”

18. In effect, the Brazilian Government noted that “the ‘automatic’ processing of manifestly unfounded petitions could generate unnecessary disquiet, in addition to diverting material and human resources available in the Commission and the member states for processing petitions that should be declared inadmissible *ab initio*.”

19. In addition, the State recalled that “Article 47(c) of the American Convention on Human Rights, as well as Article 41(c) of the Commission’s Rules of Procedure, determine that the Commission should declare inadmissible any petition which, based on the presentation by the petitioner or the State, is groundless or out-of-order. The so called *pro homine* principle, which governs international systems for the protection of human rights—and according to which the states bear the burden of proof—only makes sense in a context of likely and well-founded

allegations. Otherwise, one runs the risk of undermining the transparency and juridical security of the system.”

20. The State insisted that the case in question did not entail a violation of human rights. It said that “the police inquiry was conducted in keeping with the rules of Brazilian legislation, and archived by the competent judicial authority based on the opinion of the Public Ministry, after hearing the sworn statements of the persons involved.”

IV. ANALYSIS OF ADMISSIBILITY

A. Competence of the Commission *ratione personae*, *ratione materiae*, *ratione temporis*, and *ratione loci*

21. In keeping with Article 44 of the American Convention and Article 23 of the Rules of Procedure, the petitioners, as legally-recognized non-governmental organizations, have standing to present petitions to the Commission referring to alleged violations of the rights established in the American Convention. As for the State, Brazil is a party to the American Convention, and therefore answers internationally for violations of that Convention. The Commission observes that the facts with respect to which racial discrimination is alleged are not attributed directly to the Brazilian State, but to a private person. Nonetheless, violations of the Convention are alleged in relation to the State’s response, through its judicial organs, to the facts alleged, which are to be analyzed by the Commission in the merits stage. The petitioners noted as the alleged victim Mrs. Simone André Diniz, a national, with respect to whom the Brazilian State undertook to respect and ensure the rights set forth in the Convention. Accordingly, the Commission has competence *ratione personae* to examine the complaint.

22. The Commission is competent *ratione materiae* as violations have been alleged of human rights protected by the American Convention at Articles 1, 8, 24, and 25. With respect to the violation of rights protected by the International Convention on the Elimination of All Forms of Racial Discrimination, it should be noted that the Commission is not competent to examine violations of the rights guaranteed by that Convention. Nonetheless, in light of Article 29 of the American Convention, the Commission may use the Convention on Racial Discrimination as guidance for interpreting the international obligations freely assumed by the State.

23. The Commission is competent *ratione temporis* insofar as the facts alleged occurred when the obligation to respect and ensure the rights established by the Convention was already in force for the State, as it ratified the American Convention on September 25, 1992.

24. The Commission is competent *ratione loci* because the facts alleged occurred in the territory of the Federative Republic of Brazil, which has ratified the American Convention.

B. Admissibility requirements

a. Exhaustion of domestic remedies

25. The petitioners lodged this petition with the IACHR in October 1997, arguing that the victim had exhausted domestic remedies for investigating and punishing the offense of which Mrs. Aparecida is accused. It reported that the incident occurred on March 2, 1997. The police inquiry was opened on March 5, 1997. The pertinent report was sent to the competent judge. On April 2, 1997, the Public Ministry issued its opinion. On April 7, 1997, the criminal judge rendered the judgment, ruling that the record be archived.

26. The State did not controvert this fact; indeed, it ratified the final nature of the decision of first instance, against which no appeal lies.

27. Accordingly, the IACHR is of the view that domestic remedies were exhausted and that the requirement at Article 46(1)(a) has been met.

b. Time period for submission

28. The present complaint was filed in timely fashion, under Article 46(1)(b), as it was formally lodged on October 7, 1997, prior to the expiration of the six-month period provided for by the Convention, as the judgment, which is non-appealable, was rendered on April 7, 1997; this satisfies the requirement at Article 46(1)(b) of the American Convention.

c. Duplication of procedures and res judicata

29. The Commission does not see any indication in the record that the complaint brought before this Commission is pending before any other international procedure, and it did not receive any information indicating the existence of such a situation; likewise, there is no indication that it reproduces any petition or communication previously examined by the IACHR. Accordingly, the Commission understands that the requirement of Articles 46(1)(c) and 47(d) have been met.

d. Characterization of the facts

30. The Commission considers that prima facie the facts alleged by the petitioners state facts that tend to establish a violation of the American Convention at Articles 1, 8, 24, and 25, for possible violations of the obligation to respect the rights, the right to a fair trial, the right to equality before the law, and the right to judicial protection, in the person of Mrs. Simone André Diniz.

31. As for the statement made by the State regarding the inadmissibility of the petition for being unfounded, the Commission is of the view that establishing whether or not there has been a violation of the American Convention is not for this stage of the proceeding. For purposes of admissibility, the IACHR must decide whether facts have been alleged that tend to establish a violation, as stipulated by Article 47(b) of the American Convention, and whether the petition is “manifestly groundless,” or “obviously out of order,” as per Article 47(c). The standard of appreciation of these rules is different from that required to decide on the merits of a complaint. The IACHR must make a prima facie evaluation to examine whether the complaint states facts indicative of an apparent or potential violation of a right guaranteed by the Convention, and not

to establish the existence of a violation. This examination is a summary analysis that does not imply a pre-judging or preliminary opinion on the merits. The Commission's Rules of Procedure, on establishing two clear stages for admissibility and merits, reflects the distinction between the evaluation that the Commission must make for purposes of declaring a petition admissible and that required to establish a violation. From the analysis of the petition now under consideration, the Commission considers that the complaint does not fit under Article 47(b) or (c), and therefore that it meets the requirements of the American Convention.

V. CONCLUSION

32. The Commission concludes that it is competent to take cognizance of this petition and that it meets the admissibility requirements set forth at Articles 46 and 47 of the American Convention.

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,

DECIDES:

1. To declare, without pre-judging on the merits of this complaint, that the present petition is admissible in relation to the facts alleged and with respect to Articles 8 (right to a fair trial), 24 (equality before the law), and 25 (right to judicial protection), all in relation to Article 1(1) (obligation to respect the rights contained in the Convention).
2. To forward this report to the State and the petitioners.
3. To publish this decision and include it in its Annual Report to the OAS General Assembly.

Done and signed at the headquarters of the Inter-American Commission on Human Rights, in the city of Washington, D.C., the 9th day of October 2002. (Signed): Juan Méndez; President, Marta Altolaguirre; First Vice-President, Robert K. Goldman, Julio Prado Vallejo, and Clare K. Roberts, Commission members.