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Institution: Inter-American Commission on Human Rights
File Number(s): Report No. 38/04; Petition 547/01
Session: Hundred and Nineteenth Regular Session (23 February – 12 March 2004)
Title/Style of Cause: Maria Esther Geuna Zapcovich v. Ecuador
Doc. Type: Decision
Decided by: President: Jose Zalaquett;
First Vice-President: Clare K. Roberts;
Second Vice-President: Susana Villaran;
Commissioners: Evelio Fernandez Arevalos, Paulo Sergio Pinheiro, Freddy Gutierrez, Florentin Melendez.
Dated: 12 March 2004
Citation: Geuna Zapcovich v. Ecuador, Petition 547/01, Inter-Am. C.H.R., Report No. 38/04, OEA/Ser.L/V/II.122, doc. 5 rev. 1 (2004)
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I. SUMMARY

1. On August 13, 2001, Maria Esther Geuna Zapcovich, an Argentine national residing in Ecuador, (hereinafter “the petitioner”) submitted a petition to the Inter-American Commission on Human Rights (hereinafter “the Commission” or “the Inter-American Commission”) against the Republic of Ecuador (hereinafter “Ecuador” or “the State”) in which she alleged the violation of the following rights protected by the American Convention on Human Rights (hereinafter “the Convention” or “the American Convention”): the right to due process and judicial protection (Articles 8 and 25) in that the judicial proceedings were unduly prolonged and biased and lasted four years in violation of the obligations assumed by the State set forth in Article 1(1) when it ratified the above-mentioned treaty.

2. The allegations of the petitioner in this case concern medical malpractice but the focus of her complaint is on the delays in the judicial proceedings to vindicate her right to compensation for the alleged malpractice and the alleged denial of justice for the failure of the court to find in her favor. The gist of Ms. Geuna’s complaint is that no one was punished for the harm that had been inflicted upon her and that she received no compensation. The judicial proceedings began on May 26, 1997, and then, five years later, on June 7, 2002, the Ecuadorian courts concluded that the cause of action was barred by the statute of limitations. The State maintains that the petition should be declared inadmissible in light of the fact that domestic remedies have not been exhausted.

3. In this report, the Commission analyzes information submitted in accordance with the American Convention and it concludes that the petition fails to comply with the requirements for admissibility set forth in Article 46 of the American Convention. Specifically, the Commission

finds that the petition does not state facts that tend to establish a violation of the American Convention, and falls within one of the grounds pursuant to which the Commission is to declare a petition inadmissible. Accordingly, pursuant to Article 47(b) of the American Convention, the Commission decides to declare the petition inadmissible, to notify the parties of this decision, and to publish the report in its Annual Report.

II. PROCESSING BEFORE THE COMMISSION

4. On January 7, 2003, the Commission transmitted the complaint filed by the petitioner on August 13, 2001, and the additional information presented by the petitioner on December 4, 2002, concerning Maria Esther Geuna Zapcovich to the Government of Ecuador with a request that the State respond within the two month time period set forth in Article 30(3) of the Commission's Rules of Procedure. On May 22, 2003, after the expiration of the allotted time period set forth in the Commission's Rules, the Government of Ecuador responded to the allegations in the complaint and requested that the Commission declare the petition inadmissible and immediately proceed to file it. Further, the State alleged that the petitioner had failed to exhaust available domestic remedies and that she failed to characterize a violation of the American Convention.

5. The State's response was transmitted to the petitioner on May 29, 2003 and any observations requested within one month. The petitioner presented her observations to the State's response on June 27, 2003. On July 21, 2003, the Commission transmitted the observations of the petitioner to the State and requested that any further observations be presented to the Commission within one month. On September 24, 2003, the State submitted further observations on the petition. On October 17, 2003, the additional observations of the State were transmitted to the petitioner and any further observations requested within one month. On October 28, 2003, the petitioner presented additional observations, which were transmitted to the State on November 13, 2003. The Commission has received no further communications from the parties on this case.

III. POSITIONS OF THE PARTIES

A. Position of the petitioner

6. On November 5, 1992, Maria Esther Geuna Zapcovich, who was affiliated with the Ecuadorian Institute of Social Security entered the Carlos Andrade Marin Hospital in Quito on November 5, 1992 for treatment for a detached retina in her left eye. She had eye surgery on November 12, 1992, at approximately at 11 a.m. The surgery was carried out by Dr. Hortensia Betancourt Merlo with the assistance of Dr. Cesar Naranjo and Dr. N. Tinajero. After the operation, Ms. Geuna was ordered to have complete rest until February 16, 1993. She developed a serious infection in the eye that had been operated on but was told that she was fine and could return to work. However, the eye was so delicate, that when she returned to work on February 17-19, 1993, she was again ordered to take off for 15 days and rest (February 24 until March 10, 1993). Nonetheless, she returned to work from March 11 until April 12, and then again was told to rest on April 13-14, 1993. She returned to work again during the period April 15-May 6, 1993.

7. The condition of Ms. Geuna's eye continued to deteriorate and she returned to the Carlos Andrade Marín Hospital where a surgical cleaning was undertaken. She was released on May 26, 1993.

8. On Friday, June 4, 1993, Ms. Geuna entered the Ophthalmic Clinic in Quito, a private clinic, and was again operated on, this time by Dr. Esteban Velastegui Camorali. This operation aggravated the eye even more and resulted in an almost total loss of vision in her left eye. According to the NGO mentioned above, Ms. Geuna was the object of medical malpractice, since Dr. Velastegui, the specialist who treated her, carried out the operation on June 14, 1993, at a time when he was not yet authorized to exercise the professional specialization, in violation of Article 174 of the Health Code of Ecuador. The NGO did not provide any documentary evidence to substantiate this claim, nor was the claim ever raised in any of the legal proceedings. Since the petitioner is a woman over the age of sixty, whose eyesight has been seriously diminished, she states that as a result of the injury to her eye she has had to cease working and has been left virtually an invalid. The malpractice involved in this case is criminalized under Ecuadorian law, according to the petitioner, and set forth in Article 468 of the Criminal Code, in force at the time. The above-referenced provision of the Criminal Code provides that anyone who harms another and causes a sickness or transitional incapacity will be punished by prison from between one to six months and a fine of 80 to 200 sucres.

9. The gist of Ms. Geuna's complaint is that two doctors were responsible for medical malpractice because they destroyed the vision in her left eye. She sued in the Ecuadorian courts but was denied justice, she claims, and she has come to seek justice at the Inter-American Commission. She claims that no one was punished for the harm that had been inflicted upon her and that she received no compensation. The judicial proceedings dragged on for years. Beginning on May 16, 1997, Ms. Geuna sued Drs. Hortensia Betancourt Merlo and Dr. Esteban Velastegui Camorali in the 12th Criminal Court accusing the two doctors of medical negligence and seeking compensation in the amount of 150 million sucres (approximately \$US 50,000.00).

10. The Court initiated proceedings on May 26, 1997. The 15th Criminal Judge of Pichincha, Dr. Hernán Soto, assumed the case on August 14, 1997. Ms. Geuna requested that the preliminary proceedings be concluded on November 11, 1997 and again on December 18, 1997. In 1998, the case passed to Judge Dr. Franklin Yáñez V., and he declared the preliminary proceedings to be completed on September 14, 1998.

11. In 1999, the case passed to the 14th Criminal Judge, Dr Jaime Santos Basantes, who, on April 16, 1999, issued a ruling in favor of the respondent physicians. The case was then passed to the Sixth Chamber of the Superior Court. The petitioner, on December 21, 1999, requested reopening of the evidentiary proceedings, but the Judge ruled on February 7, 2000 that the request was extemporaneous.

12. On March 22, 2000, the petitioner sought the recusal of the judge and on March 24, 2000, the Fourth Criminal Judge assumed the case. On April 10, 2000 the Eighth Criminal Judge assumed the case. On July 5, 2000, the petitioner again sought to recuse the judge and on July 17, 2000 the Judge in charge of the 15th Criminal Court assumed the case. On August 30, 2000, the petitioner sought to recuse the judge and on September 15, 2000, the 18th Criminal Judge

assumed the case. On October 16, 2000, the judge declared himself unable to continued with the case. On November 9, 2000, the Fifth Criminal Judge ordered Drs. Gustavo Suárez, Delia Landázuri de Guerra and Marcelo Larco to testify. On December 4, 2000 the case entered the Seventh Criminal Court.

13. On December 11, 2000, the Seventh Criminal Judge assumed the case. On December 11, 2000 the petitioner requested that all the pending evidence be allowed to be presented. The petitioner claims that she was never allowed to present the pending evidence.

14. On June 5, 2001, the Seventh Criminal Judge issued a definitive dismissal of the charges against Esteban Velastegui. On September 5, 2001, the Sixth Chamber of the Superior Court, which, by law, must review the dismissal of charges issued by a lower court, issued a provisional dismissal of the charges and of the defendant.

15. The case was remanded to the Seventh Criminal Judge, and despite having presented various motions, none of them was ever granted. On June 7, 2002, the criminal action was declared barred by the statute of limitations since five years had elapsed since the events occurred. The petitioner appealed and the Sixth Chamber of the Superior Court on December 9, 1992 confirmed the lower court's holding that the action was time-barred.

B. Position of the State

16. In its reply dated May 6, 2003, the Attorney General stated that when the petition was presented, domestic remedies had not yet been exhausted.

17. The State maintained that the petitioner had failed to present facts that characterize a violation of the American Convention, and, consequently, that she failed to comply with the requirements of Article 47(b) of the American Convention. The State concludes that the Commission cannot attribute international responsibility to the State if there is no violation either of the American Convention or any other human rights treaty attributable to a member State of the Organization of American States.

18. The State noted that as concerns the requirement that the petitioner has a right to a hearing, with due guarantees and within "a reasonable time", as set forth in Article 8(1) of the American Convention, reference should be made to the Suarez Rosero case, in which the Inter-American Court of Human Rights (hereinafter, the Inter-American Court) stated:

The purpose of the principle of 'reasonable time' to which Articles 7(5) and 8(1) of the American Convention refer is to prevent accused persons from remaining in that situation for a protracted period and to ensure that the charge is promptly disposed of.[FN1]

In this context, the State alleged that it had respected this guarantee and that the proceedings were carried out within a "reasonable time". If there had been an unwarranted delay in the administration of justice, the State noted, then the denial of justice exceptions sets forth in Article 46(2) would apply. The State invoked the jurisprudence of the European Court, which held in the Stogmuller judgment of November 10, 1969, that the reasonableness of a measure or

a time period must be understood in its own specific context, that is to say that there are no generally criteria of universal validity, and that it is a matter of what legally is called a question of fact.

[FN1] See Suarez Rosero Case, Judgment of November 12, 1997, at para. 70.

19. The State submits that international human rights jurisprudence has not fixed a precise quantum of time for the duration of a trial, but that it has established definite and certain criteria that are to be taken into consideration when dealing with a concrete case. Adapting the criteria established by the European Court to the present case, the “reasonableness” of the time period should be evaluated in its specific context, as a consequence of which it will be determined that the State dealt with the case in the time period allotted to this type of proceedings and within the resource possibilities that the State had available to it. As a result, the Commission and Court cannot find that the State has violated the guarantee established in Article 8(1) of the American Convention.

20. The State also emphasized that it always preserved the petitioner’s right to a defense in all the proceedings. In the present case, the right to defense included the right to present evidence, the right to present legal arguments etc. In this case, the State affirmed that the petitioner had all the resources of Ecuadorian law available to her. The courts accepted all the motions and causes of actions that she presented and it processed the numerous requests for the judges to recuse themselves. The guarantees of due process were available to the petitioner, as well as the entire legal apparatus of the State. At no point was she impeded from exercising her right to be heard, in conditions of equality, before the competent organs of the State.

21. In the additional information presented by the State, dated September 25, 2003, the Attorney General argued that the petitioner was attempting to use the Commission as a “fourth instance.”

22. The State noted that the petitioner had at her disposition all the domestic remedies available under Ecuadorian law, but that she did not receive, at the end, the results that she had hoped for. For that reason, she attempted to have a number of judges recuse themselves. The judges all dismissed the charges that she brought and the defendants were not found to have been responsible for her injuries, since she was unable to substantiate, by law, their culpability. Since she was unhappy with the results of the judicial proceedings, she brought a number of appeals before the higher courts, and these courts confirmed the dismissal orders for the reasons mentioned, which created the result that the judicial proceedings were dragged out, but as a result of the petitioner’s own actions.

23. In addition, the State maintained that as a result of the Commission’s “fourth instance” formula, it cannot review the decision of national tribunals that act within the sphere of their own competence and pursuant to the requisite judicial guarantees, unless a violation of the American Convention has been committed.

24. The Commission, the State pointed out, is competent to declare a petition admissible and to issue a judgment on the merits when it refers to a domestic court judgment that has been issued without the requisite due process, or when another specific right guaranteed by Convention has been violated. If the petition limits itself to affirming that the judgment was wrong or unjust and nothing more, the petition must be rejected pursuant to the formula mentioned above. The Commission's function, according to the State, is to guarantee the observance of the obligations assumed by the State Parties to the Convention, but it is not intended to transform itself into a higher court and to examine alleged errors of law or fact which may have been committed by national tribunals that acted within their scope of their competence.

25. According to the State, the fact that the petitioner is not happy with the judicial decisions that have been issued in her case, within the competence of these judges, does not furnish grounds for the Commission to review these decisions. Such a situation strips the Inter-American system for the protection of human rights of its nature, and given the subsidiary nature of the system, the Commission cannot act as an appeals court to review the decision of the national tribunals when they are acting within the framework of the due process of law.

26. The State concluded that the present petition did not fulfill the requirements established in Article 46 of the American Convention and Article 38 of the Rules of Procedure and requested that the Commission declare the petition inadmissible and proceed to archive it.

IV. ANALYSIS OF ADMISSIBILITY

A. Competence of the Commission *Ratione Materiae*, *Ratione Personae*, *Ratione Temporis*, and *Ratione Loci*

27. The Commission has competence *ratione materiae*, in that the petitioners allege violations of Articles 1, 8, and 25 of the American Convention.

28. The Commission has competence *ratione personae* to examine the complaint. Under Article 44 the petitioner is entitled to submit complaints to the Commission, and the alleged victim in this case is an individual with respect to whom Ecuador had undertaken to guarantee and respect the rights enshrined in the American Convention.

29. The Commission has competence *ratione temporis* in that the sequence of events began in June 1988, when the obligation of respecting and ensuring the rights enshrined in the American Convention was already in force for the Ecuadorian State. The Commission notes that Ecuador has been a State party to the American Convention since ratifying it on December 28, 1977.

30. The Commission has competence *ratione loci*, since the incidents described in the petition took place in Ecuadorian territory, in an area under the jurisdiction of the State.

B. Other Requirements for Admissibility

a. Characterization of the Alleged Facts

31. The State argues that international responsibility cannot be attributed to Ecuador for actions that did not comprise a violation of the American Convention. The petitioner states that the alleged medical malpractice is not the basis of her complaint, but rather the delays that she incurred in pursuing her case before the judiciary, and the serious damage that this caused her, which she alleges constituted a violation of Articles 8(1) and 25 of the American Convention. The petitioner cites the relevant provisions of the Code of Criminal Procedure to conclude that the proceedings, by law, were not permitted to last more than 81 days, and if the mandatory consultation with the Superior Court is included in the calculation, then the entire proceedings are by law to be terminated in a maximum of 96 days. In her case, she argues, the provisional dismissal of the charges against the accused doctors was not issued until after four years and four months of litigation had expired, and the decision that the case was barred by the statute of limitations was issued by the Superior Court in December 1992, after more than five years of litigation. The petitioner alleges that this failure to adhere to the prescribed time periods constitutes an automatic violation of her right to due process and judicial guarantees under the American Convention.

32. The Commission is of the view that the guarantee set forth in Article 8(1) of the American Convention is that every person has the right to a hearing with due guarantees and within a “reasonable time.” Despite the fact that Ecuadorian law provides specific time periods for the completion of the different stages of the domestic judicial proceedings, the Commission does not consider these provisions to be anything more than guidelines to assist it in making its determination. The Commission stated in an earlier case involving the long-term preventive detention of a number of petitioners, some of whom had been detained as long as 5 or 6 years, despite the provision of the domestic law that explicitly prohibited preventive detention for longer than two years, that: “The duration of preventive detention (...) cannot be deemed reasonable solely because it is the term established by the law.” The Commission noted that the reasonableness of the detention “must be founded on prudent legal judgment” and that it is “up to the court hearing the case to determine whether the term in question is reasonable.”[FN2]

[FN2] See Report N° 2/97 (Argentina), March 11, 1997, at paras. 18-9.

33. The Commission considers that the petitioner has not substantiated her case that the delays in the judicial proceedings caused her serious damage, other than the failure to obtain punishment against the doctors, and this was not as a result of the delays in the proceedings but rather the failure to secure a conviction. As regards the exhaustion of domestic remedies with regard to the charges under Articles 8 and 25, although the petitioner sought to recuse the judges who did not complete the different stages of the proceedings within the allotted time, this only resulted in further delay of the proceedings, since each new judge had to familiarize himself with the case. As the European Court stated in a similar context, in the Kolompar case, “the (...) State cannot be held responsible for the delays to which the applicant’s conduct gave rise. The latter cannot validly complain of a situation which he largely created.”[FN3] Furthermore, no evidence has been presented that the petitioner sought indemnification at the national level for the failure of the domestic courts to adhere to the time frames set forth in the domestic law, so these claims would have to be dismissed for failure to exhaust domestic remedies. As the State pointed out,

the international instance is subsidiary to the national instance, the petitioner is obliged first to seek a remedy for her claim at the national level before bringing the claim to the international level.

[FN3] See, Kolompar, 24 September 1992, Series A, no. 235-C, at. para. 42.

34. Consequently, the Commission concludes that this petition falls within the grounds, pursuant to which the Commission is mandated to declare a petition inadmissible, set forth in Article 47(b) of the American Convention, for failure to state facts that tend to establish a violation of the rights guaranteed by the Convention.

V. CONCLUSION

35. In the present report, the Commission has established that while the domestic remedies were exhausted, the facts set forth in the petition failed to characterize a possible violation of the American Convention. Once the Inter-American Commission has concluded that the case is inadmissible because of a failure to comply with one of the admissibility requirements stipulated in Article 46 of the Convention, or falls within one of the grounds set forth Article 47 of the Convention, concerning petitions to be declared inadmissible, it need not decide any other facts.

36. Based on the above legal and factual considerations, the Commission concludes that the petition at hand is inadmissible pursuant to Article 47(b) of the American Convention and, without prejudging the merits of the case,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,

DECIDES:

1. To declare this petition inadmissible.
2. To transmit this report to the petitioner and to the State.
3. To publish this report and to include it in the Commission's Annual Report to the General Assembly of the OAS.

Done and signed at the headquarters of the Inter-American Commission on Human Rights, in the city of Washington, D.C., on the 12th day of March, 2004. (Signed): José Zalaquett, President; Clare K. Roberts, First Vice-President; Susana Villarán, Second Vice-President; Evelio Fernández Arévalos, Paulo Sergio Pinheiro, Freddy Gutiérrez and Florentín Meléndez, Commissioners.