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Title/Style of Cause: Asmeth Yamith Salazar Palencia v. Colombia
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Decided by: President: Clare K. Roberts;
First Vice-President: Susana Villaran;
Second Vice-President: Paulo Sergio Pinheiro;
Commissioners: Evelio Fernandez Arevalos, Jose Zalaquett, Freddy Gutierrez, Florentin Melendez.
Dated: 22 February 2005
Citation: Salazar Palencia v. Colombia, Petition 462/04, Inter-Am. C.H.R., Report No. 4/05, OEA/Ser.L/V/II.124, doc. 5 (2005)
Represented by: APPLICANT: the Corporacion Colectivo de Abogados "Jose Alvear Restrepo"
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I. SUMMARY

1. On May 7, 2004, the Inter-American Commission on Human Rights (hereinafter "the Commission" or "the IACHR" received a petition lodged by the Corporación Colectivo de Abogados "José Alvear Restrepo" (hereinafter "the petitioners") claiming that the Republic of Colombia (hereinafter "the State," "the Colombian State," or "Colombia") is responsible for failing to provide access to an effective judicial remedy for the determination of the rights of Asmeth Yamith Salazar Palencia in light of final judgments adopted by the Constitutional Court and the Supreme Court of Justice of Colombia.

2. The petitioners claim that the State is responsible for violations of Articles 8 (fair trial), 9 (principle of freedom from ex post facto laws, and 25 (judicial protection) of the American Convention on Human Rights (hereinafter "the Convention" or "the American Convention") in relation to Article 1(1) of that treaty. They also claim that the petition is admissible because the admissibility requirement of exhaustion of domestic remedies set forth in Article 46(1) of the Treaty is not applicable in this matter. The State, for its part, did not present its position on the factual and legal arguments made by the petitioners, despite the Commission's requests for information.

3. After analyzing the available information, the Commission declared the case admissible in relation to the alleged violations of Articles 8 and 25 of the Convention, in accordance with the requirements set forth in Articles 46 and 47 of the Convention and decided to notify the parties and publish its report.

II. PROCESSING BEFORE THE COMMISSION

4. The Commission registered the petition with number P462/2004 and on July 27, 2004, forwarded to the State a copy of the pertinent portions, with a deadline of two months to submit information on the allegations made, in accordance with Article 30(2) of the IACHR's Rules of Procedure. On October 1, 2004, the Colombian State requested a 30-day extension from the Commission to submit its response. On October 8, 2004, the Commission granted the extension as requested. On November 12, 2004, the Colombian State requested that the Commission grant it another 30-day extension to submit its response, which was denied in view of the provisions of Article 30(3) of the IACHR's Rules of Procedure.[FN1] When the deadline expired, the State refrained from submitting its observations.

[FN1] Article 30(3) of the IACHR's Rules of Procedure stipulates that "the State shall submit its response within two months counted from the date the request is transmitted. The Executive Secretariat shall evaluate requests for extensions of this period that are duly founded. However, it shall not grant extensions that exceed three months from the date of the first request for information sent to the State."

III. POSITIONS OF THE PARTIES

A. Position of the petitioners

5. The petition indicates that on February 23, 2000, Mr. Asmeth Yamith Salazar Palencia was sentenced to twelve months in prison, a fine of \$20,000 Colombian pesos, and a prohibition on performing public functions in a ruling handed down by Criminal Circuit Court 28 of Bogotá, for having acted as an intermediary to conceal the capital gains of a former public servant convicted of illicit enrichment.[FN2] On March 6, 2001, the Superior Court of the Bogotá Judicial District upheld this decision. Subsequently, Mr. Salazar Palencia lodged an extraordinary appeal for annulment [recurso extraordinario de casación] before the Superior Court of the Judicial District of Bogotá, which was admitted and remanded to the Criminal Chamber of the Supreme Court of Justice.

[FN2] The Special Investigations Office of the Procuraduría General de la Nación investigated former public official Francy Linares Bejarano for allegedly obtaining unjustifiable capital gains in the performance of her duties. That office determined that in order to divert control over unjustifiable capital gains, the individual under investigation turned to Mr. Asmeth Salazar Palencia to put his name on one of the illegally acquired properties.

6. On December 5, 2002, the Criminal Chamber of the Supreme Court of Justice refused to admit the motion for annulment and voided the appeal lodged, pursuant to Law N° 553/2000 which stipulates that in order for the imposition of an offense to be eligible for annulment in common proceedings, it must be punishable with a prison sentence of more than eight years, a

requirement that in the Court's opinion, had not been met in this case. Moreover, the Supreme Court—based on the procedural requirements in effect—considered that the grounds for exception, such as the need to harmonize jurisprudence or the violation of judicial guarantees, had not been invoked.

7. In response, Mr. Salazar Palencia lodged a tutela action before the Civil Chamber of the Supreme Court demanding immediate protection of his basic rights to due process and access to administration of justice.[FN3] On January 24, 2003, the Civil Chamber of the Supreme Court ruled against the request, indicating that it was not procedurally possible to lodge challenges or other types of remedies, given the absence of hierarchically superior organs. The Court also indicated that it was inappropriate to remand the matter to the Constitutional Court since the decision not to admit the tutela action could not be equated with the type of rejection on the merits capable of giving rise to a remedy before that final level.

[FN3] In this regard, the petitioners indicate that the grounds for the action instituted related to the validity of the appeal for annulment in accordance with the length of sentence required by procedural norms for the filing of tutela remedies, since the sentence imposed for the type of offense for which Mr. Salazar Palencia was convicted was eight years in prison. In this regard, they alleged that the Criminal Procedures Code, which predates law 553/2000, stipulated the validity of remedies for crimes punishable by six years or more of prison and that the Supreme Court should have applied that regulation based on the principle of favorabilidad recognized in Article 29 of the National Constitution, when it reviewed the admissibility of the appeal for annulment.

8. On January 31, 2003, Mr. Salazar Palencia filed a right to petition before the then-President of the Constitutional Court, requesting that it rule on the matter. In response, on August 6, 2003, the Constitutional Court ruled to protect Mr. Salazar Palencia's right to access to justice and declared without merit and in contravention of the relevant legal and constitutional norms – including the declaration of non-enforceability of Decree N° 553/2000— the decision of the Civil Chamber of the Supreme Court of Justice to set aside the tutela remedy without remanding it to the Constitutional Court for a possible review.[FN4] Consequently, the Constitutional Court overturned the ruling issued by the Civil Chamber and, in order to reinstate the rights affected, ordered that the proceedings be sent back to the Civil Chamber of the Supreme Court of Justice for a new ruling on the merits of the tutela remedy lodged by Mr. Salazar Palencia against the December 5, 2002, ruling issued by the Criminal Chamber of the Supreme Court of Justice. It further indicated that this ruling should respect the erga omnes effect of non-enforceability ruling C-252 of 2001 issued by the Constitutional Court.[FN5]

[FN4] The Constitutional Court determined, first, that the Civil Chamber of the Supreme Court of Justice violated due process and incurred in a *via de hecho* [grossly illegal proceeding] by failing to issue a ruling on the merits of the tutela action filed. Second, it stated that the judgment of the Criminal Chamber of the Supreme Court rejecting the appeal for annulment filed by Mr. Salazar Palencia constituted a *via de hecho* inasmuch as it was substantively flawed (it should be

noted that in its ruling it applied a norm that was no longer legally in effect) by applying Decree N° 553/2000, declared unenforceable by judgment C-252 of 2001 because it violated the principle of favorabilidad inherent to criminal due process. Constitutional Court, Judgment T 678/03 of August 6, 2003.

[FN5] In its Judgment T 678/03 the Constitutional Court established that “[...] in terms of the tutela decision involving the refusal to process the respective action, the Review Chamber of the Court finds that the decision is contrary to the Constitution and the law, and disregards the petitioner’s fundamental right to effective judicial protection. It is for this reason that the Court will proceed, first, to annul the aforementioned decision through a declaration of nullity, and second, it will grant the petitioner’s right to protection within the fundamental right to effective protection of his fundamental constitutional rights [...]. For its part, the decision adopted by the Criminal Chamber of the Supreme Court of Justice and contested through the tutela action, necessarily infringes on the fundamental rights to access to justice, due process, and a defense, since it inadvertently incurs in a *via de hecho* by disregarding a judgment of constitutionality with *erga omnes* effects[...].

9. The petitioners assert that in response, and despite the Constitutional Court decision, on October 2, 2003, the Civil Chamber of the Supreme Court of Justice confirmed the original ruling issued on January 24, 2003. Subsequently, Mr. Salazar Palencia filed a right to petition before the Criminal Chamber of the Supreme Court of Justice requesting that it admit the appeal for annulment in light of the tutela judgment issued by the Constitutional Court. In a judicial writ dated November 14, 2003, the Criminal Chamber pointed out that the Constitutional Court judgment had issued no orders and that in any case, the order indicated that the Civil Chamber should rule on the merits of the tutela remedy lodged.

10. The petitioners assert that this situation led Mr. Salazar Palencia to file a contempt motion [*incidente de desacato*] before the Third Chamber of Review [*Sala de Revisión*] of the Constitutional Court in order to request full compliance with the Constitutional Court judgment protecting his rights. On February 3, 2004, the aforementioned Chamber of the Constitutional Court stated that, in accordance with the law and constitutional norms, the tutela action was valid for any public authority, and not only the administrative authorities, and therefore, the Supreme Court had violated the petitioners’ right to administration of justice and to obtain effective judicial protection of their fundamental rights, when it disregarded the August 6, 2003 judgment. Based on these considerations, the Constitutional Court indicated that “the petitioners have the right to appeal to any judge (whether a single person or a deliberative body), including a corporation of equal hierarchy, to demand, through a tutela action, the protection of their fundamental rights.”[FN6]

[FN6] Constitutional Court, Full Chamber, Judgment of February 3, 2004.

11. In February 2004, the Supreme Court of Justice reacted by issuing a public communiqué from the full chamber in which it “deems it necessary to warn of the dangers to the legal order if the Nation were to allow the Constitutional Court, in addition to its specific functions, to be the

one to establish, in its own judgment and without limitations other than those determined by its members, sometimes with a precarious majority, other competencies than those entrusted to it, in order to act as an all-powerful, omnipotent entity able to overlap with and even substitute, the legitimate constitutional exercise...".[FN7]

[FN7] Declaration of the Supreme Court of Justice, approved by the full chamber during its session on February 19, 2004. Bogotá, March 2004.

12. Meanwhile, on February 3, 2004, Mr. Salazar Palencia filed an appeal before the Council of State, First Administrative Law Section, which was rejected on March 25, 2004 and the proceedings remanded to the Civil Chamber of the Supreme Court of Justice, by jurisdiction, according to the provisions of Decree N° 1382/2000. On April 22, 2004, the Civil Chamber of the Supreme Court reaffirmed the January 24, 2003 decision, thereby rejecting the tutela action and ordering the case set aside without remanding the file to the Constitutional Court for its review.

13. The petitioners claim that the rulings of the Civil Chamber of the Supreme Court of Justice issued on January 24, 2003, October 2, 2003, and April 22, 2004, respectively, violated legal due process and the right to effective judicial protection by failing to comply with the directives issued by the Constitutional Court in a firm and final judgment. The petitioners further claim that the principle of protection from ex post facto laws was violated by the failure to admit the appeal for annulment filed by Mr. Salazar Palencia against the ruling of the Criminal Chamber of the Supreme Court, based on the application of a norm that was not in effect: decree N°553/2000, declared non-enforceable [inexequible] by the Constitutional Court. Consequently, in their view the Colombian State has violated the rights to fair trial, equality before the law, protection from ex post facto laws, and effective judicial protection set forth in Articles 8(1), 9, and 25 of the American Convention, as well as the generic obligation to ensure respect for the rights protected by the Treaty enshrined in Article 1(1).

14. With respect to the admissibility of the instant petition, the petitioners claim that it should be excepted from the requirement of prior exhaustion of domestic remedies set forth in Article 46(1) of the American Convention, pursuant to the exception set forth in Article 46(2)(a). They also consider that the six month time period set forth in Article 46(1)(b) of the American Convention is not applicable. In addition, they claim that the failure to enforce a final judgment constitutes an ongoing violation by the State that persists as an infraction of Article 25 of the Convention, and therefore, in such cases this requirement is not applicable.[FN8]

[FN8] The petitioners cite a series of precedents for this interpretation of the American Convention, including the following reports: Report N° 75/99, Case 11.800 Cesar Cabrejos Bernuy, Peru, May 4, 1999, para. 22; Report N° 89/99 Case 12.034 Carlos Torres Benvenuto, Peru, September 27, 1999, para. 23; Report N° 85/01 Case 12.084, Workers of the Metropolitan Municipality of Lima and the Municipal Services Company of Lima, Peru, October 10, 2001, para. 21.

B. Position of the State

15. The State refrained from responding to the factual and legal claims presented by the petitioners and from stating its position on the admissibility of the petition, in accordance with Articles 46 and 47 of the American Convention.

IV. ANALYSIS OF COMPETENCE AND ADMISSIBILITY

16. Before proceeding with a discussion of the requirements for competence and admissibility, the IACHR must call attention to the fact that the Republic of Colombia has refrained from submitting a response to the petitioners' claims and from contesting the admissibility of the petition analyzed herein. The IACHR recalls that the State acquired various international obligations when it ratified the American Convention on Human Rights. In particular, Article 48(1)(a) of the Convention establishes that, upon receiving a petition or a communication, the Commission "shall request information from the government of the State indicated as being responsible for the alleged violations" and that "this information shall be submitted within a reasonable period" (...). Article 48(1)(e) stipulates that the Commission "may request the States concerned to furnish any pertinent information." These provisions stem from the obligation of member States of the Convention to provide the information requested by the IACHR in the processing of an individual case.[FN9]

[FN9] See IACHR, Report N° 129/01, Case N° 12.389, Jean Michel Richardson (Haiti), paras. 11 in the Annual Report of the IACHR 2001; and Report N° 79/03, Petition 139/02 Admissibility, Guy André François (Haiti), Annual Report 2003.

17. The IACHR wishes to underscore the importance of responding to requests for information, since it is based on these that the IACHR adopts its decisions on the petitions received. The Inter-American Court of Human Rights has established that the cooperation of States Party is one of the fundamental obligations acquired in relation to the process before the inter-American System. The Court has underscored that

[i]n contrast to domestic criminal law, in proceedings to determine human rights violations the State cannot rely on the defense that the complainant has failed to present evidence when it cannot be obtained without the State's cooperation. [...] The State controls the means to verify acts occurring within its territory. Although the Commission has investigatory powers, it cannot exercise them within a State's jurisdiction unless it has the cooperation of the State.[FN10]

Moreover, the jurisprudence of the system indicates that "the silence of the accused or elusive or ambiguous answers on its part may be interpreted as an acknowledgment of the truth of the allegations, so long as the contrary is not indicated by the record or is not compelled as a matter of law." [FN11] Consequently, the Commission reminds the State of its obligation to collaborate

with the organs of the inter-American human rights system so that it may carry out its functions in protection of human rights.

[FN10] Inter-American Court of Human Rights, Case of Velásquez Rodríguez, Judgment of July 29, 1988, Ser. C, N°4, paras. 135 and 136. Inter-American Commission on Human Rights, Report N° 28/96, Case N° 11.297, Juan Hernández (Guatemala), October 16 1996, para. 43.

[FN11] Inter-American Court of Human Rights, Case of Velásquez Rodríguez, Judgment of July 29 , 1988, Ser. C, N°4, para. 138. Inter-American Commission on Human Rights, Report N° 28/96, Case 11.297, Juan Hernández (Guatemala), October 16, 1996, para. 45.

A. Competence

18. The Commission is competent prima facie to examine the instant petition. The allegations contained in the petition affected physical persons under the jurisdiction of the State at a time when the obligation to respect and ensure the rights set forth in the Convention were in effect for it.[FN12] The Commission now proceeds to analyze whether the case at hand satisfies the requirements set forth in Articles 46 and 47 of the American Convention.

[FN12] Colombia ratified the American Convention on Human Rights on July 31, 1973.

B. Admissibility Requirements

1. Exhaustion of domestic remedies

19. Article 46(1)(a) of the American Convention establishes that, for a petition lodged before the IACHR to be considered admissible, it must fulfill the following requirement:

a. that the remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law.

As established in the jurisprudence of the Inter-American Court of Human Rights, this rule on prior exhaustion of domestic remedies has been conceived in benefit of the States.[FN13] Therefore, it is a requirement that may be waived, either expressly or by implication, by the State party concerned, without prejudice to the claims lodged by the petitioners. In the case at hand, the State refrained from formulating claims regarding the applicability of Article 46(1) of the American Convention to the petition lodged by the petitioners. Therefore, it is appropriate to conclude that it has tacitly waived its right to contest the exception to the failure to exhaust domestic remedies.

[FN13] Inter-American Court, Matter of Viviana Gallardo et al, No. 101/81, Ser. A, Resolution of July 15, 1981, Judgment of November 13, 1981, para. 26, Case of Velásquez Rodríguez,

Preliminary Exceptions, Judgment of July 26, 1987, Ser. C No. 1, para. 88; Case of Fairén Garbi and Solís Corrales, Preliminary Exceptions, Judgment of June 26, 1987, Ser. C No. 2, para. 87; Case of Godínez Cruz, Preliminary Exceptions, Judgment of June 26, 1987, Ser. C No. 3, para. 86; Inter-American Court, Case of Gangaram Panday, Preliminary Exceptions, Judgment of December 4, 1991, Ser. C No.12, para. 38; Case of Neira Alegría et al, Preliminary Exceptions, Judgment of December 11 1991, Ser. C No.13, para. 30; Case of Castillo Páez, Preliminary Exceptions, Judgment of January 30, 1996, Ser. C No. 24, para. 40, and Case of Loayza Tamayo, Preliminary Exceptions, Judgment of January 31, 1996, Ser. C No. 25, para. 40.

2. Timeliness of the petition

20. The IACHR has established the Colombian State's tacit renunciation of its right to contest the exception to the failure to exhaust domestic remedies in the instant petition specifically, and therefore the requirement set forth in Article 46(1)(b) of the American Convention is not applicable. However, conventional requirements concerning the exhaustion of domestic remedies and the time period of six months counted from the date of notification of the legal judgment exhausting domestic remedies are independent. In these cases, the IACHR must determine whether the petition has been lodged within a reasonable time period.

21. At this time, the IACHR notes that the judicial remedy invoked by Mr. Salazar Palencia in order to achieve a resolution of the alleged harm to his rights due to the failure to adhere to a judgment issued by the Constitutional Court effectively was exhausted on April 22, 2004. In view of the fact that the petition was lodged before the IACHR on May 7, 2004, and by virtue of the circumstances of this particular case, it is appropriate to conclude that it was presented within a reasonable time period.

3. Duplication of proceedings and international res judicata

22. There is no indication in the file that the petition is pending a decision in another proceeding for international settlement, or that it duplicates a petition that has already been examined by this or by any other international body. Therefore, the requirements set forth in Articles 46(1)(c) and 47(d) of the Convention have been fulfilled.

4. Characterization of the facts alleged

23. In the Commission's view, the petitioners' claims regarding the alleged violation of the right to a fair trial and effective judicial protection, if proved, could constitute a violation of the rights protected in Articles 8, and 25, in relation to Article 1(1) of the American Convention. Inasmuch as there is no evidence that these aspects of the petition are lacking in grounds or merits, the Commission considers that the requirements established in Articles 47(b) and (c) of the American Convention have been satisfied. In relation with the petitioners' alleged violation of Article 9 of the American Convention, the Commission estimates that there has not been presented substantive grounds for the specific case, therefore it should not be admissible.

V. CONCLUSIONS

24. The Commission concludes that it is competent to examine the claims submitted by the petitioners on alleged violations of Articles 8, and 25 in relation to 1(1) of the American Convention and that they are admissible in accordance with the provisions set forth in Articles 46 and 47 of the American Convention.

25. Based on the aforementioned factual and legal arguments, and without prejudging the merits of the matter,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,

DECIDES:

1. To declare the instant case admissible in relation to Articles 8, 25, and 1(1) of the American Convention.
2. To notify the Colombian State and the petitioners of this decision.
3. To continue its examination of the merits of the matter.
4. 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 Washington D.C. on the 22nd day of the month of February of 2005. (Signed): Clare K. Roberts, President; Susana Villarán, First Vice-President; Paulo Sérgio Pinheiro, Second Vice-President; Evelio Fernández Arévalos, José Zalaquett, Freddy Gutiérrez, and Florentín Meléndez, Commissioners.