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| Institution: | Inter-American Commission on Human Rights |
| File Number(s): | Report No. 57/05; Petition 12.143 |
| Session: | Hundred Twenty-Third Regular Session (11 – 28 October 2005) |
| Title/Style of Cause: | Eduardo Perales Martinez v. Chile |
| Doc. Type: | Decision |
| 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 Trajo, Florentin Melendez. Commissioner Jose Zalaquett, of Chilean nationality, did not participate in the consideration or voting on this petition, in accordance with Article 17(2) (a) of the Commission's Rules of Procedure. |
| Dated: | 12 October 2005 |
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I. SUMMARY

1. On April 22, 1999, Mr. Eduardo Perales Martinez (hereafter "the petitioner") presented a complaint before the Inter-American Commission on Human Rights (hereafter "the Commission") on his own behalf, against the Republic of Chile (hereafter "the State") for alleged violation of the rights to a fair trial (Article 8), freedom of thought and expression (Article 13) and judicial protection (Article 25), together with violation of the obligation to respect rights (Article 1(1)), in the American Convention on Human Rights. These alleged violations were caused by to the petitioner's dismissal from the national militarized police force of Chile (The Carabineros) in 1998, for having made a joke critical of the institution.

2. The petitioner alleged that the petition meets the requirements of admissibility established in the American Convention. He also claimed to have exhausted domestic remedies by seeking a constitutional remedy that was decided in the final instance by the Supreme Court on Justice on October 28, 1998. He maintained, furthermore, that the petition met all the formal requirements for admissibility.

3. In response, the Chilean State asked that the petition be declared inadmissible. It argued that the facts alleged by the petitioner did not characterize violations of rights protected by the Convention. In the State's view, the petitioner was punished appropriately for unacceptable criticism of the Carabineros. In the event, the petitioner had the opportunity to defend himself

and to turn to the courts. Consequently, the State asked that the petition be declared inadmissible, pursuant to Article 47(b) of the Convention.

4. After examining the positions of the parties, the Commission has concluded that it is competent to decide the claim submitted by the alleged victim, and that the case is admissible pursuant to Article 46 of the American Convention. Consequently, the Commission has decided to notify the parties and to publish this Admissibility Report in its Annual Report.

II. PROCEEDINGS BEFORE THE COMMISSION

5. On April 22, 1999, the Commission received a petition submitted by Mr. Eduardo Perales Martinez against the State of Chile for alleged violation of the rights protected by Articles 8, 13 and 25 of the American Convention, in concordance with Article 1(1) of the Convention. The petition was registered with the number 12.143 and transmitted to the State on May 4, 1999, with the request that the State submit its response within 90 days.

6. On July 30, 1999, the State asked the Commission for an extension of 60 days to submit its response. On August 3, 1999, the Commission granted the extension requested by the State. On November 29, 1999, the Commission asked the State to respond to the petition within 30 days. On January 21, 2000, the Commission received additional information from the petitioner, which was transmitted to the State on February 22, 2000, giving it 60 days for any observations.

7. On June 8, 2000, the State requested a further extension of 90 days. The Executive Secretariat advised the State that the maximum time limit pursuant to its Rules had already expired, and that the extension would not be granted. On June 27, 2000, the State submitted its observations on the complaint. That information was transmitted to the petitioners, giving them 30 days to submit their observations. On September 25 of that year, the petitioner responded to the observations of the State. On January 26, 2001, the State responded to the observations of the petitioner, which were sent to the petitioner on February 5 of that year.

8. On November 18, 2004, the petitioner requested a hearing during the 122nd session of the Commission. On December 28, 2004, the Commission notified the parties that a hearing would be held to consider the admissibility of the complaint. That hearing was held on Thursday, March 3, 2005.

III. THE FACTS

9. On March 12, 1998, the Government of Chile issued Decree Law 2 of the Ministry of National Defense, establishing a series of salary and social security benefits for personnel of the Carabineros of Chile. That decree offered greater benefits to officers than to members of the non-commissioned ranks, and was greeted with considerable discontent in the ranks. The family members of The Carabineros began to demonstrate their unhappiness through private meetings, primarily among the wives of Carabineros, which produced a reprimand from the high command of the Carabineros. That order prohibited non-commissioned personnel and members of their families from demonstrating against acts of the new decree law, under penalty of dismissal and sanctions for disloyalty to the institution.

10. On April 22, 1998, after a parade to mark the anniversary of the Carabineros in the city of Puerto Montt, the then-Captain of the Carabineros, Eduardo Perales Martinez, met with a group of six officers in the unit's canteen (a rest area reserved for senior personnel), where they had coffee. During the conversation, Captain Perales told a joke he had heard during a trip to Santiago. In general terms, that joke referred to the distribution of the Carabineros income supplements as "Sixty and a bit - sixty percent for the officers and a bit for the rest." [FN2] (The Spanish version involved a Chilean pun, with the phrase "Sesenta y pico": the word "pico" means "a bit" but is also a vulgar reference to the male sexual organ). His listeners laughed and the conversation turned to other matters.

[FN2] See original petition, submitted on April 22, 1999.

11. Immediately thereafter the Captain was called in by an officer with the rank of Major who had been present in the canteen and who considered the joke undignified and offensive. That officer decided to report the incident to his superiors. The victim alleges that some days later the General in charge of the Puerto Montt detachment, Chief of the 10th Zone of Lagos, pressured Captain Perales to resign voluntarily. Captain Perales refused to do so. The following day, the Superintendent of the unit told Captain Perales that he was being transferred to the prefecture of Arauca, and was to be stationed in the remote city of Lebu.

12. In a parallel development, the General of the 10th Zone ordered an informal investigation into the events to determine whether the Captain's remarks had been made in jest or whether he really meant them, in which case the victim might be deemed concluded to have committed the crime of sedition. During the investigation, half of the officers present said it had been a joke, while the other half thought the Captain was serious. The initial proceedings were conducted by the Carabineros Captain of Justice, Juan Pablo del Campo Merlet, legal counsel to the prefecture of Llanquihue, who found that "there is no legal basis to conclude that the event amounts to tendentious or seditious conduct and no administrative liability can be assigned in this situation nor can it be considered a disciplinary breach, although the remark was gross and inappropriate." [FN3]

[FN3] Resolution of the Legal Service, Llanquihue Prefecture, No. 25, signed by Captain Juan Pablo del Campo Merlet, legal adviser, April 25, 1998, contained in the internal judicial file under Folio 92.

13. In a move that contradicted this advice, the General of Puerto Montt decided to report the matter to the Director General of Carabineros to take the appropriate measures. In addition to the immediate events, previous disciplinary measures against Captain Perales were cited that had nothing to do directly with these events. The petitioner complains that the Director of the Carabineros asked the President of Chile to order Captain Perales's dismissal, without the benefit of a fair trial and conviction. As a result, Supreme Decree 304 of June 3, 1998, issued by the

Ministry of Defense, ordered the officer's immediate retirement, terminating a professional career of 13 years in the police force.[FN4] The petitioner maintains that this was a disproportionate measure, one that is reserved for extremely serious cases such as attacks against institutional stability. He also argues that the decree was issued in an irregular manner because it was not signed by the President but by an undersecretary serving as an officer of The Carabineros.

[FN4] This measure was based on Article 40 of the Organic Law of the Carabineros of Chile, No. 18.961.

14. Captain Perales filed an writ for constitutional protection before the Court of Appeals of Santiago, asking that the decree be annulled. On August 21, 1998, the Court of Appeals accepted the Captain's arguments, ruling that his statements portrayed neither the intent nor the gravity required for application of Article 40 of Law 18.961 of 1990, "however discretionary that power may be".[FN5] The court thereupon ordered the Captain's reinstatement in the position he had previously held.

[FN5] Court of Appeals of Santiago, Judgment of August 21, 1998, Role 3.018-98, "Whereas" clause 2.

15. The Carabineros appealed the decision to the Supreme Court of Justice. On October 28, 1998, the Supreme Court revoked the Appeal Court's ruling, declaring that, the President's power to order the retirement of an officer by Supreme Decree is an exclusive prerogative, the use of which does not have to be justified. The petitioner argues that this measure upheld a discretionary decision of the Executive (despite the fact that it totally ignored the conclusions of a disciplinary investigation), resulting from a procedure in which it was shown that the petitioner had not acted contrary to law, and that consequently administrative punishment was not applicable. The rule of law and the rules of due process, according to that judicial decision, would thus be hostage to the subjective discretion of the government, leaving the defendant no opportunity to contest his punishment before the courts.

IV. POSITIONS OF THE PARTIES

A. Position of the petitioner

16. The petitioner claims that the State of Chile has applied a measure so disproportionate that it verges on the absurd. He argues that, as a public employee, he sought judicial protection of his rights, which was initially granted by the Court of Appeals of Santiago in a unanimous decision of its three members, ordering his immediate reinstatement in the Carabineros. Nevertheless, the Supreme Court subsequently upheld the decision to dismiss the police officer for simply telling a joke, thereby violating his right to due process, his right to an impartial judge, and his right to the possibility of defense.

17. The petitioner argues that he was denied due process: he had no access to any procedure that would allow him to be heard before an appropriate and impartial judge. His punishment was applied by a subordinate of the General Director of Carabineros, exercising a power not conferred upon him by law. The petitioner also claims violation of the right to administrative due process, in that he was sanctioned repeatedly for the same offense. Thus, while a senior officer ordered the investigation to continue, Captain Perales was sent to a post that was deemed a place of punishment. The summary investigation concluded with the report of the legal adviser to the prefecture of Llanquihue, whereupon due process would have required the Carabineros to terminate the disciplinary investigation on the grounds that Captain Perales's transfer was sufficient punishment for his offensive statement. Yet the high command decided to seek from the President a second penalty, i.e. the dismissal of Captain Perales.

18. The petitioner adds that not only was his right to due process violated, but that he had no effective recourse before a competent tribunal where he might have appealed the violation of his rights, that he was convicted of acts that do not constitute crimes according to the legislation in force at that time, and that his freedom of expression was violated. The petitioner claims that the State of Chile has violated the following rights in this matter to his prejudice: Article 8(1), Article 25(1), Article 9, and Article 13(1).

19. With respect to admissibility, the petitioner maintains that domestic remedies were exhausted with the final ruling of the Chilean Supreme Court on October 28, 1998. He declares that he has submitted his petition within a reasonable time, and that it is not being considered by any other international procedure.

B. Position of the State

20. The State argues that on April 22, 1998, the alleged victim uttered criticisms of the salary increases for members of the Carabineros, criticisms that his superior officer deemed offensive and disrespectful: the pejorative phrase "Sesenta y pico" suggested that the amendments to the personnel statutes would arbitrarily benefit the senior officers, but prejudice the enlisted personnel. The State adds that "his harsh comments were made in the presence of subordinate officers, a circumstance that obliged Major Figueroa to clarify the true contents, purpose and scope of the amendments to the personnel statutes".[FN6]

[FN6] See Response of the State of June 27, 2000.

21. When the incident was reported to the senior command, an administrative investigation was ordered. That investigation showed that the criticisms were not made in jest and that moreover they came at a time when the institution was facing serious internal issues, as evident in cases 12.190, 12.195 and 12.233 filed with the Commission.

22. According to the State, the institution found the petitioner's conduct unacceptable, given his rank and seniority, because it sowed emotional confusion and disorientation among lower-

ranking officers. Moreover, a review of the officer's past history revealed that he had previously been disciplined with days of detention, warnings and admonishments, a background considered incompatible with the post of Subcomisario Administrativo (deputy administrative superintendent), which he held at the time of his dismissal. According to the report issued by the Director of Personnel of the Carabineros, former Captain Perales exhibited "unruly behavior, lack of talent and an inappropriate institutional commitment to the demands of the service", for which reason, on the basis of the relevant legal provisions, the President of Chile issued Supreme Decree 304 of June 3, 1998, ordering the alleged victim's retirement from the service.[FN7]

[FN7] This retirement was based on Article 40 of the Organic Law of the Carabineros of Chile, which reads as follows:

Temporary retirement shall apply to officers and civilian personnel under supreme appointment in any of the following cases: A. A person for whom the President of the Republic grants or orders retirement, at the recommendation of the General Director.

23. With administrative channels exhausted, the petitioner brought a remedy before the Court of Appeals of Santiago. Its decision was reviewed by the Supreme Court, of Justice, which denied the plaintiff's claims. In its ruling that court recognized the Presidential prerogative to retire an officer, which does not require an administrative act and which allows for reinstatement if the legal conditions are met. That power is discretionary, and its exercise requires only the recommendation of the General Director. In addition, the President is not obliged to disclose the reasons for his decision.

24. The State concludes that the petitioner was subjected to an administrative investigation during which he was heard and was able to present his defense. He then appealed to the courts, where he presented his arguments in accordance with the procedural rules applicable, and his appeals, was decided without any violation of the rules of due process. With respect to the alleged violation of Article 13 of the Convention, the State adds that "in this case, subsequent effect was given to responsibilities previously established by law, to which were added other details from the service record of Mr. Perales".[FN8]

[FN8] Position of the State expressed at the Admissibility Hearing held during the 122nd regular session of the Commission.

25. Consequently, the State asks that the petition be declared inadmissible because the facts described do not characterize a violation of the rights protected by the American Convention. In contesting the complaint, the State did not argue failure to exhaust domestic remedies or any other formal grounds for inadmissibility.

V. ANALYSIS OF JURISDICTION AND ADMISSIBILITY

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

26. The petitioner is entitled by Article 44 of the American Convention to present complaints before the Commission. The petition names as the presumed victim Mr. Eduardo Perales Martinez, with respect to whom Chile is committed to respect and guarantee the rights enshrined in the American Convention. The Commission notes that Chile has been a State Party to the American Convention since August 21, 1990, when it deposited its instrument of ratification. The Commission therefore has jurisdiction *ratione personae* to examine the petition.

27. The Commission has jurisdiction *ratione loci* to take cognizance of the petition, inasmuch as it alleges violations of rights protected under the American Convention said to have taken place within the territory of a State party to that treaty.

28. The Commission has jurisdiction *ratione temporis* because the obligation to respect and guarantee the rights protected in the American Convention was already binding upon the State on the date the facts alleged in the petition were said to have occurred.

29. The Commission has jurisdiction *ratione materiae* because the petition complains of possible violations of human rights protected under the American Convention

B. Requirements of admissibility

1. Exhaustion of domestic remedies

30. As a requirement for admissibility, Article 46(1) of the American Convention requires that the remedies under domestic law have been pursued and exhausted. The petitioner claims to have pursued and exhausted the domestic remedies available under Chilean law. He argues that the judgment of October 28, 1998 issued by the Supreme Court put an end to domestic judicial discussion. The State, for its part, has not denied or contradicted the petitioner's claim. Consequently, the Commission considers that the requirement of Article 46(1) of the American Convention is fulfilled.

2. Timeliness of the Petition

31. Article 46(1)(b) of the Convention provides that a petition must be lodged within a period of six months from the date on which the petitioners are notified of the final judgment exhausting domestic remedies. The petitioner claims that the final decision under domestic law was issued on October 28, 1998. He submitted his complaint to the Commission on April 22, 1999. The State has not argued failure to comply with the six-month rule, and therefore may be considered tacitly to have waived this objection. The Commission concludes that the petition was presented within the period established in Article 46(1)(b) of the Convention.

3. Duplication of proceedings and *res judicata*

32. There is nothing in the file to indicate that the substance of the petition is pending in any other international proceeding for settlement, or that it is substantially the same as any petition previously studied by the Commission or other international body. Hence, the requirements set forth in Articles 46(1)(c) of the Convention have also been met.

4. Characterization of the facts alleged

33. The State asks the Commission to reject the complaint, on the grounds that the facts alleged by the petitioner do not constitute violations of rights protected by the Convention. In the State's view, the petitioner was punished and dismissed for unacceptable criticism of the institution of the Carabineros. The petitioner had the opportunity to defend himself and to appeal to the courts. The fact that the petitioner did not obtain a favorable response, the State claims, does not show that there was any departure from an international legal standard.

34. The Commission considers that it is not appropriate at this stage of the proceedings to establish whether or not there was a violation of the American Convention. For purposes of admissibility, the Commission must determine whether the facts set forth in the petition tend to establish violation of the rights guaranteed by the Convention, pursuant to Article 47(b), or whether the petition, pursuant to Article 47(c), should be rejected as "manifestly groundless or obviously out of order".

35. The standard for assessing these points is different from that required for deciding the merits of the complaint. The Commission must conduct a *prima facie* evaluation to examine whether the complaint establishes the apparent or potential violation of a right guaranteed by the Convention, but it is not required to determine the existence of a violation. Such examination is a summary analysis that implies no prejudgment or opinion on the merits. The Commission's Rules of Procedure, by clearly separating the admissibility and merits stages, reflect this distinction between the evaluation that the Commission must make for purposes of declaring a petition admissible and that required for establishing a violation.

36. The Commission finds that the facts of the case raise important questions about the limits of discretionary power in a State governed by the rule of law, and in relation to the American Convention. In particular, the Commission will examine, during the merits stage, whether the standard established by the Convention would accord validity to a purely discretionary decision taken by the Chilean President, at the proposal of the General Director of the Carabineros, to dismiss a police officer, if such dismissal affects individual rights recognized in the American Convention and in the Chilean Constitution. Is a police officer entitled to due process in a disciplinary administrative procedure established by law, and does he have the right to defend himself against the charges presented? If the answer is affirmative, what are the guarantees required for due process? In addition, what purpose is served by guarantees of due process for the accused if the final decision on his dismissal can be taken by the President on purely discretionary ground? While the Commission recognizes that states have the jurisdiction to exercise certain discretionary powers in the course of government decisions and policies (for example, the appointment and removal of senior political figures such as cabinet ministers), the Commission must in this case determine whether, in light of the American Convention, those discretionary powers can be invoked in situations that involve the exercise of individual rights.

Finally, the Commission must examine the permissible limits to freedom of expression in the State security forces. In this light, the Commission finds that the matter at issue could characterize violations of Articles 8, 13 and 25 of the American Convention.

VI. CONCLUSIONS

37. The Commission concludes that the case is admissible and that the Commission is competent to examine the claim presented by the petitioner relating to the alleged violation of Articles 8, 13 and 25, taken in concordance with Article 1(1) of the American Convention, in accordance with the requirements set forth in Article 46 of the treaty.

38. By virtue of the arguments of fact and of law set forth above, and without prejudging the merits of the case,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,

DECIDES:

1. To declare this case admissible in relation to Articles 8, 13 and 25 of the American Convention, taken in conjunction with Article 1(1) of that instrument.
2. To notify its decision to the State and to the petitioner.
3. To begin its examination of the merits of the question.
4. To publish this decision and to 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 12th day of October 2005. (Signed): Clare K. Roberts, President; Susana Villarán, First Vice-President; Paulo Sérgio Pinheiro, Second Vice-President; Commissioners Evelio Fernández Arévalos, José Zalaquett, Freddy Gutiérrez Trajo and Florentín Meléndez.