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Title/Style of Cause:	Ricardo Antonio Risco Ferrer v. Peru
Doc. Type:	Decision
Decided by:	President: Clare K. Roberts; Second Vice-President: Paulo Sergio Pinheiro; Commissioners: Evelio Fernandez Arevalos, Freddy Gutierrez, Florentin Melendez. As provided by Article 17(2)(a) of the Commission’s Rules of Procedure, Commissioner Susana Villaran, a Peruvian national, did not participate in the discussion or the decision in this case.
Dated:	24 October 2005
Citation:	Risco Ferrer v. Peru, Petition 4580/02, Inter-Am. C.H.R., Report No. 87/05, OEA/Ser.L/V/II.124, doc. 5 (2005)
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I. SUMMARY

1. This report relates to the admissibility of petition No. 4580-02, opened by the Inter-American Commission on Human Rights (hereinafter “the Commission” or “the IACHR”) after receiving, on December 18, 2002, a petition submitted by Ricardo Antonio Risco Ferrer (hereinafter “the petitioner”) alleging responsibility on the part of the State of Peru (hereinafter “Peru” or “the Peruvian State”) for having denied, through various court actions filed by the petitioner, lost wages from the date of his termination to the date of his effective reinstatement.

2. The petitioner maintains that the Peruvian State is responsible for violating Articles 8 (judicial guarantees), 9 (principle of legality and [non-]retroactivity), 25 (judicial protection) of the American Convention on Human Rights (hereinafter the “Convention” or the “American Convention”) consistent with Article 1(1). He also maintains that the facts reported entail violations of the right to work and just compensation and the right to justice guaranteed by Articles XXIV and XVIII of the American Declaration of the Rights and Duties of Man (hereinafter the “American Declaration” or “Declaration”).

3. The State argues that the petition does not include any fact tending to establish a violation of any of the rights guaranteed by the American Convention. The State also maintains that remedies under domestic law have not been exhausted. Based on the preceding, the State asks that the petition be declared inadmissible pursuant to Article 47(b) of the Convention.

4. In this report, the IACHR analyzes the information available in accordance with the provisions of the American Convention and concludes that the petition is inadmissible under Article 47(b) of the American Convention, transmits the report to the parties, and orders that it be published in the Annual Report.

II. PROCESSING BY THE COMMISSION

5. The petition, dated December 8, 2002, was received on December 18 of the same year. Through communications received at the IACHR on May 21, July 22, September 2, and October 22, 2003, the petitioner submitted additional information and an expansion of the complaint, which were incorporated in the file. Processing of the file began on November 18, 2003, when the pertinent parts were sent to the State, asking it to submit all information within a period of two months.

6. The petitioner submitted a short communication on November 28, 2003. The State asked for an extension to present its response through a note dated January 22 and its request was granted on January 29, 2004. The Government submitted its response on January 29, 2004, and the petitioner submitted his observations regarding that response through a note dated April 13, 2004.

7. Through notes received on September 7 and October 27, 2004, the petitioner submitted additional information and expanded his complaint. The State submitted its response on November 11, 2004, and the petitioner submitted his observations on that response on November 30, 2004.

8. In a note dated December 3, 2004, the State submitted additional observations, which were answered by the petitioner through notes dated January 3 and January 10, 2005. On February 24, 2005, the State requested an extension to submit new observations, which was granted 30 days later.

9. On February 28, March 16, April 20, June 27, and August 26, 2005, the petitioner submitted additional observations. The Commission received observations from the State through notes dated August 2 and September 6, 2005.

III. Positions of the Parties

A. Petitioner

10. The petitioner maintains that the Peruvian State is responsible for the violation incurred by the Reserve Bank of Peru (hereinafter "the BCR" or "the Bank"), which failed to acknowledge and pay him lost wages from the date of his termination or dismissal on February 25, 1994 up to the date of his effective reinstatement to his position on July 24, 2002. The petitioner also alleges that the State violated the principle of [non-]retroactivity, due process, and judicial protection.

11. He asserts that he worked as an employee of the Central Reserve Bank of Peru from August 13, 1986 until February 25, 1994, when he was terminated as part of a staff reduction program under Legislative Decree 728, the Employment Promotion Law of December 9, 1991.

12. The petitioner maintains that he joined the Bank under the Political Constitution of 1979 and Law 24514 of June 5, 1986, which provided for stability of employment. He points out that the employment stability law, in effect during the staff reduction process, established that a worker could only be dismissed if he committed a properly substantiated and serious offense and not due to objective causes, a consideration that was in fact added by Legislative Decree 728.

13. According to the petitioner, after the collective termination proceeding had been filed with the Ministry of Labor through Board of Directors Resolution No. 208-93-DSPC of December 15, 1993, the Ministry disapproved the BCR's request to terminate the labor contracts of 22 workers, including the petitioner. The Bank then appealed the Resolution. In a decision dated December 27, 1993, the Ministry declared the appeal inadmissible as time-barred, thus leaving Board of Directors Resolution No. 208-93-DPSC as a settled and immutable matter, according to the petitioner. The petitioner alleges that the December 27, 1993 decision was not enforced and he was later terminated and dismissed through Board of Directors Resolution Nos. 015-94-DPSC and 017-94-DPSC of January 31 and February 21, 1994, respectively, executed by the Bank on February 25 with a notarized letter.

14. In response, the petitioner filed an administrative action against the above decisions alleging that the appeals filed by the BCR against the decision of December 15, 1993 denying the request to terminate were time-barred. In a decision dated December 20, 1996, the Third Labor Division declared the petitioner's action well-founded given the failure to observe procedural rules and thus null and void the decisions that had approved termination of the labor contracts. This decision was appealed and confirmed by the Supreme Court of Justice in a decision issued on October 30, 1997.

15. The petitioner then filed an action seeking enforcement of the decision with the Eighth Labor Court in Lima. That court, under Decision No. 02 of December 1, 1997, ordered the reinstatement of Ricardo Antonio Risco Ferrer. That decision was appealed and reversed; in response, the petitioner filed an appeal in cassation. On April 15, 1999, the Division of Constitutional and Social Law of the Supreme Court of Justice issued a decision ordering Mr. Risco Ferrer reinstated but without payment of lost wages. In response, the petitioner filed an appeal for defense of his constitutional rights on January 31, 2000. On July 22, 2002, the Constitutional Tribunal denied the petitioner's appeal.

16. The petitioner alleges that on the very day he was to be reinstated, the General Manager of the Bank sent him a notarized letter accusing him of serious de facto offenses occurring in 1992 when he was an active employee. The petitioner indicates that he was dismissed for the second time on March 27, 2000 and was denounced before the Office of the Attorney General for the crime of extortion.

17. In response, on April 3, 2000 the petitioner filed an appeal against the BCR for protection of his constitutional rights, seeking to have the termination letter dated March 27, 2000 declared

inapplicable and without legal effect, as well as reinstatement and payment of compensation and other payments accrued from the date of termination to the date of reinstatement.

18. On January 31, 2002, the Constitutional Tribunal determined that the Peruvian State violated the right to work, honor and good reputation, voided the termination letter of March 27, 2000 and ordered the petitioner's reinstatement "without payment of compensation not received during the period not worked." According to the petitioner, his reinstatement was carried out on July 24, 2002.

19. The petitioner states further that during the period of time when the BCR resisted enforcing his work contract (December 11, 1997 to March 17, 2000) lost wages and other benefits were generated. For this reason he filed a new action before the court on January 3, 2001, seeking an order to pay. On October 25, 2001, the Tenth Labor Court of Lima declared the suit unfounded and inadmissible. This decision was affirmed on appeal by the Third Labor Division of Lima in a decision dated May 22, 2002.

20. In the final instance, in a decision dated April 7, 2003 and reported on July 9, 2003, the Supreme Court indicated that the subject of the complaint for payment of financial benefits was in essence the same complaint made by Mr. Antonio Risco Ferrer in the enforcement proceeding, wherein the challenger submitted an appeal in cassation that was declared inadmissible. The Supreme Court also indicated that the prohibition on reviving a case for which there has been a final decision is a constitutional guarantee, concluding that it was impossible to review the substance of the matter as that would imply deciding on facts already resolved, and declared inadmissible the complaint against the BCR for payment of compensation and other accrued rights. The petitioner alleges that the Supreme Court violated his right to judicial protection because it took more than a year to rule on his appeal.

21. Finally, the petitioner alleges that State officials assaulted his honor and reputation by accusing him before the Office of the Attorney General for the crime of extortion. He indicates that he accused the General Manager of the BCR of abuse of authority and maintains that in this proceeding the decision of April 12, 2002, affirmed by a decision of October 31, 2002, ruled that the General Manager committed the crime of abuse of authority and imposed a conditional punishment of one year of restricted freedom and payment of personal compensation of 2,000 new soles.

22. The petitioner asserts that there is currently an action against the BCR for damages and injuries based on a failure to comply and enforce his labor contract with intent and responsibility or inexcusable negligence on the part of the Central Reserve Bank itself. In addition, he indicated that the Fourteenth Labor Court of Lima issued a decision on October 20, 2003 ordering the BCR to pay a sum of money. Subsequently, the decision was appealed and declared null by the Supreme Court of Justice of Lima in a decision dated August 11, 2004.

23. In this regard, the petitioner asserts that this suit refers only to the failure to enforce his labor contract and not the claim for lost wages from the date of his termination until the date of his supposed reinstatement. According to the petitioner, the referenced action is a compensatory and not a restorative measure and is not the appropriate procedural channel for recovering

compensation for time in service, as well as the calculation of time for purposes of retirement. He maintains, therefore, that he has exhausted domestic remedies with respect to measures to recover his lost salary.

24. The petitioner insists that having ordered his reinstatement to his position based on various cases that are res judicata by decision of the Supreme Court and Constitutional Tribunal, the Peruvian State should also have ordered the payment of lost wages and other benefits from the date of his dismissal to the date his reinstatement was enforced, under the legal instrument that protected his labor contract, Law 24514 on Employment Stability. According to the petitioner, Law 26513, published on July 28, 1995, establishes that as long as there was a case in progress initiated under Law 24514 the case should continue until the conclusion of the proceeding, and that when a judge orders the reinstatement of a worker to his position at his place of employment, he should also order payment of all accrued rights or lost pay for the period not worked.

25. The petitioner concludes that the Peruvian State injured him by violating Articles 9, 8 and 25 of the American Convention, in that his illegal termination by the employer, the Central Reserve Bank of Peru, deprived him of lost wages from February 25, 1994 to February 24, 2002, which are protected under the Convention.

B. The State

26. The State asks that the petition be declared inadmissible in accordance with Articles 46(a) and 47(b) of the Convention, consistent with Articles 31(1) and 34(a) of the Commission's Rules of Procedure, alleging that the petitioner has not exhausted the remedies available under domestic law and that the complaint does not contain facts characteristic of a violation of rights embodied in the Convention.

27. Regarding the alleged violation of the principle of the non-retroactive nature of laws, the State maintains that Legislative Decree No. 728 expressly established that workers subject to the regime of Law 24514 would continue to be governed by that law in certain areas only, but for all other matters the common regime of the aforementioned Legislative Decree would apply. It also maintains that the application of the Legislative Decree in the case of Mr. Risco Ferrer and the other persons included in the proceeding for collective termination for objective causes was carried out with strict adherence to its provisions.

28. In addition, the State emphasizes that the petitioner has not demonstrated that he filed court action based on the alleged retroactive application of Legislative Decree No. 728. In this regard, the State maintains that if the petitioner felt that he had been affected by the application of the aforementioned decree, he had available to him the appeal for constitutional protection to enforce his rights and did not make use of that remedy. In addition, it points out that he did not include any claim based on this concept in the court actions he filed. For this reason, the State believes that the petitioner has not exhausted the remedies under domestic law in accordance with Article 46 of the Convention, in order to ask the IACHR to conclude that Peruvian State had violated Article 9 of the Convention.

29. Regarding the State's alleged violation of Articles 8 and 25 for having failed on various occasions to have enforced court decisions that ordered reinstatement and payment of lost wages, the State asserts that it did not fail to carry out the aforementioned decisions, in that the BCR, making use of legal defense measures, had proceeded to appeal them and the recent decision of February 29, 2000, indicating March 17, 2000 as the date for reinstatement of the petitioner, had concluded the sentence execution phase. The State also alleges that if there were delays in the process they were not precisely due to the Bank but rather to the normal processing of the file.

30. According to the State, the petitioner effectively had the opportunity to submit his complaints at all levels of the judiciary, including the Constitutional Tribunal, as these are handled through regular procedures established by domestic law. In addition, he had the opportunity to challenge them at the proper time. The State adds that as indicated by the Commission and the Inter-American Court, the fact that he has not obtained a favorable ruling does not imply that his right to judicial protection has been violated.

31. Regarding the alleged failure to recognize lost wages, the State maintains that the judicial branch's exclusion of those wages was a strict application of rules in effect at the time. The State indicates that under the decision of April 15, 1999, the Constitutional and Social Law Division indicated that payment of lost wages is applicable, in accordance with the law, only when the suit is challenging dismissal in an ordinary labor proceeding. The Division concluded that the proceeding had disputed a collective termination and not a dismissal, i.e., the administrative decision that authorized that termination, and thus there was no responsibility on the part of the employer generating economic obligations against it.

32. On this point, the State indicates that the Commission cannot act as a fourth instance of the Peruvian judicial system, intervening to review decisions adopted by competent domestic judicial authorities. Therefore, it reiterates its request that the petition be declared inadmissible, given that the facts reported therein do not constitute a violation of rights established in the Convention.

33. Regarding the alleged injury to his personal honor and good reputation, the State maintains that this complaint does not meet the requirements established with respect to exhaustion of domestic remedies. In particular, it states that the complaint for the crime of extortion was filed by the BCR in the month of January 2000 and the Final Ruling rejecting that complaint was issued on May 19, 2000. More than four years have past since the final decision, and thus the period for filing a petition has long since expired.

34. In addition, the State reports that the petitioner filed a suit with the civil courts on May 20, 2003 for moral damages resulting from an assault on his personal honor and reputation due to an accusation for the crime of extortion. The State maintains that since there is a judicial proceeding in progress for the same claim as that submitted to the IACHR, the petitioner's request does not satisfy the provisions of Article 46 (1) (a) of the Convention.

35. Finally, the State maintains that the petitioner has not exhausted the remedies available under domestic law. In this regard, it asserts that the claim that is the subject of this petition to the IACHR—the payment of a sum equal to that of his lost wages—is being handled in three

different court proceedings. The State indicates that the petitioner has filed various court actions in order to obtain an amount similar to that of his lost wages, including a claim for compensation for damages and injuries for failure to carry out obligations and failure to enforce the labor contract due to inexcusable negligence and willful intent before the Fourteenth Labor Court in Lima; an action dated May 20, 2004 for compensation for moral damages as a result of an attack on his personal honor and good reputation with the Twenty-Third Civil Court of Lima; and another action for award of compensation dated October 26 with the Twenty-Seventh Labor Court of Lima. In this regard, the State alleges that these proceedings must be concluded before the Commission can admit this petition; otherwise, the petitioner could receive a double benefit for the same reason.

IV. ANALYSIS

A. The Commission's competence *ratione materiae*, *ratione personae*, *ratio loci* and *ratione temporis*

36. The Commission is competent to examine the subject of this petition relating to alleged violations of rights embodied in Articles 8, 9, and 25 of the American Convention.

37. The petitioner is empowered by Article 44 of the American Convention to submit claims before the IACHR. The petition indicates as alleged victim an individual person with respect to whom Peru agreed to respect and guarantee rights embodied in the American Convention. Therefore, the Commission is competent *ratione personae* to examine the petition.

38. The Commission is competent *ratione loci* to hear this petition in that it alleges violations of rights protected in the American Convention, violations that would have occurred within the territory of a State Party to that convention.

39. The IACHR is competent *ratione temporis* in that the facts alleged in the petition took place when the obligation to respect and guarantee the rights established in the American Convention were already in effect for the Peruvian State. The Peruvian State ratified the Convention on July 28, 1978. The petition in question refers to events subsequent to the ratification date of the American Convention.

B. Admissibility requirements for the petition

1. Exhaustion of domestic remedies

40. Article 46 of the American Convention indicates that:

1. Admission by the Commission of a petition or communication lodged in accordance with Articles 44 or 45 shall be subject to the following requirements:

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

[...]

41. According to the information appearing in the file, the Commission notes, first, that before his employment was terminated on February 24, 1994, the petitioner filed an administrative action and, in a decision from the Constitutional Law Division of the Supreme Court dated August 5, 1997, obtained the nullification of decisions approving the collective termination. With enforcement of that ruling, the petitioner achieved reinstatement. At the same time, with respect to his right to lost wages, with the decision reached on April 15, 1999 in the appeal in cassation filed by the petitioner, the Supreme Court denied the request, clarifying that a termination and not a dismissal was involved.

42. In response, Mr. Risco Ferrer filed an appeal for constitutional protection against the section of the decision issued on April 15, 1999 that ordered [him reinstated] “without right to accrued wages.” On July 22, 2002, the Constitutional Tribunal declared the petitioner’s suit unfounded.

43. In this regard, the IACHR notes that the petitioner made use of the ordinary remedies available to him and obtained a decision with which the remedies are exhausted, even though the result was not in his favor with respect to lost wages.

44. Second, with respect to the dismissal that occurred on March 27, 2000, the IACHR notes that the petitioner filed an appeal for constitutional protection against the Central Reserve Bank of Peru. The case was decided by the Constitutional Tribunal in its ruling of January 31, 2002, ordering the BCR to reinstate Mr. Risco Ferrer in his position, “without payment of compensation not received during the period not worked.”

45. Third, with respect to the alleged violation of the principle of the non-retroactive nature of laws, established in Article 9 of the Convention, the Commission notes that analysis of the file indicates that this claim was not included in any of the various actions filed by the petitioner. In this sense, the Commission concludes that the petitioner did not exhaust the remedies of domestic law, in accordance with Article 46 of the Convention, before asking the IACHR to conclude that the Peruvian State violated Article 9 of the Convention.

46. Fourth, with respect to the claim submitted by the petitioner regarding the alleged injury to his personal honor and good reputation, the IACHR notes that the petitioner is currently engaged in a court action on the same issue. Therefore, this claim does not satisfy the requirements established in the Convention on the exhaustion of domestic remedies and cannot be considered by the IACHR.

47. In the current situation, the Commission notes that the petitioner has more than one proceeding in progress in the domestic court system. The State alleges that the claims for compensation for damages and injury involve the claim that is the subject of the petition before the Commission and, therefore, domestic remedies have not been exhausted. The petitioner alleges that those claims do not represent the claim for lost wages from the date of termination to the date of reinstatement.

48. The Commission notes that the State has recognized that although the claim for damages and injury is not the appropriate procedural route for recovering compensation for time in service, as well as the calculation of time for purposes of retirement, the concepts of lost income and general damages would include an amount similar to that of the wages he did not receive. Consequently, the Commission believes that subject of the referenced claim and the petition under review is the same.[FN2]

[FN2] The petition submitted to the IACHR refers to lost wages not received from the termination of Mr. Risco Ferrer on February 24, 1994 until his effective reinstatement on February 24, 2002. The claim for damages and injuries based on failure to comply with and enforce his employment contract with intent and responsibility or inexcusable negligence on the part of the Bank, refers to a double failure to enforce Board of Directors Resolution No. 208-93-DPSC of December 15, 1993, which disapproved termination of the employment contract: first, as a result of the decision of December 27, 1993, which made the appeal filed by the BCR inadmissible; second, as a result of the administrative action that voided the resolutions approving the termination of his contract, and the failure to perform the obligations under the decision of October 30, 1997.

49. Regarding the foregoing, the Commission has indicated that the international protection granted by the Convention's supervisory bodies is subsidiary, supportive and supplemental in nature. The very preamble to the Convention refers to reinforcing or complementing the protection provided by the domestic law of the American States and, therefore, the Commission cannot be assumed to be a jurisdiction for filing and settling disputes involving alleged violations when the disputes have not been dealt with and exhausted in domestic courts or, to the same effect, are now pending resolution in the respective State.[FN3]

[FN3] See: Decision 29/88, Case 9260, Jamaica, September 14, 1988, Report No. 39/96, Report No. 11.673, Argentina, October 15, 1996; and Report N° 88/99, Case 12.013, Paraguay, September 27, 1999.

50. In this regard, and given the identity between the claim for damages and injury due to failure to enforce the employment contract now pending within the domestic courts and the petition the petitioner has submitted against the Peruvian State, the Inter-American Commission notes that on earlier occasions it has ruled on the inadmissibility of petitions filed without having satisfied the requirement of having exhausted domestic remedies and thus concludes that it is not competent to hear the petition. Based on the foregoing, the Commission declines, based on separation of subject matter [por sustracción de materia], to examine the remaining admissibility requirements provided in the Convention.[FN4]

[FN4] On this subject, see: Report N° 73/99, Case 11701, Mexico, May 4, 1999; Report N° 24/99, Case 11.812, Mexico, March 9, 1999; and Report N° 82/98, Case 11.703, Venezuela, September 28, 1998, et al.

V. CONCLUSIONS

51. Based on the de facto and de jure arguments presented above, the Commission considers the petition inadmissible in accordance with the requirements established in Article 47(b) of the American Convention, in that no facts are presented that constitute a violation of rights protected by that Convention.

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,

DECIDES:

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

Rendered and signed at the headquarters of the Inter-American Commission on Human Rights, in the city of Washington, D.C., on the 24th day of October, 2005. (Signed) Clare K. Roberts, President; Paulo Sérgio Pinheiro, Second Vice President; Commissioners Evelio Fernández Arévalos, Freddy Gutiérrez and Florentín Meléndez.