

Institution: Inter-American Commission on Human Rights
File Number(s): Report No. 10/09; Petition 4071-02
Session: Hundred Thirty-Fourth Regular Session (16 – 27 March 2009)
Title/Style of Cause: Mercedes Eladia Farelo v. Argentina
Doc. Type: Decision
Decided by: President: Luz Patricia Mejia Guerrero;
Second Vice President: Felipe Gonzalez;
Commissioners: Sir Clare K. Roberts, Paulo Sergio Pinheiro, Florentin Melendez, Paolo Carozza.
Commissioner Victor E. Abramovich, an Argentine national, did not participate in study and decision of this report, in compliance with Article 17.2.a of the Commission’s Rules of Procedure.
Dated: 19 March 2009
Citation: Eladia Farelo v. Argentina, Petition 4071-02, Inter-Am. C.H.R., Report No. 10/09, OEA/Ser.L/V/II., doc. 51, corr. 1 (2009)
Terms of Use: Your use of this document constitutes your consent to the Terms and Conditions found at www.worldcourts.com/index/eng/terms.htm

I. SUMMARY

1. This report deals with the admissibility of Petition 4071-02. The proceedings were initiated by the Inter-American Commission on Human Rights (hereinafter “the Inter-American Commission,” “the Commission,” or “the IACHR”) after receiving, on August 10, 2002, a petition lodged by Mrs. Mercedes Eladia Farelo (hereinafter “the petitioner”) against the Argentine Republic (hereinafter “Argentina” or “the State”) in connection with the failure to execute a judgment handed down against the Embassy of Australia in Argentina.

2. The petitioner states that in 2001, the Argentine judiciary ordered the Embassy of Australia to pay her compensation since, according to decisions adopted by the labor courts, Mrs. Mercedes Eladia Farelo was dismissed on the grounds that she was pregnant after having worked for the embassy since 1988. According to the petitioner, although the embassy agreed to submit to Argentine jurisdiction, to date it has not complied with the judgment, and neither has the State taken the steps necessary to enforce the judgment and thus guarantee her right to effective judicial protection.

3. In turn, the State maintains that it is unable to enforce execution of a judgment against a foreign state that has invoked immunity from execution in its defense, and that Argentina can only pursue extrajudicial channels to enforce the ruling. The State maintains that the petitioner had full access to the organs of the Argentine judiciary, which ruled in her favor, and that consequently no responsibility for violating any of the rights protected by the Convention can be apportioned to the Argentine State.

4. Without prejudging the merits of the case, the Commission concludes that it is competent to hear the petition as regards the State's obligation to ensure the means to enforce the final rulings of its judicial agencies in connection with alleged violations of the rights to judicial protection and to property, as stipulated by Articles 25 and 21 of the American Convention on Human Rights (hereinafter "the American Convention" or "the Convention"), in conjunction with Article 1.1 thereof. Under the principle of *iura novit curia*, the Commission also decides that it will analyze the possible applicability of Article 2 of the Convention as regards the State's obligation to adopt the measures necessary to give effect to the rights and freedoms protected by the Convention. In addition, the Commission resolves to give notice of this decision to the parties, to publish it, and to include it in its Annual Report to the General Assembly of the Organization of American States (OAS).

II. PROCESSING BY THE COMMISSION

5. The petition is dated August 5, 2002, and it was received by the IACHR on August 10, 2002. The petitioner submitted additional information on May 26, 2004. The relevant parts of the petition were forwarded to the State on January 3, 2005, along with a period of two months in which to return its comments. The State sent its comments to the Commission on May 11, 2005, and they were duly forwarded to the petitioner on March 3, 2006.

6. The petitioner sent additional comments on April 4, 2006, which were duly conveyed to the State on August 3, 2006. Under the deadline extension that she was granted, the petitioner sent additional comments on November 10, 2006, which were duly forwarded to the State on November 20, 2006. The petitioner submitted additional comments on February 26, 2007, and they were duly conveyed to the State on March 7, 2007.

7. The State submitted additional comments on September 5, 2006, which were duly forwarded to the petitioner on September 19, 2006. Under the deadline extension that it was granted, the State submitted additional comments on December 27, 2006, and they were duly conveyed to the petitioner on January 16, 2007.

8. The petitioner contacted the Executive Secretariat to inquire about the status of her petition on July 11, 2005, on September 11, 2006, and on November 20, 2008.

III. POSITIONS OF THE PARTIES

A. Petitioner

9. The petitioner states that she began working as an employee of the Embassy of Australia in the Argentine Republic on September 1, 1988. She claims that she was not registered in the embassy's employment records nor with the social security agencies. She states that on March 26, 1997, she informed the embassy that she was pregnant and then, on May 2, 1997, she was dismissed for no good reason. She was therefore forced to file suit against the Embassy of Australia to secure payment of outstanding wages and other forms of compensation related to her firing.

10. As indicated in information presented by the petitioner, on February 28, 2001, the National First-Instance Labor Court issued a ruling upholding the complaint and ordering the Embassy of Australia to pay Mrs. Mercedes Eladia Farelo the amount of \$219,924.86 (Argentine pesos), particularly because her dismissal was unjustified and occurred during the period of protected maternity provided for by Argentine labor law. Both parties filed appeals against the judgment and on October 18, 2001, the National Labor Appeals Chamber partially amended the first-instance judgment by increasing the amount owed to \$277,535.84 (Argentine pesos), adding interest and trial costs. The Embassy of Australia filed no special remedies with the Supreme Court of Justice.

11. The petitioner states that even though the judgment is final, the Embassy of Australia in Argentina has to date not complied with it and she has not been able to collect the amounts owed to her. Furthermore, in spite of the orders of the Argentine courts, the embassy has not provided the petitioner with her certificate of services, retirement contributions, or welfare payments, nor has it made the retirement contributions to the social security agency, thus affecting her future retirement possibilities.

12. Following a request made by the petitioner for the Argentina judicial system to execute the judgment handed down in her favor, on February 8, 2002, the judge asked the Embassy of Australia to specify whether it would invoke immunity from execution or whether it would effectively comply with the sentence, warning that it would inform the Ministry of Foreign Affairs, International Trade, and Worship of noncompliance, in order for that ministry to take the steps provided for by the international law of diplomatic relations for the embassy to abide by the final judgment. On February 20, 2002, the embassy reported that it was not renouncing the immunity from execution it had argued in its defense against the suit, charges, and statement of grievances.

13. The petitioner reports that in September 2003, the Embassy of Australia in Argentina offered to pay her an amount equal to less than 50% of the total debt owed. The petitioner states she was forced by circumstances to accept the offer and, on November 25, 2003, they signed a payment agreement that was subsequently authorized by the Argentine courts. In this agreement, however, the embassy again did not renounce its immunity from execution and, upon expiry of the deadline they agreed upon, it had not complied with its payment obligation. According to the petitioner, this agreement was left null and void because the Embassy of Australia did not abide by its terms.[FN2]

[FN2] The petitioner cites clause 10 of the agreement, which stipulates that: "If payment is not made in the terms and conditions agreed on, this agreement shall be left null and void, and the judicial proceedings shall return to the situation they were in prior to this agreement."

14. The petitioner notes that her working relationship with Australia was at no time detached from Argentine jurisdiction. She claims that for Australia to renounce its immunity from execution would be a violation of the Vienna Convention on Diplomatic Relations. In connection

with this, she claims that the privileges and immunities set out in that Convention do not authorize states parties to ignore the laws in force in a receiving state and that its provisions cannot be interpreted in such a way as to violate the basic rights of individuals in the fields of employment and welfare. The petitioner emphasizes that the Argentine courts would not have intervened in a lawsuit between a foreign embassy and an Argentine citizen if she were not subject to the jurisdiction of Argentina.

15. She adds that Article 2 of Law 24.488, on the Jurisdictional Immunity of Foreign States before Argentine Courts, enacted on June 22, 1995, provides that: “Foreign states may not invoke jurisdictional immunity in the following cases: [...] (d) when they are sued for labor matters, by Argentine nationals or residents in the country, under contracts entered into in the Argentine Republic or abroad and that have effects within the nation’s territory.” She notes that Law 24.488 is silent on the question of the execution of judgments.

16. The petitioner reports that she repeatedly contacted the Ministry of Foreign Affairs, International Trade, and Worship of the Argentine Republic, and the President of the Nation, to demand their intervention in ensuring the Australian Embassy’s compliance with the judgment. She claims that the Argentine State did not respond to her demands and that the steps taken by the foreign ministry served to reinforce the Australian Embassy’s noncompliance with the judgment. The petitioner holds that the Argentine State should not have helped in producing a payment agreement that represented the waiver of a large part of her rights, that was limited to requesting compliance with the entitlement recognized by the embassy in the agreement but did not seek the enforcement of the court ruling, and that included no instruction for the embassy to deposit the payments and contributions owed to the social security system.

17. She further reports that on April 9, 2003, she lodged a complaint against the Embassy of Australia with the Argentine National Discrimination, Xenophobia, and Racism Institute, but that to date the Institute has issued no legal opinion regarding her complaint.

18. The petitioner states that she is unable to seek execution of the judgment before the Australian courts, and that no convention for the execution and recognition of judgments exists between Australia and Argentina. On this point, she reports that in similar cases, the Supreme Court of Justice of the Argentine Nation has stated that it would be unjust to force a worker to pursue chimerical proceedings before the courts of a foreign state or to request Argentina’s diplomatic assistance through legal mechanisms that are generally onerous and extrajudicial.

19. According to the petitioner’s claim, the judgment ordered the Embassy of Australia to pay the legal costs in the entirety, but that it also ignored that instruction. She explains that Argentine law states that if a party ordered to pay costs fails to do so, payment is sought from the other party; consequently, in April 2005, the petitioner received a court order, subject to threat of execution, to pay the professional fees of the attorneys and expert witnesses (appointed at the Australian Embassy’s request) as required by law. She thus states that instead of collecting the amounts owed to her by the Embassy of Australia, she had to assume debts to settle the court costs that the Embassy failed to pay.

20. The petitioner holds that the incidents she describes constitute violations of Articles 17.1, 21, 24, 25, 26, and 29 of the American Convention on Human Rights, which cover, respectively, the rights of the family, to property, to equality before the law, and to judicial protection, together with the progressive development of human rights and the rules for the interpretation of the Convention, all in conjunction with the general obligations enshrined in Article 1.1 thereof.

21. In particular, she believes that her right to judicial protection was reduced to a mere formality, leading to a situation in which she was denied justice, in that since neither the court's ruling nor the payment agreement could be executed, the effectiveness of the judicial remedy was rendered illusory. The petitioner claims that due legal process must include the execution of final judicial decisions that have the status of *res judicata*.

22. She further claims that her right to property was violated, in that the concept of property also covers entitlements legally enshrined in final legal judgments, and that this situation has directly affected the integrity and survival of her family. She adds that the principle of equality before the law was unjustifiably breached in that on account of her pregnancy, she received discriminatory treatment *vis-à-vis* other employees of the embassy, who were compensated in accordance with Argentine law upon being dismissed. Finally, she claims that Article 26 of the Convention was violated as regards her right to social security, and that the provisions of international law were interpreted by Argentina in such a way as to curtail her enjoyment and exercise of rights enshrined in domestic law.

23. The petitioner maintains that there exists, alongside the Argentine State's interest in upholding the rules of international coexistence, its obligation of ensuring the availability of the tools necessary for the recognition and satisfaction of her basic rights and that, since those rights cannot be renounced, the Argentine State cannot require that she renounce them. She holds that the Argentine State is responsible for guaranteeing that her basic human rights are respected, and maintains that the alleged violations took place in Argentina and produced effects in Argentina.

24. As stated in the petitioner's claims, "the absolute immunity from execution recognized by Argentina constitutes a waiver of [her] rights by the Argentine State in Australia's favor, whereby [she] was deprived of [her] property and judicial protection was rendered a mere formality, with no practical effect whatsoever other than the negative effect of requiring [her] to pay [...] Australia's legal costs." The petitioner therefore believes that the Argentine State must assume the harm inflicted on her by the exemption afforded to Australia.

B. State

25. The State holds that the Argentine courts admitted the petitioner's labor claim, and that she enjoyed a fair and equitable trial and received a court ruling that favored her claims and that was subsequently upheld on appeal. It states that she received swift access to the Argentine courts and enjoyed the right of jurisdiction in that Australia recognized the authority of the Argentine courts by responding to the suit.

26. The State explains that renouncing immunity from jurisdiction does not mean renouncing immunity from execution, and that Australia put that argument forward in its defense against the

unfavorable ruling of the Argentine legal system. It therefore holds that Argentina's possibilities for action are eminently extrajudicial since forced execution against a foreign state is disallowed. The State adds that domestic law does not resolve the question of a foreign state's immunity from execution and that neither has the matter been settled in international practice.

27. In spite of this, the State claims that when execution of the judgment became impossible because of the immunity from execution defense, the Argentine Republic exercised its good offices to urge the Embassy of Australia in Buenos Aires to comply with the judgment ordering payment of compensation to the petitioner. It also reports that the State assisted in producing the payment agreement, which was judicially ratified and which the embassy chose not to observe. The Argentine State reports that Australia appears reluctant to make any payment.

28. The State believes the petitioner was not harmed by any of Argentina's actions, but rather by the Embassy of Australia's invocation of immunity from execution in connection with her claim. It notes that the petitioner, upon commencing her employment with the embassy, was not unaware that Australia enjoyed immunity from jurisdiction in Argentina. According to Argentina, the State cannot be held responsible for the position adopted by the diplomatic representation of a foreign state. The State holds that the petitioner's desire for Argentina to discharge Australia's obligations toward her is not in line with any legal provision currently in force in Argentina.

29. In consideration whereof, the State holds that the Argentine Republic is in no way internationally responsible for these incidents, although "it recognizes that the petitioner's situation became burdensome." Argentina therefore believes that the petitioner should have filed for action before an international human rights venue against the state that invoked its immunity and not against the state of which she is a national, which afforded her due legal process and enabled her to obtain a favorable judgment.

30. Although the State maintains that it can be apportioned no responsibility for any violation of rights protected by the Convention, it notes that technically this is not a matter that involves the right to property, and it adds that neither can a claim of discrimination be made, since no evidence exists of distinctions on the grounds of sex, language, religion, nationality, or any other reason having been made with the purpose or effect of undermining the enjoyment or exercise of her human rights.

31. Finally, as regards the processing of the petition, the State claims that the Commission's delay in forwarding the complaint after it was lodged by the petitioner undermines legal certainty and stability, thereby depriving the State of the ability to exercise an appropriate defense; consequently, it holds, the Commission should refrain from continuing to analyze the petition and order it sent to the archive.

IV. ANALYSIS OF ADMISSIBILITY

A. Competence of the Commission

32. Under Article 44 of the American Convention, the petitioner is entitled to lodge petitions with the Commission. The petition indicates that the alleged victim was subject to the jurisdiction of the Argentine State at the time of the incidents she describes. As regards the State, Argentina has been a state party to the American Convention since it duly deposited its instrument of ratification on September 5, 1984. Consequently, the Commission has competence *ratione personae* to examine the complaint lodged with it. It also has competence *ratione materiae*, because the petitioner claims the violation of rights protected by the American Convention.

33. The Commission has competence *ratione temporis* to examine the petition, since it is based on alleged incidents that occurred on or after October 18, 2001, the date of the judgment of the National Labor Appeals Chamber that the complaint maintains was not executed. The alleged incidents therefore occurred following the entry into force of the State's obligations as a party to the American Convention. Additionally, since the petition alleges violations of rights protected by the American Convention that took place in the territory of a state party, the Commission concludes that it has competence *ratione loci* to hear the matter.

34. The Commission wishes to point out that under the rules of the inter-American human rights system, the time between the date when a complaint is received by the IACHR and the date when it is forwarded to the State is not in and of itself a reason for a petition to be dismissed, as the State claims. As the Commission has said, "in the processing of individual cases before the Commission, there is no concept of expiry of jurisdiction as an *ipso jure* measure merely because of the passage of time." [FN3]

[FN3] IACHR, Report No. 33/98, Case 10.545 Clemente Ayala Torres et al. (Mexico), May 15, 1998, paragraph 28.

B. Other Requirements for Admissibility

1. Exhaustion of Domestic Remedies

35. Article 46 of the American Convention sets, as a requirement for a case to be admitted, "that the remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law." This requirement is intended to facilitate the domestic authorities' examination of the alleged violation of a protected right and, if appropriate, to resolve it before it is placed before an international venue.

36. In the case at hand, the IACHR notes the State appears responsible for the failure to execute the judgment handed down by the National Labor Appeals Chamber against the Embassy of Australia on October 18, 2001. The State claims that the petitioner should have taken action against Australia before an international human rights venue, but it has argued no exceptions regarding the requirement of exhausting the remedies afforded by domestic law in Argentina. In this regard, the Inter-American Court has ruled that "the objection asserting the

nonexhaustion of domestic remedies, to be timely, must be made at an early stage of the proceedings by the State entitled to make it, lest a waiver of the requirement be presumed.”[FN4]

[FN4] I/A Court H.R., Velásquez Rodríguez Case, Preliminary Objections, Judgment of June 26, 1987, Series C No. 1, paragraph 8; Fairén Garbi and Solís Corrales Case, Preliminary Objections, Judgment of June 26, 1987, Series C No. 2, paragraph 87; Gangaram Panday Case, Preliminary Objections, Judgment of December 4, 1991, Series C No. 12, paragraph 38; Loayza Tamayo Case, Preliminary Objections, Judgment of January 31, 1996, Series C No. 25, paragraph 40.

37. Accordingly, the Commission believes that the State has waived its right to lodge an exception on the grounds of nonexhaustion. Nevertheless, the Commission notes that the petitioner claims to have exhausted the resources available under domestic jurisdiction and states she acted with due diligence in attempting to secure the execution of the judgment. In turn, the State has not disputed the petitioner’s claims, nor has it indicated the existence of pending or available resources that the petitioner has not exhausted. The Commission consequently believes that the remedies related to the petitioner’s central claim have been exhausted.

2. Filing Period

38. Under Article 46.1.b of the Convention, a petition must be lodged before the end of the filing period: that is, within six months following the date on which the complainant was notified of the final judgment at the national level.

39. The Commission has stated that: “noncompliance with an unappealable judgment constitutes a continued violation by States that persists as a permanent infraction of Article 25 of the Convention, which establishes the right to effective judicial protection. Therefore, in such cases, the requirement concerning the period for submission of petitions stipulated in Article 46.1.b of the American Convention is not effective.”[FN5] Since the alleged violation has allegedly continued up to the present day, the Commission believes that the petition was presented on time.

[FN5] IACHR, Report No. 85/05, Petition 430/00, Romeel Eduardo Díaz Luna (Peru), October 24, 2005, paragraphs 24 and 25; Report No. 43/07, Petition 362-03, Lucio Orlando Ortuño Rivas (Bolivia), July 23, 2007, paragraph 39; Report No. 89/99, Case 12.034, Carlos Torres Benvenuto et al. (Peru), paragraphs 22 and 23; Report No. 75/99, Case 11.800 Cabrejos Bernuy (Peru), paragraph 22.

40. In this case, the court decision that was allegedly not complied with is dated October 18, 2001, and the petition was lodged on August 10, 2002, after the petitioner attempted a series of legal and extrajudicial domestic actions to secure the execution of the judgment handed down to her.

3. Duplication of Proceedings

41. Article 46.1.c. states that the admissibility of a petition depends on the matter not being “pending in another international proceeding for settlement,” and Article 47.d of the Convention rules that the Commission cannot admit a petition that is “substantially the same as one previously studied by the Commission or by another international organization.” In this case the parties have not argued the presence of either of those reasons for inadmissibility, nor is their presence indicated by the steps taken. In fact, the petitioner claims she is unable to pursue the execution of the judgment through Australian or international venues, and the State has not disputed those claims.

4. Characterization of the Alleged Facts

42. For the purposes of admissibility, the Commission must decide whether the alleged facts tend to establish a rights violation, as stipulated in Article 47.b of the American Convention, or whether the petition is “manifestly groundless” or “obviously out of order,” as described in Article 47.c. The level of conviction regarding those standards is different from that required in deciding on the merits of a complaint: the Commission must conduct a *prima facie* evaluation to determine whether the petition establishes the grounds for the possible or potential violation of a right protected by the Convention, but it does not establish the existence of a rights violation. This determination is a preliminary analysis and does not represent a prejudgment on the merits of the matter.

43. In the instant case, the Commission believes that an analysis of the measures the State should have taken to ensure execution of the judgment handed down against the Embassy of Australia is a task for the merits phase and so, *prima facie*, the petitioner’s claims regarding the absence of effective mechanisms for enforcing that decision could tend to establish a violation of Article 25 of the Convention, in conjunction with the general obligations set out in Article 1.1 thereof. Furthermore, since the courts required the petitioner to cover the legal costs owed by the Embassy of Australia, the facts could tend to establish a violation of Article 21 of the Convention, in conjunction with Article 1.1 thereof. Under the principle of *iura novit curia*, the Commission also decides that it will analyze the possible applicability of Article 2 of the Convention as regards the State’s obligation to adopt the measures necessary to give effect to the rights and freedoms protected by the Convention.

44. The Commission believes that the petitioner’s claims regarding the progressive development of her rights, under Article 26 of the Convention, are subsumed for the purposes of the admissibility report by the guarantees of the right of judicial protection and of the right to property, set out in Articles 25 and 21 of the American Convention, and not in Article 26 thereof. Similarly, the IACHR believes that the petitioner has not presented sufficient information to indicate that the facts could tend to establish violations of the rights of the family and of equal protection as enshrined, respectively, in Articles 17.1 and 24 of the Convention. Finally, Article 29 of the American Convention refers to the way in which the treaty is to be interpreted, but it does not set out rights specific for individuals subject to the jurisdiction of its states parties.

45. In light of the facts set out above, the IACHR does not find the petition to be “manifestly groundless” or “obviously out of order” and it believes, prima facie, that the petitioner has met the requirements set by Articles 47.b and 47.c of the American Convention on Human Rights.

V. CONCLUSIONS

46. The Commission concludes that it has competence to hear the instant case and that the petition is admissible under Articles 46 and 47 of the American Convention.

47. In light of the foregoing arguments of fact and law, and without prejudging the merits of the case,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

DECIDES:

1. To declare this case admissible as regards the alleged violations of the rights enshrined in Articles 21 and 25 of the American Convention, in conjunction with Articles 1.1 and 2 thereof.
2. To declare inadmissible its claims regarding Articles 17.1, 24, 26, and 29 of the American Convention.
3. To give notice of this decision to the parties.
4. To continue with its analysis of the merits of the case.
5. To make this report public and to publish it in its Annual Report to the General Assembly of the OAS.

Done and signed in the city of Washington, D.C., on March 19, 2009. (Signed): Luz Patricia Mejía Guerrero, President; Felipe González, Second Vice-President; Sir Clare K. Roberts, Paulo Sérgio Pinheiro, Florentín Meléndez, and Paolo Carozza, members of the Commission.