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| Institution: | Inter-American Commission on Human Rights |
| File Number(s): | Report No. 64/09; Petition 12.182 |
| Session: | Hundred Thirty-Fifth Regular Session (3 – 8 August 2009) |
| Title/Style of Cause: | Florentino Rojas 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 G. Carozza. Commissioner Victor E. Abramovich, an Argentine national, participated in neither the deliberations nor the decision of this case, in accordance with Article 17(2)(a) of the Rules of Procedure of the Commission. |
| Dated: | 4 August 2009 |
| Citation: | Rojas v. Argentina, Petition 12.182, Inter-Am. C.H.R., Report No. 64/09, OEA/Ser.L/V/II., doc. 51, corr. 1 (2009) |
| Represented by: | APPLICANTS: Jose Sergio del Francio and Pablo Ignacio Pita |
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I. SUMMARY

1. This report refers to the admissibility of Case 12.182, opened by the Inter-American Commission on Human Rights (hereinafter “Inter-American Commission,” “Commission,” or “IACHR”) in response to a petition received on June 5, 1997, at the former National Office of the OAS in Argentina, lodged by Mr. Florentino Rojas and his attorneys José Sergio del Francio and Pablo Ignacio Pita (hereinafter “the petitioners”) on behalf of the first, and against the Argentine Republic (hereinafter “Argentina” or “the State”). The petitioners allege that the State has incurred in responsibility under the American Convention on Human Rights (hereinafter the “American Convention” or “the Convention”) specifically for the alleged violation of Article 24 (right to equal protection of law) and Article 25 (right to judicial protection) of said Convention, to the detriment of Mr. Florentino Rojas.

2. In the petition, it is alleged that on July 7, 1973, Mr. Florentino Rojas suffered a “disabling” accident while returning home, having completed his day working in obligatory military service. On those grounds, Mr. Rojas applied to the administrative authority for a military pension, which was denied. Additionally, in April 1980, Mr. Rojas instituted proceedings, in whose judgment the Fifth National Federal Administrative Court of First Instance stated that the injuries suffered by Mr. Rojas were related to the line of duty and ordered the Argentine Army to grant him a military pension. The petitioners explain that the court of second instance, the National Court of Administrative Appeals, overturned the judgment of the National Court of First Instance, indicating that the accident had not occurred in the line of duty,

so that it was not appropriate for him to be granted a pension. The petitioners add that the National Supreme Court of Justice refused to hear, merely for reasons of form and based on Article 280 of the Code of Civil Procedure,[FN2] the special appeal lodged by the petitioners, and did not enter into consideration of the merits.

[FN2] "Article 280. JUDICIAL ORDER FOR ALL PERTINENT FILES [LLAMAMIENTO DE AUTOS]. REFUSAL TO ADMIT A SPECIAL APPEAL. LEGAL BRIEF IN APPELLATE COURT. When the Supreme Court hears a special appeal, admission of the case shall entail a court order for all pertinent files. The Court, in its sound discretion and solely by citing this provision, may refuse to hear a special appeal for lack of sufficient lower federal court error or when the matters raised are insignificant or inconsequential ..."

3. The petitioners also alleged that, with regard to benefits issues, the law discriminates against conscripts, since to access a military pension, they had to show not only disability but also that it was incurred in the line of duty; whereas enlistees had only to show disability.

4. For its part, the State argues that the alleged victim did not allege before an administrative or judicial court that the national legislative is discriminating against conscripts vis-à-vis enlistees, whose relationship with the military is that of employee. It also alleges that there was no violation of Article 24 of the Convention to the detriment of Mr. Florentino Rojas, since the legislation accords reasonably equal treatment to all those in similar circumstances. As regards the alleged violations of Article 25 of the Convention, the State argues that Mr. Florentino Rojas' aim is for the Commission to review the final judgment simply because he disagrees with points of fact and evidence, and that he has been unable to show any violation of due process guarantees. According to the State, therefore, the case should be declared inadmissible.

5. Having analyzed the positions of the parties, the Inter-American Commission concludes that it has jurisdiction to consider the complaint lodged by the petitioners, which is admissible under the provisions of Articles 46, 8(1), and 25 of the American Convention, but not under Article 24 thereof, as alleged by the petitioners. Therefore, the Commission decides to notify the parties, to continue its consideration of the merits with regard to the alleged violations of the American Convention, to publish this admissibility report, and to include it in its Annual Report to the General Assembly of the OAS.

II. PROCEEDINGS BEFORE THE COMMISSION

6. The complaint was lodged by the petitioners on June 5, 1997, with the former National Office of the OAS in Buenos Aires, Argentina, and the Executive Secretariat of the Commission received it on June 18, 1997. The IACHR forwarded the pertinent parts of the petition to the Argentine State on June 17, 1999, requesting it to submit a reply within 3 months. In communications received on October 26 and December 1, 1999, the State requested extensions of the period for its reply. These were granted. The State submitted its observations in communications of December 14, 1999, August 31, 2000, March 21, 2001, September 21, 2001,

and October 1, 2002. In communications of December 21, 1999, May 22, 2001, October 29, 2001, and January 14, 2003, the Commission duly forwarded those replies to the petitioners. For their part, the petitioners forwarded their observations in communications of February 21, 2000, December 29, 2000, June 9, 2001, and December 4, 2001. The Commission forwarded the replies of the petitioners to the State in communications of May 19, 2000, January 3, 2001, August 16, 2001, and July 25, 2002. On January 22, 2009, the Commission requested specific information from both the State and the petitioners in order to complete its analysis of the petition. On March 23, 2009, the State was granted the requested extension and, on April 29 of that year, the reply was received from both the State and from the petitioner.

III. POSITIONS OF THE PARTIES

A. Position of the petitioners

7. As recited in the petition, on July 7, 1973, Mr. Florentino Rojas suffered a “disabling” accident while returning home after completing his day working in obligatory military service. On those grounds, Mr. Rojas applied for a military pension, for which was opened the administrative file “Rojas Florentino and the National State (Argentine Army), on military pension.” On June 28, 1985, he was notified that his pension application had been denied.

8. The petitioners add that after his notification of the decision, Mr. Rojas requested that he be allowed to see the records of the legal acts in the administrative file with a view to appeal. However, because he was not allowed to review the case file records, he was required to lodge the appeal without substantiation. Nonetheless, he brought an amparo action before the National Federal Administrative Court of First Instance with a view to gain sight of the case file records. The petition was admitted and the Argentine Army was ordered to let him have sight of the case file records. He notes that ultimately he had access to the records, but had to apply for an enforcement order before the Argentine Army would comply with the judgment in the amparo action.

9. Mr. Rojas indicates that in April 1980, before the administrative decision was issued, he instituted legal proceedings in whose judgment, of March 16, 1994, the Fifth National Federal Administrative Court of First Instance indicated that the injuries suffered by Mr. Rojas were related to the line of duty, as it considered them in itinere, the Argentine Army therefore being obliged to grant him a military pension “corresponding to the rank of corporal.” The defendant filed an appeal with the National Court of Administrative Appeals which, on October 17, 1994, overturned the judgment of the court of first instance, since it considered that the injuries suffered by Mr. Rojas were unrelated to the line of duty. The petitioners allege that during the hearing of the administrative case, all evidence provided by Mr. Rojas had disappeared and the decision of the Court of Appeals was based on copies of the case file. The petitioners also allege that during the appeal proceedings, no full and effective analysis of the evidence was made and account was taken of information that did not correspond to the facts.

10. The petitioners allege the absence in Argentina of equality before the law with regard to military pensions for conscripts, since they do not enjoy the benefits of enlistees^[FN3] and, to access a military pension, they must prove that the event leading to the disability occurred in the

line of duty. They therefore reiterate that discrimination is evident, since they must prove both disability and that it was incurred in the line of duty; whereas professional armed forces members must only prove disability. With regard to the alleged inequality to which Mr. Florentino Rojas has been subject, the petitioners indicate that although they did not pursue specific domestic remedies in this regard, it was mentioned in their submissions during both the administrative and judicial proceedings by questioning the inequity of the law, and that in neither proceeding did the authorities seek to investigate the truth.

[FN3] The petitioners state that all enlistees in the Argentine Army are protected by law in the event they incur disability of 66% or above and, in that event, they may access a military disability pension without having to argue that it occurred in the line of duty or in travel between home and the military unit to which they were assigned, having only to show that they were, at the time of the accident, enlisted in the Army.

11. Mr. Rojas alleges that the accident left him with disability of 85% for civilian work and totally disabled for military purposes. He notes that he suffers from paraparesis as a result of level D 12 rachimedular trauma, and that, on the date his petition was lodged, 24 years had passed since the accident and the Argentine State had not assumed its responsibility.

12. Mr. Rojas alleges that on November 5, 1996, the Supreme Court refused, for reasons of form, to hear his special appeal without considering the merits, basing its decision solely on Article 280 of the Code of Civil and Commercial Procedure of the Nation. He notes that four of the nine judges characterized the decision as “arbitrary, since no reasons were given for the lack of inclusion of evaluations of factual circumstances that might determine the applicable legal doctrine ... which disqualifies the decision as a legal act.” Nonetheless, the other five judges, with formal reservations, upheld the judgment of the second tier court. The petitioners allege violation of the provisions of Article 25 of the American Convention as a result of the decision of the latter five judges, for reasons of form, to abstain from consideration of the merits of the case.

13. The petitioners also allege unwarranted delay by both the administrative and the judicial court at the different stages. They emphasize that it took 21 years from the date of the accident and the submission of the pension application for the State, through the judicial authorities, to render a final judgment against Mr. Florentino Rojas, so that it was evident that the State had failed to fulfill its obligation to provide prompt recourse.

14. Based on the foregoing considerations, the petitioners state that Mr. Rojas has exhausted the available legal remedies and that the State has incurred in responsibility for violating Articles 24 and 25, in conjunction with Article 1(1) of the American Convention.

B. Position of the State

15. In its first submission, the main allegation of the State was that the petition had been lodged with the Commission after the six month period established in Article 46(1)(b) of the

Convention, since the complaint was received in the Executive Secretariat on June 18, 1997. However, in subsequent communications, and once it had been clarified that the petition had been received on June 5, 1997 at the former National Office of the OAS in Argentina, the State indicated that it agreed that the petition had been presented within the established period.

16. Additionally, the State alleged that Mr. Florentino Rojas did not exhaust domestic remedies in connection with the alleged violations of Article 24 of the Convention to which the petition referred. It argued that the alleged victim did not cite in the administrative or the judicial court the alleged discrimination in national law against conscripts vis-à-vis those who enlisted in the armed forces as employees thereof. The State indicates that Argentine law provides remedies effective and sufficient for oversight of the constitutionality of legislation. In that regard, it states that the petitioner should have alleged in a timely manner the unconstitutionality of Law 19.101, and that, as domestic legislation was involved, it was incumbent upon him to reserve the right, in all submissions, to institute special appeal proceedings with the Supreme Court.

17. The State also alleges that there has been no violation of Article 24 of the Convention to the detriment of Mr. Florentino Rojas, since the legislation affords reasonably equal treatment to all those in the same circumstances and does not discriminate arbitrarily, recognizing that inequalities warrant unequal treatment, since not all different legislative treatment is discriminatory and not every distinction may be deemed detrimental. It adds that the jurisprudence of the Court has no bearing on the discrimination cited by the petitioners, since rules compared are those used to grant benefits to persons of dissimilar legal status with the State.

18. It adds that the obligation to provide military service arises from a one-year, one-time obligation imposed by the National Constitution and the Military Service Act to ensure the continuity of the “national defense service.”[FN4] It also adds that the relationship of enlistees with the State is that of employee. Therefore, it argues, the law would not constitute a violation of Article 24 of the Convention since it grants different benefits based on different requirements, taking account of the different situations under which conscripts and enlistees enter the service as military personnel.

[FN4] The State notes that the military service obligation was lifted by Law 24.429, whose regulations are contained in Decree 978/95.

19. As regards the alleged violations of Article 25 of the Convention, the State alleges that Mr. Florentino Rojas’s objective is for the Commission to review the judgment of October 17, 1994, of the Second Federal Chamber of Administrative Appeals, which was rendered final by the decision of the Supreme Court of the Nation, because he disagrees with points of fact and evidence. It adds that it is not alleged in the petition that there was any violation of due process guarantees, and that Mr. Florentino Rojas had had legal assistance at all stages of proceedings.

20. Moreover, the State alleges that the Supreme Court of the Nation adequately addressed the case and the fact that it refused to hear a special appeal because it did not contain the

elements stipulated by Article 280 of the Code of Civil and Commercial Procedure of the Nation, does not mean that the appeal was not addressed in the prior decision, as is shown by the dissenting votes of four of the members of said Court. The fact that the Court did not admit the appeal does not imply the existence of violations of judicial guarantees. Therefore, the State requested the Commission to declare the petition inadmissible.

IV. ADMISSIBILITY

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

21. Under Article 44 of the American Convention, the petitioners are entitled to present petitions to the Commission. The petition names as the alleged victim a person whose rights enshrined in the American Convention the State undertook to respect and guarantee. As regards to the State, the Commission notes that Argentina has been a Party to the American Convention since September 5, 1984, the date of deposit of its instrument of ratification. Therefore, the Commission has competence *ratione personae* to consider the petition.

22. The Commission has competence *ratione loci* to consider the petition as in it are alleged violations of rights protected in the American Convention that occurred within a State Party to said treaty. The IACHR has competence *ratione temporis* since the obligation to respect and guarantee the rights protected in the American Convention was in force for the State on the date that the violation of the protected rights alleged in the petition allegedly occurred. Lastly, the Commission has competence *ratione materiae*, since the petition refers to violations of human rights protected by the American Convention.

B. Other requirements for admissibility of the petition

1. Exhaustion of domestic remedies

23. Article 46(1)(a) of the Convention establishes as a requirement for admission of a petition lodged with the Inter-American Commission that the remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law. The objective of this requirement is to enable national authorities to consider the alleged violation of a protected right and, if appropriate, to have an opportunity to address the violation prior to its consideration by an international court.

24. In the instant case, the petitioners argue that Mr. Rojas exhausted domestic remedies by lodging the special appeal with the Supreme Court of Justice of the Nation. For its part, the State confirms that domestic remedies were exhausted with regard to Mr. Rojas' claims in connection with the accident and pension requested. The Commission considers that domestic remedies were exhausted with regard to the alleged violations of Article 25 of the Convention, thus fulfilling the provisions of Article 46(1)(a) of the Convention.

25. Additionally, in its submissions, the State has alleged that, with regard to the allegations of violation of the right to equality before the law, enshrined in Article 24 of the Convention, the

alleged victim did not cite in the administrative court the alleged discriminatory treatment in national legislation in his specific case and to the detriment of conscripts in general vis-à-vis military enlistees. In that connection, the State indicated that Argentine law provides remedies effective and sufficient for oversight of the constitutionality of laws and that the petitioner should have raised the unconstitutionality of Law 19.101, reserving the right, in all submissions, to lodge a special appeal with the Supreme Court.

26. With regard to the foregoing, the petitioners have alleged that although Mr. Florentino Rojas did not institute proceedings specifically in connection with the unconstitutionality of the law, all administrative and judicial submissions had referred to the discriminatory treatment it accords.

27. The Commission notes that no remedy was sought by the alleged victim or his legal representatives against the discriminatory treatment or unconstitutionality of legislation affecting him, nor did his administrative or judicial submissions specifically mention it,[FN5] so that the Commission considers that the instant petition does not meet the requirement set forth in Article 46(1)(a) of the Convention.

[FN5] The annexes forwarded to the Commission by both the petitioners and the State contain a copy of both the administrative and the judicial proceedings instituted, wherein it was noted that in none of his submissions did Mr. Rojas specifically refer to the alleged discriminatory legislative treatment.

28. To summarize, the Commission considers that domestic remedies have been exhausted with regard to the alleged violations of Article 25 of the Convention, but not with regard to those alleged by the petitioners with regard to Article 24 thereof.

2. Period for lodging the petition

29. Article 46(1)(b) of the American Convention provides that admission of a petition shall be subject to the requirement that it is lodged within the stipulated period, that is, six months from the date on which the party alleging violation of his rights was notified of the final judgment at the domestic level.

30. In the instant case, Mr. Rojas was notified on December 9, 1996, of the judgment of the Supreme Court of Justice of the Nation regarding the special appeal, and he lodged his petition with the former National Office of the OAS in Argentina on June 5, 1997. Therefore the requirement stipulated in Article 46(1)(b) of the American Convention has been met.

3. Duplication of proceedings and res judicata

31. Article 46(1)(c) provides that admission of petitions shall be subject to the requirement that the matter “is not pending in another international proceeding for settlement,” and Article 47(d) of the Convention stipulates that the Commission shall consider inadmissible any petition

that “is substantially the same as one previously studied by” the Commission or by another international organization. In the instant case, the parties have not adduced the existence of either of these two requirements of inadmissibility, nor may they be deduced from the proceedings.

4. Characterization of the facts alleged

32. Article 47(b) of the American Convention establishes the inadmissibility of petitions that do not state facts that tend to establish a violation of the rights guaranteed by the Convention.

33. In the instant case, it is not incumbent upon the Commission at this stage of the proceedings to decide whether there were violations of the American Convention as alleged. The IACHR has made a prima facie evaluation and determined that the petition states complaints that, if proven, could tend to establish the existence of a violation of the rights guaranteed by the Convention.

34. The information and submissions of the petitioners show that in April 1980, Mr. Florentino Rojas instituted proceedings in the Fifth National Federal Administrative Court of First Instance against the National Army with a view to obtain from it a disability pension to which he considered himself entitled. The Commission notes that only on November 5, 1996, 16 years later, were the judicial proceedings concluded.

35. The State has stated that no irregularities occurred during the administrative and/or judicial proceedings as alleged by Mr. Florentino Rojas. The State did not submit to the Commission arguments regarding the alleged delay in the judicial proceedings and argues that the petitioners’ objective is for the Commission to review the domestic judgment unfavorable to Mr. Rojas. It has therefore requested that the petition be declared inadmissible.

36. The Commission notes that it did in fact take the State 16 years to conclude the judicial process, so that, regarding the delay alleged by the petitioners, if proven, the matters raised would tend to establish violations of Article 25 of the Convention as regards the right to prompt access to judicial protection, which it is incumbent upon the Commission to evaluate at the merits stage. Additionally, taking into consideration the question of a reasonable period and, in accordance with the *jura novit curia* principle, the Commission will, to the extent relevant, also analyze the potential applicability of Article 8(1) of the American Convention.

37. Therefore, in the instant case, the Commission concludes that the petitioners have lodged complaints which, if consistent with other requirements and if proven, could tend to characterize a violation of the rights protected under the American Convention; specifically those enshrined in Articles 8(1) (judicial guarantees) and 25 (judicial protection), in conjunction with Article 1(1) (obligation to respect and guarantee rights).

V. CONCLUSIONS

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

39. Based on the foregoing arguments of fact and law, and without prejudging the merits,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

DECIDES:

1. To declare the instant case admissible with regard to the alleged violations of the rights enshrined in Articles 8(1) and 25, in conjunction with Article 1(1) of the American Convention.
2. To declare the petition inadmissible with regard to the alleged violations of Article 24, in conjunction with Article 1(1) of the American Convention.
3. To notify the parties of this decision.
4. To continue to analyze the merits.
5. To publish this report and to include it in its Annual Report to the General Assembly of the OAS.

Done and signed in the city of Washington, D.C., on the 4th day of the month of August 2009.
(Signed): Luz Patricia Mejía Guerrero, President; Felipe González, Second Vice-president; Sir Clare K. Roberts, Paulo Sérgio Pinheiro, Florentín Meléndez, and Paolo G. Carozza, members of the Commission.