

REPORT No. 7/10¹

PETITION 12.378

ADMISSIBILITY

FÁTIMA REGINA NASCIMENTO DE OLIVEIRA AND MAURA TATIANE FERREIRA ALVES
BRAZIL

March 15, 2010

I. SUMMARY

1. On March 22, 2001, the Inter-American Commission on Human Rights (hereinafter "the Inter-American Commission", or "the IACHR") received a petition alleging the international responsibility of the Federative Republic of Brazil ("the State" or "Brazil") for the alleged discrimination against the adopting mother Fátima Regina Nascimento de Oliveira and her adopted daughter, Maura Tatiane Ferreira Alves, ("the alleged victims"), by reason of the denial of the right to maternity leave. It is alleged that the State is responsible for violations of the rights to judicial protection, protection of the family, the rights of the child, and equality before the law. The petition was presented by THEMIS - *Assessoria Jurídica e Estudos de Gênero; Justiça Global*; the *Comissão de Cidadania e Direitos Humanos da Assembléia Legislativa do Rio Grande do Sul*; the *Subcomissão da Criança e do Adolescente da Assembléia Legislativa do Rio Grande do Sul*; and the *Instituto Amigos de Luca* (hereinafter "the petitioners").

2. The petitioners allege that civil servant Fátima Regina Nascimento de Oliveira adopted her daughter Maura Tatiane Ferreira Alves on the day of her birth, July 23, 1989, pursuant to the decision of Judge for Minors of the Comarca of Porto Alegre, in the state of Rio Grande do Sul. Ms. Oliveira immediately requested her maternity leave through official channels from the Military Hospital of Santa Maria, a public health institution; however, according to the petitioners, her request was rejected by the aforementioned State institution. The petitioners report that Ms. Oliveira lodged a precautionary action in the labor jurisdiction and after a number of favorable decisions issued by labor judges and courts, starting in 1990, the Federal Supreme Court ruled that she did not have the right to maternity leave in a decision issued on May 30, 2000. Consequently, they maintain that the State of Brazil has violated Articles 8 (judicial guarantees), 17 (protection of the family), 19 (rights of the child) and 24 (equality before the law) of the American Convention on Human Rights ("the American Convention"); and has failed to fulfill its general obligation enshrined in Article 1.1 of the same instrument.

3. The State failed to respond to the petition despite being notified pursuant to the provisions of the Rules of Procedure and the American Convention.

4. Without prejudice to the merits of the claim, and in accordance with Articles 46 and 47 of the American Convention, the Inter-American Commission decides to declare the petition admissible with respect to the alleged violations of Articles 8.1, 17, 19 and 24 of the said international instrument, all in accordance with the general obligation set out in Article 1.1. Additionally, in accordance with the principle *iura novit curia*, the IACHR declares the petition admissible regarding the alleged violation of Article 25.1 of the American Convention. The Inter-American Commission has also decided to publish the present report and include it in its Annual Report to the General Assembly of the Organization of American States.

II. PROCEEDINGS BEFORE THE INTER-AMERICAN COMMISSION

5. The petition was received on March 22, 2001. On April 24, 2001, the IACHR sent the pertinent parts of the petition to the State with time period of three months² to present observations.

¹ Commissioner Paulo Sérgio Pinheiro, of Brazilian nationality, did not participate in either the deliberations or the decision on the present petition, in accordance with the requirements in Article 17.2 of the Commission's Rules of Procedure.

² In accordance with Article 34 of the IACHR's Rules, in force at the time.

From April 24, 2001 up until the date of the adoption of the present report, the State has failed to submit a written response to the petition.

6. On October 15, 2002, during its 116th ordinary period of sessions, the Inter-American Commission held a working meeting on the present issue, with the participation of both parties.

III. POSITION OF THE PARTIES

A. The petitioners

7. The petitioners allege that the civil servant Fátima Regina Nascimento de Oliveira adopted her daughter Maura Tatiane Ferreira Alves on the day of her birth, 23 July 1989, pursuant to the decision of the Judge for Minors of the Comarca of Porto Alegre, in the state of Rio Grande do Sul. Immediately thereafter, Ms. Oliveira officially requested her "maternity leave" from the Military Hospital of Santa Maria, a public health institution, in conformity with Article 7, XVIII of the Brazilian Constitution, which establishes that, "the following are the rights of urban and rural workers, among others, that aim at the improvement of their social conditions: ...maternity leave, without loss of employment or salary, for a period of 120 days."³ However, her request was rejected by the aforementioned State institution. According to the petitioners, she was also threatened with removal from her position on contractual grounds if she failed to return to work within thirty days.

8. The petitioners report that, in light of the foregoing, Ms. Oliveira lodged a precautionary action on her own, and her daughter's, behalf before the labor jurisdiction (Precautionary Action 4056/89), and on June 15, 1990 she obtained a precautionary measure, and a favorable judgment of first instance (Process 4405/89). According to the petitioners, since the respondent (*Hospital Público Santa Maria*) was a public institution, an appeal was automatically lodged at second instance. The Regional Labor Tribunal confirmed the prior decision in favor of the alleged victims on November 19, 1991. The petitioners allege that the Government of Rio Grande do Sul appealed against this decision to the Superior Labor Tribunal through a *Agravo Regimental* (AC. 5th T - 4628/93), which nonetheless confirmed the decision in favor of the alleged victims on November 2, 1993. According to the petitioners, the Government of Rio Grande do Sul lodged an *Embargos de Declaração* action (AC.5th T - 953/94), which was dismissed on March 24, 1994.

9. Finally, the petitioners report that the Government of Rio Grande do Sul lodged an extraordinary appeal (TST – RE – ED – AG – AI – 53.462/92.4), which was dismissed by the Superior Labor Tribunal on July 20, 1994; however, the extraordinary appeal lodged before the Federal Supreme Court (RE 197.807-04, RS) - the country's last instance - resulted in a judgment handed down on May 30, 2000, against the alleged victims. The petitioners indicate that the Federal Supreme Court rejected the alleged victims' right to maternity leave on the basis that Ms. Oliveira was an adopting mother, and that the aforementioned judgment stated that "the right of leave does not extend to an adopting mother, under Article 7, XVIII of the Federal Constitution, which benefits pregnant employees; the ordinary legislature is the entity competent to deal with the matter." According to the petitioners, the said decision was published on September 24, 2000 as *res judicata*; in other words, it became a definitive decision without the possibility of further appeal, following which the domestic remedies were exhausted.

10. In relation to the decision of the Federal Supreme Court, the petitioners allege in the first place that, having been issued ten years after the adoption of Maura Tatiane Ferreira Alves, the alleged victims have effectively been denied access to justice and the right to judicial protection within a reasonable period. The petitioners also argue that the decision of the Federal Supreme Court violated the right to equality before the law. They allege that the distinction drawn by the Court between adopting mothers and natural mothers is substantially discriminatory. The petitioners maintain that the said judicial

³ Free translation from the original Portuguese: "São direitos dos trabalhadores urbanos e rurais, além de outros que visem à melhoria de sua condição social: licença à gestante, sem prejuízo do emprego e do salário, com a duração de cento e vinte dias".

decision fails to fulfill the duty to protect motherhood, the family and, in particular, the rights of the child; and that therefore, it violates the American Convention.

11. According to the petitioners, the expression "maternity leave" contained in the Brazilian Constitution cannot be understood in the abstract, but should correspond to the object of the rule, which is the protection of the healthy development of newborn children. Therefore, it ought not to be interpreted strictly in relation to the biological mother, in violation of the provisions of the American Convention for the protection of the family, and children.

12. The petitioners therefore submit that the State of Brazil has violated Articles 8 (judicial guarantees), 17 (protection of the family)⁴, 19 (rights of the child)⁵ and 24 (equality before the law)⁶ of the American Convention on Human Rights ("the American Convention"); and equally has failed to fulfill its general obligation enshrined in Article 1.1 of the same instrument.

13. Lastly, during the working meeting held on October 15, 2002, the petitioners recognized that there has been progress in the Brazilian legislation regarding maternity leave, through the adoption of Law No. 10.421 of April 15, 2002, which extends the right to maternity leave to adopting mothers. Without prejudice to the foregoing, the petitioners pointed out that the legislative reform did not have retroactive application for the alleged victims, nor granted comprehensive reparation in their favor.

B. The State

14. Up to the date of adoption of the present report, the State has failed to submit a response in writing to the petition, despite being duly notified of the claim and having a three month time limit, as provided in the Rules of Procedures then in force, to present its observations.

15. During the working meeting held on October 15, 2002, the State requested that the IACHR archive the present petition, on the grounds that the relevant domestic legislation had already been amended, and that the new law cannot be retroactively applied to benefit the alleged victims.

IV. ANALYSIS OF ADMISSIBILITY

A. Competence *ratione personae*, *ratione materiae*, *ratione temporis* y *ratione loci*

16. The petitioners have *locus standi* to lodge complaints before the IACHR, under Article 44 of the American Convention. The petition claims that the alleged victims are Fátima Regina Nascimento de Oliveira and Maura Tatiane Ferreira Alves, towards whom the State of Brazil has undertaken to respect and ensure the rights enshrined in the aforementioned international instrument. With reference to the State, the Federative Republic of Brazil ratified the American Convention on September 25, 1992. Therefore, the Inter-American Commission has competence *ratione personae* to examine the petition.

17. The IACHR has competence *ratione loci* to examine the petition, since it alleges violations of human rights protected by the American Convention, which took place within the jurisdiction of Brazil, a State party to the said Treaty.

⁴ The petitioners also refer to the provisions in Article 10 of the International Covenant on Economic, Social and Cultural Rights, in order to interpret the provision on protection of the family in the American Convention (Article 17).

⁵ The petitioners also refer to the provisions in Article 24 of the International Covenant on Civil and Political Rights, in Article 10.3 of the International Covenant on Economic, Social and Cultural Rights, and in Articles 3, 5, 18, and 24 of the Convention on the Rights of the Child, in order to interpret the provision on protection of children in the American Convention (Article 19).

⁶ The petitioners also refer to the provisions in Article 2 of the International Covenant on Economic, Social and Cultural Rights, and in Article 11 of the Convention on the Elimination of All Forms of Discrimination against Women, in order to interpret the rules against discrimination in the American Convention (Articles 1.1. and 24).

18. The Commission also has competence *ratione temporis*, because the claims on the alleged violation of the rights protected in the American Convention occurred by virtue of a decision adopted by the Federal Supreme Court on May 30, 2000, a date on which the American Convention had already entered into force for Brazil. Lastly the IACHR is competent *ratione materiae* because the petitioners allege the violation of rights enshrined in the American Convention.

B. Other Admissibility Requirements

1. Exhaustion of Domestic Remedies

19. Pursuant to Article 46.1 of the American Convention, in order for a petition to be declared admissible by the Inter-American Commission, it is necessary that domestic legal remedies have been exhausted in accordance with generally recognized principles of international law.

20. The IACHR finds that it is undisputed that on May 30, 2000, the alleged victims' claim for maternity leave was dismissed in a last instance decision issued by the Federal Supreme Court. It is equally undisputed that the said decision became *res judicata* and was notified on September 24, 2000.

2. Timeliness of the Petition

21. Article 46.1 of the American Convention requires that petitions be lodged within a period of six months from the date on which the final judgment was notified. As indicated *supra*, the final judgment on was notified on September 24, 2000. The petition was received by the Commission on March 22, 2001, within the period of six months referred to in Article 46.1.b. of the American Convention.

3. Duplication of Procedures and *res judicata*

22. There is no information on the record indicating that the subject of this petition is pending settlement in another international procedure, or that the case essentially duplicates a petition pending or already examined and settled by this or another international governmental organization. The Commission therefore finds that the requirements provided for under Articles 46.1.b and 47 of the Convention have been satisfied.

4. Colorable Claim

23. Article 47.b of the American Convention states that the IACHR shall consider inadmissible any petition or communication presented that "does not state facts that tend to establish a violation of the rights guaranteed by this Convention." The criterion for the evaluation of these requirements differs from those used by the Inter-American Commission to pronounce on the merits of a case. In effect, the evaluation serves to determine, *prima facie*, whether the petition includes the basis of a violation, possible or potential, of a right guaranteed by the American Convention, and not to establish the actual existence of a violation of rights. In other words, this determination constitutes a preliminary analysis, which does not imply a prejudging of the merits of the claim.⁷

24. The IACHR notes that the petitioners have claimed that the judgment of the Federal Supreme Court allegedly involves discrimination by drawing a substantial and unjustified distinction between natural and adopting mothers. They have also alleged that the right to maternity leave has been denied to the adopting mother and her adopted daughter, and that this infringes the right to equality before the law, the protection of maternity, and the protection of the child. These claims, if proved at the merits stage, could characterize violations of Article 24 of the American Convention to the prejudice of the alleged victims.

⁷ IACHR, Report No. 21/04, Petition 12.190, Admissibility, *José Luís Tapia González and others* (Chile), February 24, 2004, paragraph 33.

25. Also, regarding the alleged violation of the protection of the family and the rights of the child, the Inter-American Commission considers that, if true, the alleged unjustified distinction drawn between an adopted family and a natural family for the granting of maternity leave, as well as between adopted and biological offspring, could be characterized as a violation of the rights enshrined in Articles 17 and 19 of the American Convention, to the prejudice of the alleged victims.

26. Finally, if it is established that the aforementioned decision of the Federal Supreme Court denied the alleged victims the right to due process guarantees and judicial protection, that is, the right to an effective remedy within a reasonable time, the IACHR considers that the former could characterize a violation of Article 8.1 and - applying the principle of *iura novit curia* - of Article 25.1, both of the American Convention. All the foregoing Articles of the American Convention must be considered in conjunction with the obligation to respect rights, enshrined in Article 1.1 of the same international instrument.

27. Therefore the IACHR finds that the petitioners have satisfied *prima facie* the requirements in Article 47.b of the American Convention.

V. CONCLUSIONS

28. The Inter-American Commission concludes that it is competent to examine the merits of this case, and that the petition is admissible pursuant to Articles 46 and 47 of the American Convention. Based on 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 petition admissible in relation to the alleged violations of the rights protected in Articles 8.1, 17, 19, 24 and 25 of the American Convention, in conjunction with the general obligation enshrined in Article 1.1 of the said Treaty;
2. To notify this decision to the parties;
3. To continue with the analysis of the merits of the case; and
4. To publish its decision and to include it in its Annual Report to the General Assembly of the Organization of American States.

Done and signed in the city of Washington, D.C., on the 15th day of the month of March 2010.
(Signed): Felipe González, President; Dinah Shelton, Second Vice-president; María Silvia Guillén, José de Jesús Orozco Henríquez, and Rodrigo Escobar Gil, members of the Commission.