

REPORT No. 80/10
PETITION 12.280
INADMISSIBILITY
MARTHA ALFARO SUÁREZ *ET AL.*
PERU
July 12, 2010

I. SUMMARY

1. On February 6, 1998, the Inter-American Commission on Human Rights (hereinafter "the Commission", "the IACHR", or "the Inter-American Commission") received a petition presented by the Center for Labor Assistance of Peru (CEDAL) and the Association Pro-Human Rights (APRODEH) (hereinafter "the petitioners") in favor of Martha Alfaro Suárez, Fausto Jesús Arangoitia Laviña, Cirila Castro Espinoza, Manuel Jesús Camargo Castañeda, Victoria Céspedes Viuda del Castillo, Berta Huaman Ríos de López, Feliciano Mendoza Carrion, Carlos Alberto Pajuelo, Carmen Pérez Loyola, Julio Pozo Saavedra and Delia Justa Reinoso Canchaylla de Cubas (hereinafter "the alleged victims") alleging the responsibility of the Republic of Peru (hereinafter "Peru", "the State of Peru", or "the State") for the violation of the rights enshrined in Articles XIV, XVI, XVIII and XXIII of the American Declaration of the Rights and Duties of Man (hereinafter "the American Declaration" or "the Declaration"), and in Articles 21, 24, 8 and 25, in relation to Article 1.1 of the American Convention on Human Rights (hereinafter "the American Convention", or "the Convention").

2. The petitioners alleged that in September 1994, the Ministry of Labor and Social Development authorized the dismissal of 133 workers from the firm P y A D'Onofrio S.A., among whom are the alleged victims. They submitted that this authorization took place without administrative fair trial and other rights provided for in the Peruvian Constitution. The petitioners stated that in November 1994 the alleged victims presented an action for constitutional protection (hereinafter "*amparo* suit") against the Labor Ministry, which was declared groundless at all levels of the constitutional court system. They indicated that the reasoning employed by the Peruvian courts to dismiss the *amparo* suit does not conform either to domestic legislation or to the case-law drawn from situations allegedly similar to that referred to by the alleged victims.

3. For its part, the State alleged that all the courts seized of the *amparo* action filed by the alleged victims ruled that the claim was akin to a contentious-administrative procedure and not to an *amparo* suit. It argued that by choosing an inappropriate procedural route, the alleged victims failed to comply with the exhaustion of domestic remedies' requirement set forth in Article 46(1)(a) of the Convention. Lastly, the State alleged that the facts stated by the petitioners are manifestly groundless and requested that the petition be declared inadmissible in accordance with Article 47(c) of the Convention.

4. After analyzing the position of the parties, the Commission concluded that it is competent to examine the claim but that it is inadmissible by virtue of Articles 46(1)(a) and 47(b) of the American Convention. The Commission decided to notify the parties of the current Inadmissibility Report, to publish it and to include it in its Annual Report.

II. PROCEEDINGS BEFORE THE COMMISSION

5. On February 6, 1998, the petition was received by the IACHR, and registered as number 12.280. The petitioners submitted additional information on March 23, June 22 and September 14, 1998; and on January 22, February 11, and March 16, 1999. On May 12, 2000, the IACHR sent the relevant parts of these documents to the State, setting a time limit of 90 days to present a response, in accordance with its Rules then in force.

6. On October 3, 2000, the State sent its response, which was transmitted to the petitioners on November 9 of the same year. The petitioners submitted additional briefs on September 24, and November 29, 2000; on August 18, 2003; on November 6, 2009, on March 16 and June 16, 2010. For its part, the State presented additional briefs on March 1, 2001 and December 12, 2003.

III. POSITION OF THE PARTIES

A. The Petitioners

7. The petitioners alleged that on April 20, 1994, the firm P y A D'Onofrio S.A. sent a notarized letter to the respective labor union, announcing the initiation of proceedings for "collective dismissal from employment on objective grounds" laid down in Chapter VII of Legislative Decree No. 728. They indicated that on April 22, 1994, the company requested authorization from the Under-Department of the Ministry of Labor and Social Development in Lima (hereinafter the "Under-Department of the Ministry of Labor", or "the administrative authority") to dismiss 139 workers. According to their allegations, the company based its request in an opinion of December 2, 1993, whereby the Department for Industry, Tourism, Integration and Commercial Negotiations (hereinafter "the Department for Industry") stated that the economic and technological reasons invoked by the company had been verified.

8. The petitioners indicated that on June 6, 1994, the Under-Department of the Ministry of Labor declared the nullity of the request for collective dismissal and indicated that it was not possible to take into consideration a legal opinion issued by the Ministry for Industry four months prior to the initiation of the proceedings. In view of the foregoing, P y A D'Onofrio requested a second legal opinion from the Department for Industry, which again supported the appropriateness of the economic and technical reasons and indicated that the collective dismissals ought to affect 64 production workers, 58 administrative employees and 11 from the human resources department.

9. The petitioners stated that, based on the Department of Industry's second opinion, the Under-Department of the Ministry of Labor renewed the proceedings begun on April 22, 1994, despite being previously declared groundless on June 6, 1994. They emphasized that although the Department of Industry pointed out that the dismissals would impact 64 production workers, 58 administrative employees and 11 in human resources, the company P y A D'Onofrio maintained its original list of 139 manual workers, excluding six workers who held trade-union immunity. They pointed out that this scheme breaches the provisions of Articles 86 and 88 of Legislative Decree No. 728. In the relevant sections, the text of these provisions, in force at the time of the alleged facts, provided:

Article 86.- The following are objective reasons for the termination of the contract of employment:

- a) The unforeseen case and *force majeure*;
- b) Economic, technological, structural or other similar grounds;

[...]

Article 88.- The termination of contracts of employment for objective reasons is subject to the following procedure:

- a) The company shall inform the union (...), indicating the precise reasons invoked, the identification of the affected workers and the anticipated date for the termination of each individual contract;

[...]

- c) Should no direct agreement be reached, the employer shall have recourse to the Ministry of that Sector (...) for a determination on the relevance of the objective reason put forward, within a period of 15 working days from the request (...). The report shall be limited to an opinion on the request made by the employer;

d) With the said opinion the employer shall have recourse to the Administrative Labor Authority adding to its request an expert assessment, if desired.¹

10. According to the allegations, on August 26, 1994, the Under-Department of the Ministry of Labor adopted Resolution No. 185-94-DPSD, approving the collective dismissal of 133 manual workers of P y A D'Onofrio. The workers' union lodged an administrative appeal petition against this resolution, which was dismissed by the Under-Department of the Ministry of Labor in Executive Resolution No. 050-94-DR-LIM on September 14, 1994. Applicants indicated that on September 19, 1994, the same administrative authority rejected a nullity petition filed by the union, after which the company dismissed the said 133 workers.

11. The petitioners alleged that unlike an individual dismissal, the procedure for collective dismissals set out in Chapter VII of Legislative Decree No. 728 excludes the possibility of initiating an ordinary labor claim directly against the employing company in order to obtain re-instatement. They maintained that the above decree created a special procedure by which the Ministry of Labor and Social Development performs a prior control of the legality of collective dismissals.

12. The petitioners pointed out that on November 18, 1994, the eleven alleged victims and the other dismissed workers of P y A D'Onofrio lodged an *amparo* suit before the First Civil Judge of Lima, requiring a declaration of the inapplicability of Resolutions 050-94-DR-LIM and 185-94-DPSC, on account of the breach of constitutional guarantees to employment security and administrative due process. The said suit also included a demand for the alleged victims' reinstatement to their positions of work and the payment of wages lost since the breach of the employment relationship. According to the information, the First Civil Judge and the Fifth Chamber of the Superior Court of Lima, by decisions of January 30 and August 15, 1995 respectively, declared the proceedings unfounded. On April 26, 1996, the Social and Constitutional Chamber of the Supreme Court of Justice ruled there were no grounds for annulling the above judgments. The alleged victims lodged an extraordinary appeal in *cassation* against this last ruling, which was dismissed by the Constitutional Tribunal on September 23, 1997.

13. The petitioners stated that the Peruvian courts' decisions are based on the ground that the alleged victims should have pursued their claim through the contentious-administrative proceedings, in conformity with the provisions established in Article 148 of the Political Constitution. They maintained that even though the above constitutional rule lays down that "definitive administrative decisions may be challenged by contentious-administrative proceedings", Article 200.2 of the same Political Charter enshrines the precedence of the *amparo* action against acts or omissions on the part of any State entity that breaches fundamental rights. They concluded that the alleged victims could opt to choose between the *amparo* and contentious-administrative route against the decisions issued by the Under-Department of the Ministry of Labor.

14. The petitioners pointed out that the contentious-administrative action was unsuitable in the alleged victims' case, since both preferential and summary proceedings and the possibility of precautionary measures were unavailable. They indicated that the said action is aimed at requiring judicial oversight of an act of the Public Administration and its compatibility with a rule below the Constitution. On the other hand, they alleged that the *amparo* suit has the capacity of restituting *in integrum* the enjoyment of a Constitutional right. Lastly, the petitioners emphasized that the basis of the decisions reached by the Peruvian courts in the present case contradicted previous judgments in which the Social and Constitutional Chamber of the Supreme Court of Justice had ruled that the *amparo* suit was suitable to declare administrative resolutions voided.

B. The State

15. The State confirmed that after an attempt at direct negotiations with the workers' union, on April 22, 1994, the firm P y A D'Onofrio requested from the administrative authority the initiation of

¹ Petitioners' Brief received on June 22, 1998, Annex 7, copy of Legislative Decree No. 728 of August 11, 1991.

proceedings for collective dismissal for objective reasons laid down in Legislative Decree No. 728. It pointed out that the request ended with Executive Resolution No. 185-94-DPSD, authorizing the dismissal of 133 employees. It emphasized that the affected workers lodged administrative appeals, which were adjudged to be groundless by the competent entity, the Under-Department of the Ministry of Labor against a background of due process. It indicated that once the previous administrative route was exhausted, Article 148 of the 1993 Political Constitution establishes the contentious-administrative proceedings as the appropriate means to challenge the validity of decisions duly issued by a public body.

16. The State described in similar terms of those of the petitioners the decisions issued by the organs of the domestic jurisdiction relating to the *amparo* suit lodged by the alleged victims and other workers dismissed by the firm P y A D'Onofrio. It alleged that each one of the courts ruled that the proper channel to dispute the validity of the Under-Department of the Ministry of Labor's decisions 050-94-DR-LIM and 185-94-DPSC was a contentious-administrative action. It argued that by availing themselves of a procedural channel incompatible with their claim, the alleged victims did not exhaust the remedies laid down in the domestic law, and that therefore the petition should be declared inadmissible by virtue of Article 46(1)(a) of the American Convention.

17. The State argued that in the administrative proceedings before the Under-Department of the Ministry of Labor, and in the judicial process via the *amparo*, the alleged victims made use of the methods of proof and means of defense set out in domestic law, and that the rights to due process and judicial protection were respected. In this sense, it stated that facts set out in the petition fail to constitute colorable claims under the Convention and requested that the IACHR declare it inadmissible in conformity with Article 47(c) of the said instrument.

IV. ANALYSIS OF COMPETENCE AND ADMISSIBILITY

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

18. The petitioners are entitled under Article 44 of the American Convention to present petitions before the Commission. The petition states that the alleged victims are individuals, with respect to whom the State of Peru undertook to respect and guarantee the rights recognized in the Convention. For its part, Peru ratified the American Convention on July 28, 1978. Therefore the Commission has competence *ratione personae* to examine the complaint.

19. The Commission has competence *ratione loci*, since the petition alleges violations of rights protected in the American Convention, which took place within the territory of a State party to the said treaty.

20. The Commission has competence *ratione temporis* regarding the obligation to respect and guarantee the rights protected in the American Convention as they were in force for the State on the date on which the actions alleged in the petition occurred.

21. Lastly, the Commission is competent *ratione materiae* because the petition complains of possible violations of human rights protected by the American Convention. With regard to the alleged violation of provisions of the American Declaration, the Commission observes that the rights that the State undertook to guarantee as a party to the OAS Charter, are to be found in the said instrument, which is source of international obligations.² However, from the time that the Peruvian State ratified the American Convention, this treaty became the principal source of obligations within the framework of the Inter-American system for the promotion and protection of human rights.³ In this sense and given that the

² I/A Court HR, *Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights*. Advisory Opinion OC-10/89 of July 14, 1989. Series A No.10, paragraphs 43 and 46.

³ *Idem*. para. 46.

American Convention enshrines the rights alleged by the petitioners, the analysis undertaken in the following section will be limited to the foregoing instrument.⁴

B. Exhaustion of domestic remedies and characterization of the facts

22. Pursuant to Article 46(1)(a) of the American Convention, in order for a petition filed under Article 44 of the Convention 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. Article 47(b) of the said instrument establishes that the Commission shall declare a petition inadmissible whenever it fails to state a colorable claim on the violation of the rights guaranteed in the Convention.

23. The current petition raises potential breaches of rights enshrined in the American Convention on the basis of decisions issued by the Under-Department of the Ministry of Labor authorizing the dismissal of the alleged victims by the firm P y A D'Onofrio S.A.. The available information indicates that the administrative labor authority considered that the company had fulfilled the requirements set out in Chapter VII of Legislative Decree No. 728, which governs the so-called "collective dismissal on the basis of objective grounds" proceedings. So far as is relevant, the administrative authority emphasized:

That, from an examination of the foregoing, the appellant company has complied with the procedure laid down in Article 88 of Legislative Decree No. 728, since not having arrived at any agreement through direct means (...) it resorted to the Department for Industry, Tourism, Integration and Commercial Negotiations, which issued Decision No. 1152-94-MITINI-VMI-DNI-DIA (...), opining on the validity of the employer's request for reduction of 133 workers.⁵

That, from an examination of the decrees, it appears that the company, in turning to the Administrative Labor Authority - requesting the collective dismissal on objective grounds laid out in paragraph b) of Article 86 of Legislative Decree 728 - observed the requirement for direct negotiation with the union organization, as well as to duly file the respective opinion issued by the relevant Department Sector, complying in the present case with the procedural stages set out in Article 88 of the above mentioned Legislative Decree.⁶

24. The petitioners stated that the alleged victims lodged an *amparo* suit on November 18, 1994, against the above decision of the administrative authority, which was declared inadmissible by the First Court and the Fifth Civil Chamber of the Superior Court of Justice of Lima, the Supreme Court of Justice and the Constitutional Tribunal. They argued that these courts decided on grounds relating to the appropriateness of the *amparo* suit that did not correspond to the domestic legal framework. They added that this conduct resulted in a violation of the rights enshrined in Articles 21, 24, 8 and 25 of the American Convention.

25. In the last instance judgment issued on September 23, 1997, the Constitutional Tribunal ruled in the following way on the suit lodged by the alleged victims and other workers dismissed by the firm P y A D'Onofrio:

2. That, given the litigious nature of the action, which aims to establish the validity of final labor decisions issued by a competent authority in administrative proceedings, it must be resolved through a contentious-administrative action, in accordance with the provisions of Article 148 of the 1993 Constitution, which determines the legality or illegality of relevant administrative acts.

⁴ IACHR, Report No. 38/09, Case 12.670, Peru, National Association of Ex-Employees of the Peruvian Social Security Institute and others, March 27, 2009, para. 68.

⁵ Initial Petition received on February 6, 1998, Annexes, Executive Decision No. 185-94-DPSC issued by the Under-Department of the Ministry of Labor on August 25, 1994.

⁶ Initial Petition received on February 6, 1998, Annexes, Executive Decision No. 050-94-DR-LIM issued by the Under-Department of the Ministry of Labor on September 14, 1994, administrative appeal on the merits lodged by the employees' union of the firm P y A D'Onofrio.

3. That, as a result, not being the *amparo* suit, which is summary in nature and lacking in evidentiary force, the appropriate remedy to clarify controversial issues requiring the production of evidence, as in this case, the present action of guarantee is unfounded.⁷

26. In regard to the aforementioned reasoning, the petitioners alleged that even though Article 148 of the Peruvian Constitution establishes the suitability of the contentious-administrative action to challenge the resolution of decisions issued by State organs, Article 200.2 of the same Political Charter provides that breaches of fundamental rights may be raised through an *amparo* suit. In addition, they maintained that the relevant legislation would permit both the contentious-administrative as well as the *amparo* channels to question the validity of administrative decisions affecting constitutional rights.

27. The IACHR and the Inter-American Court of Human Rights (hereinafter "the Inter-American Court") have stressed that in light of Article 25.1 of the Convention in connection with Articles 1.1 and 2 of the same instrument, the States parties have the obligation to provide rapid, effective, and simple remedies aimed at guaranteeing or preventing the breach of fundamental rights.⁸ In the present petition, the petitioners indicated that the *amparo* suit was the only remedy concentrating these elements because, unlike other ordinary remedies laid down in domestic law, it has preferential and summary proceedings. With regard to such submissions, the petitioners failed to submit concrete information permitting an evaluation of the potential lack of effectiveness of the contentions-administrative proceedings or of its incompatibility with the standards of the Inter-American system for the promotion and protection of human rights. On the other hand, they did not present information on any potential impediments to exercise the contentious-administrative proceedings, which was defined by the Peruvian courts that decided the *amparo* suit of November 18, 1994, as the suitable channel for the determination of the alleged victims' claim, pursuant to domestic law.

28. In a communication received on June 22, 1998, the petitioners attached the copy of four resolutions on nullity appeal issued by the Social and Constitutional Law Chamber of the Supreme Court of Justice between May and November 1995, in the context of *amparo* suit proceedings. These resolutions declared the inapplicability of administrative decisions of various types, considering that they breached certain constitutional guarantees.⁹ In view of these resolutions, the petitioners affirmed that the Supreme Court of Justice denied its own case-law while issuing the judgment of April 26, 1996, dismissing the nullity appeal lodged by the ex-employees of P y A D'Onofrio S.A. The IACHR notes that the appended resolutions contain a summary of the main submissions of the *amparo* suits' plaintiffs, the opinion by the Supreme Prosecutor on Administrative-Contentious' cases and a brief assertion by the Social and Constitutional Law Chamber of the Supreme Court of Justice on the existence of nullity in the judgments issued by the *a quo* tribunals. The IACHR deems that this information is not sufficient to assess a possible similarity between the factual assumptions and questions of law to be drawn from the precedents attached by the applicants and those raised in the *amparo* suit pursued on November 18, 2004 by the alleged victims of the current complaint. To this regard, the Inter-American Court has emphasized that for a case to be analogous to another it is necessary to prove the existence of similarities between the facts of the first and second cases so that both share the same essential and relevant characteristics permitting the application of the same legal result to both cases.¹⁰

⁷ Initial Petition received on February 6, 1998, Annexes, Judgment of the Constitutional Tribunal of September 23, 1997, file No. 288-96-AA/TC, *Martha Suárez Alfaro and others*, quoting paragraphs 2 and 3.

⁸ IACHR, Report No. 49/99, Case 11.610, Mexico, *Loren Laroye Riebe Star, Jorge Barón Guttlein and Rodolfo Izal Elorz*, April 13, 1999, paras. 81 and 82; I/A Court HR, *Ivcher Bronstein v. Peru Case*, Judgment of February 6, 2001. Series C No. 74, paragraph 136; *The Mayagna (Sumo) Awas Tingni Community v. Nicaragua Case*. Judgment of August 31, 2001. Series C No. 79, paragraph 113, among others.

⁹ According to the information submitted by the petitioners, three of the resolutions adopted by the Social and Constitutional Law Chamber of the Supreme Court of Justice are related to *amparo* suits which applicants were public-employees of different organs. These applicants had been dismissed in view of laws, decrees and administrative resolutions diverse in nature. A fourth resolution is linked to an *amparo* suit whereby the applicant alleged the non-observance of the right of preference of employment conveyed under collective labor agreement between a private company and the respective labor-union.

¹⁰ I/A Court HR, *Castañeda Gutman v. Mexico Case*. Preliminary Objections, Merits, Reparations and Costs. Judgment of August 6, 2008. Series C No.184, para. 170.

29. The petitioners maintained that by dismissing the *amparo* suit on procedural grounds, the Peruvian courts deprived the alleged victims of an effective remedy to redress a breach of their constitutional rights to an administrative fair trial and to work stability. With regard to such allegations, the Inter-American Court has ruled that the effectiveness of the judicial process implies that, potentially, when the formal requirements of admissibility and procedure established in domestic law are fulfilled, the judicial organ shall evaluate the merits of the case. In the same sense, the Court has stated that the existence and application of requirements for admissibility prior to a ruling on the merits of a claim is not incompatible with the right protected in Article 25 of the Convention.¹¹

30. In the light of the foregoing considerations, the IACHR observes that the petitioners' allegations are directed at questioning the domestic jurisdiction's interpretation of the procedural requirements of the *amparo* suit lodged by the alleged victims. In this respect, the IACHR reiterates the doctrine according to which it has no jurisdiction to replace the domestic judicial authorities in interpreting the scope of the applicable rules of procedural and substantive law.¹² In a similar sense, the IACHR has asserted that it cannot act as a court of appeal to examine alleged errors of fact or law possibly committed by the national courts within the limits of their competence.¹³

31. Finally, the IACHR does not possess sufficient elements to consider whether the alleged victims were prevented from presenting a contentious-administrative action, nor on the potential incompatibility between the way the said procedural avenue is regulated and the obligations to provide a effective, speedy and simple remedy laid down in the American Convention.

V. CONCLUSIONS

32. Based on the arguments of fact and law expressed above, the Commission considers that the petition does not satisfy the requirements set out in Articles 46(1)(a) and 47(b) of the American Convention, and therefore,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,

DECIDES:

1. To declare the present petition inadmissible for non-fulfillment of the requirements laid down in Articles 46(1)(a) and 47(b) of the American Convention.
2. To notify this decision to the State and the petitioners.
3. To make this report public, and publish it in its Annual Report to the General Assembly of the OAS.

Done and signed in the city of Washington, D.C., on the 12th day of the month of July, 2010. (Signed: Felipe González, President; Paulo Sergio Pinheiro, First Vice-President; Dinah Shelton, Second Vice-President; María Silvia Guillén, José de Jesús Orozco Henríquez, Rodrigo Escobar Gil, and Luz Patricia Mejía Guerrero, members of the Commission).

¹¹ I/A Court HR, *Castañeda Gutman v. Mexico Case*. Preliminary Objections, Merits, Reparations and Costs. Judgment of August 6, 2008. Series C No.184, para. 94; and *Dismissed Congressional Employees (Aguado-Alfaro et al.) v. Peru Case*. Judgment of November 24, 2006. Series C No. 158, para. 126.

¹² IACHR, Report No. 27/07, Petition 12.217, Peru, José Antonio Aguilar Angeletti, March 9, 2007, paras. 41 and 43; and Report No. 39/05, Petition 792-01, Peru, Carlos Iparraguirre and Luz Amada Vásquez de Iparraguirre, March 9, 2005, paras. 52 and 54.

¹³ IACHR, Report No. 45/04, Petition, 369-01, Peru, Luis Guillermo Bedoya de Vivanco, October 13, 2004, para. 41; Report No. 16/03, Petition 346-01, Ecuador, Edison Rodrigo Toledo Echeverría, February 20, 2003, para. 38; Report No. 122/01, Petition 15-00, Argentina, Wilma Rosa Posadas, October 10, 2001, para. 10; and Report No. 39/96, Case 11.673, Argentina, Santiago Marzióni, October 15, 1996, para. 71.