

REPORT No. 12/11
PETITION 69-04
ADMISSIBILITY
GINO OLÓRTEGUI PEÑAHERRERA
PERU
March 22, 2011

I. SUMMARY

1. On February 2, 2004, the Inter-American Commission on Human Rights (hereinafter “the Inter-American Commission, “the Commission,” or “the IACHR”) received a petition filed by Gino Olórtgui Peñaherrera (hereinafter also “the petitioner” or “the alleged victim”) on his own behalf, in which he alleged that the Republic of Peru (hereinafter also “Peru,” “the State,” or “the Peruvian State”) had violated the rights enshrined in Articles 24 and 25 of the American Convention on Human Rights (hereinafter also “the American Convention” or “the Convention”). The petitioner stated that, on July 31, 1990, he was given retirement by decree of the National Police of Peru. He indicated that two *amparo* actions and an action under administrative law had resulted in favorable judgments ordering his reinstatement as an active duty officer and the recognition of social benefits. He stated that the National Police of Peru had not complied fully with said judgments.

2. The State alleged that Mr. Olórtgui Peñaherrera could exercise the right of judicial recourse prescribed by national law and obtained favorable judgments. It maintained that the IACHR has no jurisdiction to consider complaints relating to pension rights and that it is not entitled to review judgments issued by competent courts acting under a fair trial. It added that the petitioner’s application for reinstatement to active duty in the National Police was contrary to internal rules on the age limit for officers in said entity. Lastly, it held that the facts alleged by the petitioner did not constitute violations of rights protected under the Convention and requested the IACHR to declare the complaint inadmissible in accordance with Article 47(b) of said instrument.

3. After examining the positions of the parties in the light of the admissibility requirements set forth in Articles 46 and 47 of the Convention, the Commission concluded that it has jurisdiction to consider the petition and that it is admissible regarding the potential violation of the rights enshrined in Articles 8(1), 21 and 25 of the American Convention, in conjunction with Article 1(1) of said instrument. Articles 8(1) and 21 of the Convention were included in application of the principle *iura novit curia*. The Commission also concluded that the petition is inadmissible with respect to the alleged violation of Article 24 of the Convention. Lastly, it decided to notify the parties of the present Report of Admissibility, to publish it, and to include it in its Annual Report.

II. SUBMISSIONS TO THE COMMISSION

4. The petition was received on February 2, 2004 and registered as number 69-04. The petitioner provided additional submissions on March 22, 2006, December 11, 2007, and August 8 and December 8, 2008. On January 27, 2009, the relevant portions of these documents were forwarded to the State, which was given a period of two months to submit its reply in accordance with the Rules of Procedure of the IACHR.

5. On May 14, 2009, the State submitted its reply, which was forwarded to the petitioner on May 22, 2009. The petitioner provided additional submissions on July 15, 2009 and January 8, May 10, June 8, August 6 and December 21, 2010. In turn, the State made written submissions on August 27, 2009 and on March 17 and 19, April 12, May 12, June 18, July 21 and December 10, 2010 and March 7, 2011.

III. POSITIONS OF THE PARTIES

A. Position of the petitioner

6. The petitioner stated that on July 31, 1990, he was given retirement from the National Police of Peru (hereinafter also "the PNP") with the grade of Major. His retirement was ordered by Supreme Decree No. 315-90-IN/DM, which cited as the reason a need for turnover in the upper ranks. On January 31, 1991, he brought an action for *amparo* with the Fifth Civil Court of Lima, which subsequently vacated the aforementioned supreme decree and ordered his reinstatement as from June 31, 1990, as well as the recognition of social benefits for the appropriate grade. Said judgment was confirmed by the Constitutional Court on June 25, 1996.

7. The petitioner asserted that, after a lengthy sentence enforcement process, on July 10, 2001 the PNP issued Supreme Decree No. 0726-2001-IN/PNP ordering his reinstatement to active duty and the payment of social benefits. However, said supreme decree specified that the social benefits should be paid as from January 15, 1993, even though the court order had set January 15, 1990 as the reinstatement date. On the next day, July 11, 2001, the PNP issued Supreme Decree No. 0738-2001-IN/PNP ordering Gino Olórtegui's retirement by reason of the age limit for the grade of Major, applicable retroactively to February 1, 1995, the date on which he had reached the maximum age of 52 for said grade under the legislation in effect at that time.

8. The petitioner indicated that on October 16, 2001, he filed a second *amparo* action (Case 5816-2001) contesting the validity of Supreme Decrees No. 0726-2001-IN/PNP and No. 0738-2001-IN/PNP. On December 19, 2002, the Sixty-Fifth Civil Court of Lima declared the first decree inapplicable and ordered the PNP to reinstate the alleged victim, to place his name on the roll of officers with time in service calculated as from July 31, 1990, and to submit the payment sheet with a calculation of the restoration of social benefits. The lower court judgment was confirmed by the First Civil Chamber of the Lima Superior Court of Justice on September 4, 2003, and the National Police have not lodged any further appeals.

9. On the basis of the information submitted, the enforcement of the judgment of December 19, 2002 lies with the Forty-Seventh Civil Court of Lima (Case 4824-2004), which has ordered the respondent Ministry of Interior/National Police of Peru to comply with the aforementioned judgment on several occasions. This information also indicates that, alongside the *amparo* action, the alleged victim filed an action under administrative law (Case 925-2002), which was found to be with merit in Judicial Decision No. 6 of November 27, 2008, issued by the First Administrative Law Chamber of the Lima Superior Court of Justice. Said decision of November 27, 2008 ordered the vacation of Supreme Decree No. 0738-2001-IN/PNP, the promotion of the alleged victim to the grade of PNP Commander effective January 1, 1991, and the restoration of the rights and privileges associated with that grade.

10. The petitioner stated that on February 29, 2008, an official document was issued announcing his physical reinstatement in the PNP. He added that on May 29, 2008 the PNP issued Directorial Decree No. 6870-2008-DIRREHUM-PNP acknowledging more than 42 years of uninterrupted service for pension purposes, and on August 21, 2010, the PNP issued Ministerial Decree No. 0890-2010-IN/PNP promoting him to the grade of Commander effective as from January 1, 1991. He maintained that, although these orders provide partial compliance with the judicial decisions in the *amparo* and administrative law actions, payment of his financial entitlements and other benefits remain pending.

11. Lastly, the petitioner alleged that the Peruvian State is responsible for the violation of the rights enshrined in Articles 24 and 25 of the American Convention.

B. Position of the State

12. The State's account of the outcome of the *amparo* and administrative law actions is similar to the petitioner's. However, it maintained that the IACHR has no *ratione materiae* jurisdiction to

consider the complaint, “given that pension-related topics are outside the judicial purview of this supranational body.” It argued that the Commission neither has jurisdiction to review judgments that comply with fair trial guarantees and asserted that “the nature of the Inter-American Commission on Human Rights is derived from the American Convention on Human Rights, and the latter did not place it in the category of a so-called court of fourth instance.”

13. It stated that the National Police of Peru Personnel Status Act (Legislative Law No. 745) establishes the retirement age limit for police officers and that Gino Olórtegui’s application for reinstatement to active duty in the National Police is contrary to said act.

14. The State submitted a copy of Decree No. 38 of April 7, 2010, issued by the Twelfth Administrative Court of Lima, which is responsible for enforcing the judicial decision in the administrative law action filed by Gino Olórtegui. The decree of April 7, 2010 enjoins the PNP to comply in full with the judicial decision of the First Administrative Law Court “under penalty of lawful action.”

15. The State also provided a copy of Ministerial Decree No. 0890-2010-IN/PNP of August 21, 2010, which decides (i) to promote Gino Olórtegui to the grade of PNP Commander; (ii) to move him from active duty status to retired status owing to the age limit for the grade of Commander in effect since February 1, 1999; and (iii) “to authorize the directorates of human resources, logistics, economy and finances of the National Police of Peru to take the appropriate actions in their areas of competence.”

16. The State maintained that the facts alleged in the complaint do not constitute a violation of Article 24 of the American Convention on Human Rights, because “nothing therein gives credence to the contention that the actions of the Ministry of Interior represent personal discrimination.”

IV. ANALYSIS OF JURISDICTION AND ADMISSIBILITY

A. Commission's jurisdiction *ratione personae*, *ratione loci*, *ratione temporis* and *ratione materiae*

17. The petitioner is entitled to lodge complaints under Article 44 of the Convention. The alleged victim is an individual who was within the jurisdiction of the Peruvian State at the time of the reported facts. For its part, Peru ratified the American Convention on July 28, 1978. Therefore, the Commission has jurisdiction *ratione personae* to consider the petition.

18. The Commission has jurisdiction *ratione loci* to consider the petition inasmuch as it alleges violations of rights protected under the American Convention that occurred in a State party to said treaty.

19. The Commission has jurisdiction *ratione temporis* because the obligation to respect and guarantee rights protected under the American Convention was already incumbent on the State at the time of the facts alleged in the petition.

20. In regard to the State’s claim that the IACHR lacks jurisdiction to consider pension-related complaints, the rights and guarantees established in the American Constitution are not limited to certain branches of the law. Indeed, without prejudice to the merits of the present complaint, the Commission and the Inter-American Court of Human Rights have ruled in cases in which the judicial remedies lodged at the national level by the alleged victims included pension-related claims.¹ Given that the present petition alleges violations of rights protected under the Convention, the IACHR therefore rejects the objection put forward by Peru and declares that it has jurisdiction *ratione materiae*.

¹ IACHR, Report 110/00, Case 11,800, Merits, César Cabrejos Bernuy, Peru, December 4, 2000; IA Court HR, case of *Acevedo Buendía et al. (“Discharged and Retired Employees of the Comptroller”) v. Peru.*, Preliminary Objection, Merits, Reparations and Costs, Judgment of July 1, 2009, Series C No. 198.; and case of *“Five Pensioners” v. Peru*, Judgment of February 28, 2003, Series C No. 98.

B. Exhaustion of domestic remedies

21. Article 46(1)(a) of the American Convention provides that, for a complaint filed with the Inter-American Commission pursuant to Article 44 of the Convention to be admissible, all remedies under domestic law must have been exhausted in accordance with the generally recognized principles of international law. The purpose of this requirement is to allow the national authorities to be seized of alleged violations of rights protected under the American Convention and, if warranted, have the opportunity to cure them before they are considered in an international jurisdiction.

22. The present petition alleges the violation of provisions of the American Convention arising from alleged noncompliance with final judiciary branch decisions in *amparo* and administrative law proceedings. In cases of alleged noncompliance with judicial decisions by public law entities, the IACHR has held that, for the purposes of the exhaustion of domestic remedies, the alleged victims must at a minimum have notified the competent judicial body of the persistence of such situations so that, if appropriate, it may act in accordance with the law and take such steps as are required to enforce the decisions. In doing so, the alleged victims give the State an opportunity to correct possible violations of the right to judicial protection before they are considered in an international jurisdiction.²

23. According to the information available, the petitioner has received final judicial decisions in *amparo* and administrative law actions and has reported noncompliance therewith to the Forty-Seventh Civil Court of Lima and the Twelfth Administrative Law Court of Lima on various occasions. Although a number of years have elapsed since enforcement proceedings began in both venues, they were still current as of the date of adoption of this report. Under such circumstances, the IACHR considers that the national jurisdiction authorities have had the opportunity to remedy the reported noncompliance with the final judicial decisions in favor of the alleged victim and that the requirement established in Article 46(1)(a) of the American Convention has therefore been satisfied.

C. Compliance with the filing period

24. Article 46(1)(b) of the Convention establishes that, to be declared admissible, petitions must be filed within a period of six months from the date on which the applicant was notified of the final judgment at the national level.

25. Given the active role of Mr. Olórtegui Peñaherrera in the proceedings for execution of judgments issued in his favor and that the alleged violation of the right to judicial protection continued up to the date of this report, the IACHR considers that the requirement stipulated in Article 46(1)(b) of the American Convention has been met.

D. Duplication of proceedings and international *res judicata*

26. Article 46(1)(c) of the Convention makes the admission of petitions subject to the requirement that the subject "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 or communication that is substantially the same as one previously studied by the Commission or another international organization. In the petitions under consideration in this report, the parties have not argued the existence of either of these circumstances, nor can it be deduced from the case file.

E. Characterization of the facts alleged

27. For the purposes of admissibility, the Commission must decide if the facts described in the petition would tend to establish a violation, as stipulated in Article 47(b) of the American Convention, or whether the petition is "manifestly groundless" or "obviously out of order," pursuant to (c) of the same Article. This determination is subject to a different standard of appreciation than a decision on the merits

² IACHR, Report 13/10, Petition 480-00, Inadmissibility, Fidel Gutiérrez Gayoso, Peru, March 16, 2010, para. 35 and Report 43/09, Petition 1166-05, Inadmissibility, Jorge Rafael Valdivia Ruiz, Peru, March 27, 2009, para. 38.

of a complaint. The Commission must undertake a “prima facie” evaluation to determine whether the complaint presents evidence of an apparent or potential violation of a right guaranteed under the Convention, not to establish whether a violation has occurred. Said evaluation is a summary analysis that does not imply prejudgment or the expression of an opinion on the merits.

28. With respect to the alleged violation of the right to judicial protection, the Commission considers that, if the facts alleged by the petitioner are correct, they could characterize a violation of the right protected under Article 25(2)(c) of the American Convention, in conjunction with Article 1(1) thereof. Furthermore, the alleged delay in the enforcement of the judicial decisions in favor of Gino Olórtegui could be characterized as a violation of the right to be heard by a competent tribunal within a reasonable time. Additionally, the case-law of the Inter-American system has established that the patrimonial effects of noncompliance with judgments aimed at protecting a right to a pension can in some circumstances constitute a violation of the right to property.³ Therefore, in application of the principle of *iura novit curia*, the IACHR will examine the possible violation of the rights enshrined in Articles 8(1) and 21 of the American Convention at the merits stage.

29. With respect to the alleged violation of the rights enshrined in Article 24 of the American Convention, the IACHR finds that the petitioner has not submitted sufficient evidence of a potential violation of said provision.

30. Lastly, inasmuch as these aspects of the complaint are not obviously groundless or out of order, the Commission finds that the petition meets the requirements established in Article 47(b) and (c) of the American Convention.

V. CONCLUSIONS

31. On the basis of the above factual and legal arguments, and without prejudging the merits of the case, the Inter-American Commission concludes that the petition satisfies the admissibility requirements set forth in Articles 46 and 47 of the American Convention, and therefore:

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

DECIDES:

1. To declare the petition admissible under Articles 21, 8(1) and 25(2)(c) of the American Convention, in conjunction with the obligation established in Article 1(1) thereof.
2. To declare inadmissible the alleged violation of the right enshrined in Article 24 of the American Convention.
3. To notify the State and the petitioner of this decision.
4. To publish this decision and include it in the Annual Report to the OAS General Assembly.

Done and signed in the city of Washington, D.C., on the 22nd day of March 2011. (Signed): Dinah Shelton, President; José de Jesús Orozco Henríquez, First Vice-President; Rodrigo Escobar Gil, Second Vice-President; Paulo Sérgio Pinheiro, Felipe González, Luz Patricia Mejía Guerrero, and María Silvia Guillén, Commission Members.

³ IA Court HR, case of *Acevedo Buendía et. al. (“Discharged and Retired Employees of the Comptroller”)*; Judgment of July 1, 2009, Series C No. 198, para. 85. See also IA Court HR, case of *“Five Pensioners”*; Judgment of February 28, 2003. Series C N° 98, para. 103.