REPORT No. 60/12[1]
PETITION 513-04
INADMISSIBILITY
JOSE CARLOS RAMIREZ RAMOS
MEXICO
March 19, 2012

I. SUMMARY

1. On June 4, 2004, the Inter-American Commission on Human Rights (hereinafter "Commission," "Inter-American Commission," or "IACHR") received a petition submitted by Pedro Isabel Morales Ache, Ricardo González Gutiérrez, and Cynthia Paola Lepe González (hereinafter "petitioners"), on behalf of José Carlos Ramírez Ramos, a former physician specialized in ophthalmology with the Mexican Social Security Institute (Instituto Mexicano del Seguro Social) (hereinafter the "alleged victims"), against the United Mexican States (hereinafter "the State" or "the Mexican State" or "Mexico"), for alleged violations of his rights to equality before the law and his rights to a fair trial and to judicial protection, as he was declared disabled and, consequently, retired based on his status as HIV positive (human immunodeficiency virus).

2. The petitioners allege that the Mexican State is responsible for violating the rights enshrined in Articles 5(1) (humane treatment), 8(1) (judicial guarantees), 9 (freedom from ex post facto laws), 11(2) and 11(3) (protection of honor and dignity), 24 (equality before the law), 25(1) (judicial protection), and 26 (progressive development of rights) of the American Convention on Human Rights (hereinafter "the Convention" or "the American Convention"), in conjunction with the general obligation of Article 1(1) of said international instrument. In addition, they adduce violations of Articles 3 (obligation of non-discrimination), 6(1) (right to work), 7 (fair, equitable, and satisfactory working conditions), and 10(1) (right to health) of the Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights (hereinafter "Protocol of San Salvador"). The petitioners argue that they exhausted domestic remedies as required by Article 46 of the American Convention.

3. With respect to the admissibility requirements, the State indicates that the alleged victim had access to all remedies provided for under domestic law and argues that he had available to him a motion for review (*recurso de revisión*) that he did not pursue. It alleges that the petitioners seek to have the IACHR sit as a court of fourth instance. It also indicates that the petition was not submitted within the time established in the American Convention, because the judgment of the Fourth Collegial Court of the Eighth Circuit was handed down on October 6, 2003, and the petition was submitted to the IACHR eight months later, on June 4, 2004.

4. After analyzing the parties' positions, the Commission found that it is competent to hear the claim, but that it is inadmissible insofar as it fails to meet the requirement provided for in Article 46(1)(b) of the American Convention, since it was filed after the limitations period had run. The Commission resolved to notify the parties of this report, publish it, and include it in its Annual Report to the General Assembly of the Organization of American States.

II. PROCESSING BEFORE THE COMMISSION

5. On June 4, 2004, the Commission received the petition and assigned it number 513-04. On May 10, 2005, it transmitted the pertinent parts of the petition to the State of Mexico, asking that it submit its response within two months, in keeping with Article 30(2) of the IACHR's Rules of Procedure. The State requested a five-day extension on June 11, 2005. The response was received on July 18, 2005, and the annexes were received on July 25, 2005. Those communications were duly forwarded to the petitioners.

[1] In keeping with Article 17(2)(a) of the Commission's Rules of Procedure, Commissioner José de Jesús Orozco Henríquez, of Mexican nationality, did not participate in the debate or in the decision in the instant case.

6. In addition, the IACHR received information from the petitioners on October 18, 2011. That communication was duly forwarded to the State.

7. The Commission also received information from the State on May 9, 2011, which was duly forwarded to the petitioners.

8. By communication of January 17, 2012, the IACHR asked both parties for a copy of the judgment handed down by the Fourth Collegial Court of the Eighth Circuit in the Labor Direct Amparo Proceeding 665/2003, as well as documentation of the date notice was given. The State provided the information requested on February 10, 2012.

III. THE PARTIES' POSITIONS

A. The petitioners

9. The petitioners allege that on December 31, 1988, José Carlos Ramírez Ramos began a labor relationship for an indefinite time with the Mexican Social Security Institute (hereinafter "IMSS": Instituto Mexicano del Seguro Social), as non-family physician with a specialization in ophthalmology; he worked at the Hospital General No. 24, in the city of Nueva Rosita, Coahuila.

10. They assert that as of mid-September 1997 the alleged victim turned to the medical services of the IMSS, as he was ill, and he was diagnosed as having an upper respiratory tract condition. He was given leave due to temporary disability for 15 days as of September 1, 1997. They state that on September 1, 1997, it was detected that he was a carrier of the human immunodeficiency virus (HIV), and he was given leave due to disability "for periods of 28 days and then for periods of 7 days, up until June 8, 1998." They note that on April 14, 1998, the IMSS drew up an expert opinion of disability (*invalidez*) in which it was determined that he would be given a disability pension, since allegedly the prognosis for the alleged victim to perform remunerated work was not good, since he was HIV positive. They note that on July 22, 1998, the Mixed Commission on Retirement and Pensions of the IMSS unilaterally determined to grant a disability pension to the alleged victim.

11. They argue that the alleged victim expressed his disagreement with being granted the disability pension, in a writing of February 11, 1999, submitted to the Office of the Chief of Administrative Services (Jefatura Delegacional de Servicios Administrativos) and sent to the State Delegate of the IMSS. In this regard, the petitioners maintain that the State's argument that the alleged victim had requested the declaration of disability makes no sense.

12. They argue that the IMSS Advisory Council failed to issue a resolution in response to the appeal for reconsideration (*recurso de inconformidad*). In the face of that situation, they indicate that on July 19, 1999, the alleged victim brought a labor action – without specifying the claims – before Special Board No. 25 of the Federal Conciliation and Arbitration body, based in Saltillo, Coahuila (file 357/99). By ruling of November 14, 2001, the Special Board ruled in favor of the IMSS.

13. The petitioners indicate that in response to that ruling, the alleged victim filed a direct *amparo* action for labor matters on January 31, 2002, that was resolved in his favor by the Third Collegial Court of the Eighth Circuit. The Court ordered, by judgment of May 16, 2002, a rehearing of the procedure for the Special Board to cure the procedural violations committed during the consideration of the matter. They indicate that the matter was reheard, and that the expert evidence on medicine was introduced into the record; both the expert designated by the alleged victim and the court-appointed expert considered that the alleged victim could indeed work at his job, and that his symptoms did not limit him physically or mentally in the performance of his work. Despite that, they allege that the Special Board, by ruling of April 30, 2003, absolved the IMSS of liability for the benefits claimed. According to the information in the record, the Special Board determined that the alleged victim did not show his right to have the disability pension canceled because he still has the acquired immunodeficiency virus and therefore the state of disability declared by the IMSS persists. With respect to being reassigned to

another position, the Board indicated that it is not in order because under the Federal Labor Law (Article 498), it is only in order when the workers have suffered a workplace hazard, not for having acquired a general disease that gives rise to a state of disability.

14. They note that the alleged victim brought direct *amparo* action in respect of a labor matter against the decision of April 30, 2003. Among the arguments, they argue that: (a) his individual guarantees of legality and juridical security had been violated; (b) it was unlawfully determined that it was correct that with the expert report on disability, it should be considered that having AIDS and Kaposi's sarcoma is sufficient to be declared disabled and retire him; (c) on weighing the request for retirement or pension of August 7, 1998, it was improperly considered that the IMSS had shown that it granted the retirement or pension to the alleged victim on occasion of a request signed by him, and that said document has evidentiary value because it was not objected to in terms of the authenticity of contents or signature; (d) on issuing a disability pension for being HIV positive, and at the same time for unilaterally retiring him, he was subjected to a discriminatory animus observed by the IMSS in the labor proceeding for being HIV positive; (e) there was a failure to duly value the expert report given by the alleged victim's medical expert and the court-appointed medical expert that indicated that the alleged victim, on being an asymptomatic HIV carrier, can work in his specific position but cannot perform surgery with a bladed or perforating instrument; (f) there was a failure to apply the legal provision that considers the situation in the event that the alleged victim cannot perform his work, but can perform other work. The employer is obligated to provide him with it, pursuant to the provisions of the Collective Bargaining Agreement of the IMSS. By judgment of October 2, 2003, the Fourth Collegial Court of the Eighth Circuit upheld the ruling of April 30, 2003.

15. With that decision, the petitioners argue that they exhausted domestic remedies. With respect to the motion for review (*recurso de revisión*) that the State argues should have been exhausted, they indicate that said appeal can only be brought on an exceptional basis under limited circumstances "that were not present in the specific case."

16. As for the time for filing, the petitioners note that José Carlos Ramírez Ramos learned of the existence of the judgment on December 5, 2003, and that consequently the petition was filed within the six-month period.

B. The State

17. The State indicates that the alleged victim began the labor relationship with the IMSS on December 31, 1988. After nine years of work, in September 1997 he was diagnosed with anemia and asthenia/adynamia, which led him to be examined in more detail. The results confirmed anemia, and HIV was found.

18. He was submitted to antiretroviral treatment, to which he responded favorably; nonetheless, even with the treatment serious health problems presented subsequently. Because of this development, the administrative area initiated the procedures for the ST4 expert opinion on disability, based on the Three-dimensional Guide of the Worker, which is the evaluation of capacities in the face of the requirements of the position for AIDS patients. The result of that research confirmed that he was HIV positive in addition to other complications such that they classified him as having AIDS. The State argues that due to the alleged victim's medical-surgical activities in a "high-risk" hospital setting, his health could be seriously compromised had he continued performing the labor functions entrusted to him.

19. The State argues that the alleged victim, in tandem with learning of his illness and of the results of the treatment, voluntarily requested the declaration of disability with the IMSS. It states that once he was diagnosed with HIV/AIDS, and mindful of his request for a finding of disability from the IMSS, on July 22, 1998 he was granted a disability pension in keeping with the provisions of the Retirement and Pensions Regime of the Collective Bargaining Agreement for the workers of the IMSS.

20. The State argues that the alleged victim is under medical care at the Delegación 16 of the IMSS, situated in the city of Toluca, in the state of México.

21. According to the petitioner's argument with respect to the filing of an appeal for reconsideration (*recurso de inconformidad*) with the local IMSS Advisory Council on February 11, 1999, in which he affirmed that he was in a position to work and therefore he asked that the disability pension that he himself had requested and that had been granted be cancelled, a motion for which the petitioner never obtained a response, the State indicates that by labor decision issued by Special Board No. 25 of the Federal Conciliation and Arbitration body, of November 14, 2001, it was determined that the alleged victim never brought an appeal the Advisory Council and that the disability pension granted on his behalf was at the petitioner's express request, and not unilaterally at the request of the IMSS.

22. The State argues that in response to that decision the alleged victim filed an *amparo* action before the Third Collegial Court of the Eighth Circuit, which ordered a rehearing. On April 30, 2003, Special Board No. 25 of the Federal Conciliation and Arbitration body handed down a new decision in which it found the alleged victims' claim unfounded. According to information produced by the State, it appears from the decision that the alleged victim did not indicate that he had been forced under coercive conditions or in the face of a risk of dismissal to sign the request for disability. In response to that judgment the alleged victim filed an *amparo* action that was resolved in favor of the IMSS by the Fourth Collegial Court of the Eighth Circuit.

23. According to the State, in the whole proceeding domestically there does not appear to be any act or deed that allows one to presume a violation of his rights. It also indicates that the rights of the alleged victim to judicial guarantees and judicial protection were guaranteed. The alleged victim did not show any discriminatory practice by the State during the proceeding regarding the disability pension.

24. Regarding exhaustion of domestic remedies, the State indicates that the alleged victim had access to all the remedies provided by domestic law; accordingly, he is seeking to have the IACHR sit as a court of fourth instance. In addition, it argues that the alleged victim did not exhaust domestic remedies because he had available to him the motion for review in relation to the *amparo* action that was filed. Finally, it indicates that the petition was not submitted in timely fashion since the judgment of the Fourth Collegial Court of the Eighth Circuit was handed down on October 6, 2003, and the petition was filed with the IACHR eight months later, on June 4, 2004.

IV. ANALYSIS OF COMPETENCE AND ADMISSIBILITY

A. Competence

25. The petitioners are authorized, in principle, by Article 44 of the American Convention to submit petitions to the Commission. The petition notes as the alleged victim an individual person with respect to whom the State of Mexico undertook to respect and ensure the rights enshrined in the American Convention. As regards the State, the Commission notes that Mexico has been a state party to the American Convention since March 24, 1981, the date on which it deposited its instrument of ratification, and a party to the Protocol of San Salvador since April 16, 1996, the date on which it deposited its instrument of ratification. Therefore, the Commission is competent *ratione personae* to examine the petition. In addition, the Commission is competent *ratione loci* to take cognizance of the petition, insofar as it alleges violations of rights protected by the American Convention said to have taken place in the territory of Mexico, a state party to that treaty.

26. The Commission is competent *ratione temporis* insofar as the obligation to respect and ensure the rights protected in the American Convention was already in force for the State on the date the facts alleged in the petition are said to have taken place. Finally, the Commission is competent, *ratione materiae*, because the petition alleges possible violations of human rights protected by the American Convention.

B. Other admissibility requirements

1. Exhaustion of domestic remedies

27. In the instant case there is a dispute with respect to the exhaustion of domestic remedies. The State argues that in the face of the *amparo* proceeding that was unfavorable to the alleged victim, there was, available to him, a motion for review (*recurso de revisión*). The petitioners, for their part, note that domestic remedies were exhausted by the judgment handed down October 2, 2003 by the Fourth Collegial Court.

28. The Commission observes that the alleged victim brought a labor action on July 19, 1999, before Special Board No. 25 of the Federal Conciliation and Arbitration body, which on November 14, 2001 issued a decision favorable to the IMSS. In response to that decision, the alleged victim brought an *amparo* action before the Third Collegial Court of the Eighth Circuit. That Court ordered the matter reheard and on April 30, 2003, Special Board No. 25 of the Federal Conciliation and Arbitration body issued a new decision in which it ruled the alleged victim's claim unfounded. In response to that judgment the alleged victim brought another *amparo* action before the Fourth Collegial Court of the Eighth Circuit, which by judgment of October 2, 2003, upheld the decision handed down on April 30, 2003.

29. On considering the parties' positions on exhaustion, the Commission observes that the petitioner turned to the labor jurisdiction, and with the issuance of the decision of April 30, 2003, the petitioner exhausted regular remedies. The alleged victim also filed two *amparo* actions in which the rulings were against him. On this point, the IACHR notes that both the *amparo* action (*recurso de amparo*) and the *amparo* review (*revisión de amparo*) are special remedies, while in principle the petitioners had to pursue and exhaust regular remedies.

30. In effect, the IACHR has established that the requirement of exhaustion of domestic remedies does not mean that alleged victims have the obligation to exhaust all the remedies available to them. Both the Court and the Commission have held repeatedly that "…the rule which requires the prior exhaustion of domestic remedies is designed for the benefit of the State, for that rule seeks to excuse the State from having to respond to charges before an international body for acts imputed to it before it has had the opportunity to remedy them by internal means."[2] Accordingly, if the alleged victim raised the issue by means of the alternatives considered valid and adequate by the domestic legal order and the State had the opportunity to remedy the matter in his own jurisdiction, the aim of the international provision is satisfied.[3]

31. Accordingly, based on the terms of Article 46 of the Convention, the Commission concludes that the prior exhaustion requirement has been met. Consequently, the Inter-American Commission verifies that the remedies provided for by Mexican legislation have been exhausted and determines that the petition analyzed meets the requirement set forth in Article 46(1)(a) of the Convention.

2. Deadline for filing a petition

32. Under Article 46(1)(b) of the American Convention, the petition must be "lodged within a period of six months from the date on which the party alleging violation of his rights was notified of the final judgment." On referring to that article, the IACHR has determined that the six-month deadline "has a twofold purpose: to ensure legal certainty and to provide the person concerned with sufficient time to consider his position."[4]

33. The IACHR has also established that "the six-month time period must be counted from the date of notification of the judgment that exhausted domestic remedies; in other words, the date on

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[2] I/A Court H.R., *In re: Viviana Gallardo et al.* Series A No. G 101/81, para. 26.

[3] IACHR, Report No. 57/03 (Admissibility), petition 12,337, Marcela Andrea Valdés Díaz v. Chile, October 10, 2003, para. 40.

[4] IACHR, *María Estela Acosta Hernández et al. (Explosions in the Reforma Sector of Guadalajara)*, Mexico, February 20, 2003, para. 32.

which the petitioners learned of it."[5] In this respect, the Inter-American Commission observes that the date of the judgment that brought an end to the domestic judicial proceeding was handed down on October 2, 2003. The petitioner notes that he learned of the judgment on December 5, 2003, and therefore, on having submitted the petition on June 4, 2004, it was within the six-month period. The petitioner has not presented arguments with respect to why he did not learn of the judgment until two months after it was handed down. For its part, the State notes that eight months elapsed from the issuance of the judgment to the filing of the complaint before the IACHR, thus the petition would be untimely.

34. In view of the controversy between the parties with respect to the deadline for filing, one must analyze the notice of *amparo* proceedings under Mexican legislation. The IACHR observes that the Law on Amparo of the United Mexican States establishes, at Articles 28 and 29, that notice in *amparo* proceedings within the jurisdiction of the Collegial District Courts (Tribunales Colegiados del Distrito) that do not refer to authorities responsible and authorities in the position of third parties suffering prejudice, shall be made by list publication.

> Article 29
> III Apart from those cases referred to in the previous sections [referring to authorities responsible and authorities in the position of aggrieved third party, and the Attorney General of the Republic], notices, in respect of *amparo*, in the Supreme Court of Justice or in the Collegial Circuit Courts, shall be made in keeping with section II and III of the preceding article.

> Article 28 section III
> **III.-** persons aggrieved not deprived of personal liberty, third persons aggrieved, the attorneys, prosecutors, defense counsel, representatives, persons authorized to receive notices, and the Public Ministry, by means of the list posted in a visible and easy-to-access place, of the court. The list shall be posted at the beginning of the workday on the day following the date of the resolution. If any of the parties mentioned does not come forward to hear personal notice by 2:00 p.m. of the same day, it will be considered as made, and the clerk shall make the corresponding entry.

35. The IACHR notes that in the petition under analysis, the situation of the petitioner comes under Article 29 and Article 28, section III, of the Law on Amparo. In other words, notice must be made by publication in a list. In effect, the IACHR observes that according to documents produced by the parties, on October 3, 2003, the judgment was published in a list. In the face of the State's arguments regarding untimely filing, the petitioner has not presented any arguments regarding the reasons why he did not come to learn of the judgment until two months after it was handed down. The Commission also observes that the petitioner had the representation of a lawyer in that proceeding. Consequently, under the domestic legislation, the alleged victim was considered to have been given notice on that date mentioned.

36. In view of the foregoing and considering that this petition was received at the headquarters of the Inter-American Commission on June 4, 2004, the IACHR concludes that the period of six months counted from the date on which the petitioner learned of the final judgment in the domestic courts had already lapsed. Therefore, the petition does not meet the requirement stipulated in Article 46(1)(b) of the American Convention.

37. The Commission refrains, having decided the matter is inadmissible, from examining the other admissibility requirements set forth in the Convention.[6]

V. CONCLUSIONS

[5] IACHR, Report No. 17/03, Petition 11,823, Inadmissibility, María Estela Acosta Hernández et al. *(Explosions in the Reforma Sector of Guadalajara)*, Mexico, February 20, 2003, para. 33.

[6] IACHR, Report No. 14/10, Petition 3576-02, Inadmissibility, Workers Dismissed from Lanificio del Perú S.A., Peru, March 16, 2010, para. 35; Report No. 135/09, Petition 291-05, Inadmissibility, Jaime Salinas Sedó, Peru, November 12, 2009, para. 37; and Report No. 42/09, Petition 443-03, Inadmissibility, David José Ríos Martínez, Peru, March 27, 2009, para. 38.

38. Based on the arguments of fact and law set forth above, the Commission considers that the petition is inadmissible in light of Article 46(1)(b) of the American Convention, and, accordingly,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,

DECIDES:

1. To declare the present petition inadmissible pursuant to Article 46(1)(b) of the American Convention.

2. To notify the parties of this decision.

3. To publicize this report and to publish it in its Annual Report to the General Assembly of the OAS.

Done and signed in the city of Washington, D.C., on the 19th day of the month of March 2012. (Signed): Tracy Robinson, First Vice-President; Felipe González, Second Vice-President; Dinah Shelton, Rodrigo Escobar Gil, Rosa María Ortiz, and Rose-Marie Antoine, Commissioners.