REPORT No. 15/12
PETITION 786-02
ADMISSIBILITY
ESTER AVIGAIL FAJARDO GARCÉS AND CLAUDIO ALFONSO NASER LEAL
ECUADOR
March 20, 2012

I. SUMMARY

1. On December 13, 2000 and June 28, 2002, the Inter-American Commission on Human Rights (hereinafter "the Commission" or "the IACHR") received a petition lodged by Ester Avigail Fajardo Garcés (hereinafter "petitioner A"), and on October 2, 2002 it received another petition lodged by Claudio Alfonso Naser Leal (hereinafter "petitioner B") and his wife (hereinafter jointly referred to as "the petitioners"), asserting that the Republic of Ecuador (hereinafter "the State" or "Ecuador") was responsible for the violent and arbitrary arrest and torture in detention of the petitioners, as well as for the unfair trial and conviction of Claudio Alfonso Naser Leal in criminal proceedings instituted against him for drug trafficking on September 13, 1994 in Guayaquil.

2. The petitioners alleged violation by the State of the rights to humane treatment, personal liberty, fair trial, privacy, and judicial protection established in Articles 5, 7, 8, 11, and 25 of the American Convention on Human Rights (hereinafter "the Convention" or "the American Convention") in conjunction with its Article 1(1). The State argued that the petition should be denied as time-barred.

3. After analyzing the positions of the parties and determining that the requirements in Articles 46 and 47 of the American Convention had been satisfied, the Commission decided to admit the petitions regarding alleged violation of Articles 5, 7, 8, 11, and 25 of the American Convention, in accordance with Article 1(1) of the American Convention; to notify the parties, and to order publication of the report in its Annual Report to the General Assembly.

II. PROCEEDINGS BEFORE THE COMMISSION

4. The Commission registered the petitions under numbers 786-02[1] (Ester Avigail Fajardo Garcés) and 4182-02 (Claudio Alfonso Naser Leal). On July 30, 2002, it sent a copy of the relevant portions of the first petition to the State for its comments. On February 6, 2003, the State submitted its reply, which was forwarded to petitioner A for her comments. On March 11, 2003, petitioner A submitted her reply, which was forwarded to the State for its comments. On July 11, 2005, the petitioners submitted additional information, which was forwarded to the State for its comments.

5. On November 21, 2007, the Commission asked petitioner A to provide information in order to determine whether the grounds for the petition still existed and informed her that if it did not receive the information within the indicated time limit, it could archive the petition. On December 27, 2007, she reported that the grounds for her petition still existed and submitted additional information, which was forwarded to the State with a request for its comments. On December 11, 2008, the IACHR repeated its request to the State for information.

6. On March 12, 2009, the IACHR decided to join the two petitions and sent a copy of the relevant portions of the second petition to the State for its comments. On April 17, 2009, the State asked the IACHR to have the petitioners complete their petition. On July 20, 2009, the IACHR sent copies of the relevant portions of the completed petition to the State. On August 19, 2009, the State reaffirmed its previous comments. On March 26 and December 28, 2010 and September 30, 2011, the petitioners

[1] The IACHR initially registered the petition on December 13, 2000 as P-638-00. However, because the case file had been mislaid, and the petition was received again on June 28, 2002 and registered as P-786-02. (The previous registration was canceled.).

submitted additional information, which was forwarded to the State with a request for its comments. On February 1, 2012, the Commission repeated its request to the State for information, but as of the approval date of this report, it had not received a reply.

III. POSITIONS OF THE PARTIES

A. Petitioner's position

7. The petitioners, Claudio Alfonso Naser Leal, Chilean, import-export company manager, and his wife, Ester Avigail Fajardo Garcés, Ecuadorian, report that hooded members of a special Ecuadorian police unit broke into their home on the night of September 13, 1994. They report that they were arrested as part of Operation "Bosque" (Forest), during which the police arrested 14 other people connected with the company, in the context of a drug trafficking investigation.

8. They claim that their arrest was "violent and degrading" and that no arrest warrant was produced. They report that the police took them naked from their home, in front of their three children (aged eight months, three, and five), and killed their pets. Petitioner A reports that during their arrest and transportation to a station, they were blindfolded, beaten, and verbally abused, and that she was sexually assaulted.

9. They report that they were kept separately in incommunicado detention at the station for more than 10 days and that they were subjected to all manner of torture and abuse during questioning in which they were forced to testify against themselves or others under threat of physical harm to their children. They report that they did not have access to a lawyer. Among the alleged tortures, petitioner B indicates that he was beaten in the genitals and all over his body, asphyxiated with a plastic bag and gas, and threatened. He reports that his ears were boxed, resulting in deafness. Petitioner A reports that while in incommunicado detention she was beaten, subjected to constant sexual violence, and cruelly humiliated by "indecent offers to buy better treatment," and that they wanted to force her to testify against her husband. She further reports that the other people arrested in the same operation were also tortured, and that "their shouting and screaming for hours on end" became psychological torture for her. She claims that at bedtime, high-decibel music was played to keep them from sleeping.

10. They report that the authorities kept the detainees from talking to each other, and that they made them stand for more than 18 hours and then threw water on the floor of the cell so that they were forced to sit or sleep in wet clothes. They report that petitioner B was hit with such force that he required 14 sutures to the head, placed without anesthetic, and lost 50 percent of the vision in his left eye. They indicate that, to cover up the incident, the police forced him to write a letter saying that he had attempted suicide over his involvement in the crime under investigation, which he had signed under threat of having his wife put in with the common criminals and raped by them.

11. They report that they were forced to sign a statement drawn up in the presence of the public prosecutor, who allowed the abuse and beating. They indicated that almost all of the detainees signed it, regardless of its contents, in order to end the torture.

12. They state that on the fourth day of their detention, September 16, 1994, petitioner B, various company employees, and others who had been unjustly detained in the context of the same police operation were exposed to the press, with their faces uncovered, even though they still had not testified before the judge.

13. They indicate that despite the media publicity, the police denied their presence to family members making the rounds of the police stations in search of them. Petitioner B reports that he asked the authorities for consular assistance from the Chilean government, but that it was denied.

14. Petitioner B reports that after 10 days he was taken to a prison and held for 31 days in a crowded, insalubrious cell, "without daylight and without visits." Petitioner A reports that she spent 15

days in similar confinement. They indicate that they were subsequently confined "with ordinary criminals, without any kind of segregation."

15. The information provided by the petitioners indicates that on September 22, 1994 the investigation order was broadened to include the petitioners. In statements made during questioning, beginning on October 14, 1994 the alleged victims reported to the judicial authorities that they had been abused, beaten, and subjected to physical, psychological, and moral pressure from the first interrogations onward and contested the INTERPOL report, which, they said, contained statements obtained under physical, psychological, and moral duress.

16. Petitioner A reported as follows:

> The police broke into our house when I was with my husband and my children, and I even had to put my underwear on in front of them. More over (sic), first the officers hit my husband, and then they shoved me with a machine gun. After that we were taken to the Cuartel Modelo police headquarters. They kept us standing a long time without being able to even sit down, and they threw water in the cells.

17. Petitioner B reported that "he rejects the report written by INTERPOL Guayas because it was prepared under pressure and he was forced to sign," and his defense has indicated that "the gentleman testified in police custody because he was being physically abused. He was even treated because, I'm telling you, they were boxing his ears and the prosecutor says, 'Sign here.' My client didn't even read the statement […]."

18. They also entered an appeal against the March 16, 1996 order initiating formal cross-examination, in which petitioner B indicates that "he contests and rejects the police thus (sic) as well as his statement because he was physically incapacitated by torture at the time," which order was upheld on October 8, 1996. The public hearing was conducted on April 30, 1997. On August 29, 1997, the Los Ríos Criminal Court found Claudio Alfonso Naser Leal guilty of the crime defined in article 64 of the Law on Narcotic Drugs and Psychotropic Substances and sentenced him to 12 years of imprisonment. At the same time, his wife was convicted as an accessory after the fact and received a two-year prison term. Arrangements were made for *ex officio* review of the decision by the Babahoyo High Court. In this context, the petitioners filed an appeal in cassation, which the trial court allowed. However, without prejudice to this allowance, the trial court referred the case first to the Babahoyo High Court for *ex officio* review.

19. The aforementioned information indicates that on February 20, 1998, the Babahoyo High Court reduced Claudio Alfonso Naser Leal's prison term to eight years and acquitted Ester Avigail Fajardo Garcés. On August 27, 1998, the Supreme Court of Justice denied the appeal in cassation against the above decision.

20. The petitioners claim that their lawyers were under constant threat from the authorities and received repeated threats from the lawyers for the other defendants, many of whom had waived their defense in less than a month.

21. They report that petitioner A was released after serving two years of an unfair sentence and was forced to leave Ecuador with her children and go to Chile because of threats made against her. Petitioner B indicates that once his wife was released from prison, he was able to obtain access to a defense lawyer who mounted a real defense despite the threats. They report that, after serving four years and one month of an unfair sentence, petitioner B was released for good conduct and moved to Chile.

22. They maintain that their children also suffered psychological harm as a result of being separated in different families while petitioner A was in prison. They indicate that their eldest daughter "developed hard-to-diagnose neurological symptoms that caused her to fall behind in school […]."

23. They report that the only item of seized property that has been restored to them is a pickup truck, returned in 2002 in poor condition, and that their household furnishings are in the house of an important police chief, despite a court order for the police to return the property.

24. In response to the State's assertion that the petition is time-barred (see III.B above), petitioner A argues that she was under constant threat in Ecuador, which prevented her from filing the petition until she and her husband had left the country and settled in Chile.

25. They also claim applicability of the exceptions provided in Article 46(2)(a) and (2)(b), given that the accused State has "no legislation providing adequate protection of fundamental rights […] and the danger incurred to my person and my family as a result of my release ceased when we left Ecuador […]."

26. The petitioners deny the State's assertion that petitioner B admitted guilt during a public hearing (see III.B above). They indicate that, quite to the contrary, there is a recording of the hearing in which petitioner B, who is "seeing the members of the court for the first and only time, emphatically DEN[IES] the accusation."

27. Lastly, the petitioners report that their criminal record still figures on their identity documents and in public records, despite petitioner A's acquittal. In petitioner B's case, they claim that the legal time limits have expired, thereby extinguishing criminal liability and the associated administrative penalties. They indicate that they are required to pay an unfair fine to expunge their criminal records. They also report that an Internet search on them shows them "listed on various pages by the Accused State as persons with a drug trafficking record." They maintain that this has affected all of petitioner B's personal, professional, business, or administrative initiatives, in addition to constituting a violation of the right to privacy and a psychological burden for his family.

B. State's position

28. The State contends that the petition should be denied because it does not meet the six-month requirement established by the American Convention.

29. With regard to the events giving rise to the petition, the State indicates that, on the basis of evidence submitted to the Associate Justice of the Los Ríos Criminal Court by the Second Public Prosecutor of the Los Ríos Criminal Court, the State initiated criminal proceedings for drug trafficking against various suspects and seized 600 kilograms of cocaine chlorhydrate, 14,043 US dollars, 2,619,000 Sucres, an electronic scale, and other material evidence. It states that, on September 22, 1994, the initial order was broadened to include the petitioners. It indicates that, on December 13, 1996, the case against Ester Avigail Fajardo Garcés as an accomplice after the fact and against Claudio Alfonso Naser Leal as the perpetrator entered the final cross-examination phase of the trial.

30. It reports that, on August 29, 1997, the Los Ríos Criminal Court sentenced Claudio Alfonso Naser Leal to 12 years of long-term rigorous imprisonment and a fine of 8,000 general minimum living-wage salaries; sentenced Ester Avigail Fajardo Garcés to two years of correctional imprisonment, and provided for *ex officio* review by the Babahoyo High Court. It indicates that before the aforesaid review could be completed, the petitioners prematurely filed appeals in cassation with the Los Ríos First Criminal Court, which allowed them.

31. It reports that the Babahoyo High Court's *ex officio* review, completed on February 20, 1998, resulted in the acquittal of Ester Avigail Fajardo Garcés. Claudio Alfonso Naser Leal's conviction was upheld, given that…

> [M]r. Claudio Alfonso Naser Leal admitted responsibility during the public prosecution hearing for the offense of which he is accused, i.e., organizing the introduction of drugs into Ecuador[2].

32. As no appeals had been filed, the decision was deemed final, and the case was returned the criminal court of origin. The State indicates the said court remitted the case to the Supreme Court of Justice, which denied the appeals in cassation against the conviction on the grounds that the decision had passed into *res judicata*.

33. The State therefore considers the petition time-barred. In its view, the Babahoyo High Court decision marks the end of the domestic proceedings, since it was not appealed. It maintains that the Supreme Court acknowledged the finality and *res judicata* nature of the Babahoyo High Court decision when it denied the appeals in cassation. The State also points out that petitioner A submitted her petition to the IACHR after a lapse of four years and five months,[3] which is obviously beyond the six-month limit.

34. The State contends that the supposed violations that allegedly occurred during the petitioners' detention cannot be deemed continuous in nature or lasting in time, for which reason the delay in submitting the petition cannot be considered reasonable. Accordingly, it asks the Commission to declare the petition inadmissible.

IV. ANALYSIS OF COMPETENCE AND ADMISSIBILITY

A. Competence

35. The petitioner is empowered by Article 44 of the Convention to submit petitions to the Commission. The petition specifies alleged victims who are natural persons, whose rights the Ecuadorian State is bound to respect and ensure under the Convention. For its part, Ecuador ratified the American Convention on December 28, 1977. Accordingly, the Commission is competent *ratione personae* to hear the petition.

36. The Commission is competent *ratione loci* to hear the petition inasmuch as it alleges violations of rights protected by the American Convention that took place within the territory of Ecuador, a State party to that treaty. The Commission is competent *ratione temporis* because the obligation to respect and ensure the rights protected under the American Convention was already in force for the State at the time of the facts alleged in the petition. Lastly, the Commission is competent *ratione materiae* because the petition alleges violations of rights protected under the American Convention.

B. Requirements for admissibility

1. Exhaustion of domestic remedies and time limit for presentation of the petition

37. Article 46(1)(a) of the American Convention provides that, for a petition lodged with the Inter-American Commission under Article 44 of the Convention to be admissible, the remedies under domestic law must have been pursued and exhausted, in accordance with generally recognized principles of international law. This requirement was established to allow national authorities the opportunity to consider alleged violations of protected rights and, if applicable, resolve such matters before they might be heard by an international body.

38. Article 46(1)(b) of the American Convention provides that, to be declared admissible, a petition must have been lodged within a period of six months from the date on which the interested party was notified of the final judgment that exhausted domestic remedies.

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[2] State document received on February 6, 2003.

[3] The State considers July 30, 2002 (the date on which the relevant portions of the initial petition were transmitted to the State) to be the date of submission of the petition.

39. The information provided by the parties indicates that the alleged victims reported to the judicial authorities that they had been abused, beaten, and subjected to physical, psychological, and moral pressure from the first interrogations onward and contested the INTERPOL report, which, they said, contained statements obtained under physical, psychological, and moral duress. Furthermore, they appealed the March 16, 1996 order initiating formal cross-examination, which was upheld on October 8, 1996. They subsequently lodged appeals in cassation against the conviction handed down by the Los Ríos Criminal Court on September 1, 1997. Following *ex officio* review, petitioner B's sentence was reduced to eight years of imprisonment, and petitioner A was acquitted. Cassation was denied on August 27, 1998.

40. The State considers the petition time-barred, given that it was lodged four years and five months after the February 20, 1998 Babahoyo High Court decision—obviously beyond the six-month limit—when the decision had already passed into *res judicata*. For her part, petitioner A claims that she was under constant threat in Ecuador, which prevented her from filing the petition until she and her husband had left the country and settled in Chile. The petitioners also claim applicability of the exceptions provided in Article 46(2)(a) and (2)(b), given that the accused State has "no legislation providing adequate protection of fundamental rights […] and the danger incurred to my person and my family as a result of my release ceased when we left Ecuador […]."

41. The Commission notes that the authorities have not investigated the incidents of torture reported beginning in 1994 by the alleged victims. Neither has the State reported the initiation of any investigations or proceedings in connection with the offenses reported by the alleged victims, which should have been pursued and instigated *ex officio*. The Commission also takes into account that Petitioner A was under constant threat in Ecuador, which prevented the exhaustion of local remedies. Therefore, in view of the characteristics and context of this petition and the absence of information regarding the initiation of any investigation despite the petition's allegations, the exception provided in Article 46(2)(b) of the American Convention is applicable given the impossibility to present a recourse and the lack of access to an effective remedy.

42. With respect to the petitioners' claims in connection with the failure to return their household furnishings, the Commission notes that they have not yet exhausted the domestic remedies for this part of the petition.

43. The applicability of the exceptions to the rule of exhaustion of domestic remedies established in Article 46(2) of the Convention is closely related to the establishment of possible violations of rights enshrined in it, such as the guarantees of access to justice. However, by both nature and purpose, the rules in Article 46(2) are independent from the Convention's substantive provisions. Accordingly, the issue of whether the exceptions to the rule of exhaustion of domestic resources should apply to the case in question must be decided separately, before analysis of the merits of the case, since this determination is subject to a different standard of appreciation from the one used to establish a possible violation of Articles 8 and 25 of the Convention. To establish whether there have been violations of the American Convention, the Commission will analyze the causes and effects that prevented the exhaustion of domestic remedies in its report on the substance of the dispute.

2. Time limit for presentation of the petition

44. The American Convention provides that, to be admissible, a petition must be lodged within a period of six months from the date on which the alleged victim was notified of the final decision of the domestic courts. Article 32 of the Commission's Rules of Procedure further establishes that, in cases in which the exceptions to the requirement of prior exhaustion of domestic remedies are applicable, the petition shall be presented within a reasonable period of time, as determined by the Commission.

45. As the Commission has already established, the exception to exhaustion of domestic remedies provided in Article 46(2)(b) of the American Convention is applicable to the present petition. In order to determine if the petition was lodged within a reasonable period of time pursuant to Article 32 of

the Commission's Rules of Procedure, the Commission must consider the date on which the alleged rights violations occurred and the circumstances of each case.

46. In the present case, the petition from Ester Avigail Fajardo Garcés was received on December 13, 2000, and the petition from Claudio Alfonso Naser Leal was received on October 2, 2002. The events giving rise to the claims occurred beginning September 13, 1994, the date of the alleged victims' arrest. For the purpose of determining if the petition was lodged in due time, the Commission notes that petitioner A had been under constant threat in Ecuador, and therefore the filing of the petition was possible once she and her husband had left the country and settled in Chile. Therefore, in view of the context and characteristics of this petition, the Commission deems the petition to have been presented in due time.

3. Duplication of proceedings and international *res judicata*

47. Article 46(1)(c) of the Convention provides that the admission of a petition is subject to the requirement that the matter "is not pending in another international proceeding for settlement"; and Article 47(1)(d) of the Convention stipulates that the Commission will not admit a petition or communication that is substantially the same as one previously studied by the Commission or by another international organization. The requirements established in Articles 46(1)(c) and 47(1)(d) of the Convention have been satisfied.

4. Characterization of the facts alleged

48. In light of the facts and legal issues presented by the parties and the nature of the matter before it, the IACHR believes that the petitioners' allegations regarding arbitrary arrest and incommunicado detention, torture, poor detention conditions, due process guarantees and police threats against the alleged victims may constitute possible violations of the rights to humane treatment, personal freedom, fair trial, privacy, and judicial protection protected under Articles 5, 7, 8, 11, 19, 21, and 25, in accordance with Article 1(1) of the American Convention.

V. CONCLUSIONS

49. The Commission concludes that it is competent to consider the claims presented by the petitioner and the alleged violation of Articles 5, 7, 8, 11, and 25, in accordance with Article 1(1) of the American Convention; and that the petition is admissible under the requirements established in Articles 46 and 47 of the American Convention.

50. On the basis of the foregoing findings of fact and of law, and without prejudging the merits of the matter,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

DECIDES:

1. To declare the petition admissible under Articles 5, 7, 8, 11, and 25, in accordance with Article 1(1) of the American Convention.

2. To notify the Ecuadorian State and the petitioner.

3. To continue with the analysis of the merits of the case.

4. To publish this decision and 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 20th day of the month of March 2012. (Signed): José de Jesús Orozco Henríquez, President; Tracy Robinson, First Vice-President; Felipe González, Second Vice-President; Dinah Shelton, Rodrigo Escobar Gil, Rosa María Ortiz, and Rose-Marie Belle Antoine, members of the Commission.