

REPORT No. 25/12¹
PETITION 700-04
INADMISSIBILITY
AURORA CORTINA GONZÁLEZ
MEXICO
March 20, 2012

I. SUMMARY

1. On August 6, 2004, the Inter-American Commission on Human Rights (hereinafter the “Commission”, the “Inter-American Commission” or the “IACHR”) received a petition lodged against the State of Mexico (hereinafter the “State”) by Mrs. Aurora Cortina González, counseled by Mr. Raúl Armando Jiménez Vásquez and Mrs. Carmen Herrera García² (hereinafter the “petitioners”). The petition alleges that Mrs. Cortina (hereinafter the “alleged victim”) was dismissed from her position of public trust as Director of the *Instituto de Estudios Fiscales y Administrativos* (IEFA) [Institute of Fiscal and Administrative Studies] of the Federal Court of Fiscal and Administrative Justice (TFJFA) in retaliation for having exercised her right to freedom of expression.

2. The petitioners contend that the State violated articles 2 (duty to adopt domestic legislative measures), 5 (right to humane treatment), 8 (right to a fair trial), 13 (freedom of thought and expression), 24 (right to equal protection) and 25 (right to judicial protection) of the American Convention on Human Rights (hereinafter the “Convention” or the “American Convention”), considered in conjunction with Article 1(1) thereof, article XIV (right to work) of the American Declaration of the Rights and Duties of Man and articles 6 and 7(a) (the right to work and the right to just, equitable and satisfactory conditions of work) of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (hereinafter the “Protocol of San Salvador”), to the detriment of Mrs. Aurora Cortina González. On the matter of exhaustion of domestic remedies, the petitioners’ contention is that the Mexican system does not afford an effective remedy to protect the rights alleged to have been violated and they therefore request that the Commission apply the exception allowed under Article 46(2)(a) of the American Convention.

3. The State maintains that the petition should be declared inadmissible on the grounds that domestic remedies were not exhausted. It also denies that the alleged victim’s human rights were violated and asserts that she was dismissed when she lost her superiors’ confidence in the wake of a number of irregularities she was alleged to have committed.

4. After examining the parties’ positions, the Commission concludes that while it is competent to hear the petition under examination, the latter is inadmissible under articles 46 and 47 of the American Convention. The Commission also decides to notify the parties of its decision, to publish it and include it in its Annual Report to the General Assembly of the Organization of American States.

¹ In keeping with Article 17(2)(a) of the Commission’s Rules of Procedure, Commissioner José de Jesús Orozco Henríquez, a Mexican national, did not participate in the deliberation, discussion or decision of the present case.

² By a communication dated December 2, 2008, the alleged victim revoked the appointment of Carmen Herrera García as her advisor, and Raúl Armando Jiménez Vásquez was designated as her sole defense counsel.

II. PROCESSING BY THE COMMISSION

5. The petition was lodged on August 6, 2004, and was registered as number 700/04. On August 10, 2005, the Commission requested additional information from the petitioners. On April 21, 2006, the petitioners filed a brief with an amplification of the petition. On August 23, 2006, the Commission forwarded the relevant parts to the State and gave it two months in which to submit its response, in keeping with Article 30(3) of the Commission's Rules of Procedure. On October 25, 2006, the State submitted its response, which was forwarded to the petitioners on January 30, 2007.

6. The petitioners supplied additional information on March 27, 2007, June 5, 2007, September 14, 2007, March 2, 2009, December 14, 2009, July 20, 2010 and September 21, 2010.

7. The State submitted additional information on July 16, 2007, April 16, 2009 and January 19, 2011.

III. POSITIONS OF THE PARTIES

A. The petitioners

8. The petitioners point out that Mrs. Cortina's career in public service began in 1980, when she was Director of the Publications Department of the Federal Court of Fiscal and Administrative Justice (hereinafter the "TFJFA"). She began serving as a Magistrate in that Court's Regional Chamber in May 1990, but resigned from that position when she became Director of the Court's Institute of Fiscal and Administrative Studies, which was a position of public trust. The petitioners assert that she was arbitrarily dismissed from her post on April 30, 2002, in retaliation for having exercised her right to freedom of expression.

9. According to the petitioners, the biennial rotation of the office of President of the Court happened in January 2000. Mrs. Cortina went to the office of the new president to present him with the Institute's work program and a copy of an article titled "The Autonomy of the Federal Court of Fiscal and Administrative Justice and of the Judicial Service", which Mrs. Cortina had written at the request of the editors of the journal published by the Judiciary Institute of the Federal Judicial Branch; the article was scheduled to be published in 2002.

10. The petitioners allege that on March 20, 2002, Mrs. Cortina was summoned by the President of the Court, who told her that the article she had delivered to him at their previous meeting was "reprehensible and subversive, as it was contrary to the State reforms that President Fox had announced"; for that reason, he asked her to tender her resignation, a request that the alleged victim refused. When she declined to submit her resignation, the petitioners contend that the president of the Court launched a campaign to harass her and thereby force her into resigning.

11. The petitioners report that on April 19, 2002, Mrs. Cortina received a summons to appear on April 25, 2002, to be present for the proceeding at which a formal written record would be drawn up documenting the grounds for the loss of confidence. They argue that because the proceeding was conducted by the employer state institution, without the guarantees of due process, the alleged victim was under no obligation to appear for that proceeding. The petitioners observe that on April 30, 2002, Mrs. Cortina was forcibly removed from her office and dismissed from her post.

12. The petitioners claim that this situation has stymied the alleged victim's professional career and left her in such a state of depression and despair that she had to undergo therapy.

13. As for the exhaustion of domestic remedies, the petitioners argue that the Mexican legal system does not offer an effective remedy to protect the rights allegedly violated. They therefore request that the Commission apply the exception provided for in Article 46(2)(a) of the American Convention.

14. The petitioners claim that they filed the following specific remedies: a) a complaint with the National Human Rights Commission (CNDH); b) a petition seeking *amparo* relief in which they claimed violation of a number of constitutional principles, among them the alleged victim's right to freedom of expression; and c) a request filed with the Congress of the Union.

15. The petitioners' contention is that a complaint lodged with the National Human Rights Commission (CNDH) is not a remedy "of the nature and authority required to protect human rights", since the CNDH's recommendations are not binding upon the authorities identified as the responsible parties.

16. As for the petition seeking *amparo* relief, the petitioners claim that the petition filed was declared inadmissible on May 3, 2002, on the grounds that the facts alleged therein were employment related. While a motion for review could have been filed, the petitioners assert that they opted not to pursue that avenue because the Supreme Court's case law holds that the viable action is the one filed with the Federal Conciliation and Arbitration Tribunal.

17. As for the request filed with the Congress of the Union, the petitioners contend that the permanent congressional committee issued an appeal urging that the necessary measures be taken to settle the matter.

18. The petitioners assert that Mrs. Cortina did not file a case with the labor courts, because the Collegiate Circuit Courts of the Supreme Court of the Nation have held that persons in positions of public trust are not guaranteed job security and are not entitled to compensation for termination. The petitioners argue that this interpretation is at variance with Article 123.B.IX of the Constitution, which provides that "in the event of unjustified termination, [workers] shall be entitled to opt for either reinstatement in their positions or the corresponding compensation." The petitioners contend that this jurisprudence closes off any possibility of an effective judicial remedy to assert those rights.

B. The State

19. The State contends that the petition is inadmissible because the petitioners failed to exhaust the domestic remedies available. The State observes that the petitioners' claim that the alleged victim resigned her position as Magistrate in 1998 is false, since –according to the State- she ceased to serve as a Magistrate on May 22, 1997, because her appointment was never legally confirmed. The alleged victim was reinstated on June 1, 1997, this time as the Reporter of the Superior Chamber's Decisions, and in July 1998 was promoted to the position of Deputy Director General of the Institute of Studies in Administrative Justice.

20. The State contends that on April 19, 2002, the alleged victim's appointment was terminated due to a "loss of confidence." According to the State, on March 20, 2002 the then president of the TFJFA met with the alleged victim; because of the complexity of the issues under discussion, he proposed that the meeting resume on March 25 or 26. According to the State, the irregularities committed by the alleged victim included the following: she failed to report for work on March 25 and 26, 2002; she was disrespectful to her superiors in a brief she wrote to them on April 11, 2002; she gave a distorted version of the reorganization of the Institute of Studies in Administrative Justice and made 37 international phone calls that the State claimed were unjustified given the nature of her official functions. According to the State, these irregularities prove that the alleged victim's claim that she was dismissed because she exercised her right to freedom of expression is false.

21. The State denies that the alleged victim was the target of harassment or of subtle requests that she tender her resignation. It claims that on April 23, 2002, she was summoned to a proceeding whose purpose would be to draw up a report formally documenting an administrative action against her. This proceeding was the alleged victim's guarantee of a hearing and due process, as it was the procedural opportunity that the alleged victim had to "appear, make whatever statement she deemed to be in her interests, offer whatever evidence and rebuttal witnesses she deemed necessary for her defense, to disprove the accusations made against her as grounds for the loss of confidence." The State reports that the alleged victim never appeared for the proceeding. It also reports that on April 29, 2002,

by decision 10,392/02, the President of the Court ordered that the alleged victim's appointment be terminated. The petitioner removed her belongings on July 10, 2003.

22. The State argues that the alleged victim had available all the legal means and resources with which to file a challenge; there was no attempt to obstruct her defense of her rights. The State contends that, contrary to what the petitioners are claiming, the Mexican legal system does provide the means by which to challenge the measure taken with respect to the alleged victim.

23. The State argues further that domestic remedies were not exhausted. The complaint lodged with the CNDH did not prosper because the latter did not find any violation of human rights. The State further contends that the petition for *amparo* relief was not followed through to completion, as the alleged victim did not file a motion for review of the decision that declared her petition "inadmissible". The request filed with the Congress of the Union is not an action pursued through the judicial system.

24. The State contends that the alleged victim should have exhausted the avenue of the labor courts. Specifically, it observes that the alleged victim could have brought a case in the jurisdiction of the Federal Conciliation and Arbitration Tribunal. Had that Tribunal declared that it did not have jurisdiction, the alleged victim could have filed a petition of *amparo* with the District Judge for Labor-related Matters.

IV. ANALYSIS OF ADMISSIBILITY

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

25. Under Article 44 of the American Convention, the petitioner is authorized to file a petition with the Commission. The alleged victim named in the petition is a natural person whose rights under the American Convention the State undertook to respect and ensure. As for the State, the Commission notes that Mexico has been a State party to the Convention since March 24, 1981, the date on which it deposited its instrument of ratification. The Commission, therefore, has competence *ratione personae* to examine the petition.

26. The Commission has competence *ratione materiae* because the petition alleges violations of human rights protected by the American Convention. It also has competence *ratione temporis* inasmuch as the obligation to respect and ensure the rights protected by the American Convention was already binding upon the State on the date on which the events alleged in the petition were said to have occurred. The Commission is competent *ratione loci* to take up the petition, as it alleges violations of rights protected under the American Convention that were said to have occurred within the territory of a State party to that instrument.

27. The Commission must again point out that once the Convention has entered into force in a State, it and not the Declaration becomes the primary source of law applied by the Commission, as long as the petition alleges violation of substantially identical rights and a continuing violation is not alleged.³ The Commission will, therefore, rely entirely on the provisions of the Convention.

B. Admissibility requirements

1. Exhaustion of domestic remedies

28. Article 46(1)(a) of the American Convention provides that for a complaint lodged with the Inter-American Commission in accordance with Article 44 of the Convention to be admissible the domestic remedies must have been pursued and exhausted in accordance with generally recognized principles of international law. The purpose of this requirement is to allow domestic authorities to take

³ IACHR, Report No. 03/01 (Admissibility), Case 11.670, Amílcar Menéndez, Juan Manuel Caride *et al.* (Social Security System), Argentina, January 19, 2001, paragraphs 41 *et seq.*

cognizance of the alleged violation of a protected right and, if appropriate, resolve the matter before it is heard in an international venue. For its part, Article 46(2) of the Convention establishes three hypothetical circumstances under which the rule requiring prior exhaustion of domestic remedies would not apply: a) the domestic legislation of the state concerned does not afford due process of law for the protection of the right or rights that have allegedly been violated; b) the party alleging violation of his rights has been denied access to the remedies under domestic law or has been prevented from exhausting them; or c) there has been unwarranted delay in rendering a final judgment under the aforementioned remedies. These exceptions are germane not just to the formal existence of the remedies, but to their adequacy and effectiveness as well.

29. In the instant case, the State is alleging that the petitioner failed to exhaust the domestic remedies. It specifically asserts that if the alleged victim believed that her dismissal was unjustified, she should have taken her case to the Conciliation and Arbitration Tribunals. The petitioners, on the other hand, assert that such a remedy was neither “suitable” nor “adequate” for resolving their situation, arguing that under the case law of the Supreme Court, persons in positions of public trust do not have the job security that the alleged victim was demanding.

30. The Commission believes that a number of observations are in order. First, having examined the objection entered by the State, it is clear that its arguments center around the alleged victim’s supposedly improper use of the domestic remedies, based on the fact that she resorted to various mechanisms, including a petition for *amparo* relief, rather than turn to the Conciliation and Arbitration Tribunals. The instant case, therefore, necessitates an examination to determine what the proper domestic remedy was to settle Mrs. Aurora Cortina’s legal situation.

31. Based on the information supplied by the parties, the IACHR observes that under Mexico’s jurisprudence, termination of a person in a position of public trust is not an act of authority, since the relationship between that person and the State is equivalent to an employment relationship.⁴ Hence, under Mexico’s jurisprudence, the proper course to pursue to challenge such a termination is not *amparo*, but rather a case filed with the Federal Conciliation and Arbitration Tribunal.⁵ Therefore, the alleged victim did not duly exhaust the remedies available with the domestic courts.

32. Concerning the petitioner’s argument to the effect that a remedy filed with the Federal Conciliation and Arbitration Tribunal is neither adequate nor effective, the IACHR has previously observed that if they are to afford the State the opportunity to correct an alleged violation of Convention-protected rights before that violation is taken up in an international venue, then the judicial remedies pursued by the alleged victim must comply with the reasonable admissibility requirements established by domestic law.⁶ The Inter-American Court of Human Rights has held that the effectiveness of a judicial remedy implies that if the formalities that the domestic law establishes regarding admissibility and cause of action are fulfilled, the court will proceed to examine the merits.⁷

33. The petitioner asserts that the State violated a number of Convention-protected rights and that she was unable to exhaust domestic remedies because Mexico’s legal system does not afford

⁴ *Semanario Judicial de la Federación, Tesis P./J.9/90 – Trabajadores de Confianza al servicio del Estado. El Tribunal Federal de Conciliación y Arbitraje es competente para conocer de la controversia que se suscite con motivo de su cese* [Persons employed by the State in Positions of Public Trust. The Federal Conciliation and Arbitration Tribunal has jurisdiction to hear the dispute that arises upon their termination].

⁵ *Semanario Judicial de la Federación, Tesis P./J.9/90 – Trabajadores de Confianza al servicio del Estado. El Tribunal Federal de Conciliación y Arbitraje es competente para conocer de la controversia que se suscite con motivo de su cese*. [Persons employed by the State in Positions of Public Trust. The Federal Conciliation and Arbitration Tribunal has jurisdiction to hear the dispute that arises upon their termination].

⁶ IACHR, Report No. 18/11, Petition 871-03, Inadmissibility, Víctor Eladio Lara Bolívar, Peru, March 23, 2011, paragraph 27.

⁷ I/A Court H.R., *Case of Castañeda Gutman v. Mexico*. Preliminary Objections, Merits, Reparations and Costs. Judgment of August 6, 2008. Series C No. 184, paragraph 94; and *Case of the Dismissed Congressional Employees (Aguado Alfaro et al)*. Judgment of November 24, 2006. Series C No. 158, paragraph 126.

an effective remedy to protect the rights of persons in positions of public trust. The IACHR, however, finds that the petitioner has failed to show that she pursued and exhausted judicial remedies with regard to the other violations alleged in her petition, such as the alleged workplace harassment and/or discrimination based on her status as an employee in a position of public trust.

34. The IACHR finds that the present petition does not satisfy the requirement set forth in Article 46(1)(a) of the Convention and refrains from examining the other admissibility requirements set forth in the Convention, as this petition is not a matter properly before it.

V. CONCLUSION

35. Based on the arguments of fact and of law set forth above, the Commission deems that the petition is inadmissible under Article 46(1)(a) of the American Convention. Therefore,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

DECIDES:

1. To declare the present petition inadmissible under Article 46(1)(a) of the Convention.
2. To notify the parties of this decision.
3. To publish this decision and include it in its Annual Report to the OAS General Assembly.

Done and signed in the city of Washington, D.C., on the 20th 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.