

REPORT No. 78/12
PETITION 1485-07
ADMISSIBILITY
JOSÉ LAURINDO SOARES
BRAZIL
November 8, 2012

I. SUMMARY

1. On November 16, 2007, the Inter-American Commission on Human Rights (hereinafter, “the Inter-American Commission” or “the IACHR”) received a petition alleging the international responsibility of the Federative Republic of Brazil (“the State” or “Brazil”) for the delay in the administration of justice regarding a “lawsuit to review social security benefits” brought against the National Social Security Institute (*Instituto Nacional de Seguro Social* – “INSS”). It is claimed that that lawsuit, filed on May 21, 1986 by José Laurindo Soares (“the alleged victim”), has not, to date, more than 26 years later, resulted in payment of the amount owed by the State. Therefore, attorney José Carlos Lima Barbosa (“the petitioner”) maintains that the State is responsible for violation of Articles 1.1, 2, 8.1 and 25 of the American Convention on Human Rights (“the American Convention”) to the detriment of the alleged victim, who was 79 years old at the time of the submission of the petition.

2. The State maintains, firstly, that the petition is inadmissible because of failure to exhaust domestic remedies as required by Article 46.1.a of the American Convention. Thus, the State claims that the civil action brought by the alleged victim for review of his social security benefits is proceeding in normal fashion in the 3^o Civil Court of the District of Barueri, state of São Paulo, and therefore argues that the State’s administration of justice has been effective and that the grounds for the petition no longer exist. The State also maintains that in the current phase of settlement of the award in the context of the aforementioned civil action, the alleged victim has repeatedly challenged the amounts set by the court-appointed accountant, and therefore, the alleged delay in the administration of justice was provoked by his own conduct in the proceedings. It therefore concludes that violations of Articles 8 and 25 of the American Convention may not be attributed to the State.

3. Without prejudging the merits of the petition, having examined the information available, and the positions of the Parties in the light of Articles 46 and 47 of the American Convention, the IACHR decides to declare the case admissible for the purpose of examining the alleged violation of the rights set forth in Articles 8.1, 21 and 25 of the American Convention, in concordance with Articles 1.1 and 2 thereof. The Inter-American Commission further decides to publish this report and to include it in its annual report to the General Assembly of the OAS.

II. PROCEEDINGS BEFORE THE IACHR

4. The complaint was received on November 16, 2007. By note of June 24, 2008, the IACHR forwarded the complaint to the State so that it might present its response. The State responded to the petition on August 28 and September 9, 2008. The IACHR received additional information from the petitioner on November 3, 2008 and June 14, 2012. Those communications were duly remitted to the State. The IACHR received additional information from the State on December 16 and December 29, 2008. Those communications were duly forwarded to the petitioner.

III. POSITION OF THE PARTIES

A. Position of the petitioner

5. The petitioner alleges that the State violated the Brazilian Constitution and the American Convention because of the delay in the administration of justice concerning a “lawsuit for review of social security benefits” (*ação revisional de benefício previdenciário*) against the INSS, an agency of the Brazilian State. The petitioner argues that this lawsuit was filed by the alleged victim on May 21, 1986

with the 3rd Civil Court of the District of Barueri, state of São Paulo. According to the petitioner, more than 26 years later, despite the fact that the civil action was decided in favor of the alleged victim, it has not to date resulted in payment of the amount owed by the State.

6. According to the petitioner, the alleged victim was 79 years old at the time the petition was lodged with the IACHR,¹ and during the handling of his civil action, he repeatedly requested that his case be given priority because of his advanced age; however, the Brazilian judicial authorities acted with inexplicable delay and in violation of domestic legal provisions.² The petitioner adds that the alleged victim has no income other than his pension, which has not been paid to him to date in the correct amount as determined in the aforementioned action for review of social security benefits. Consequently, the petitioner concludes that the delay in the administration of justice found in the present situation seriously affects the alleged victim's right to a living.

7. The petitioner maintains that the civil action brought by the alleged victim on May 21, 1986 took more than twenty years before the regular and special instances, until the Supreme Court of Justice ("STJ") denied a special appeal submitted by the INSS. The petitioner indicates that the lower court ruling found in favor of the alleged victim; however, actions of a monetary nature brought against the State are subject to automatic review by a higher court, which meant that the case was referred to the Federal Regional Court of the 3rd Region ("TRF") on September 20, 1989. The petitioner alleges that the processing of the action for review was "lethargic" until the decision of the STJ mentioned *supra*, on April 27, 2006, and that, as of now, settlement and execution have not been completed.

8. To date, indeed, the petitioner alleges that the action continues at the stage of settlement of the award, so that the amount owed by the State to the alleged victim may be calculated. According to the petitioner, the stage of settlement of the award and the pertinent calculation by the court-appointed accountant of the amount owed by the State has taken more than five years, from February 5, 2007 until the present. In this regard, the petitioner indicates that the court-appointed accountant has repeatedly issued calculations that are not in accord with the award in the judicial decision, and because of that, the alleged victim has challenged them. In any event, the petitioner claims that once execution of the judgment proper begins, the process will surely take many more years. This is because, according to the petitioner, in Brazil, settlement of monies owed by the State is carried out via executive orders called *precatórios*, execution of which may be postponed indefinitely, according to an order of precedence, until the State has available sufficient resources to make payment.

9. Based on the foregoing, the petitioner maintains that the petition is admissible by virtue of the applicability to the present situation of the exceptions provided for in paragraphs "a", "b" and "c" of Article 46.2 of the American Convention, inasmuch as the unjustified delay in the decision on the case has been caused by the judicial authorities themselves, who have jurisdiction over the decision on domestic remedies. In conclusion, the petitioner maintains that the State is responsible for violation of Articles 1.1, 2, 8.1 and 25 of the American Convention.

B. Position of the State

10. The State alleges that the petition is inadmissible because domestic remedies have not been exhausted, as is required under Article 46.1.a of the American Convention. The State claims that the civil action for review of social security benefits (Process 068.01.1986.000061-6) filed by the alleged victim in 1986 was decided in his favor, and is following its normal course before the 3rd Civil Court of the District of Barueri, state of São Paulo. According to the State, the conclusion of the civil action and review may be anticipated shortly, and therefore, the State's administration of justice has been effective and the grounds for the petition no longer exist.

¹ According to the petitioner, the alleged victim turned 84 years of age on April 25, 2012.

² The petitioner refers specifically to Article 1211 of the Brazilian Code of Civil Procedure, which provides for priority for processing of cases in which one of the parties is over 65 years old.

11. The State further observes that in the current stage of settlement of the award in the civil action, the alleged victim has repeatedly challenged the amounts set by the court-appointed accountant, and therefore that the alleged delay in judicial services has been caused by his own conduct in the proceedings. It therefore concludes that violations of Articles 8 and 25 of the American Convention may not be attributed to the State.

12. On the basis of the foregoing, the State requests that the IACHR declare this petition inadmissible, in accordance with Article 46.1.a of the American Convention.

IV. ANALYSIS ON COMPETENCE AND ADMISSIBILITY

A. Competence

13. The petitioner has standing, in principle, pursuant to Article 44 of the American Convention to lodge a petition with the IACHR. The petition indicates as the alleged victim José Laurindo Soares, an individual with respect to whom the State has undertaken the commitment to respect and ensure the rights recognized in the American Convention. With regard to the State, the Inter-American Commission notes that Brazil has been a Party to the American Convention since September 25, 1992, the date on which it deposited its instrument of ratification. Therefore, the IACHR has competence *ratione personae* to examine the petition. The Inter-American Commission is also competent *ratione loci* to hear the petition, inasmuch as it adduces violations of rights protected in the American Convention that took place within the territory of Brazil, a State Party to that treaty.

14. With respect to its competence *ratione temporis*, the Inter-American Commission notes that the petitioner complains of facts in a civil action begun on May 21, 1986, before Brazil ratified the American Convention on September 25, 1992; therefore, the source of law applicable initially is the American Declaration of the Rights and Duties of Man.³ Despite the foregoing, the IACHR observes that what is denounced in this petition is the continuing delay by the State of judicial protection and guarantees, which presumably continues to the present time, and therefore, the Inter-American Commission also has competence *ratione temporis* to examine this petition under the American Convention from the date of ratification thereof. The IACHR has competence *ratione materiae*, because the petition denounces possible violations of human rights protected by the American Convention.

B. Exhaustion of domestic remedies

15. In accordance with Article 46.1 of the American Convention, in order for a petition to be admitted by the Inter-American Commission, domestic remedies must have been exhausted in accordance with generally recognized principles of international law. Article 46.2 of the American Convention provides that this requirement does not apply when (i) 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; (ii) 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 (iii) there has been unwarranted delay in rendering a final judgment under the aforementioned remedies.

16. The Inter-American Commission observes that it is not disputed that the judicial action for review of his social security benefit filed by the alleged victim on May 21, 1986 is still awaiting its conclusion, that is, it has not to date been executed (paras. 7, 8 and 10 *supra*), more than 26 years after it was filed.⁴ Taking into account the circumstances of this petition, the IACHR finds that the delay noted in

³ See I/A Court H.R., *Advisory Opinion OC-10/89, Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights*, July 14, 1989, Ser. A No. 10, paras. 35-45; IACHR. James Terry Roach and Jay Pinkerton (United States, Case 9647, Res. 3/87, September 22, 1987, paras. 46-49; and Rafael Ferrer-Mazorra *et al.* (United States), Report N° 51/01, Case 9903, April 4, 2001. See also Article 20 of the Statute of the Inter-American Commission.

⁴ In effect, according to the documents in the record, for example, in the phase of settlement of the award, the case was sent to the court accountant on February 5, 2007, and discussions continue to this day about the amount owed by the State. In this
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the decision on the civil action significantly exceeds what might be considered reasonable for the purposes of admissibility of the petition.⁵

17. The Inter-American Court of Human Rights (“the Inter-American Court”) has held that the rule on exhaustion of domestic remedies “must never lead to a halt or delay that would render international action in support of the defenseless victim ineffective.”⁶ In the instant case, the requirement for exhaustion of domestic remedies may not be interpreted in such a way as to cause a lengthy or unjustified restriction on access to the inter-American system of human rights. Consequently, the IACHR decides that there has been an unjustified delay in the final decision on domestic remedies, and therefore, the exception provided for in Article 46.2.c of the American Convention applies.

18. Finally, it should be noted that the exception on account of unjustified delay is closely related to the possible violation of certain rights protected by the American Convention, specifically under Articles 8 and 25 thereof. In this regard, the IACHR clarifies that the State’s claim about the alleged victim’s conduct in the proceedings will, *inter alia*, be examined at the merits stage regarding the alleged violation of judicial guarantees, and the unreasonableness of the time period for conducting the civil action in question.⁷ Therefore, at the merits stage, the IACHR will examine whether the causes and effects of that exception specifically constitute violations of the American Convention,⁸ in particular of its Articles 1.1, 2, 8.1 and 25.

C. Timeliness of the petition

19. Article 46.1.b of the American Convention requires that the petition “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”. Article 32.2 of the Rules of Procedure of the IACHR further provides as follows:

In those 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

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(contd.) regard, see, for example, *Certidão de Objeto e Pé* of October 19, 2009 (which includes the judge’s referral of the records to the court accountant on February 5, 2007); and the Judgment of September 27, 2010 in re *Agravo de Instrumento* Nº 0006420-50.2010.4.03.0000/SP filed by the alleged victim (which confirmed that the criteria for calculating the award to the alleged victim were not fully observed by the court accountant and had to be corrected) – Annexes to the petitioner’s communication of June 14, 2012.

⁵ The IACHR observes that the petitioner has claimed (para. 8 *supra*) that once the settlement has been carried out and paid in the amount owed, execution of the settlement will be subsequently carried out by means of a *precatório*, since it is a question of payments of monies owed by the State. In the event such a situation were to arise as a supervening event during the merits stage of this case, the Inter-American Commission notes that, with regard to the failure to pay a *precatório* owed by the State of Brazil, the IACHR has already taken a decision of admissibility on exhaustion of domestic remedies on this topic, in Report No. 144/11 on P-1050-06 (Pedro Stábile Neto and other officers of the town of Santo André), of October 31, 2011; and it has used it as grounds for other decisions *per curiam* on admissibility of claims related to this situation (See on the same issue IACHR Report No. 145/11, Admissibility, Petition 1140-04, *Clélia de Lurdes Goldenberg and Rita de Cassia da Rosa*, October 31, 2011, para. 17; and Report No. 10/12, Admissibility, Petition 341-01, *Márcio Manoel Fraga and Nancy Victor da Silva*, March 20, 2012, para. 16).

⁶ I/A Court H.R., *Case of Velásquez Rodríguez v. Honduras. Preliminary Objections*. Judgment of June 26, 1987. Series C No. 1, para. 93.

⁷ As the IACHR and the Inter-American Court have repeatedly stated, an unreasonable length of time in conducting a case constitutes, in principle, *per se*, a violation of judicial guarantees, and for the purposes of undertaking the **analysis of the merits** of the reasonableness of the length of time, four points have been taken into consideration: a) complexity of the matter, b) **the interested party’s activity in the proceedings**, c) conduct of the judicial authorities, and d) impact produced on the legal situation of the person involved in the case. See, *inter alia*, I/A Court H.R., *Case of Garibaldi v. Brasil. Preliminary Objections, Merits, Reparations and Costa*. Judgment of September 23, 2009. Series C No. 203, para. 133.

⁸ IACHR. Report No. 35/10, Admissibility. Petition 150-06, *Nélio Nakamura Brandão and Alexandre Roberto Azevedo Seabra da Cruz*, March 17, 2010, para. 35; Report No. 96/09, Admissibility, Petition 4-04, *Antônio Pereira Tavares et al.*, December 29, 2009, para. 35; Report No. 72/08, Admissibility, Petition 1342-04, *Márcio Lapoente da Silveira*, Brazil, October 16, 2008, para. 75; Report No. 23/07, Admissibility, Petition 435-2006, *Eduardo José Landaeta Mejía et al.*, Venezuela, March 9, 2007, para. 47; and Report No. 40/07, Admissibility, Petition 665-05, *Alan Felipe da Silva, Leonardo Santos da Silva, Rodrigo da Guia Martins Figueiro Tavares et al.*, Brazil, July 23, 2007, para. 55.

the Commission. For this purpose, the Commission shall consider the date on which the alleged violation of rights occurred and the circumstances of each case.

20. The IACHR has decided *supra* (para. 17) that an exception to the requirement of prior exhaustion of domestic remedies applies to this petition, and it must thus determine whether the petition was lodged within a reasonable time period. The petition was presented on November 16, 2007. Bearing in mind the specific circumstances of this petition, particularly the claims regarding denial of justice and delay in judicial protection and guarantees, which presumably continue to this day, the IACHR concludes that the petition was presented within a reasonable time period, and that the requirement set in Article 32.2 of the Rules of Procedure of the IACHR has been met.

D. Duplication of proceedings and international *res judicata*

21. It does not appear from the case file that the subject of the petition is pending in other international proceedings, nor that it duplicates a petition already examined by this or any other international organization. The requirement set out in Articles 46.1.c and 47.d of the American Convention is deemed therefore to have been complied with.

E. Colorable claim

22. The Inter-American Commission must determine whether the facts described in the petition characterize violations of the rights set forth in the American Convention, in accordance with the requirements of Article 47.b, or whether the petition should, under Article 47.c, be denied as being “manifestly groundless” or “obviously out of order”. At this procedural stage, the IACHR will conduct a *prima facie* assessment, not for the purpose of establishing an alleged violation of the American Convention, but rather to examine whether the petition raises facts that could potentially constitute violations of rights guaranteed in the American Convention. This examination does not imply any pre-judgment or advance opinion on the merits of the matter.

23. Neither the American Convention nor the IACHR Rules of Procedure require a petitioner to identify the specific rights allegedly violated by the State in the matter brought before the Commission, although petitioners may do so. It is for the Commission, based on the system's jurisprudence, to determine in its admissibility report which provisions of the relevant Inter-American instruments are applicable and could be found to have been violated if the alleged facts are proven by sufficient elements.

24. In this case, the petitioner claims that there was delay in judicial protection and guarantees regarding a judicial action for review of his social security benefits filed by the alleged victim on May 21, 1986, more than 26 years ago. The Inter-American Commission concludes that, if they are proven to be true, the petitioner's claims might be characterized as violations of Articles 8.1 and 25 of the American Convention, in conjunction with the general obligations contained in Articles 1.1 and 2 thereof. Further, given that the petitioner claims that he has been deprived of a significant part of his pension as a result, the Inter-American Commission will, at the merits stage, also examine a possible violation of Article 21 of the American Convention. In conclusion, the IACHR decides that this petition is neither manifestly groundless nor out of order, and as a result, declares that the petitioner has complied *prima facie* with the requirements provided for in Articles 47.b and 47.c of the American Convention.

V. CONCLUSIONS

25. The IACHR concludes that it is competent to examine the claims presented by the petitioner, in accordance with the requirements established in Articles 46 and 47 of the American Convention. On the basis of the arguments 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 present petition admissible with regard to Articles 8.1, 21 and 25 of the American Convention, in relation to Articles 1.1 and 2 thereof;
2. To notify the State and the petitioner of this decision;
3. To continue with analysis of the merits of the matter;
4. To publish this decision and to include it in its annual report to the OAS General Assembly.

Done and signed in the city of Washington, D.C., on the 8th day of the month of November 2012.
(Signed): Felipe González, Second Vice-President; Dinah Shelton, Rosa María Ortiz, and Rose-Marie Antoine, Commissioners.