

REPORT No. 11/13¹
PETITION 157-06
INADMISSIBILITY
JUAN FERNANDO VERA MEJÍAS
CHILE
March 20, 2013

I. SUMMARY

1. On February 17, 2006, the Inter-American Commission on Human Rights (hereinafter the “Commission”, the “Inter-American Commission”, or the “IACHR”) received a petition from Juan Fernando Vera Mejías (hereinafter “alleged victim” or “petitioner”) against the State of Chile (hereinafter “Chile,” “the State,” or “the Chilean State”). The petition alleges employment discrimination suffered by the petitioner as a person living with the Human Immunodeficiency Virus (HIV) and due to his sexual orientation.

2. The petitioner alleges that the State is responsible for violating the rights contained in Articles 11 (protection of honor and dignity) and 24 (right to equal protection), in relation to Article 1(1) of the American Convention on Human Rights (hereinafter the “Convention” or the “American Convention”). The State maintains that the petition should be declared inadmissible for failure to exhaust domestic remedies.

3. After examining the parties’ positions the Commission concludes that it is competent to consider the petition and that the petition is inadmissible in light of Articles 46 and 47 of the American Convention. The Commission also decided to give notice of this decision to the parties, to publish it, and to include it in its Annual Report to the General Assembly of the Organization of American States.

II. PROCESSING BY THE COMMISSION

4. On February 17, 2006, the Commission received a petition dated February 14, 2006, from Juan Fernando Vera Mejías. The petition was assigned number 157-06. The Commission received new information from the petitioner in 2006 and 2007, as supplemental information to the initial petition. On August 5, 2010, the Commission requested information from the petitioner regarding the exhaustion of domestic remedies, to which the petitioner responded. On November 24, 2010, the Commission opened the petition for processing and forwarded the pertinent parts to the State.

5. The Chilean State sent its observations on May 25, 2011, and on June 18, 2012, which were forwarded to the petitioner. The petitioner sent his observations on July 5, 2011, and on August 16, 2012. These observations were forwarded to the State.

¹ In keeping with Article 17(2)(a) of the Commission’s Rules of Procedure, Commissioner Felipe González, of Chilean nationality, did not participate in the debate or decision in the instant case.

III. THE POSITIONS OF THE PARTIES

A. The petitioner

6. The petitioner and alleged victim alleges that he was an employee of Hormo Química de Chile, a private company, beginning in 1988, and that he received various professional accolades. He indicates that he became gravely ill in 1996 due to HIV, and that his situation became known at the company where he worked.

7. The petitioner maintains that afterwards his employers sought to remove him from the company due to his sexual orientation and for being a person living with HIV. However, he states that he sent communications to the company's headquarters in The Netherlands denouncing this situation, and that he remained in his position until 2001, when a reform process was instituted and a new general manager was designated.

8. The petitioner alleges that as of the designation of the new manager, his employers sought his permanent exit from the company, and that he was dismissed on October 22, 2001. Also, that his employers threatened him with publicly disclosing his sexual orientation and health status as a person living with HIV both in Chile and internationally if he did not accept the terms of his contract termination. The petitioner alleges that this threat prevented him from exhausting remedies, as he did not want his sexual orientation or health status to be made public.

9. On April 30, 2002, the petitioner sent a communication to Queen Beatrix of The Netherlands requesting her to intervene in his case. A response was sent by the Royal Embassy of The Netherlands on July 23, 2002, reporting that, after a meeting with company managers, the company agreed that its staff "from now on [would] refrain from making observations and disclosing information regarding his sexual orientation and his health, and will only refer to his labor relationship."²

10. On August 26, 2002, the petitioner sent a communication to then-president Ricardo Lagos Escobar in which he described his situation and requested that his case be reviewed by personnel working with the first lady, who were experts on discrimination and compensation for damages, arguing that the company had made his sexual orientation and health status of a person living with HIV public. The petitioner received a response from the Advisor for Management of the Office of the President requesting that the petitioner "send pertinent records and information so as to provide a response."

11. On March 6, 2006, the petitioner sent a communication to then-President Michelle Bachelet in which he described his situation and requested her intervention in the matter. On March 19, 2007, the petitioner received a response from a presidential adviser in which he was informed that the company's staffing had been changed and that, additionally, there was a contract termination signed by the petitioner, making it impossible to determine whether there were motives of discrimination and harassment at the time of the facts.

² Response from the Royal Embassy of the Netherlands to the request submitted by Mr. Juan Fernando Vera M. on April 30, 2002.

12. In response to the observations sent by the Chilean State on July 5, 2011 regarding failure to exhaust domestic remedies, the petitioner noted that he sought out attorneys and legal clinics to take up his case, but was denied legal representation for having accepted the contract termination. Additionally, the petitioner noted a context of employment discrimination in Chile, citing various cases from 2002 to 2008 that involved the sexual orientation and the health situation of persons living with HIV.

B. The State

13. The State notes that in this case the petitioner has not exhausted domestic remedies, and argued this objection in its communication of May 25, 2011, reiterated in on June 18, 2012.

14. First, the State questions the petitioner's failure to exhaust domestic remedies arguing discrimination, especially taking into account that the petitioner has come before an international body, with which he has made public his sexual orientation and health status.

15. The Chilean State notes that its responses to the letters sent by the petitioner to the presidents of Chile were timely and appropriate, as it was explained to him, after he made inquiries, with the Regional Bureau of Labor, that the physical office where he had worked no longer existed and that the company's managers had been replaced. Therefore, it was not possible to establish the existence of harassment or discrimination in his case.

16. The State also argues that there were a series of domestic remedies that could have been exhausted, such as filing a suit before the Chilean labor courts; a motion seeking the nullification of the judgment by labor courts; and a special appeal for unification of jurisprudence against the judgment ruled. The State also notes the writ for protection of labor rights (*procedimiento de tutela laboral*), which addresses issues related to fundamental labor rights, and that the petitioner had access to the *recurso de protección* provided for in Article 20 of the Chilean Constitution.

IV. ANALYSIS OF ADMISSIBILITY

A. Competence of the Commission *ratione personae, ratione loci, ratione temporis* and *ratione materiae*

17. Under Article 44 of the American Convention, the petitioner is authorized to lodge petitions on his behalf given that the State of Chile undertook to respect and ensure the rights enshrined in the American Convention. Therefore, the Commission is competent *ratione personae* to examine the petition.

18. The Commission is competent *ratione loci* to take up this petition inasmuch as it alleges violations of rights protected under the American Convention said to have occurred under the jurisdiction of the State. The Commission is competent *ratione temporis* inasmuch as the facts alleged are said to have occurred when the obligation to respect and ensure the rights recognized in the American Convention was already in force for the Chilean State, which ratified the American Convention on August 21, 1990.

19. Finally, the Commission is competent *ratione materiae* to take cognizance of this case as the petition alleges possible violations of human rights protected by the American Convention.

B. Other requirements for the admissibility of a petition

1. Exhaustion of domestic remedies

20. Article 46(1)(a) of the American Convention provides that for a complaint brought before the Inter-American Commission to be admissible under Article 44 of the Convention, all domestic remedies must be pursued and exhausted in accordance with generally recognized principles of international law. The purpose of this requirement is to allow the domestic authorities to take cognizance of an alleged violation of a protected right and, if appropriate, to resolve it before it is heard by an international body. Article 46(2) of the Convention establishes three exceptions to the prior exhaustion rule: (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 an unwarranted delay in rendering a final judgment under the aforementioned remedies. These exceptions do not refer merely to the formal existence of such remedies, but they must also be adequate and effective.

21. In the instant case, the State argues that the petitioner failed to exhaust domestic remedies. It specifically notes that none of the remedies available to denounce the situation were pursued, to wit, filing the respective action, a motion for nullity with respect to the final judgment, or a motion for unification of case-law with respect to the resolution on nullity, available on an exceptional basis. In addition, none of the remedies for protection of fundamental labor rights were pursued, nor the *recurso de protección*. In this respect, the petitioner notes that despite his search for legal assistance to file an appeal, at that time (2001) the concept of discrimination was not recognized domestically, and there was a context of threats of having his sexual orientation and health situation being publicly announced by his employer, and that for these reasons he did not exhaust domestic remedies.

22. Regarding the petitioner's concern that filing a judicial complaint would make public his sexual orientation or health status, the Commission observes that the petitioner turned to the Executive Branch from August 2002.

23. The Commission observes that according to the information supplied by the petitioner, he made public his sexual orientation and health status as of December 2006 in an interview with the magazine "Vivopositivo."³ For all this reasons, the Commission observes that the petitioner was not able to demonstrate the existence of systemic or individualized discrimination that would have impeded him from exhausting domestic legal remedies. Additionally, the IACHR observes that the petitioner signed a document recognizing the termination of the employment relationship, which was not appealed domestically.

24. Finally, the IACHR observes that this case deals with alleged discrimination by a private company, a situation that is not directly attributable to the State, and that no remedy was pursued before the judicial branch, which would have enabled the State to take cognizance of the matter. The Commission gives the highest seriousness to allegations related with context of discrimination, and also taking in account that a context of discrimination could restrict access to domestic remedies in certain circumstances, the IACHR considers that the petitioner's general arguments in the specific case, that he

³ VIVOPOSITIVO Magazine. *Discriminación laboral en Chile (la historia de Fernando Vera)*. No. 21. December 2006.

was prevented from accessing remedies at the time of the alleged facts, are not sufficient to justify the failure to exhaust domestic remedies.

25. The Commission does not find, in this case, that the exception alleged by the petitioner is well-founded. The Commission reiterates that considers by virtue of the complementary nature of the American Convention, the petitioner should resort to and exhaust domestic remedies to resolve the alleged violations.⁴ For all this considerations, the Commission finds that in this case do not proceed the exception claimed by the petitioner. It has not been shown in any part of the proceeding that the petitioner was denied access to remedies or prevented from exhausting them.

26. The IACHR considers that this petition does not satisfy the requirements provided for in Article 46(1)(a) of the Convention and refrains from examining the remaining admissibility requirements provided for in the American Convention, as the matter cannot be considered once the petition has been found inadmissible.

V. CONCLUSION

27. Based on the foregoing arguments of fact and law, the Commission finds that this petition is inadmissible in accordance with Article 46(1)(a) of the American Convention, and therefore,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,

DECIDES:

1. To find the petition inadmissible in accordance with Article 46(1)(a) of the Convention.
2. To notify the parties of this decision.
3. To publish this decision and to 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 March 2013. (Signed): José de Jesús Orozco Henríquez, President; Tracy Robinson, First Vice-President; Rosa María Ortiz, Second Vice-President; Dinah Shelton, Rodrigo Escobar Gil and Rose-Marie Belle Antoine, Commissioners.

⁴ IACHR, Report No. 70/01, Petition 12,055, Inadmissibility, Ernesto Galante, Argentina, August 3, 2001. IACHR, Report No. 18/02, Petition 12,274, Inadmissibility, César Verduga Vélez, Ecuador, February 27, 2002. IACHR, Report No. 82/98, Petition 11,703, Inadmissibility, Gustavo A. López Gómez, Venezuela, September 28, 1998. IACHR, Report No. 43/99, Petition 11,688, Alan García Pérez, Peru, March 11, 1999, paragraph 18.