

REPORT No. 71/14¹
PETITION 537-03
INADMISSIBILITY
MAYRA ESPINOZA FIGUEROA
CHILE
July 25, 2014

I. SUMMARY

1. On July 21, 2003, the Inter-American Commission on Human Rights (hereinafter the Commission or IACHR) received a petition filed by the La Morada Women's Development Corporation (Corporación de Desarrollo de la Mujer La Morada) alleging that the Republic of Chile (hereinafter the State, the Chilean State or Chile) had incurred responsibility for an alleged violation of the right to privacy and intimacy and for discrimination to the detriment of Mayra Espinoza Figueroa (hereinafter the alleged victim), a 19-year old female student who had supposedly been expelled from a private high school for having been seen kissing a woman. Subsequently her request for protection was allegedly turned down, as the State alleged that her request was filed after the time-limits set by law because the 15 calendar or consecutive days provided for by domestic law had elapsed. In addition to La Morada Women's Development Corporation, the Humanas Corporation and the Regional Center for Human Rights and Gender Justice (Centro Regional de Derechos Humanos y Justicia de Género) (hereinafter the petitioners) participated in filing the petition.

2. The petitioners alleged that the State incurred responsibility for the violation of the rights to protection of honor and dignity, to equality before the law and to judicial protection, as set forth in Articles 11, 24 and 25 of the American Convention on Human Rights (hereinafter the Convention or the American Convention) in connection with Article 1(1) of said treaty. As for the State, it alleged that the petitioners' claims are inadmissible because there was no intrusion into their private life or discriminatory treatment and, furthermore, that the petitioners did not duly exhaust the remedies under domestic law as required by Article 46(1)(a) of the American Convention.

3. After examining the positions of the parties, the Commission concludes that it has the jurisdiction to hear the petition being examined and that the petition is inadmissible in the light of Articles 46 and 47 of the American Convention because the petitioners did not duly exhaust the remedies under domestic law as required by Article 46(1)(a) of the American Convention. The Commission also decided to advise the parties of this decision, as well as to publish and include it in its Annual Report to the General Assembly of the Organization of American States.

II. PROCEEDINGS WITH THE COMMISSION

4. The IACHR recorded the petition under number 537-03 and, after a preliminary review, it proceeded on December 3, 2003 to send a copy of its relevant parts to the State, with a two-month time-limit for the State to submit its observations.

5. The State sent its observations on September 27, 2004, which were in turn duly forwarded to the petitioners.

6. The petitioners sent their observations on March 16, 2005, which in turn were duly forwarded to the Chilean State. On July 7, 2006, the Chilean State requested an extension of the deadline to send its additional observations, and this extension was granted to it by the Commission.

¹ In accordance with the provisions of Article 17.2 of the Commission's Rules of Procedure, Commissioner Felipe González, a Chilean national, did not participate in the discussion or decision involved in the present case.

7. On July 19, 2007 and January 7, 2008, the petitioners submitted documents requesting the IACHR to once again ask the State to provide additional observations, and these requests were duly forwarded to the Chilean State.

8. On April 19, 2012, the Commission reiterated its request to the Chilean State for additional observations, but no response was forthcoming.

9. On August 22, 2012, the Commission requested the State to provide additional information about the case, but no response was forthcoming. Because of this, on July 18, 2013, said request was once again made to the State. At the time of the present report's drafting, no additional observations had been received from the State.

III. POSITIONS OF THE PARTIES

A. Position of the petitioners

10. The petitioners contend that Mayra Espinoza Figueroa, who at the time of the incident was nineteen (19) years old, was a regular fourth-year high-school student in a private school until October 2002. This establishment was the José Francisco Vergara Echevers Polytechnic High School located in the region of Valparaíso, Chile. They pointed out that Mayra had had good grades and outstanding conduct since the second year. They also pointed that, in her fourth year, she had even been chosen as Group President, which required good conduct.

11. They said that, on September 11, 2002, Mayra's partner, who was another woman, came to pick her up after school and kissed her. They indicated that they noticed that the husband of the school's assistant principal had seen them. They indicated that the assistant principal and her husband followed them by car on their way home.

12. The petitioners claimed that, on the following day, September 12, 2002, the assistant principal of the school called Mayra Espinoza Figueroa and told her that she had to leave the high school "because they had found out that she had 'strange' or lesbian behaviors and that [the school's authorities] could not tolerate that in the school." They indicated that, on that same day, the alleged victim's mother was contacted to inform her that her daughter was being transferred to another school.

13. They pointed out that, on Friday, September 13, 2002, the alleged victim went to speak to the assistant principal of the school once again so that she could reconsider her position, since there were only two months left before the end of the school year and also because the fourth year of high school is the last year of secondary education in Chile. They indicated that the assistant principal informed her that she herself, along with the principal and the Inspector General, had decided that she would have to leave the school. At that time, Mayra Espinoza Figueroa asked if it was because of her sexual orientation, and the assistant principal nodded "yes" and she added that the Inspector General had said that "the school's moral code did not permit it" and that "it undermined its image." According to what was said by the petitioners, that same day, two bad grades were put on the alleged victim's report card.

14. They indicated that, on that same day, September 13, 2002, Mayra Espinoza Figueroa went to the Regional Secretariat of the Ministry of Education (hereinafter SEREMI), where they told her that she should go back to school as usual on Monday. Nevertheless, on Monday, September 16, 2002, when she went to attend class, the doorkeepers, by order of the Inspector General, prevented her from entering the high school.

15. The petitioners contended that, days later, the alleged victim held a meeting with the Head of the Provincial Department for Education and a congresswoman. They indicated that, finally, the solution that was provided by the authorities was to grant her the diploma for the last semester of the fourth year of high school, as a result of which she was officially recognized as having successfully completed high school ahead

of time. This was done on the basis of Article 13 of Decree 83/01.² They indicated that, as a result, the alleged victim was prevented from attending the rest of her classes or her graduation ceremony.

16. On December 4, 2002, the alleged victim filed a request for protection with the Court of Appeals of Valparaíso, alleging discrimination based on her sexual orientation.

17. On January 21, 2003, the Court of Appeals of Valparaíso issued a ruling that the case “was inadmissible because it was filed after the time-limits set for the protection requested,” because “more than fifteen days granted by the General Order (*Auto Acordado*) of the Honorable Supreme Court for Processing a Request for Protection had elapsed.”

18. The petitioners alleged that the ruling made by the Court of Appeals of Valparaíso turned down the only option that Chile’s legal framework offered in cases of human rights violation, on the basis of a rule issued by an administrative authority. They also pointed out that the request for protection enshrined in Article 20 of the Chilean Constitution does not include the protection of all the rights listed in Article 19 of the Constitution. The latter includes, among others, the right to education.

19. In short, the petitioners alleged that the State has incurred responsibility for the violation of the rights to protection of honor and dignity, to equality before the law, and judicial protection, as provided for in Articles 11, 24 and 25 of the American Convention in connection with Article 1(1) of said treaty.

B. Position of the State

20. The State alleged that, throughout the proceedings, the violations alleged by the petitioners have not been substantiated. It contended that the situations that were described had been resolved with the early completion of school studies and end of the school year. The State alleged that, regarding the expulsion of Mayra Espinoza Figueroa, the narration of the incidents by her at the SEREMI of the Fifth Region focused on the fact that “she indicated that it was a problem of conduct because she had talked back to a teacher [...]” and that days earlier she had been seen by the husband of the school’s assistant principal supposedly giving a kiss. The State pointed out that, in view of this comment, and in order to determine whether it was dealing with a situation of discrimination or discipline at school, the alleged victim’s sexual orientation was investigated to have a better understanding of the reasons for the complaint. The State pointed out that “in reply to that question, she assured them that she was not a lesbian and insisted that the real reason was that she had talked back to a teacher.”

21. The State pointed out that the decisions taken at that time to reach a settlement regarding the case were based on the narrative presented by the alleged victim to the SEREMI. That is why a series of resolutions were issued addressing the case as an isolated one about discipline not as a case of discrimination. The State pointed out that the alleged victim had even been told that, if it was a situation of discrimination, the possibility of filing a request for protection would have to be examined, an action that was not taken because Mayra Espinoza Figueroa denied being a lesbian for a period of time.

22. The State alleged that, in line with Mayra Espinoza’s narration of the facts, in which she pointed out that the high school she attending was trying to get her expelled, transfer to another school was proposed to her as a way of settling the problem. This proposal responded to a situation that had been going on for some time, where incidents of the student’s misconduct were being reported. The State alleged that, contrary to what the alleged victim has claimed, there were previous incidents in her report card that even included, since 2001, admittance on condition. Because of that, the State alleged that “situations of persecution or discrimination based exclusively on Mayra’ sexual status should be [ruled out].” In that regard, when SEREMI received the complaint filed by the alleged victim, her statements indicating that it was

² Decree 83/01 of March 6, 2001 provides regulations for the grading and passing of third and fourth-year students of secondary education, both modalities, and includes provisions for schools to draw up their own regulations for student grading.

because she had “talked back to a teacher” and denying her sexual orientation was what led the case to being considered as more a matter of discipline and not one of discrimination.

23. The State pointed out that, because the alleged victim did not agree to transfer to another school, the option was taken to allow early completion of the school year in line with the provisions of Decree 83/01, a solution that all parties, including the alleged victim, agreed to. It contended in addition that another type of action that could have been taken, such as filing a request for protection, was never carried out because of the information provided by Mayra Espinoza Figueroa.

24. Finally, the State alleged that the request for protection was the suitable mechanism to protect the right that the petitioners claimed had been infringed. Nevertheless, the State cannot be held liable for the late filing of a request for protection by the alleged victim. It can only be attributed to the lack of legal know-how on the part of the alleged victim, who allowed legal time-limits to elapse and filed the request three months after the incident had taken place, although domestic law provides a 15-day time-limit for filing this request.

IV. REVIEW OF COMPETENCY AND ADMISSIBILITY

A. Competency

25. Petitioners are entitled by Article 44 of the American Convention to file petitions with the Commission. The petition indicates that the alleged victim is an individual, whose rights as enshrined in the American Convention the Chilean State has pledged to respect and guarantee. Regarding the State, the Commission points out that Chile is a State Party to the American Convention since August 21, 1990, when it deposited its ratification instrument; therefore, the Commission has jurisdiction *ratione personae* to hear the petition.

26. The Commission also has jurisdiction *ratione loci* to hear the petition, because the petition alleges violations of the rights protected in the American Convention, which had supposedly taken place in the territory of Chile, which is a State Party to said treaty.

27. The Commission has jurisdiction *ratione temporis* because the obligation to respect and guarantee the rights protected by the American Convention was already in force for the State at the time that the incidents alleged in the petition had occurred.

28. Finally, the Commission has jurisdiction *ratione materiae*, because the petition alleges possible infringements of human rights protected by the American Convention.

B. Requirements for admissibility

1. Exhaustion of remedies under domestic law

29. Article 46(1)(a) of the American Convention provides that, for a petition lodged with the Inter-American Commission to be admissible, it is required that remedies under domestic law be pursued and exhausted in conformity with generally recognized principles of international law. This requirement is aimed at allowing national authorities to hear cases of alleged violations of a protected right and, if appropriate, having the opportunity to resolve them before being heard by an international body.

30. In the present case, the State alleges that remedies under domestic law have not been exhausted because the request for protection provided for in the Constitution must be filed within the administrative time-limit of fifteen (15) days after the alleged infringement of rights occurred. According to the State, this infringement had taken place when Mayra Espinoza was notified of the Agreement. The State alleges that the Agreement whereby early completion of the alleged victim’s school year was decided upon, which is the agreement that is being challenged, was reached on September 27, 2002 and notified on October

10, 2002. The date when the request for protection was filed was December 4, 2002, past the deadline for its filing, and that is why the case has been declared inadmissible for being filed after the set time-limits.

31. The petitioners allege that the ruling of the Court of Appeals declaring the request inadmissible violates the Convention as it does not rule on the merits of the case nor does it adopt protective measures for Mayra Espinoza, although it involves a case of discrimination for sexual orientation, as well as the right to secondary education of a 19-year-old woman. In that regard, the petitioners allege that the time-limits of fifteen (15) days is so short that the remedy is rendered ineffectual.

32. The Commission notes that both the petitioners and the State agreed in pointing out that the request for protection, as stipulated in Article 20 of the Chilean Constitution, is aimed at safeguarding some of the fundamental rights enshrined in Article 19. Indeed, Article 20 of the Chilean Constitution provides the following:

Whoever, because of arbitrary or illegal deeds or omissions, suffers from deprivation, disruption or threat in the legitimate exercise of the rights and guarantees established in Article 19, paragraphs 1, 2, 3 fourth subparagraph, 4, 5, 6, 9 final subparagraph, 11, 12, 13, 15, 16 regarding the freedom to work and the right to freely choose and freely be hired, as well as what is established in the fourth subparagraph, 19, 21, 22, 23, 24 and 25 will be entitled to resort personally or with anyone on his/her behalf, to the respective Court of Appeals, which shall immediately adopt the measures deemed necessary to reestablish the rule of law and ensure due protection of the affected party, without detriment to the other rights that he/she might wish to defend with the corresponding authority or courts. The request for protection shall also be admissible in the case of No. 8 of Article 19, when the right to live in a pollution-free environment is undermined by an illegal deed or omission that can be attributed to a given authority or person.

33. Furthermore, the petitioners allege that the Constitution does not set any time-limit for the filing of a request for protection, but rather it is a Supreme Court Order, which ranks below the Constitution, that sets the time-limit at fifteen (15) calendar or consecutive days. They allege that it would undermine the provision set forth in Article 19.26 of the Constitution, which provides for the following:

The security that legal tenets which, by a mandate of the Constitution, regulate or supplement the guarantees established by the latter or which limit them in those cases where it authorizes it cannot undermine rights in their essence or impose conditions, fees or requirements that might prevent them from being freely exercised.

34. The petitioners claim that this position has been endorsed by various legal experts³ and defenders of human rights in Chile, who have even promoted legal regulations for the appeal. In this regard, the petitioners contend that the Constitution's protection of basic rights cannot be constrained by a lower-ranking regulation that does not qualify as law.

35. Furthermore, the petitioners point out that Article 20 of the Chilean Constitution does not establish the request for protection for all the rights enshrined in its Article 19, such as the right to education, recognized in the tenth subparagraph of said article, which provides for the following:

[The Constitution guarantees for all persons] [...] The right to education. Education is aimed at providing for the full development of the person at various stages of his/her life. Parents have the priority right and duty to educate their children. It pertains to the State

³ Among the attachments to the petition, the petitioners included: TAVOLARI OLIVEROS, Raúl, "El Proceso en Acción," p. 478; ZUÑIGA, Urbina Francisco, "El recurso de protección en proyecto de Ley de Acciones Protectoras de Derechos Fundamentales" in *Estudios Constitucionales*, Year 5, No. 2, 2007, pp. 61-82; and NOGUEIRA ALCALÁ, Humberto, "La Acción Constitucional de Protección en Chile y la Acción Constitucional de Amparo en México" in *Revista Ius et Praxis*, Year 16, No. 1, 2010, pp. 219-286.

to grant special protection for the exercise of this right. For the State, it is mandatory to promote preschool education and guarantee free access and public funding for kindergarten (*segundo nivel de transición*), although the latter is not a requirement for enrolling in basic education. Basic education and secondary education are compulsory, for which purpose the State must fund a system free of charge, aimed at ensuring that the entire population will have access to them. In the case of secondary education, this system, in conformity with the law, shall extend until the student is 21 years old. The State is also required to foster the development of education at all levels; to encourage scientific and technological research and artistic creation; and to protection and increase the Nation's cultural heritage. It is the community's duty to contribute to developing and enhancing education.

36. In that regard, they allege that the alleged victim has been prevented from filing a specific request to protect her right to education because of the absence of any adequate remedy for this purpose.

37. Regarding the duration of the time-limit to file the request for protection, the Chilean State asserted that it would be willing to agree, on a strictly theoretical basis, that the time-limit for filing a request for protection (or "an appeal for protection on constitutional grounds (*acción de amparo*)" to use Inter-American terminology) is short.⁴ Nevertheless, it stated that, without detriment to the above, the time-limit of fifteen (15) days was a well-known time-limit and not arbitrarily applied by the Courts of Justice.⁵ Likewise, with respect to the suitability of the remedy, the Chilean State believes that the request for protection is suitable for safeguarding the right to education in the present case.

38. The Commission observes that the parties agree that a request for protection was filed on the grounds of an alleged discrimination. Both parties also agree that the request for protection is an adequate remedy to protect the alleged victim's dignity and right to equality, as a result of which the Commission understands that said remedy, in principle, was suitable to protect the legal situation that was being infringed in the present case.

39. Specifically, the Commission notes that in response to the alleged violation of her rights, the solution offered to the alleged victim by the state authorities consisted of the signing of the Agreement, which took place on September 27, 2002. That agreement was apparently negotiated and agreed upon, in its terms, with the alleged victim, deciding therein that the certificate for the fourth year of secondary education would be awarded, which accredited the successful early completion of the fourth year. As neither of the parties made allegations to the contrary, one should consider that said instrument was freely signed by the alleged victim.

40. Domestic law offered the possibility of challenging the act of the State, which could be done by filing a request for protection (*recurso de protección*) within 15 days of receiving notice of the act. In the specific case, that notice was served on October 10, 2002, and the motion was filed, with counsel, on December 4, 2002. By that time 55 days had gone by, and the legal term had lapsed. That circumstance prevented the courts from ruling on the merits.

41. The principle regarding the complementarity of the protection afforded by the American Convention on Human Rights requires that every petition be heard previously, in substance, before the domestic bodies. In the instant case, the circumstance that the alleged victim had not filed the appropriate motion as per the regulation in force at the time of the facts means that the Commission cannot consider that it has been shown that the admissibility requirement at Article 46(1)(a) of the Convention has been met, given that there was no proper exhaustion of domestic remedies.

⁴ The Commission notes that the initial time-limit of fifteen (15) calendar or consecutive days set forth in the General Order (*Auto Acordado*) of the Supreme Court of June 24, 1992 was subsequently extended to thirty (30) calendar or consecutive days by the General Order of the Supreme Court of June 8, 2007.

⁵ Observations made by the Chilean State sent to the IACHR on September 23, 2004, page 7.

42. Since this admissibility requirement has not been met, the Commission shall refrain from examining the other admissibility requirements provided for in the American Convention.

V. CONCLUSION

43. Based on the arguments of fact and law set forth above, the Commission deems that the petition is inadmissible in accordance with Article 46(1)(a) of the American Convention, and as a result,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

DECIDES:

1. To declare the present petition inadmissible, in conformity with 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 General Assembly of the OAS.

Done and signed in the city of Washington, D.C., on the 25th day of the month of July, 2014. Tracy Robinson President; Rose-Marie Belle Antoine, First Vice President; Rosa María Ortiz (dissident), Paulo Vannuchi and James L. Cavallaro (dissident), Commissioners.