

REPORT No. 162/11
PETITION 1474-10
ADMISSIBILITY
L.M. AND OTHERS¹
PARAGUAY
November 2, 2011

I. SUMMARY

1. On September, 2010, the Inter-American Commission on Human Rights (hereinafter "the Inter-American Commission" or the "IACHR") received a petition submitted by the Coordinator for Children and Adolescents' Rights (Coordinadora por los Derechos de la Infancia y la Adolescencia) and the Center for Justice and International Law, (hereinafter "the petitioners") in relation to the child L.M., and his biological parents and maternal grandparents. It is alleged that the Paraguayan State (hereinafter "the State" or "the Paraguayan State" or "Paraguay") violated his rights to humane treatment, the right to a fair trial, the right to privacy, the rights of the family, right to a name, rights of the child, the right to equal protection and the right to judicial protection guaranteed respectively in Articles 5, 8, 11, 17, 18, 19, 24 and 25 of the American Convention on Human Rights (hereinafter "the American Convention" or "the Convention"), in accordance with Article 1.1 of such treaty.

2. According to the petition, the child L.M. would be the son of L.S. and V.H.R., who would have separated and finished their relationship before L.S. knew that she was pregnant. Due to different family issues, the child's mother would have concealed her pregnancy from her family and the child's father. On August 2, 2009, she gave birth to her child and on August 4, 2009, she abandoned him at the door of a church, as a consequence of her vulnerable emotional condition. In view of the child's abandonment, the authorities would have granted provisional guardianship to a family. But, in light of a request made by other couple who was in the process of adopting, the guardianship was revoked from the first family and awarded to the second one.

3. The petitioners allege that in November 2009, the biological parents declared their will to assume responsibility for the child. Since then, domestic proceedings have taken so long that until now the jurisdictional authorities have not decide upon the guardianship and custody of the child L.M., who continues under in the guardianship of the couple and has no contact with his biological parents.

4. The State has requested the Commission to declare the petition inadmissible due to non-exhaustion of domestic remedies, and since the jurisdictional authorities are currently revising the legal actions that are pursued, in accordance with the procedural time limits established in the Paraguayan law. Likewise, it alleges that the facts described therein do not characterize violations of rights protected by the Convention.

5. It should be noted that on June 17, 2010, before the filing of the petition, a request for precautionary measures was submitted to the IACHR by the petitioners in favor of the child L.M., which were awarded by the Commission. After the reception of this petition, on May 23, 2011, the Commission submitted a request for provisional measures before the Inter-American Court of Human Rights, which were also granted.

6. According to Articles 46 and 47 of the American Convention, as well as in Articles 30 and 36 of its Rules of Procedure, and after having analyzed the position of the parties, the Commission decided to declare the petition admissible. Therefore, the IACHR decides to notify its decision to the parties and to continue its examination of the merits of the case in relation to the alleged violations of Articles 5, 8, 17, 19 and 25, in relation to Article 1.1 of the American Convention. Likewise, the Commission decided to notify the parties of this decision, to publish

¹ At the request of the petitioners, the child's identity is withheld; therefore, he is identified with letters L.M. Likewise, at the request of the petitioners, the identity of the people involved in the domestic proceedings is also withheld, as the alleged biological family of the child and those who have acted as "foster family".

it, and to include it in its Annual Report to the General Assembly of the Organization of American States.

II. PROCEEDINGS BEFORE THE COMMISSION

7. The Commission received the petition on September 1st, 2010, and by means of a note dated May 10, 2011, it began to process the petition and requested the State to submit its observations on the admissibility of the case within a two-month term. On August 17, 2011, the Commission sent to the State additional information submitted by the petitioners and reiterated the request of observations of May 2011. The State sent its observations on September 28, 2011, which was sent to the petitioners.

8. On November 10, 2010, the Commission requested the Paraguayan State to adopt precautionary measures with the purpose of speeding internal proceedings regarding the custody and care of the child L.M. After having received a communication on this regard, on May 23, 2011 the Commission submitted a request for provisional measures before the Inter-American Court of Human Rights. By means of resolution dated July 1st, 2011, the Court requested the State to "immediately adopt the necessary, adequate and effective measures to protect the right to humane treatment, the rights of the family and the right to identity of the child L.M., allowing him to be in contact with his biological family, with the support of adequate professional staff for the proper monitoring of his emotional circumstances..."

III. POSITION OF THE PARTIES

A. Position of the petitioners

9. According to the petition, the child L.M is the son of L.S. (26 years old) and V.H.R. (22 years old), who separated and finished their relationship in April, 2009, before L.S. knew she was pregnant. Apparently, due to various family issues, the mother of the child concealed her pregnancy from her family and from the father of the child. She gave birth to her son on August 2, 2009 and abandoned him on August 4, 2009 at the door of the San Bautista Church in the city of Asunción. The petitioners allege that this was the consequence of her vulnerable emotional situation.²

10. In view of the child's abandonment the authorities, through the Judge of the First Instance Court of Childhood and Adolescence (*Jueza de Primera Instancia de la Niñez y la Adolescencia*), ordered the provisional guardianship in favor of the B.I. family. However, on September 17, 2009, the judge E.A.P. and her husband O.O.Z. – who were in the process of adopting a boy or a girl –requested the provisional guardianship of the child L.M.

11. On November 10, 2009 the jurisdictional authorities revoked the temporary guardianship in favor of the B.I. family and granted it in favor of the O.A. family. The petitioners allege that it happened even when the Adoption Center³ had sent a report indicating the inconvenience of giving the child to another family because he had already established emotional ties with the first family.

12. The petitioners assert that on November 12, 2009, before giving the child to the O.A. family, the Adoption Center informed the court about the location of the child's biological parents, stating that reunification was likely and that the child should not be transferred to a foster family or a family with a view to adopt a child. Nonetheless, the child L.M. was given to the O.A. family.

13. The petitioners allege that the child's biological father, V.H.R., appeared to the process explaining that he was not aware of the situation, expressing his intention of assuming

2 The petitioners allege that when the child was abandoned in front of the church, he was wearing a bracelet with his mother's name, which proves that L.S. acted under the influence of her emotional condition and that she did not think about the consequences of her actions.

3 The Adoption Center is the central administrative authority for adoptions, and works together with other organizations and the judicial body.

responsibility for his son. The petitioners state that on November 16, 2009, L.S. and V.H.R. registered L.M. as their son at the Civil Registry Directorate General (*Dirección General del Registro del Estado Civil*). In light of this, on November, 2009, Mrs. E.A.P. and Mr. O.O.Z. filed a motion for termination of the parent-child legal relationship (*patria postestad*) against L.S. and, three months later, they brought an action against V.H.R to contest his paternity. According to the petitioners, none of these two proceedings were solved.

14. The petitioners state that on December 14, 2009, both biological parents ratified their request to assume responsibility for the child in a hearing held before the Third First Instance Judge for Children and Adolescents (*Jueza de Primera Instancia de la Niñez y Adolescencia del Tercer Turno*). After the hearing, Mrs. L.S. requested the Judge to order the necessary measures to visit her son during the end-of-year holidays. She also expressly stated that she would not give her consent to an adoption and requested, as a precautionary measure, to prohibit L.M. from leaving the country. The Judge ordered the intervention of the Judiciary's Office for Maintenance of Relationships (*Oficina de Mantenimiento del Vínculo del Poder Judicial*) and the execution of socioeconomic and psychological studies in relation to the biological parents. The petitioners indicate that the Adoption Center (*Centro de Adopciones*), the Technical Team of the Secretariat for the Childhood and Adolescence (*Equipo Técnico dependiente de la Secretaría de la Niñez y Adolescencia*), and the *Corazones por la Infancia* Foundation (*Fundación Corazones por la Infancia*) recommended the pertinence of reinserting L.M. into his biological family.

15. The petitioners allege that the biological parents appealed against the resolution dated December 14, 2009, because it would keep the child away from them, while the relevant examinations were conducted. Remedies were awarded but, on March 11, 2010, the Childhood and Adolescence Court of Appeals declared that they were improperly awarded and ordered the file to be sent to the court of the original proceedings.

16. They indicate that many judges disqualified themselves from the case, taking into account the public positions and career of Mrs. E.A.P., current guardian of the child. During six months, no decision was made or measure taken in favor of the child L.M., even when his biological parents had submitted several requests to promptly settle the matter. The petitioners indicate that on July 2, 2010, the Second Childhood and Adolescence Appeals Chamber issued a resolution revoking the custody granted to the O.A. family and ordering the restitution of the child to the biological father and a visits regime in favor of the biological mother. In view of such resolution, the O.A. family filed an appeal for annulment and, on August, 18, 2010, the Childhood and Adolescence Court of Appeals annulled the previous sentence referring the case back to the court on duty.

17. Due to the self-disqualification of all Childhood and Adolescence judges, the case would be currently pending before the Adolescents Criminal Court. The process would go back to the sentence dated December 14, 2009, in which psychological and environmental studies were indicated for the biological parents, which have not been yet carried out. The petitioners indicate that despite the fact that the child's biological parents and grandparents submitted various requests, the child only had one contact of one hour and a half with his maternal grandparents, and none with his biological parents.

18. Based on the above-mentioned, the petitioners requested the Commission to declare the violation, to the detriment of the child L.M., his biological parents, L.S. and V.H.R, and his maternal grandparents, of their rights to humane treatment, to a fair trial, to privacy, the rights of the family, the right to a name, rights of the child, the right to equal protection and the right to judicial protection, set forth in Articles 5, 8, 11, 17, 18, 24 and 25 of the American Convention, pursuant to Article 1.1 of such treaty.

B. Position of the State

19. In its reply, the State alleges that the petitioners have not exhausted the remedies offered by the domestic jurisdiction and denies the violation of the best interests of the child and the right to judicial guarantees.

20. The State indicates that proceedings are still under way and have not expired and that these are being developed in line with the deadlines and processes established in the Paraguayan law, which is in agreement with Articles 8 and 25 of the American Convention. The State also alleges that in this case, the guardians, both parents, and the maternal grandparents of the child initiated seven different proceedings before the national judicial bodies: a) "L.M. Measure of protection and support (*Medida de protección y amparo*)"; b) "L.M. Contesting paternity" (*Impugnación de paternidad*); c) "L.M. Termination of the parent-child legal relationship" (*Pérdida de la patria potestad*); d) "L.M. Guardianship and Provisional Access Arrangements" (*Guarda y Régimen de Relacionamento Provisorio*); e) "L.M. Access Arrangements"; f) "L.M. Access Arrangements (*Relacionamento*)"; g) "V.H.R. and L.S.M. Abandonment and others" (*Abandono y otros*).

21. It indicates that the right to defense and procedural guarantees was never denied to the parties by the national jurisdictional bodies, and that the delay alleged by the petitioners was not caused by the State but, that it was due to the remedies lodged by the parties.

22. Based on the above-mentioned, the State requests the Commission to declare the petition inadmissible because domestic remedies were not exhausted and because it does not establish violations of human rights.

IV. ANALYSIS OF ADMISSIBILITY

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

23. The petitioners are entitled, under Article 44 of the American Convention, to file complaints before the Commission. The petition names as the alleged victim an individual for whom the State has assumed the commitment to respect and guarantee the rights protected by the American Convention. Regarding the State, the Commission notes that Paraguay is a State Party to the Convention since August 24, 1989, date on which it deposited its instrument of ratification. The Commission is therefore competent *ratione personae* to examine the petition.

24. The Commission has competence *ratione loci* to examine the petition, given that the alleged violations of human rights occurred in a State Party to the American Convention. The IACHR has competence *ratione temporis*, since the obligation to respect and guarantee the rights protected in the American Convention existed on the date it is claimed that the violations of rights alleged in the petition occurred. Finally, the Commission is competent *ratione materiae*, inasmuch as the petition alleges the violation of human rights protected under the American Convention.

B. Other requirements for the admissibility of the petition

1. Exhaustion of domestic remedies

25. Article 46 of the American Convention establishes as requirement for the admission of a petition "that the remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law". The aim of this requirement is to enable national authorities to be apprised of the alleged violation of a protected right and, if appropriate, to have the opportunity to settle the matter before it is considered at the international level.

26. The requirement of exhausting domestic remedies refers to those judicial remedies that are available, appropriate, and effective to settle the alleged violation of human rights. The same Convention provides that this provision shall not be applicable when domestic remedies are unavailable for *de facto* or *de jure* reasons. Specifically, Article 46.2 establishes exceptions to the general principle of exhaustion of domestic remedies when: (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 to settle the matter.

27. The State alleged that domestic remedies were not exhausted in this case and that seven legal proceedings, initiated before the national judicial bodies by the guardians, both parents, and maternal grandparents of the child, are under way.

28. The petitioners alleged that this case should be exempt from the requirement of the exhaustion of domestic remedies regarding the unwarranted delay in the decision on such remedies. The petitioners say that the Paraguayan Code of the Childhood and Adolescence acknowledges, in principle, the importance of promptly solving those matters related to childhood and adolescence, establishing the summary character of the proceedings, something which was not observed in the case of the child L.M., since two years passed without establishing a relationship between the child and his parents.

29. The petitioners state the L.M.'s parents used ordinary remedies provided in the Paraguayan law without any answer to guarantee their rights and those of the child L.M. The petitioners indicate that the time limits established by the domestic law have elapsed and are afraid that the child be declared in adoption, since rules establish that the family relationship is not a requirement if he stays in custody for more than two years. Thus, they say that the delay of the process is against the best interests of the child. Therefore, the delay on the domestic proceedings and the exhaustion of domestic remedies are against the protection of the child L.M. and the rights of his parents.

30. The Commission observes that the child L.M. is slightly over two years old and almost two years elapsed since he was given in temporary custody to the couple O.A. and since judicial proceedings for his custody started, without any definite ruling delivered at the time of preparation of the present report. Nor was a decision made regarding the request made by the biological relatives in December 2009 to establish access arrangements with the child L.M. The Commission establishes that the absence of such decision has prevented to reunite the alleged victim with his parents.

31. To assess any delay in resolving remedies available under domestic law, the purpose of the legal action must also be taken into account. In this regard, the Commission must take into account that the actions undertaken by L.S. and V.H.R were intended to establish and maintain an emotional and caring relationship with their son. The Commission also considers that the petitioners allege that the length of time taken by the proceedings had a deleterious effect on the rights of L.M. and his biological parents, since as time goes by, the child builds up stronger emotional ties with his guardians. The Commission has noted that the judicial proceedings concerning guardianship and custody of a boy or a girl should be handled with exceptional dispatch, because of the importance of the interests involved.⁴

32. According to the Commission, the petitioners have appealed to competent jurisdictional courts at the national level, submitting ordinary remedies provided by the Paraguayan law, to remedy the violation of the rights of the child L.M. and his parents. Therefore, the State was fully aware of the claims that originated the legal petition. As stated by the Inter-American Court, "the rule of prior exhaustion must never lead to a halt or delay that would render international action in support of the defenseless victim ineffective..."

33. Without prejudice to anything that may be disposed regarding the merits of the case in the future by the Commission, the Commission concludes that there was an unwarranted delay in the proceedings of the remedies concerning the legal guardianship and visiting rights and this excuses the petitioner from the obligation to exhaust domestic remedies. It should be noted that although the application of this exception is closely linked with issues related to prompt access to protection measures and judicial guarantees, the former is decided in line with the admissibility criteria of the system which differ from those that are applicable during the merits

4 IACHR, Report N° 117/06, Petition 1070-04, Admissibility, Milagros Fornerón and Leonardo Aníbal Javier Fornerón, October, 26, 2006, paragraph. 41.

stage. The causes that prevented the opportune exhaustion of domestic remedies, as well as any possible consequences, will be examined in the extent in which they are relevant when the Commission examines the merits of the case.

2. Deadline for the presentation of the petition

34. Article 46.1.b of the Convention establishes that every petition shall 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 at the national level. However, according to Article 46(2) of the Convention and 32(2) of the Rules of Procedure of the IACHR, "this rule shall not be applicable when 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; 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 there has been unwarranted delay in rendering a final judgment under the aforementioned remedies [...]".⁵ Such Article states that in these cases, the petition shall be presented "within a reasonable period of time as determined by 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."

35. In this case, it should be taken into account that the petition was lodged on September 1st, 2010, some days after the sentence pronounced by the Childhood and Adolescence Courts of Appeals on August 18, 2010, which annulled the sentence that ordered the return of the child in favor of the biological father and visiting rights in favor of the biological mother, taking the process back to its initial stage. The Commission has concluded that due to the prolonged duration of the ordinary proceedings, it is appropriate to exempt this petition from the requirement of prior exhaustion of additional extraordinary remedies. In light of the circumstances, and even considering the fact that such process is still under way, the Commission considers that the petition was lodged within a reasonable period and that the requirements set forth in Article 46.1.b have been observed.

3. Duplication of procedures and *res judicata*

36. Article 46.1.b of the American Convention provides that the admissibility of a petition must meet the requirement that the subject of the petition "is not pending in another international proceeding for settlement"; and Article 47.d of the Convention stipulates that the Commission shall consider inadmissible any petition or communication "that is substantially the same as one previously studied by the Commission or by another international organization." In this case, the parties have not alleged any of such circumstances that would give rise to inadmissibility, nor can they be inferred from the case file.

4. Characterization of the alleged facts

37. Article 47.b of the American states that petitions that do not state facts that tend to establish a violation of rights guaranteed by the Convention shall be considered inadmissible.

38. 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.

39. In this case, it is not for the Commission at this stage of the proceedings to decide whether or not the alleged violations of the American Convention actually took place. The IACHR has carried out a *prima facie* evaluation and decided that the petition describes complaints that, if proved, could be described as possible violations of the rights protected under the Convention.

⁵ See IACHR, Report N.º 72/03 (Admissibility), Petition 12.159, Gabriel Egisto Santillán, paragraph 60; Report N.º 33/99 (Admissibility), Case 11.763, *Masacre de Plan de Sánchez*, Guatemala, April 16, 1999, paragraph 29 and 30. IACHR, Report 69/05, Case 960-03, Admissibility, Argentina, October 13, 2005, paragraph 43.

In this regard, the Commission is competent to examine the situation that is the subject of this complaint in the light of Article 17 of the American Convention concerning the obligations of the State to respect the rights of the family. Furthermore, the child L.M. is entitled to special measures of protection of minors. In this regard, the Commission will examine the facts alleged in relation to the duties of States to prevent and protect in accordance with Articles 18 and 19 of the Convention.

40. Although the Commission is not competent to decide about the guardianship and custody of the child L.M., it is competent to analyze if the proceedings and jurisdictional timelines observed the conventional rules, especially in relation to the best interests of the child. Therefore, in relation to the information and considerations submitted on the excessive time taken in the proceedings of judicial guardianship and visiting rights, the Commission states that, if proved, they could be described as violations of Article 5 of the Convention, pursuant to Article 25 of the Convention, with regards to the right to prompt recourse to judicial protection, as well as to judicial guarantees set forth in Article 8 of the American Convention.

41. Furthermore, according to the information submitted by the petitioners, the Commission does not have enough elements to establish *prima facie* possible violations of Articles 11 and 24 of the Convention.

42. Consequently, the Commission concludes in this case that the petitioners have lodged complaints that, if compatible with other requirements and if proved correct, could establish the violation of those rights enshrined in Articles 5 (humane treatment), 8 (right to a fair trial), 17 (rights of the family), 18 (right to a name), 19 (rights of the child), 25 (right to judicial protection) of the American Convention, in agreement with Article 1.1 (obligation to respect and guarantee rights) of the said instrument, to the detriment of the child L.M., of his biological parents, L.S. and V.H.R., and of his maternal grandparents.

43. The Commission concludes that it does not have sufficient grounds to infer an alleged violation of Articles 11 and 24 of the Convention by the Paraguayan State.

V. CONCLUSIONS

44. The Commission concludes that is competent to examine the case and that the petition is admissible pursuant to Articles 46 and 47 of the American Convention, regarding the rights enshrined in Articles 5, 8, 17, 18, 19 and 25 of the American Convention, in relation to the obligations established in Article 1.1 of such international instrument.

45. Furthermore, the Commission concludes that it does not have enough grounds to infer the alleged violation of Articles 11 and 24 of the Convention.

46. Based on the foregoing factual and legal considerations, and without prejudging the merits of the case,

THE INTER-AMERICAN COMMISSION OF HUMAN RIGHTS, DECIDES:

1. To declare the instant case admissible with respect to the rights enshrined in Articles 5, 8, 17, 18 and 25 of the American Convention, pursuant to obligations of Article 1.1 of the same instrument.
2. To declare the case inadmissible with respect to Articles 11 and 24 of the American Convention.
3. To notify this report to the petitioners and to the State.
4. To continue with its analysis of the merits of the case.

5. To publish this report and include it in its Annual Report of the Commission to the General Assembly of the OAS.

Done and signed in the city of Washington, D.C., on November 2, 2011. (Signed): Dinah Shelton, President; José de Jesús Orozco Henríquez, First Vice-President; Rodrigo Escobar Gil, Second Vice-President; Paulo Sérgio Pinheiro, Felipe González, Luz Patricia Mejía Guerrero, and María Silvia Guillén, Commissioners.