

**REPORT No. 79/14**  
**PETITION 95-07**  
ADMISSIBILITY  
JULIO CASA NINA  
PERU  
AUGUST 15, 2014

**I. SUMMARY**

1. On February 6, 2007, the Inter-American Commission on Human Rights (hereinafter, “the Commission” or “the IACHR”) received a petition submitted by Julio Casa Nina, (hereinafter, “the petitioner” or “the alleged victim”) alleging violations on the part of the Republic of Peru (hereinafter, “the State” or “the Peruvian State”) of Articles 8 (right to a fair trial), 9 (freedom from ex post facto laws), 11 (right to privacy), 24 (right to equal protection) and 25 (right to judicial protection) of the American Convention on Human Rights (hereinafter, “The American Convention”).

2. The petitioner contends that he was appointed as Provisional Deputy Prosecutor in 1998, a period in which most of the prosecutors in Peru were Provisional. He argues that he was subject to the Labor and Public Administration Career Act [Ley Laboral y de la Carrera Administrativa], and that he had not been subject to any administrative penalty in the discharging of his duties, however pursuant to resolution No. 087-2003-MP-FN of January 21, 2003, he was removed from his post as Provisional Deputy Prosecutor of the Second Criminal Prosecutor’s Office of the Province of Huamanga, Ayacucho, Peru, without a cause. In this regard he argues that such removal violates Peruvian law which guarantees the permanence in the post of provisional prosecutors while there are no permanent prosecutors to replace them.

3. The State, on its part, alleges that the petitioner’s removal from his post was not a dismissal, rather a decision to end his appointment as a prosecutor, which is valid pursuant to the provisional nature of the post to which he was appointed, which in keeping with the applicable legal framework, does not give rise to more rights than those inherent to the post.

4. Without prejudging the merits of the complaint, after having analyzed the positions of the parties, and in compliance with the requirements provided for under Articles 46 and 47 of the American Convention, the Commission has decided to declare the case admissible for purposes of its review, based on alleged violations of Articles 8 (right to a fair trial), 9 (freedom from ex post facto laws) and 25 (right to judicial protection), in keeping with Articles 1.1 (obligation to respect rights) and 2 (domestic legal effects) of said Convention, and inadmissible for review based on alleged violations of Articles 11 (right to privacy) and 24 (right to equal protection). The Commission has further decided to notify the parties of the report and order its publication in the Annual Report of the OAS General Assembly.

**II. PROCESSING BY THE COMMISSION**

5. On February 6, 2007, the Commission received the petition and registered it under No. 95-07. After undertaking a preliminary analysis, on July 22, 2011, the IACHR forwarded the State the pertinent parts of the petition in order for it to submit its observations within two months. On September 21, 2011, the IACHR received the State’s written observations. On June 4, 2012, the IACHR received written observations from the petitioner. On August 27, 2012, the State presented additional observations, and on April 13, 2013, the petitioner submitted additional information, which was forwarded to the State on June 26, 2013.

### III. POSITION OF THE PARTIES

#### A. Position of the Petitioner

6. The petitioner states that from 1991 to 2000 there was no agency that appointed prosecutors in Peru and for this reason the attorney general's office appointed them on a provisional basis subsequent to evaluating them. The petitioner states the provisional prosecutors discharged the same duties as permanent prosecutors but were removed by the Attorney General's office without any prior proceedings.

7. Under these circumstances, the petitioner contends that he was appointed as the "Provisional Provincial Deputy Prosecutor for the Joint Provincial Office of the Prosecutor for La Mar", pursuant to resolution No. 464-98-MP-CEMP of June 30, 1998, and that thereafter, he was appointed Provisional Provincial Deputy Prosecutor for the Second Office of the Criminal Provincial Prosecutor for Huamanga, pursuant to resolution No. 565-2002-MP-FN of April 8, 2002. He states that he held the position of Prosecutor for five consecutive years without ever having been subject to any administrative penalty.

8. Nevertheless, the petitioner states that pursuant to Resolution No. 087-2003-MP-FN of January 21, 2003, the Attorney General of the Nation [Fiscal de la Nación] decided to remove him from his post without any cause for ordering said removal. Nonetheless, in said Resolution, a reference was made to a complaint and a report filed against him, which were pending at that time.

9. The petitioner indicates that he filed a motion for reconsideration [recurso de reconsideración] which was declared groundless on February 14, 2003, based on the fact that his appointment was of a temporary nature. He filed an *amparo* appeal regarding this decision with the First Civil Court of Huamanga, Ayacucho, Peru, which was declared groundless, taking into account that his removal from the post did not constitute a dismissal for any disciplinary matter, rather it was a decision to end his appointment. He points out that this decision was upheld by the Civil Court pursuant to a judgment of July 11, 2005, which ruled that the petitioner could not assert rights that are conferred on permanent prosecutors. Finally, the petitioner filed a constitutional remedy [recurso de agravio constitucional] regarding this ruling with the Constitutional Court, which declared it groundless because provisional posts have a status that does not give rise to any further rights than those inherent to such posts.

10. The petitioner claims that under Peruvian legislation, permanence in the post of provisional prosecutors continues while there are no permanent prosecutors to replace the provisional ones, and in his case this requirement had not yet been fulfilled. In this respect the petitioner states that Article 245 of the Peruvian Organic Law of the Judiciary is applicable. Said Article provides that in the case of provisional and substitute magistrates, they cease to exercise their functions when the post they temporarily hold is covered by a permanent magistrate. The petitioner contends that he was never informed about any fact, situation or accusation against him, nor were charges of improper or bad conduct ever raised, and he was removed from his post without any prior proceedings. In this regard, the petitioner considers that his removal from his post by the Office of the Attorney General of the Nation [Fiscalía de la Nación] was an arbitrary act that violated his right to due process and his right to defense protected under Article 8 of the American Convention.

11. The petitioner contends that Article 9 of the American Convention was violated as he was removed from his post without having committed any specific violation provided for by law that constitutes conduct unbecoming to a prosecutor. He also indicates that the State violated Article 11 of the American Convention, given that removal from a post for no reason has stigmatizing effects vis-a-vis the community, which gets the impression that said removal stems from improper and even illegal conduct.

12. The petitioner argues that Article 24 of the American Convention, which provides for the right to equal protection under the law, was violated inasmuch as the aforementioned situation constitutes unequal protection of provisional and permanent prosecutors under the law and that his right to effective judicial protection, stipulated in Article 25 of the American Convention, was violated, given that there was no effective remedy allowing judicial oversight of removal proceedings of provisional prosecutors and judges.

## **B. Position of the State**

13. The State asserts that the petitioner was not dismissed nor was he subject to disciplinary action rather that his removal came about because his appointment, which was of a provisional nature, was concluded.

14. The State explains that, in keeping with Peruvian legislation, the provisional post that the petitioner held is a position of trust, which is temporary and does not give rise to any additional rights beyond those inherent to such post. According to the State, Law No. 24041, which provides that “public servants hired for permanent posts, may not be fired or dismissed, except for the reasons specified under Legislative Decree 276,” is applicable. Such law, however, according to the State, does not cover those who hold “political or trust” positions. As a result, the State contends that the petitioner’s removal from his position as a provisional prosecutor does not constitute a violation of any conventional or constitutional right, and was ordered by the Attorney General’s office of the Nation in exercise of the powers conferred thereon by law.

15. The State indicates that it did not commit a violation of the judicial guarantees and protection recognized under Articles 8 and 25 of the American Convention, inasmuch as the petitioner had access to each and every one of the judicial bodies where he brought actions, where he was able to make use of his “right to respond” and was afforded the guarantees of due process.

16. As to the principle of legality protected under Article 9 of the Convention, the State asserts that said right was not violated as the decisions that upheld the termination of the petitioner’s provisional employment are grounded in the law that governs the positions of such nature.

17. Furthermore, with regard to the right to equality before the law protected by Article 24, the State indicates that while Peruvian case law provides for the right to equality, such right does not include under any circumstances equal criteria for dismissing provisional prosecutors as compared to permanent ones.

18. Finally, the State considers that as the petitioner obtained unfavorable rulings domestically, he is seeking to use the Commission as a “fourth instance” to review the criterion that has already been decided on by Peruvian judicial bodies with regard to provisional prosecutors. The State contends that the decision to remove the petitioner from his position, as well as the domestic rulings handed down with regard to the petitioner’s removal from his position as provisional prosecutor, are completely valid and grounded in the Peruvian legal system.

## **IV. ANALYSIS REGARDING COMPETENCE AND ADMISSIBILITY**

### **A. Competence**

19. The petitioner has standing, in principle, by Article 44 of the American Convention to present petitions to the Commission. The petition identifies as an alleged victim, an individual, with regard to whom the Peruvian State committed to respect and ensure the rights enshrined in the American Convention. As regards the State, the Commission notes that Peru has been a State party to the American Convention since July 28, 1978, when it deposited its instrument of ratification. Thus, the commission is competent *ratione personae* to review the petition.

20. Furthermore, the Commission is competent *ratione loci* to examine the petition inasmuch as it alleges violations of rights protected under the American Convention that purportedly took place in Peru, a State party to said Convention. The Commission is competent *ratione temporis*, given that the obligation to respect and ensure the rights protected under the American Convention was already in effect for the State on the date upon when the facts alleged in the petition presumably occurred. Lastly, the Commission is competent *ratione materiae* because the petition denounces potential violations of human rights protected under the American Convention.

## **B. Admissibility Requirements**

### **1. Exhaustion of Domestic Remedies**

21. Article 46.1.a) of the American Convention provides that for a complaint submitted to the Commission to be admissible, it is necessary that domestic remedies be filed and exhausted, in keeping with generally recognized principles of international law.

22. In the instant case, there is no disagreement about the exhaustion of domestic remedies. The State does not allege otherwise, rather it affirms that the petitioner had access to justice and legal remedies, and that these were not in his favor. At the same time, the case file reveals that the petitioner made use of the administrative and legal remedies that were available to him.

23. The alleged victim filed a motion for reconsideration on February 13, 2003, which was ruled to be groundless. He also filed an *amparo* appeal with regard to the Attorney General's Office, requesting that resolution No. 087-2003-MP-FN, of January 21, 2003, issued by the Attorney General's Office of the Nation, be ruled inapplicable, and that he consequently be returned to the post. Said request was dismissed by the First Specialized Civil Court of Huamanga, pursuant to ruling No. 7 of April 19, 2005. This ruling was upheld, in turn, by the Civil Section of the Superior Court of Justice of Ayacucho on July 11, 2005. Lastly, on November 14, 2005, the Constitutional Court denied the appeal for constitutional protection filed by the alleged victim.

24. In conclusion, the Commission observes that the alleged victim exhausted all the domestic remedies available in its legislation. Therefore, the Commission considers that domestic remedies were exhausted in accordance with the provisions of Article 46.1.a) of the American Convention.

### **2. Timeliness**

25. In keeping with the provisions of Article 46.1. b) of the American Convention, for a petition to be admitted by the Commission, it must be lodged within a time limit of six months from the date on which the party alleging the violation of rights was notified of the final decision.

26. In the instant case, according to information provided by the petitioner—which is not questioned by the State—Mr. Casa Nina was notified of the judgment of the Constitutional Court of the Republic of Peru regarding the appeal for constitutional protection on August 15, 2006 and he submitted his petition on February 6, 2007, thus fulfilling the requirement stipulated by Article 46.1.b) of the American Convention.

### **3. Duplication of Proceedings and International *Res Judicata***

27. There is no evidence in the case file indicating that the matter the petition addresses is subject to any other international settlement proceeding, or that it reproduces a petition that has already been reviewed by this or any other international body. Therefore, it is deemed that the requirements provided for under Articles 46.1.c) and 47.d) of the American Convention have been fulfilled.

### **4. Colorable Claim**

28. For purposes of admissibility, the Commission must decide whether the facts laid out in the petition could tend to establish a violation, as stipulated in Article 47.b) of the American Convention, whether the petition is “manifestly groundless” or “obviously out of order” in terms of subparagraph (c) thereof. At this procedural stage, the Commission is to undertake a *prima facie* evaluation, not for purposes of establishing alleged violations of the American Convention, rather for examining whether the petition denounces facts that

may potentially constitute violations of rights ensured under said instrument. This review does not imply any prejudgment or foreshadow any opinion on the merits of the case.<sup>1</sup>

29. Furthermore, 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 Inter-American Commission, although petitioners may do so. It is for the Inter-American 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.

30. The instant case is about the alleged removal of a provisional prosecutor without a cause. In the context of the case, the alleged victim argues that from 1991 to 2000 most of the prosecutors in Peru were Provisional because there was no agency that appointed prosecutors and for this reason the attorney general's office appointed them on a provisional basis subsequent to evaluating them. The petitioner contends that the provisional prosecutors discharged the same duties as permanent prosecutors but were removed by the Attorney General's office without any prior proceedings.

31. The petitioner argues that he was appointed and removed in this context, as he was removed from office as provisional prosecutor through a decision of the Attorney General's Office, without trial, without motivation and in breach of the requirement established in the legislation under which the separation would be appropriate only if they appoint a permanent prosecutor. The petitioner also notes that in the decision the Attorney General's Office referred to the existence of two complaints filed against him and that he doesn't know so far whether the decision to separate him from his post was a sanction. In relation to the complaints, he adds that he was acquitted of the charges brought against him.

32. On its part, the State contends that the petitioner's removal was nothing more than the result of the decision to end his appointment, grounded in the fact that provisional prosecutors, in keeping with Peruvian legislation, are considered to be officials in trust positions, who have no rights beyond those that stem from the post. Therefore, the State holds that the petitioner's removal from his position is not a violation of any right enshrined in a Convention.

33. In this regard, the Commission has underscored the importance of the independence of justice operators to guarantee the right to access to justice. In this sense, the Commission has indicated that the removal of provisional justice operators without complying with the condition or the time frame previously established, or in the absence of guarantees of due process can pose risks to its independence and could allow them to be subject to multiple pressures of the authority from which its permanence in the position depends<sup>2</sup>.

34. Taking into account the petitioner's allegations, the Commission will examine in the merits of the case if the separation from office constituted an act that had a punitive nature, and as such required the guarantees of due process provided under Article 8 of the American Convention<sup>3</sup> and the guarantees laid down in Article 9 of the American Convention. On the other hand, in case it is not proved that the separation from office constituted a sanction, the Commission will examine if the act of separation of the alleged victim required motivation to meet the guarantees and necessary limits to avoid abuses of power that endanger the rights

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<sup>1</sup> See IACHR, Report N° 36/13, Petition 403-02, Admissibility, José Delfín Acosta Martínez and Family, Argentina, July 11, 2013, para 40.

<sup>2</sup> IACHR, Guarantees for the Independence of Justice Operators, Towards Strengthening Access to Justice and the Rule of Law in the Americas, OEA/Ser.L/V/II.Doc.44, December 5, 2013, para. 89.

<sup>3</sup> In this sense, the Commission recalls that Article 8 of the American Convention is not limited to judicial remedies in a strict sense, but "to all the requirements that must be observed in the procedural stage" in order for all persons to be able to defend their rights adequately vis-à-vis any type of State action that could affect them. According to the Inter American Court "the due process of law must be respected in any act or omission on the part of the State bodies in a proceeding, whether of a punitive administrative, or of a judicial nature. Inter-American Court of Human Rights, *Case of Baena -Ricardo et.al. v. Panama. Merits, Reparations and Costs.* Judgment of February 2, 2001. Series C No. 72, para.124.

protected by the Convention<sup>4</sup>. Accordingly, the Commission finds that the allegations of the petitioner could tend to establish in the merits phase violations of the rights protected by Articles 8 (right to a fair trial), 9 (freedom from ex post facto laws) and 25 (right to judicial protection) of the American Convention.

35. In addition, the Commission will examine in the merits whether the Peruvian legal framework regulating the guarantees for removal of provisional prosecutors<sup>5</sup> is in keeping with the American Convention, which could tend to establish a violation of the right protected in Article 2 of the American Convention.

36. Furthermore, the Commission concludes that it has insufficient evidence to allow it to infer alleged violations on the part of the Peruvian State regarding the other rights invoked by the petitioner, contained in Articles 11 (right to privacy) and 24 (right to equal protection), and therefore has decided to declare them inadmissible. Finally, given the allegations of the petitioner, it must be noted that Article 29 of the Convention shall be used in this as in other matters, as the guide for interpreting the State's conventional obligations.

## **V. CONCLUSIONES**

37. The Commission concludes that it is competent to review the claims submitted by the petitioner regarding alleged violation of Articles 8 (right to a fair trial), 9 (freedom from ex post facto laws), and 25 (right to judicial protection) in keeping with Articles 1.1 (obligation to respect rights) and 2 (domestic legal effects) of the convention and that these are admissible, pursuant to the requirements set forth in Articles 46 and 47 of the American Convention. The Commission further concludes that it does not have sufficient evidence to rule on the claim of the alleged violation of Articles 11 (right to privacy) and 24 (right to equal protection) of the American Convention.

38. Based on the foregoing arguments of fact and law and without prejudice to the merits of the matter,

### **THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS**

#### **DECIDES:**

1. To find the instant case admissible pursuant to Articles 8 (right to a fair trial), 9 (freedom from ex post facto laws) and 25 (right to judicial protection) in relation to Articles 1.1 (obligation to respect rights) and 2 (domestic legal effects) of the American Convention.
2. To notify the Peruvian State and the petitioner of this decision.
3. To continue analyzing the merits of the matter.
4. To publish this decision and include it in its Annual Report to the OAS General Assembly.

Approved by the Inter-American Commission on Human Rights in the city of Mexico, on August 15, 2014. (Signed): Tracy Robinson, President; Rose-Marie Belle Antoine, First Vice President; Felipe González, Second Vice President; José de Jesús Orozco Henríquez, Rosa María Ortiz, Paulo Vannuchi, and James L. Cavallaro, Commissioners.

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<sup>4</sup> The Inter-American Court has established that "decisions adopted by domestic bodies that could affect human rights should be properly grounded; otherwise they would be arbitrary decisions. In this sense, the argumentation of a ruling and of certain administrative actions should allow one to know what the facts, reasons and regulations are on which it bases the decision-making authority, to therefore rule out any hint of arbitrariness. Inter-American Court of Human Rights, *Case of López Mendoza v. Venezuela. Merits, Reparations and Costs*. Judgment of September 1, 2011. Series C No. 233, para. 141.

<sup>5</sup> See IACHR, Report N° 62/12, Petition 1471-05, Admissibility, Yenina Esther Martínez Esquivia, Colombia, March 20, 2012, which concerns about the removal from office of a temporary prosecutor allegedly without any cause or due process.