

REPORT No. 116/18

CASE 12.975

MERITS

JULIO CASA NINA

PERU¹

OCTOBER 5, 2018

I. SUMMARY

1. On February 6, 2007, the Inter-American Commission on Human Rights (hereinafter, “the Inter-American Commission,” “the Commission” or “the IACHR”) received a petition submitted by Julio Casa Nina (hereinafter, “the petitioner” or “the alleged victim”) alleging international responsibility of the Republic of Peru (hereinafter, “the State” or “the Peruvian State”) to the detriment of Julio Casa Nina.

2. The Commission approved Report on Admissibility No. 79/14 on August 15, 2014.² On October 8, 2014, the Commission notified the parties of said report and placed itself at their disposal in order to reach a friendly settlement, though circumstances did not materialize to begin said process. The parties were given the time period provided for under the Rules to submit their additional observations on the merits. All information received was duly forwarded to the opposing party.

3. The petitioner contended that he was appointed Provisional Deputy Prosecutor in 1998, a period when the vast majority of public prosecutors in Peru served on a provisional basis. He claimed that he held this position for 5 consecutive years and that he had not been subjected to any administrative penalty in the performance of his duties. He asserted that on January 21, 2003, a ruling was issued to remove him from the office of Provisional Deputy Prosecutor of the Second Provincial Criminal Prosecutor’s Office of Huamanga, Ayacucho, Peru, though no grounds were cited and no prior proceedings were instituted.

4. The State argued that Mr. Casa Nina’s removal from office was not a dismissal, but rather a decision to terminate his appointment as public prosecutor, which is valid under the provisional status system through which his was appointed. It further contended that, based on applicable law, said system does not give rise to any rights other than those inherent to his position. It clarified that, while a tenured judge has permanent status, a provisional judge is not permanent and only serves in office on a temporary basis.

5. Based on the findings of fact and law, the Inter-American Commission concluded that the State is responsible for violation of Articles 8.1, 8.2, 8.2 b), 8.2 c) (fair trial), 9 (freedom from ex post facto law), 23.1.c (right to participate in government) and 25.1 (judicial protection) of the American Convention on Human Rights (hereinafter, “the American Convention” or “the Convention”), in connection with the obligations set forth in Articles 1.1 and 2 of the same instrument. The Commission issued the respective recommendations.

II. ARGUMENTS OF THE PARTIES

A. Petitioner

¹ As provided for under Article 17.2 of the Commission’s Rules of Procedure, Commissioner Francisco José Eguiguren Praeli, a Peruvian national, did not take part in the debate or in the decision of the instant case.

² IACHR, Report No. 79/14. Case 12.975, Julio Casa Nina. August 15, 2014. In said report, the IACHR found admissible the claims pertaining to articles 1.1, 2, 8, 9 and 25 of the American Convention. It also found inadmissible the claims pertaining to articles 11 and 24 of the same instrument.

6. By way of context, the petitioner noted that from 1991 to 2000, there did not exist in Peru any entity to appoint prosecutors and, therefore, the Office of the Attorney General would make provisional appointments of prosecutors after assessing their qualifications. He explained that provisional prosecutors performed the same duties as tenured prosecutors, but were removed by the Office of the Attorney General without any prior proceeding. He also noted that at that time all prosecutorial positions were of a provisional nature.

7. In that context, he claimed, he was appointed as Provisional Provincial Deputy Prosecutor to the Joint Provincial Prosecutor's Office of La Mar under resolution No. 464-98-MP-CEMP of June 30, 1998 and that, subsequently, under resolution No. 565-2002-MP-FN of April 8, 2002, he was appointed as Provisional Provincial Deputy Prosecutor at the Second Provincial Criminal Prosecutor's Office of Huamanga. He asserted that he held the position of Prosecutor for five consecutive years and had never been the subject of any administrative penalty, under the Labor and Administrative Career Act, earning a monthly salary with the respective withholdings being deducted for benefits.

8. He noted that under No. 087-2003-MP-FN of January 21, 2003, the Attorney General of the Nation decided to remove him from his position without citing any grounds to order his removal and without providing him the opportunity to defend himself. He stated that reference was made in said decision to a pending complaint and a charge brought against him at the time, of which he was eventually acquitted through an ordinary proceeding at a later date.

9. He stated that on February 13, 2003, he filed a motion for reconsideration (*recurso de reconsideración*) with the same authority, which was denied on February 14, 2003 by the Attorney General of the Nation on the grounds that his appointment was of a temporary nature.

10. The petitioner noted that he filed an appeal for constitutional relief via *amparo* with the First Specialized Court for Civil Matters of Huamanga, Ayacucho, Peru, which on April 19, 2005 was denied on the grounds that the act of removal from office did not constitute a dismissal based on issues of a disciplinary nature, but was instead based on termination of his appointment.

11. He contended that he appealed to the Civil Chamber of Ayacucho, and on July 11, 2005, the Specialized Chamber for Civil Matters of the Superior Court of Justice of Ayacucho upheld the decision of the First Specialized Court finding that the alleged victim could not assert rights to which tenured prosecutors are entitled. Finally, he filed a petition for constitutional relief for denial of rights (*recurso de agravio constitucional*) with the Constitutional Court against the lower appeals court decision, which was denied on November 14, 2005, on the grounds that provisional status constitutes a situation that does not give rise to any rights other than those inherent to such a position.

12. As to the law, the alleged victim claimed violations of his right to a **fair trial, freedom from ex post facto law, judicial protection, work, privacy and equal protection.**

13. With regard to **fair trial rights**, he argued that the State violated the duty to state grounds and his right to prior and detailed notification of the charges and to adequate time and means to prepare for his defense, because he was never advised of any event, situation or accusation against him, nor were any charges of impropriety or misconduct ever brought, and he was unaware of the grounds for his dismissal. He further contended that the decision by the Office of the Attorney General of the Nation to remove him from his position lacks sufficient justification and constituted an arbitrary act. He contended that the State had failed to enforce Articles 146 and 158 of the Political Constitution or the Regulations for Organization of the functions of the Higher Prosecutorial Office, which ensure permanence and tenure of officials provided that their conduct is proper and they discharge their duties suitably.

14. The petitioner alleged that his right to **freedom from ex post facto law** was violated, because Law 27362 was applied to him and that this law was approved subsequent to his appointment

as a prosecutor. Law 27362 repeals the equal status between tenured and provisional judges that had been provided for in Law 26898, which was in effect at the time he was appointed Provisional Prosecutor.

15. He argued that his **right to judicial protection** was violated, because no effective remedy was available to exercise judicial oversight of the process of removal from his position of provincial prosecutor.

16. He contended that his **right to work** was violated, inasmuch as he had been removed arbitrarily from his position.

17. The petitioner continued to allege violations of his right to privacy and equal protection. The IACHR will not address said arguments in light of the fact that these violations were found inadmissible in the report on admissibility of the instant case.

B. State

18. The State claimed that there was no context of a majority of prosecutors with provisional appointments, as was argued by the alleged victim and that, in any case, it is irrelevant because the timeframe of the alleged context is from 1991 to 2000, while the events of the instant case took place in 2003.

19. It contended that the alleged victim was not dismissed or subjected to disciplinary punishment, but rather was removed from office because his provisional appointment had been terminated. The State specified that provisional and tenured prosecutors do not have the same rights and are not subject to the same proceedings and, therefore, a proceeding such as a dismissal hearing, could not be demanded. It claimed that under Peruvian law, there is no proceeding for dismissal applicable to provisional deputy prosecutors.

20. The State explained that, under Peruvian law, the provisional office held by the alleged victim is a temporary position of trust, which does not give rise to any rights other than those that are inherent to it. It also noted that even though Law No. 24041 says that "public servants contracted for permanent functions cannot be removed or dismissed, except for under the grounds set forth in Legislative Decree 276," this law does not include those who perform "political" functions or functions "of trust." It argued that because of the foregoing provision, the alleged victim's removal from office did not violate any right protected under the Constitution or any convention, because it was ordered by the Office of the Attorney General of the Nation under the powers granted to her by the law.

21. The State further contended that the alleged victim served as a provisional deputy prosecutor, meaning, he performed support duties without permanent status for a tenured prosecutor, and noted that even though no specific termination date was specified in his appointment, the duration was contingent upon need for service. It also pointed out that the lack of a termination date in the appointment resolution was not at issue in the controversy.

22. The State argued that all due process protections are available to provisional prosecutors in the framework of cases of termination of their appointments, because on the one hand, the grounds are stated in the decisions terminating their positions and, on the other hand, they are able to exercise their right to a defense through a motion for reconsideration and the *amparo* proceeding to seek constitutional relief.

23. As for the law, the State contended that it did not violate the right to a **fair trial and judicial protection, or freedom from ex post facto law**. With respect to **job security**, it asserted that the system of individual petitions of the Convention does not cover the right to **job security** as one of the rights over which the Commission has subject matter-based competence.

24. The State argued that it did not violate the **right to a fair trial and judicial protection**, inasmuch as the alleged victim had access to different jurisdictional bodies where he had the opportunity to defend himself assisted by guarantees of due process. It contended that the rights asserted by the alleged victim could not be protected by domestic bodies, because these rights apply to tenured as opposed to provisional prosecutors.

25. The State claimed that it did not violate the right to **freedom from ex post facto law** because the resolutions upholding the termination of the alleged victim's appointment are based on laws currently in effect. It noted that Law 26898, which establishes the same rights and duties for provisional and tenured prosecutors, was repealed and replaced by Law 27362. In other words, since the time of the alleged victim's second appointment, the new law was already applicable to him. It also underscored that the grounds of the first and second resolutions terminating his different appointments are identical, but that the petitioner is only contesting the second one and is in agreement with the first one.

26. Lastly, the State indicated that in 2014, the Office of the Attorney General of the Nation approved the "Regulation for the appointment, evaluation and permanence of provisional prosecutors at the national level," which sets forth the criteria for the selection of provisional prosecutors, such as need, which means that a provisional prosecutor shall serve in the position as long as there is a need for service. It also reported on approval of the Law of the Prosecutorial Career, which clearly defines the difference between tenured and provisional prosecutors.

III. FINDINGS OF FACT

A. Regarding the alleged victim's appointments

27. It is on record in the case file that, on June 30, 1998, the alleged victim was appointed as Provisional Provincial Deputy Prosecutor of the Joint Provincial Prosecutor's Office of La Mar, Ayacucho, under Office of the Attorney General Executive Commission Resolution No. 464-1998-MP-FN-CEMP. In the resolution, it was noted that "the position of Provincial Deputy Prosecutor of the Joint Provincial Prosecutor's Office of La Mar, Judicial District of Ayacucho is vacant" and "That, after applying as a candidate Dr. Julio Casa Nina (...)" "IT IS RESOLVED: ARTICLE ONE: To appoint Dr. Julio Casa Nina as Provisional Provincial Deputy Prosecutor of the Joint Provincial Prosecutor's Office of La Mar, Judicial District of Ayacucho."³

28. On April 8, 2002, the Attorney General of the Nation appointed the petitioner as Provisional Provincial Deputy Prosecutor of the Judicial District of Ayacucho at the Second Provincial Criminal Prosecutor's Office of Huamanga, under Resolution 565-2002-MP-FN, of April 08, 2002. In the resolution, it indicates: "That, because of the need for service (...) IT IS RESOLVED: ARTICLE TWO: To appoint Dr. Julio Casa Nina, as Provisional Provincial Deputy Prosecutor of the Judicial District of Ayacucho (...)."⁴

29. The IACHR recalls that in its Second Report on the Situation of Human Rights in Peru of 2000, it was noted that at that time, "more than 80% of the prosecutors in Peru are 'provisional.'"⁵

B. Regarding termination of alleged victim's appointment

30. On January 21, 2003, the Attorney General of the Nation terminated the appointment of the alleged victim under Resolution No. 087-2003-MP-FN. In said resolution, she wrote that "the appointment of Prosecutors with provisional status is of a temporary nature, subject to need of service

³ Annex 1. Copy of Resolution No. 464-98-MP-CEMP of June 30, 1998, issued by the Executive Commission of the Office of the Attorney General, Annex to the initial petition of February 6, 2007.

⁴ Annex 1. Copy of Resolution No. -565-2002-MP-FN of April 8, 2002, issued by the Office of the Attorney General of the Nation. Annex to the initial petition of February 6, 2007.

⁵ IACHR, Second Report on the Situation of Human Rights in Peru, Chapter II, Administration of Justice and Rule of Law, OEA/Ser.L/V/II.106 Doc. 59 rev, June 2, 2000, par.35.

(...)” and decided “To terminate the appointment of Dr. Julio Casa Nina as Provisional Provincial Deputy Prosecutor of the Second Provincial Criminal Prosecutor’s Office of Huamanga, Judicial District of Ayacucho (...) without prejudice to the legal actions that could be pertinent to the complaint and charge that are pending.”⁶

C. Regarding the mechanisms of challenge pursued

1. Motion for reconsideration (*Recurso de reconsideración*)

31. As the record in the case file shows, the alleged victim filed a motion for reconsideration with the Attorney General of the Nation to “vacate the decision adopted and order the reinstatement of the appellant in the position of provincial deputy prosecutor that he had been discharging.” In the motion, he argued that “the charges that have been brought against me have been dispelled and because there is a pronouncement of the court, there are no stated grounds to adopt removal from office and this evidence, on the contrary, proves my innocence, and your Authority should reconsider the administrative act.”⁷ The Commission takes note that, according to information from the petitioner, which was not refuted by the State, he was subsequently acquitted of said complaints.

32. On February 14, 2003, the Attorney General of the Nation denied the motion for reconsideration filed by the alleged victim. Among her considerations, she found:

That, the appointment of Prosecutors on provisional status is of a temporary nature and that the arguments invoked by the appellant in his written motion for reconsideration do not disprove in any way, the grounds of Resolution of the Office of the Attorney General of the Nation No. 087-2003-MP-FN, dated January 21, 2003, pursuant to the provisions of Article 5 of Law 27362.

That, as of the date when the aforementioned Resolution was issued the appellant has two complaints before the Decentralized District Commission of Internal Control.⁸

33. The Commission takes note that Article 5 of Law 27362 established that “provisional judges may only discharge jurisdictional duties while the interim status lasts. They are precluded from assuming any administrative function or representation.”⁹

2. Amparo suit

34. Subsequently, the alleged victim brought an amparo suit with the First Specialized Court for Civil Matters of Huamanga, Ayacucho, against the Office of the Attorney General, claiming a violation of the right to work, to due process and to a defense. The *amparo* filing was cured on December 16, 2004 after being denied on the grounds that it did not specify “the date when his right was affected” and because it did not provide proof of “prior exhaustion of remedies.”¹⁰ Among his contentions, the alleged victim wrote that:

(...) my appointment as Provisional Deputy Prosecutor cannot simply be terminated by unilateral decision and especially when there is no justified reason to do so.

⁶ Annex 2. Copy of Resolution No. 087-2003-MP-FN of January 21, 2003, issued by the Office of the Attorney General of the Nation. Annex to initial petition of February 6, 2007

⁷ Annex 3. Copy of Motion for Reconsideration of February 13, 2003, filed by Julio Casa Nina with Nelly Navarro, Attorney General of the Nation. Annex to State’s response to the initial petition of July 22, 2010.

⁸ Annex 4. Copy of Resolution No. 285-2003-MP-FN of February 14, 2003, issued by the Office of the Attorney General of the Nation. Annex to State’s response to initial petition of July 22, 2010.

⁹ See Law No 27362, *Ley que Deja sin efecto la homologación de los magistrados titulares y provisionales del Poder Judicial y del Ministerio Público*. [Law repealing the equal status of tenured and provisional magistrates of the Judiciary and of the Office of the Public Prosecutor].

¹⁰ Annex 5. Copy of Resolution No. 01 of December 02, 2004, issued by the First Specialized Court for Civil Matters of Huamanga, Ayacucho. Annex to State’s response to initial petition of July 22, 2011.

(...) it is false that there exist any administrative complaints charging misconduct in performance of duties. Furthermore, because I was dismissed and was not explained the reasons for such decisions I am being belittled in my conduct as a human person...it violates the principle of dignity of the person (...)

(...) to be removed from office, required an administrative proceeding, providing for all guarantees, without infringing at a minimum the right to a defense.¹¹

35. On April 19, 2005, the Chambers of the First Specialized Court for Civil Matters of Huamanga denied the *amparo* claim. Among its considerations, it found:

That, because the plaintiff held Provisional, not Tenured, status in the position of Provincial Deputy Prosecutor; the decision adopted by the Attorney General of the Nation does not in any way constitute a disciplinary measure of dismissal from office as provided in Article 52 of the Organic Law of the Office of Public Prosecution, Legislative Decree 052, and therefore the claim filed must be dismissed inasmuch as no constitutional violation has been proven; all the more so because in the same resolution that the plaintiff seeks to overturn, it is specified that the measure adopted is without prejudice to the legal actions that could be pertinent because of the complaint and charge that are pending; which means that the complaint and charge do not constitute the grounds of the resolution as is argued in the suit.¹²

3. Appeal and petition for constitutional relief for denial of rights (*Recurso de apelación y de agravio constitucional*)

36. Subsequently, the alleged victim filed an appeal with the Civil Chamber of Ayacucho. On July 11, 2005, the Specialized Chamber for Civil Matters of the Superior Court of Justice of Ayacucho upheld the decision of the First Specialized Court finding that:

(...) the moving party seeks to allege rights to which tenured prosecutors are entitled, [who are] appointed in accordance with the provisions of article one hundred and fifty-four of our Magna Carta, inasmuch as the office that he had been discharging (...) as an appointment of trust, was Provisional Provincial Deputy Prosecutor of the Second Provincial Criminal Prosecutor's Office of Huamanga, that is to say, a temporary office, that does not give rise to rights other than those inherent to his office (...).¹³

37. The same day, the alleged victim filed a petition for constitutional relief for denial of rights with the Constitutional Court against the appellate ruling. On November 14, 2005, the Constitutional Court handed down a judgment denying the petition because it found that:

(...) substitution or provisional appointment, as such, constitutes a situation that does not give rise to rights other than those inherent to the office, which is held "provisionally" by a person who has no permanent title [tenure]. This being the case, protection of rights cannot be sought, before a constitutional court, when the person is not entitled to such rights because he has not been appointed pursuant to the provisions of articles 150 and 154 of the Constitution, but [instead] discharges, on an interim basis, a function of a transitory nature.¹⁴

¹¹ Annex 6. Copy of *amparo* filing with the Judge of the Civil Court of Huamanga, Ayacucho, brought by Julio Casa Nina. Annex to State's response to initial petition of July 22, 2011.

¹² Annex 7. Copy of Resolution No. 07 of April 19, 2005, issued by the First Specialized Court for Civil Matters of Huamanga, Ayacucho. Annex to initial petition of February 6, 2007.

¹³ Annex 8. Copy of Resolution No. 13 of July 11, 2005, issued by the Specialized Chamber for Civil Matters of the Superior Court of Justice of Ayacucho. Annex to initial petition of February 6, 2007.

¹⁴ Annex 9. Copy of the Judgment of the Constitutional Court of November 14, 2005, handed down by the Constitutional Court. Annex to initial petition of February 6, 2007.

IV. LEGAL ANALYSIS

A. Right to a fair trial¹⁵ and freedom from ex post facto law¹⁶

1. General considerations regarding applicable guarantees in punitive and fact-finding proceedings

38. The Commission recalls that both bodies of the Inter-American system have held that the guarantees established in Article 8 of the American Convention are not confined to criminal proceedings, but also apply to proceedings of another nature.¹⁷ Specifically, when punitive proceedings are involved, both bodies of the system have asserted that the guarantees set forth in Article 8.2 of the American Convention, by analogy, are applicable.¹⁸ In proceedings where issues of rights or interests are settled, the “due guarantees” established in Article 8.1 of the American Convention, including the right to sufficient justification, are applicable.¹⁹ Likewise, the European Court has provided that due process protections must be respected and ensured in the context of administrative proceedings, which include dismissals of a public servant.²⁰

39. Pursuant to the foregoing, the determination of which due guarantees apply in a specific proceeding for the determination of rights must be based on the nature of the proceeding and the legal interests at stake.²¹

2. General considerations on guarantees applicable to justice operators including prosecutors

2.1 The principle of judicial independence and removal of justice operators

¹⁵ Article 8.1 of the Convention reads: Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature. Article 8.2 establishes, in the relevant portions that: 2. Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees: b) prior notification in detail to the accused of the charges against him; c) adequate time and means for the preparation of his defense.

¹⁶ Article 9 of the American Convention establishes that no one shall be convicted of any act or omission that did not constitute a criminal offense, under the applicable law, at the time it was committed. A heavier penalty shall not be imposed than the one that was applicable at the time the criminal offense was committed. If subsequent to the commission of the offense the law provides for the imposition of a lighter punishment, the guilty person shall benefit therefrom.

¹⁷ IACHR, Report No. 65/11, Case 12.600, Merits, Hugo Quintana Coello et al “Judges of the Supreme Court of Justice,” Ecuador, March 31, 2011, par. 102; IA Court of HR. Case of Baena Ricardo et al v. Panama. Merits, Reparations and Costs. Judgment of February 2, 2001. Series C No. 72, pars. 126-127; Case of the Constitutional Court v. Peru. Merits, Reparations and Costs. Judgment of January 31, 2001. Series C No. 71, pars. 69-70; and Case of López Mendoza v. Venezuela. Merits, Reparations and Costs. Judgment of September 1, 2011 Series C No. 233, par. 111.

¹⁸ IACHR, Report No. 65/11, Case 12.600, Merits, Hugo Quintana Coello et al “Judges of the Supreme Court of Justice,” Ecuador, March 31, 2011, par. 102; IA Court of HR. Case of Baena Ricardo et al v. Panama. Merits, Reparations and Costs. Judgment of February 2, 2001. Series C No. 72, pars. 126-127; Case of the Constitutional Court v. Peru. Merits, Reparations and Costs. Judgment of January 31, 2001. Series C No. 71, pars. 69-70; and Case of López Mendoza v. Venezuela. Merits, Reparations and Costs. Judgment of September 1, 2011 Series C No. 233, par. 111

¹⁹ IA Court of HR. Case of Barbani Duarte et al v. Uruguay. Merits, Reparations and Costs. Judgment of October 13, 2011. Series C No. 234, par. 118; and Case of Claude Reyes et al v. Chile. Merits, Reparations and Costs. Judgment of September 19, 2006. Series C No. 151, par. 118.

²⁰ ECHR, Cudak v. Luthania. Application No. 15869/025. Judgment of March 23, 2010, para.42.

²¹ IA Court of HR. Case of Barbani Duarte et al v. Uruguay. Merits Reparations and Costs. Judgment of October 13, 2011. Series C No. 234, pars. 118-119.

40. The IACHR has asserted that the principle of judicial independence is a requisite inherent to a democratic system and a fundamental prerequisite for the protection of human rights.²² It is enshrined as one of the due process guarantees protected by Article 8.1 of the American Convention and, additionally, “reinforced”²³ guarantees emanate from said principle, which States must provide to judges in order to ensure their independence.²⁴ The bodies of the Inter-American system have interpreted the principle of judicial independence to include the following guarantees: a suitable appointment process, tenure in office and guarantee against external pressures.²⁵

41. Specifically, with respect to guarantees to ensure tenure, the Court has held that proceedings that culminate in the removal of a justice operator must be conducted in a way that is compatible with the principle of judicial independence. This means that States must ensure that all persons who discharge judicial duties have guarantees of reinforced stability, meaning that dismissal or cessation of a judge from his or her office may proceed based on two fundamental reasons: i. for engaging in “clearly punishable” conduct, “the most serious grounds of misconduct or incompetence,”²⁶ or ii. because the time period or condition established in the appointment has lapsed or been fulfilled. Provisional appointment is not the same as discretionary removal and must not involve any change in the guarantees for proper performance of the judge and must safeguard the claimants themselves.²⁷

42. Stability in office of justice operators is closely linked to protection against external or internal pressure, inasmuch as if operators do not have job security over a certain period of time, they will be vulnerable to pressure from different sectors, mainly from those who have the power to decide on their dismissal.

43. Consequently, the Commission reiterates that States must ensure that all persons who serve in the judicial function have guarantees of reinforced stability, meaning that, except for when they commit serious disciplinary offenses, stability in office must be respected for the period of time or under the condition established in the appointment, regardless of whether they are career judges or hold temporary or provisional appointments to a judicial function. Such temporary or provisional appointments must be set for a specific period of time or under a specific condition for the discharge of the judgeship, in order to ensure that these judges will not be removed from office based on the rulings they hand down or based on arbitrary decisions of administrative or judicial entities. The appointment of justice operators without a time period or conditionality clause in their appointment must be considered incompatible with the international obligations of a State in the area of judicial independence and cannot be argued as an excuse to not afford the guarantees of due process in a decision for removal

²² IACHR, Report on the Merits 12.816, Report No. 103/13, November 5, 2013, par. 112. Citing United Nations. Human Rights Committee. General Comment No. 32, CCPR/C/GC/32, August 23, 2007, par.19. Also see: Habeas Corpus under Suspension of Guarantees (articles. 27.2, 25.1 and 7.6 American Convention on Human Rights). Advisory Opinion OC-8/87 of January 30, 1987. Series A No. 8, par. 30. Also see, IACHR, Democracy and Human Rights in Venezuela, III. Separation and Independence of Public Powers, December 30, 2009. Par. 80.

²³ IA Court of HR. Case of Reverón Trujillo v. Venezuela. Preliminary Objections, Merits, Reparations and Costs. Judgment of June 30, 2009. Series C No. 197, par. 67; IACHR, Democracy and Human Rights, December 30, 2009, par. 185; IACHR, Second Report on the Situation of Human Rights Defenders, December 31, 2011, par. 359.

²⁴ Thus, for example, the Inter-American Court has held that “rights for judges” emanate in turn from the State’s obligations for justiciable claims subject to proceedings before courts. Regarding these rights, the Court has written that “the guarantee of not being subjected to discretionary removal means that disciplinary and punitive proceedings of judges must respect due process guarantees and an effective recourse must be offered to those harmed.” IA Court of HR. Case of Apitz Barbera et al (“First Court of Administrative Disputes”) v. Venezuela. Preliminary Objection, Merits, Reparations and Costs. Judgment of August 5, 2008. Series C No. 182, par. 147.

²⁵ IACHR, Report on Guarantees for the Independence of Justice Operators. Towards strengthening access to justice and the rule of law in the Americas, December 5, 2013, pars. 56, 109 and 184; IA Court of HR. Case of López Lone et al v. Honduras. Preliminary Objection, Merits, Reparations and Costs. Judgment of October 5, 2015. Series C No. 302, par. 191.

²⁶ IA Court of HR. Case of López Lone et al v. Honduras. Preliminary Objection, Merits, Reparations and Costs. Judgment of October 5, 2015. Series C No. 302, par. 259.

²⁷ IA Court of HR. Case of Apitz Barbera et al (“The First Court of Administrative Disputes”) v. Venezuela. Preliminary Objection, Merits, Reparations and Costs. Judgment of August 5, 2008. Series C No. 182, par. 43.

from office.²⁸ The IACHR has held that the independence of the judicial system is undermined when provisional judges are subject to dismissal without cause.²⁹

44. In short, even when “needs of service” may justify an appointment of a justice operator on a temporary basis or in order to perform a specific function, said period or condition must be clearly set forth in the appointment document and must also be one of the grounds for eventual removal. This is the only way for the independence of the judicial function to be protected and to prevent provisional appointments of operators from being used arbitrarily to undermine said independence.

2.2 General considerations on prosecutors’ reinforced stability

45. The Commission finds that the principle of reinforced stability of judges is also applicable to prosecutors, inasmuch as they play a complementary role to that of a judge in the administration of justice, in bringing criminal cases, investigating crime, as well as the performance of other duties of public interest, which in the absence of sufficient guarantees, could make conditions ripe for them to be the target of internal and external pressure on the decisions they make.³⁰

46. In this regard, the United Nations Guidelines on the Role of Prosecutors establishes that “States shall ensure that prosecutors are able to perform their professional functions without intimidation, hindrance, harassment, improper interference or unjustified exposure to civil, penal or other liability.”³¹

47. Likewise, the Bordeaux Declaration on Judges and Prosecutors in a Democratic Society establishes that:

The independence of public prosecution constitutes an indispensable corollary to the independence of the judiciary (...) The independence of public prosecutors is indispensable for enabling them to carry out their mission (...) Thus, akin to the independence secured to judges, the independence of public prosecutors is not a prerogative or privilege conferred in the interest of the prosecutors, but a guarantee in the interest of a fair, impartial and effective justice that protects both public and private interests of the persons concerned.

(...) the proximity and complementary nature of the missions of judges and prosecutors create similar requirements and guarantees in terms of their status and conditions of service, namely regarding recruitment, training, career development, discipline, transfer, remuneration, termination of functions and freedom to create professional associations.³²

48. Moreover, the Consultative Council of European Prosecutors of the Council of Europe wrote in its Opinion No. 9 that:

The independence and autonomy of the prosecution services constitute an indispensable corollary to the independence of the judiciary. Therefore, the general tendency to enhance the independence and effective autonomy of the prosecution services should be encouraged (...)

²⁸ IACHR, Application to the Inter-American Court of Human Rights in the case of Mercedes Chocrón Chocrón, Case 12.556, par.78.

²⁹ IACHR, Second Report on the Situation of Human Rights in Peru, Chapter II, Administration of Justice and Rule of Law, OEA/Ser.L/V/II.106 Doc. 59 rev, June 2, 2000, par.15.

³⁰ See for example IACHR, Toward a Comprehensive Policy to Protect Human Rights Defenders, OEA/Ser.L/V/II.Doc.207/17, December 29, 2017, par. 47.

³¹ United Nations. Guidelines on the Role of Prosecutors. Approved by the Eighth United Nations Congress on the Prevention of Crime and Treatment of Offenders, held in Havana, Cuba, from August 27 to September 7, 1990.

³² Consultative Council of European Judges and Consultative Council of European Prosecutors. Bordeaux Declaration, on Judges and Prosecutors in a Democratic Society, Strasbourg, December 8, 2009, pars. 27 and 37.

Prosecutors should be autonomous in their decision-making and should perform their duties free from external pressure or interference, having regard to the principles of separation of powers and accountability.³³

49. Based on the foregoing considerations, the IACHR finds that the standards cited in the previous section are applicable to prosecutors, who by the very nature of the function they perform, must enjoy reinforced stability in their office as a guarantee of independence in their job, and they must only be replaced for committing serious misdeeds or because their time period or a condition set forth in their appointment has lapsed or has been fulfilled, similar to how it works with judges. As was mentioned in the previous section, this is applicable to operators appointed on a provisional basis, inasmuch as they perform the same function as tenured persons and it is said function that is the subject of protection under the principle of judicial independence.

3. Analysis of the instant case

3.1 Regarding the right to a hearing, the right to a defense and freedom from ex post facto law

50. In applying the foregoing considerations, the Commission finds that the instant case involved a process of determination of rights, wherein the due process guarantees established in Article 8.1 of the American Convention, as a minimum, are applicable, including the right to a hearing and the duty to state grounds. Additionally, based on the reasons set forth below, the Commission also finds that the case should be analyzed in light of the applicable guarantees of Article 8.2 and 9 of the Convention.

51. As was noted in the findings of fact section, the IACHR recalls that the alleged victim was appointed in 1998 as a Provisional Provincial Deputy Prosecutor of the Joint Provincial Prosecutor's Office of La Mar, Ayacucho, an office he held for five consecutive years. Likewise, on April 8, 2002, he was appointed "for need of service" as a Provisional Provincial Deputy Prosecutor of the Judicial District of Ayacucho. On January 21, 2003 the Office of the Attorney General of the Nation terminated his appointment, on the grounds that "the appointment of prosecutors on provisional status is of a temporary nature, subject to needs of service."

52. The Commission notes that the appointment of the alleged victim did not have any time limit or conditionality to it but only a justification for the appointment, namely, need of service, which was also mentioned when he was removed from office.

53. The State contended that the alleged victim served in a temporary position of trust, which does not give rise to rights other than those that are inherent to it, and that provisional prosecutors and tenured ones do not have the same rights nor do the same proceedings apply to them and, therefore, the application of proceedings such as dismissal hearings could not be demanded. Additionally, it was noted that Peruvian law does not provide for a dismissal proceeding applicable to provisional deputy prosecutors.

54. The Commission notes that making provisional prosecutors equal to "positions of trust," as was the case with the alleged victim, makes their discretionary removal possible, which undermines the independence that must be ensured for them, inasmuch as it renders them vulnerable to being removed based on the decisions they adopt or based on arbitrary decisions of administrative or judicial entities.

55. The IACHR reiterates, taking into consideration the points of the previous section regarding the nature of the function performed by them, that prosecutors must have the guarantees of reinforced stability and should only be removed from their offices on serious disciplinary grounds or

³³ Consultative Council of European Prosecutors, Opinion No. 9 (2014), Rome Charter, items IV and V.

because their time limit lapsed or the condition of their appointment was fulfilled. Accordingly, the Commission finds that in the instant case the appointment of the alleged victim without any time limit or condition, only generically citing the “needs for service,” was incompatible with the Convention.

56. In this context, the State has not managed to prove that the situation of provisional appointment of the alleged victim for five consecutive years had any specific purpose linked to a delimited timeframe or an operative condition of his appointment. Under the above-cited international standards, the alleged victim was entitled to his removal from office being consistent with the only other acceptable option under said standards, which is, a proceeding in which the right to defense and the principle of legality are respected, inasmuch as there should have been a formal disciplinary proceeding.

57. Based on the proven facts, it is clear that by the nature of the act whereby the alleged victim was removed, he did not have a proceeding that fulfilled the minimum guarantees stemming from the right to a defense and the principle of legality (freedom from *ex post facto* law).

58. By virtue of the foregoing reasoning, the IACHR finds that the State violated Articles 8.1, 8.2 b), 8.2 c) and 9 of the American Convention in connection with Articles 1.1 and 2, to the detriment of Julio Casa Nina.

3.2 The right to a properly reasoned decision³⁴ and the principle of the presumption of innocence³⁵

59. The Commission recalls that the duty to state grounds is one of the “due guarantees” included in Article 8.1 to safeguard the right to due process,³⁶ which consists of “the exteriorization of the reasoned justification that allows a conclusion to be reached”³⁷ and constitutes a right to expect that decisions adopted by domestic bodies that could affect his or her human rights or interest will be duly substantiated; otherwise, they would be arbitrary decisions. Said duty “is a guarantee related to the correct administration of justice, which protects the right of the people to be tried for the reasons established by law and grants credibility to judicial decisions in a democratic society.”³⁸

60. The IACHR has held that a reasoned decision in proceedings of a punitive nature serves a twofold purpose: to show to the parties that they have been heard and, when the decision is subject to appeal, it affords them the possibility to argue against it, and of having such decision reviewed by an appellate body. As the Inter-American Court has held, in disciplinary proceedings, “it is essential to indicate the violation precisely and to submit arguments that allow it to be concluded that the comments provide sufficient grounds to justify removing a judge from a post.” The requirement of providing sufficient grounds for a decision is highly relevant since the purpose of disciplinary oversight is to assess a public official’s or civil servant’s conduct, qualifications and performance. Therefore, the statement of the grounds or the reasoning thereof is the appropriate place to examine the severity of the conduct attributed to the person in question and whether the disciplinary measure is proportionate to that conduct.³⁹

³⁴ Article 8.1 of the Convention establishes that every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.

³⁵ Article 8.2 of the American Convention establishes that every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law.

³⁶ IA Court of HR. Case of Chocrón Chocrón v Venezuela. Preliminary Objection, Merits, Reparations and Costs. Judgment of July 1, 2011. Series C No. 227, par. 118.

³⁷ IA Court of HR. Case of Chaparro Álvarez and Lapo Íñiguez. v. Ecuador. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 21, 2007. Series C No. 170, par. 107.

³⁸ IACHR, Guarantees for the Independence of Justice Operators. Towards strengthening access to justice and rule of law in the Americas, OEA/ser.L/V/II.Doc.44, December 5, 2013, par. 224.

³⁹ IACHR, Guarantees for the Independence of Justice Operators. Towards strengthening access to justice and rule of law in the Americas, OEA/ser.L/V/II.Doc.44, December 5, 2013, par. 225.

61. Additionally, under the principle of the presumption of innocence a person may not be punished while compelling evidence of their liability has not been introduced. According to the Inter-American Court, if evidence against the person is incomplete or insufficient, then he or she may not be convicted, but instead must be acquitted. In this regard, the Court has found that “the principle of presumption of innocence underlies the purpose of the right to a fair trial, in affirming the notion that a person is innocent until proven guilty.”⁴⁰ The Court has also held that the principle of the presumption of innocence is violated if before the accused is found guilty, a judicial decision related to him reflects the opinion that he is guilty.⁴¹

62. In the instant case, the Commission notes that the decision relieving the alleged victim of his post lacks a statement of grounds and only indicates that the appointment of prosecutors is temporary, in keeping with the needs of service and, therefore, it decided “to terminate the appointment of Dr. Julio Casa Nina.” Additionally, in said decision, it notes that it is “without prejudice to the legal actions that may be pertinent because of the complaint and charge that are pending.” In the decision of February 14, 2003, which denied the motion for reconsideration filed by the alleged victim, the Attorney General reiterated that the appointment of prosecutors is temporary and added among her considerations that “as of the date of issuing the aforementioned decision, the appellant has two complaints pending before the Decentralized District Commission of Internal Control.”

63. The Commission underscores that because the grounds of said decisions were not stated, it is impossible to understand the reasons behind the termination of the appointment of the alleged victim. The IACHR notes that merely citing in the recitals section “needs of service” without explaining what it refers to does not fulfill the obligation to state grounds. As was examined above, the act of Mr. Casa Nina’s appointment does not offer minimum safeguards as to timeframe or operative condition to be able to understand the reasons of service supporting his appointment on a provisional basis. This, in addition to the failure to state grounds for removal from office, renders precarious the consequential function performed by Mr. Casa Nina under the rule of law, especially when he was removed without any justified grounds from a post he had been serving in for a considerable period of time.

64. Additionally, in the decision of January 21, 2003, reference is made to a pending complaint and charge, without explaining whether the existence of said complaints was a factor that was taken into account in making the decision. Nonetheless, this would seem to have been made explicit in the decision on reconsideration, which takes into account to support its decision that the alleged victim has pending complaints and charges. That means that the mere existence of the pending complaints or cases, regardless of the decisions that were reached in the context of said proceedings, were factors that could have been taken into account to relieve the alleged victim of his post, which violates the principle of the presumption of innocence. Precisely, the existence of the appointment without minimum safeguards of independence, followed by a removal without statement of grounds and under the premise that it was a “position of trust,” in addition to being incompatible with the aforementioned standards, raises serious doubts about the bearing that the complaints against the alleged victim may have had on the decision-making process. These doubts were not dispelled by the State through a proper statement of grounds.

65. Based on the foregoing considerations, the IACHR finds that the State violated the duty to state grounds and the principle of the presumption of innocence, set forth in Article 8.1 and 8.2 of the American Convention, in connection with Article 1.1 of the same instrument, to the detriment of Julio Casa Nina.

⁴⁰ IACHR, Guarantees for the Independence of Justice Operators. Towards strengthening access to justice and rule of law in the Americas, OEA/ser.L/V/II.Doc.44, December 5, 2013, par. 156.

⁴¹ IACHR, Guarantees for the Independence of Justice Operators. Towards strengthening access to justice and rule of law in the Americas, OEA/ser.L/V/II.Doc.44, December 5, 2013, par. 156.

B. The right to judicial protection⁴²

66. The IACHR recalls that the State has the general obligation to provide effective judicial recourse to persons who claim to be victims of human rights violations (Article 25), which must be substantiated pursuant to the rules of due process of law (Article 8.1). In order for an effective recourse to exist it is not enough for it to be merely provided for by the law but it must be truly suitable to establish whether a human rights violation has been committed, and provide for what is needed to remedy it.⁴³ In assessing the effectiveness of recourses, it must be examined whether the decisions in judicial proceedings have effectively contributed to putting an end to the situation violating the rights, to ensuring non-repetition of the harmful acts and to ensuring the free and full exercise of the rights protected by the Convention.⁴⁴

67. In the instant case, the Commission takes note that the alleged victim availed himself of administrative and constitutional recourses.

68. As to administrative remedies, the Commission recalls that the alleged victim filed a motion for reconsideration with the Attorney General of the Nation, which was denied on February 14, 2003 by said authority, on the grounds that the Mr. Casa Nina's appointment was of a provisional nature and that he failed to disprove the grounds of the decision that removed him from office.

69. With regard to constitutional remedies, the Commission notes that the alleged victim brought an *amparo* suit with the First Specialized Court for Civil Matters of Huamanga, which was denied on April 19, 2005, as it was found that the alleged victim held a provisional post, that the decision made by the Attorney General of the Nation does not constitute a disciplinary measure and that no violation of the Constitution was proven.

70. The alleged victim appealed this decision to the Specialized Chamber for Civil Matters of the Superior Court of Justice of Ayacucho, which denied the appeal on July 11, 2005, inasmuch as it found that the plaintiff sought to allege rights to which tenured prosecutors are entitled.

71. Lastly, the IACHR recalls that the alleged victim also filed a petition for relief for denial of rights with the Constitutional Court, which was found groundless on November 14, 2005, with the Court reiterating that the provisional appointment constitutes a situation that does not give rise to rights other than those inherent to the office.

72. Based on the foregoing, the Commission finds that none of the recourses pursued by the alleged victim was effective to challenge the decision terminating his appointment as Provisional Provincial Deputy Prosecutor of the Judicial District of Ayacucho and review the violations of due process and the principle of legality (freedom from *ex post facto* law), which arose as a consequence of his removal from office, as examined in the instant report.

73. Based on the foregoing reasons, the Commission concludes that the Peruvian State violated the right to judicial protection set forth in Article 25.1 of the American Convention in connection with the obligations established in Article 1.1 of the same instrument, to the detriment of Julio Casa Nina.

⁴² Article 25.1 of the Convention provides that: Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.

⁴³ IA Court of HR, Case of the Dismissed Congressional Employees (Aguado Alfaro et al). Judgment on Preliminary Objections, Merits, Reparations and Costs. Judgment of November 24, 2006. Series C No. 158. Par. 125; IA Court of HR, Case of the Yakyé Axa Indigenous Community. Judgment of June 17, 2005. Series C No. 125. Par. 61; IA Court of HR, Case of the "Five Pensioners." Judgment of February 28, 2003. Series C No. 98. Par. 136.

⁴⁴ IA Court of HR, Case of Ramírez Escobar et al v. Guatemala. Merits, Reparations and Costs. Judgment of March 9, 2018. Series C No. 351, pars. 251-252.

C. Right to participate in government⁴⁵

74. Article 23.1.c establishes the right to have access to public office “under general conditions of equality.” The Court has interpreted this article to mean that “when a judge’s tenure is arbitrarily impaired, the right to judicial independence recognized in Article 8.1 of the American Convention is violated, as is the right of access to public service and tenure, under general conditions of equality, established in Article 23.1.c.”⁴⁶

75. The Commission finds that the above-cited standard is also applicable to prosecutors, in light of the preceding considerations in the instant report to the effect that the guarantees of reinforced stability of judges are also applicable to prosecutors and must also protect the latter in order to ensure independence in the exercise of their office.

76. In the instant case, it has been established that Mr. Casa Nina was removed from his provisional prosecutor position in a proceeding that did not comply with the required minimum guarantees, as described throughout the instant report. In such circumstances and consistent with the criterion mentioned in the preceding paragraph, the Commission finds that the State has also violated Article 23.1 c) of the American Convention, in connection with Article 1.1 of the same instrument, to the detriment of Julio Casa Nina.

V. CONCLUSIONS AND RECOMMENDATIONS

77. The Commission concludes that the Peruvian State is responsible for violation of the right to a fair trial, to freedom from ex post facto law and to judicial protection, as enshrined in Article 8.1, 8.2, 8.2 b), 8.2 c), 9, 23.1 c) and 25.1 of the American Convention, in connection with the obligations established in Articles 1.1 and 2 of the same instrument, to the detriment of Julio Casa Nina.

78. Based on the analysis and conclusions of the instant report,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, RECOMMENDS TO THE PERUVIAN STATE,

1. To reinstate the victim in a similar position to the one he served in, with the same remuneration, social benefits and a comparable rank to the one he would be entitled to today had he not been removed. In the event that the victim should not wish to be reinstated or there are objective reasons preventing his reinstatement, the State shall pay compensation for this reason, which is independent from reparations relating to the material or moral damages included in recommendation number two.
2. To provide full reparation for the consequences of the violations declared in the instant report, including both tangible and intangible damages.
3. To adopt necessary measures of non-repetition to prevent similar events from taking place in the future. In particular, ensure application of the rules of due process in the context of the proceedings for the dismissal or removal of prosecutors, regardless of whether or not they are provisional.
4. To adopt the necessary measures so that domestic law and relevant practice conform to clear criteria and ensure guarantees in the appointment, tenure and removal of prosecutors, pursuant to the criteria set forth in the instant report.

⁴⁵ Article 23 of the American Convention establishes, in the relevant portions, that: 1. Every citizen shall enjoy the following rights and opportunities: (...) c. to have access, under general conditions of equality, to public service of his country. 2. The law may regulate the exercise of the rights and opportunities referred to in the preceding paragraph only on the basis of age, nationality, residence, language, education, civil and mental capacity, or sentencing by a competent court in criminal proceedings.

⁴⁶ IA Court of HR. Case of López Lone et al v. Honduras. Preliminary Objection, Merits, Reparations and Costs. Judgment of October 5, 2015. Series C No. 302, par. 192.

