

REPORT Nº 2/05
PETITION 11.618
ADMISSIBILITY
OSCAR ALBERTO MOHAMED
ARGENTINA
February 22, 2005

I. SUMMARY

1. The present report addresses the admissibility of petition 11.618. The Inter-American Commission on Human Rights (hereinafter "Inter-American Commission," "Commission" or "IACHR") initiated processing pursuant to receipt of a petition dated March 18, 1996, filed by Oscar Alberto Mohamed and attorney Roque J. Mantione (hereinafter "the petitioners") against the Republic of Argentina (hereinafter "Argentina" or "State").

2. The petitioners indicate that Mr. Mohamed was involved in a traffic accident in 1992, which left one person dead, and was subsequently tried for the crime of negligent homicide. He was acquitted at first instance. On appeal, he was convicted and sentenced to a three-year suspended prison term, and disqualified from driving any vehicle for eight years. The petitioners contend that the court of second instance based its conviction on legislation adopted subsequent to the facts. Mr. Mohamed sought to challenge his conviction by filing extraordinary appeals, but the petitioners indicate that these remedies were rejected absent any review of the merits of his claims. The petitioners contend that the facts alleged constitute violations of the right to due process and to be free from ex post facto laws under Articles 8 and 9 of the American Convention, in conjunction with the general guarantees under Article 1 of that instrument.

3. The State, for its part, indicates that Mr. Mohamed was convicted in accordance with the requirements of national and international law. It maintains that Mr. Mohamed had access to two instances of review, namely before the courts of first and second instance. The State considers that neither national nor international law required additional instances of review following Mr. Mohamed's conviction at second instance. The State maintains that the conviction was imposed in accordance with the terms of its Criminal Code, adopted prior to the facts. The State argues that the petition is inadmissible for failing to set forth a cognizable violation. It further argues that the Commission is not competent to act as a "fourth instance" of review with respect to questions of fact or law that pertain to the jurisdiction of the national legal system.

4. As set forth in this Report, having examined the contentions of the parties on the question of admissibility, and without prejudicing the merits of the matter, the Commission has decided to declare the petition admissible with respect to the alleged violations of Articles 8, 9 and 25 of the American Convention, in connection with the general obligations enshrined in Articles 1 and 2 of that treaty, to transmit this Report to the parties, to continue with the analysis of the merits of the case, and to publish this Report and include it in its Annual Report to the General Assembly of the Organization of American States.

II. PROCESSING BEFORE THE COMMISSION

5. The Commission acknowledged receipt of the petition, received on April 1, 1996, by note of April 8, 1996. Processing of the petition was initiated on April 29, 1996, the date on which the pertinent parts of the petition were transmitted to the State with the request that all relevant information be presented within 90 days.

6. The petitioners presented a brief communication on June 25, 1996, which was incorporated in the file. The State requested extensions to present its response by notes of July 23, August 20 and September 25, 1996. These requests were granted for 30, 30 and 21 days, respectively. The Government presented its response on October 24, 1996, and the petitioners presented their observations on that response by note of November 25, 1996.

7. By notes of January 15, February 17 and March 31, 1997, the State requested additional time to respond to the petitioners' observations, and was in each instance granted 30 days. The State presented its response on May 15, 1997. The petitioners presented observations on that response on June 27, 1997.

8. By note of August 27, 1998, the State presented additional observations. On November 3, 1998, the petitioners requested an additional 15 days to respond. The request was granted, and the additional observations were received on December 7, 1998.

9. The State presented observations in response on February 17, 1999. The petitioners presented additional observations on April 20, 1999. On July 8, 1999, the State requested an extension in order to file additional observations, and was granted 30 days. The State presented those observations on August 18, 1999. The petitioners submitted a response on October 28, 1999.

10. The Commission received additional observations from the State on January 10, 2000. By note of February 10, 2000, the petitioners requested an additional 30 days to present a response. The request was granted and the response was received on March 22, 2000. On April 11, 2000, the State requested an extension to respond, and on April 28, 2000 presented a brief response. The petitioners presented observations on July 6, 2000. On August 24, 2000, the State requested an extension to respond. By note of August 31, 2000, the State presented a brief response, and by note of October 26, 2000 presented additional observations. Finally, by note of September 10, 2002, the petitioners requested an update on the processing of the petition.

III. POSITION OF THE PARTIES

A. The Petitioners

11. The petitioners indicate that, on March 16, 1992, Oscar Mohamed, a bus driver in the City of Buenos Aires, was involved in a traffic accident while working on his line. While Mr. Mohamed was driving his bus through an intersection, he struck a pedestrian, who died of her injuries. Mr. Mohamed was subsequently charged and tried for negligent homicide (*homicidio culposo*) under the Criminal Code. The judgment at first instance, issued on August 30, 1994, absolved Mr. Mohamed of criminal responsibility.

12. The prosecution and the private claimant appealed the acquittal before the First Chamber of the Chamber of Appeals for Criminal and Correctional Matters. The defense

appealed only with respect to the allocation of attorneys' fees. In its sentence of February 22, 1995, the First Chamber revoked the sentence at first instance, sentenced Mr. Mohamed to a three-year suspended prison sentence, and disqualified him from driving any vehicle for eight years.

13. The defense filed an extraordinary appeal based on claims that the conviction violated constitutional guarantees. Among the grounds raised was that the transit regulations invoked as the basis for the conviction and sentencing had not been in effect at the time of the traffic accident. In its decision of July 4, 1995, the First Chamber of the Chamber of Appeals indicated that, while the defense had presented what was in effect a technical mistake, the conviction had been based on a principle of objective responsibility that was not subject to dispute; accordingly, the Chamber declined to accept the appeal for review. The defense then presented an extraordinary appeal directly before the Supreme Court of the Nation. In a decision of September 19, 1995, the Supreme Court rejected the appeal as inadmissible.

14. The defense then filed an extraordinary appeal before the Supreme Court seeking revocation of the challenged decision on the basis of the principle of legality and the right to be heard, set forth in the Constitution, the Universal Declaration of Human Rights and the American Convention. That appeal was dismissed via a decision of October 19, 1995, indicating that the challenged decision was not subject to such an appeal. The petitioners note in this regard that the very same composition of the Supreme Court had, in 1992, accepted just such a request for revocation.

15. The petitioners consider that the process carried out against Mr. Mohamed violated Article 9 of the American Convention, which prohibits the imposition of ex post facto laws. They contend that the First Chamber of the Chamber of Appeals based its conviction on violations of three provisions of the transit regulations of 1992. Those regulations were issued on April 27, 1992, subsequent to the traffic accident that took place on March 16, 1992. They consider that the penalization of conduct as illegal at the time of sentencing, when it was not illegal at the time of the facts, constitutes a violation of Article 9 of the American Convention.

16. The petitioners underline that, when the First Chamber of the Court of Appeals rejected their extraordinary appeal, it admitted that it had made a "material error" in referring to the regulations of 1992, which had not been in force at the time of the accident. The Chamber went on, however, to indicate that the penalty imposed had been based principally on an objective duty of care under the Criminal Code. The petitioners maintain that no such crime exists under the national legal order. The petitioners emphasize that Argentine law contains no express norm indicating that a person who violates the "objective duty of care" shall be convicted and penalized, and that the legal system does not permit the application of law by analogy or in the abstract.

17. The petitioners maintain that the Chamber of Appeals applied the Criminal Code not through a general principle, but by establishing violations of the transit regulations of 1992. Article 84 of the Criminal Code provides for a penalty ranging from six months to three years for any person who "through imprudence, negligence or lack of expertise in his or her art or profession, or failure to observe the regulations or duties under his or her responsibility, causes the death of another..." (por imprudencia, negligencia, impericia en su arte o profesión o inobservancia de los reglamentos o los deberes a su cargo, causare a otro la muerte). The petitioners consider that the

decision of the Chamber of Appeals demonstrates that it was based on failure to observe regulations. While the State argues at one point that the terms of the 1992 regulations reflect those of the prior regulations that were in effect at the time of the traffic accident, the petitioners maintain that the properly applicable regulations were not cited in the sentence, and were not in any case equivalent to those adopted subsequent to the accident. The petitioners further note that the general norms referred to by the State, dating back to 1945, did not in fact apply to the facts in question. They maintain that the facts of the accident fall under more specific subsequent norms applicable to intersections with traffic lights.

18. With respect to Article 8, the petitioners indicate that, in principle, the appropriate remedy to question the kind of constitutional violations they presented would have been review by the Supreme Court of the Nation. They maintain that, under the terms of Article 8 of the American Convention, Mr. Mohamed had a right to have his conviction reviewed. They contend that the Supreme Court's rejection of their appeal, absent examination of the merits, violated Mr. Mohamed's right to be heard with due process. They note that the Supreme Court rejected the extraordinary appeal as "insubstantial and lacking transcendence" ("*insustancial o falta de trascendencia*"), when what had been placed before it was a violation of rights under both national and international law. The petitioners note that, when they filed a further remedy seeking to revoke that decision of rejection, the Supreme Court rejected the motion as inapplicable. They indicate that the Supreme Court itself had accepted just such an appeal in another case in 1992. They contend that this further demonstrates that Mr. Mohamed did not enjoy the right to be fairly heard before the Argentine courts.

B. The State

19. The State maintains that there was no *ex post facto* imposition of liability in the present case, and that the judicial proceedings respected the requirements of due process. The State maintains that the petition is inadmissible for failing to characterize a violation of a right protected under the American Convention.

20. With respect to the right to freedom from *ex post facto* laws, the State affirms that Mr. Mohamed was condemned, not on the basis of transit regulations, but on the basis of the codification of negligent homicide set forth in Article 84 of the Criminal Code. Mr. Mohamed was convicted at second instance on the basis of having failed to observe his responsibilities as a driver, rules of objective care that are a matter of international practice. The State notes that the conduct in question, namely having passed another vehicle at a crossroads, is prohibited precisely to preserve the visibility and control of all drivers. This conduct was prohibited in general under the terms of Article 84 of the Criminal Code, in full effect at the time of the facts.

21. The State notes that, while it was unfortunate that the Chamber of Appeals cited transit regulations that were adopted subsequent to the traffic accident in its sentence, those norms referred both to a generally applicable duty of care, and to principles reflected in the transit regulations that had been in force at the time of the accident. The State refers generally in this regard to the transit regulations adopted in 1945 and revalidated in 1985, setting forth duties on the part of drivers. The State refers to Article 65 of the 1945 regulations, which concern the duty of drivers to maintain control over their vehicles, and to Article 47, which describes pulling forward in an intersection as a grave offense where this would disrupt traffic or place third parties at risk. The State underlines that the error of the Chamber of Appeals in no way

alleviated Mr. Mohamed of his responsibilities as a driver, given that both sets of transit regulations prohibited the conduct in question, and that there clearly existed certain general duties of care at the time of the accident.

22. With respect to the right to be heard under Article 8, the State maintains that Mr. Mohamed was prosecuted through two instances in which all guarantees were observed. Accordingly, it considers that the terms of Article 8 were fully respected. The State notes that the extraordinary appeal filed subsequent to Mr. Mohamed's conviction was rejected for failing to present a federal question or an arbitrary sentence. The State cites Article 2 of Protocol 7 to the European Convention in support of its contention that international law does not require a further instance of review in the case of convictions originating at the appellate level.

23. The State maintains that the petition is inadmissible for failing to state claims characterizing the violation of a right protected under the American Convention. Further, the State notes that it corresponds in the first instance to the national courts to interpret and apply national law, and that the Commission is not competent to act as a fourth instance in such matters.

IV. ANALYSIS OF ADMISSIBILITY

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

24. In accordance with the terms of Article 44 of the American Convention, the petitioners have standing to present a petition before the Commission. The petition under study identifies as the alleged victim an individual with respect to whom the Argentina State had committed itself to respect and guarantee the rights protected in the American Convention. With respect to the State, the Commission observes that Argentina is a State Party to the American Convention, having duly deposited its instrument of ratification on September 5, 1984. Accordingly, the Commission has the competence *ratione personae* to examine the claims presented.

25. The IACHR has jurisdiction *ratione loci* to consider the petition, because the alleged violation of rights protected in the American Convention occurred within the territory of Argentina, a State party to that treaty. The Inter-American Commission also has jurisdiction *ratione temporis* because the obligation to respect and guarantee the rights protected in the American Convention was already in effect for the State at the time the alleged events took place. Finally, the Commission has jurisdiction *ratione materiae* because the petition complains of violations of human rights protected by the American Convention.

B. Other requirements for the admissibility of the petition

1. Exhaustion of domestic remedies

26. Article 46 of the American Convention specifies that, in order for a case to be admitted, "remedies under domestic law [must] have been pursued and exhausted in accordance with generally recognized principles of international law." In the present case, the parties accept and the record confirms that the full range of applicable domestic remedies was invoked. The State has filed no objection to the effect that additional remedies should have been invoked, or that those presented were invoked

improperly. Accordingly, the Commission accepts that the requirements under Article 46 have been met.

2. Time period for submission of the petition

27. In accordance with Article 46(1)(b) of the Convention, a petition must be presented in a timely manner to be admitted, namely, within six months from the date on which the complaining party was notified of the final judgment at the domestic level. In the instant case, the final remedy attempted was the request for revocation dismissed by the Supreme Court by means of a decision dated October 19, 1995. The petitioners indicate that they were notified of this decision on October 24, 1995. In view of the petitioners' contention that the Supreme Court had accepted a request for revocation in another case, a contention the State has not challenged, the presentation of the appeal for revocation appears to have offered at least some possibility of relief. The State, for its part, has raised no challenge with respect to the adequacy of the particular remedy, or compliance with this requirement under Article 46(1)(b). Accordingly, the Commission considers this requirement to have been met.

3. Duplication of proceedings and *res judicata*

28. Article 46(1)(c) sets forth that admission of a petition is subject to the requirement that the subject "is not pending in another international proceeding for settlement," and Article 47(d) of the Convention stipulates that the Commission shall not admit a petition which "is substantially the same as one previously studied by" it "or by another international organization." In the present case, the parties have not claimed and the proceedings do not indicate the existence of either of these circumstances of inadmissibility.

4. Characterization of the facts alleged

29. With respect to the admissibility of petitions, the Commission has to determine whether the facts stated in the petition tend to establish a violation of rights set forth in the American Convention, as required under Article 47(b), or whether the petition must be dismissed as "manifestly groundless" or "obviously out of order" under Article 47(c).

30. With respect to the State's contention that the petition should be deemed inadmissible for failing to characterize a violation of a protected right, as the Commission has previously indicated, it is not appropriate at this stage of proceedings to determine whether the American Convention was actually violated. For purposes of admissibility, the IACHR must determine whether the facts as set forth could characterize a possible violation, as stipulated in Article 47 of the Convention. The criterion for assessing this is different from that which must be followed in deciding the merits of a complaint. The Commission must conduct a *prima facie* assessment to determine whether the complaint demonstrates an apparent or potential violation of a right protected by the Convention. This is a summary analysis, which does not imply any prejudgment as to the merits of the dispute. The distinction between the examination required for declaring admissibility and that required for determining a violation is reflected in the IACHR's own rules of procedure, which clearly differentiate these two stages.

31. The proceedings to this point set forth questions of law, insofar as the terms of Article 8(2)(h) are concerned, and questions of fact and law in terms of the claims raised with respect to Article 9. The claims presented are not so manifestly groundless as to preclude their admissibility.

32. With respect to the State's argument that review of this petition would require the Commission to act as a "fourth instance" beyond the sphere of its competence, it is true that the IACHR is "not competent to review judgments handed down by national courts acting within the scope of their jurisdiction and observing due judicial guarantees."¹ More specifically, the Commission "cannot serve as an appellate court to examine alleged errors of internal law or fact that may have been committed by the domestic courts acting within their jurisdiction."² However, within its mandate to ensure the observance of the rights set forth in the Convention, the Commission is necessarily "competent to declare a petition admissible and rule on its merits when it portrays a claim that a domestic legal decision constitutes a disregard of the right to a fair trial," or alleges other violations of rights protected there under.³ The Commission finds in the present case that the petitioners have stated claims concerning alleged violations of the right to appeal a judgment to a higher court, as well as to freedom from ex post facto laws, which, if consistent with other requirements and shown to be true, could tend to establish the violation of rights protected under Articles 8, 9 and 1(1) of the American Convention.

33. Bearing in mind the claims raised concerning the right to judicial guarantees, protection and review, and the principle of *jura novit curia*, in its decision on the merits the Commission will, to the extent relevant, also examine the potential application of Article 25 of the American Convention, concerning the right to judicial protection, and Article 2, concerning the obligation to give domestic legal effect to the rights set forth therein.

V. CONCLUSIONS

34. The Commission concludes that it is competent to take cognizance of the instant case and that the petition is admissible, pursuant to Articles 46 and 47 of the American Convention. Based on the factual and legal arguments set forth above, and without prejudging the merits of the case,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

DECIDES:

1. To declare the present case admissible with respect to the alleged violation of the rights recognized in Articles 8, 9, 25, 1(1) and 2 of the American Convention.
2. To notify the parties of this decision.
3. To continue with the analysis of the merits of the case.

1 See generally, IACHR, Report N° 101/00, case 11.630 Arauz et al. (Nicaragua), Oct. 16, 2000, in *Annual Report of the IACHR 2000*, para. 56, citing IACHR, Report N° 39/96, case 11.673 Marzioni (Argentina), Oct. 15, 1996, in *Annual Report of the IACHR 1996*, paras. 50-51.

2 IACHR, Report N° 7/01, case 11.716 Güelfi (Panama), Feb. 23, 2001, in *Annual Report of the IACHR 2000*, para. 20, quoting Marzioni, *supra*, para. 51.

3 *Id.*

4. To make this report public, and publish it in its Annual Report to the General Assembly of the OAS.

Done and signed at the headquarters of the Inter-American Commission on Human Rights, in Washington, D.C., on the 22nd of February, 2005. (Signed): José Zalaquett, President; Clare Kamau Roberts, First Vice-President; Susana Villarán, Second Vice-President; Commissioners Evelio Fernández Arévalos, Paulo Sérgio Pinheiro, Freddy Gutiérrez Trejo, and Florentín Meléndez.