



INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

Organization of American States

REPORT Nº 71/99*

Admissibility

CASE 11.656

MARTA LUCÍA ÁLVAREZ GIRALDO

COLOMBIA

May 4, 1999

I. SUMMARY

1. On May 18, 1996, Marta Lucía Álvarez Giraldo (hereinafter "the victim" or "the petitioner") presented a complaint against the Republic of Colombia (hereinafter "the State" or "the Colombian State") to the Inter-American Commission on Human Rights (hereinafter "the Commission") alleging violations of rights protected under Articles 5(1) (2), 11(1), and 24 of the American Convention on Human Rights (hereinafter the "Convention" or the "American Convention").

2. The petitioner alleges that her personal integrity, honor and equality are violated by the prison authorities' decision not to authorize the exercise of her right to intimate visits because of her sexual orientation. The State argues that allowing homosexuals to receive intimate visits would affect the internal disciplinary regime of prison establishments and that Latin American culture has little tolerance towards homosexual practices in general.

3. After analyzing the positions of both parties, the domestic remedies available to the petitioner, and all other admissibility requirements set forth in Articles 46 and 47 of the Convention, the Commission finds the case admissible.

II. PROCESSING BY THE COMMISSION

4. On August 1, 1996, the Commission opened case 11.656 and forwarded the pertinent parts of the complaint to the State, giving it 90 days in which to present its reply. The State presented its reply on November 21, 1996, and this was duly forwarded to the petitioner. On October 15, 1996, the petitioner presented additional information. On February 6, 1997, the State sent additional information, and on March 5, 1997, the petitioner sent a further communication. The pertinent parts of each communication were duly forwarded to the opposing party.

5. On September 23, 1997, the Commission placed itself at the disposal of the parties with a view to reaching a friendly settlement of the matter. The petitioner presented her reply on October 21, 1997. On November 18, 1997 and April 2, 1998, the State requested successive extensions in order to examine the petitioner's proposals. Finally, on August 12, 1998, the State rejected the possibility of a friendly settlement. On November 5, 1998, the petitioner, through her legal representative, presented written observations which were duly forwarded to State.

III. POSITIONS OF THE PARTIES

A. THE POSITION OF THE PETITIONER

6. During the time pertinent to this complaint, the petitioner had been serving a lower court prison sentence in the Dosquebradas "La Badea" Women's Prison, in Pereira, since March 14, 1994. The legislation in force in Colombia enshrines the right of inmates to intimate visits. Therefore Marta Lucía Alvarz Giraldo requested the Ombudsman for Pereira to present a request to the competent authorities for permission to be visited by her female life partner. On July 26, 1994, the 33rd Prosecutor's Office in Santuario, the judicial office that was carrying out the criminal investigation at the time, issued the corresponding authorization. This decision was communicated to the Dosquebradas Women's Prison Directorate on July 27, 1994, and ratified in official letter N° 635, dated August 19, 1994.

7. The petitioner alleges that, on receiving the official letter confirming her authorization to receive intimate visits, the Director of the Prison requested that the Sectional Director of the Prosecutor's Office review the decision of the 33rd Prosecutor's Office in Santuario. In view of this situation, the Ombudsman for Pereira sent the decision of the 33rd Prosecutor's Office authorizing the intimate visit to the Director of the "La Badea" Women's Prison. The following day, the Director of the prison applied to the competent judge of the Santuario Circuit for authorization to transfer the petitioner to another prison. On October 20, 1994, the Ombudsman for Pereira requested information on the matter, since the Director of the Women's Prison had still not issued a decision on the request for an intimate visit. In response, he was told that the petition had been forwarded to the Regional Directorate of the National Penitentiary and Prison Institute (hereinafter "INPEC").

8. In response, the Ombudsman for Pereira filed a *tutela* (a motion for protective relief) on behalf of the petitioner. The Criminal Court of Dosquebradas allowed the motion on the basis that the petitioner's right to petition had been violated. Consequently, the Director of the Women's Prison of Pereira was ordered to decide on the petitioner's request. On February 7, 1995, the Director of the Prison issued a decision on the petition, denying authorization for the intimate visit on the basis of the prisoner's sexual orientation.

9. The Ombudsman for Pereira appealed the Director's decision, which was upheld on June 13, 1995, by the Criminal Court of the Santa Rosa de Cabal Circuit. Finally, on May 22, 1995, the Constitutional Court refused to review the decision on the action for protective relief.

10. With regard to the legal arguments on the merits, the petitioner argues that the applicable Colombian legislation does not take exception to intimate visits for prisoners on the basis of their sexual orientation. She maintains that there are no provisions allowing a distinction to be made between the right of a heterosexual prisoner to intimate visits and that of a homosexual. She argues, therefore, that the penitentiary authorities have engaged in discriminatory treatment that is not authorized by domestic law and that, from any standpoint, violates Articles 5, 11, and 24 of the American Convention.

B. THE POSITION OF THE STATE

11. The State has not questioned the admissibility of the case. As regards the merits of the case, the State initially sought to justify its refusal to allow the intimate visit on the grounds of security, discipline, and morality in penitentiary institutions.

12. Subsequently, the Colombian State recognized the legitimacy of the complaint presented, based on a report of the Ministry of Justice and Law acknowledging that the petitioner is being treated in an inhuman and discriminatory manner. Nevertheless the State maintained the arguments presented in support of its initial position, that the prohibition is based upon a deeply rooted intolerance in Latin American culture of homosexual practices.

13. In support of its position, the State cited considerations regarding prison policy and personal behavior. In its view, accepting the petitioner's request would involve "applying an exception to the general banning of such [homosexual] practices which would affect the internal discipline of prisons." It also referred to the alleged "bad behavior" of the

inmate, who was apparently involved in some incidents relating to the functioning of the human rights committee of the prison.

IV. ANALYSIS

A. Competence

14. The Commission is competent to examine the petition in question. The petitioner has legal standing to appear and has presented claims regarding noncompliance with provisions of the Convention by a State party. When the events alleged in the petition took place, the obligation to respect and guarantee the rights set forth in the Convention was already in force for the Colombian State.^[1] The Commission will now determine the admissibility of this case in the light of the requirements set forth in Articles 46 and 47 of the Convention.

B. Admissibility requirements

a. Exhaustion of domestic remedies

15. The Commission finds that the appropriate administrative and judicial actions were taken to correct the alleged violations. Domestic remedies were effectively exhausted with the decision of the Constitutional Court of Colombia not to review the decision on the *tutela*. Therefore, the Commission finds that the admissibility requirement set forth in Article 46(1)(a) has been met.

b. Timeliness

16. The petition was filed on May 18, 1996. Article 46(1)(b) of the American Convention establishes that petitions must be presented within a period of **six months from the date on which the party alleging violation of his rights was notified** of the final judgment.^[2]

17. The final judgment in this case, the decision of the Constitutional Court not to review the *tutela* decision, was rendered on May 22, 1995.

18. The petitioner maintains that she was never notified of the judgment of the Constitutional Court and therefore the six-month period established in Article 46(1)(b) should not be calculated as from May 22, 1995. This allegation has not been disputed by the State. Indeed, as the Commission has confirmed in previous decisions,^[3] the six-month period established in Article 46(1)(b) should be calculated from notification of the final judgment. Given that this judgment was never formally notified, the requirement could not have been satisfied.

19. The Commission also observes that, despite having had several opportunities to do so, the State has never disputed compliance with this requirement, which amounts to a tacit waiver of the right to object to the admissibility of the case on this basis. Consequently, it must be concluded that the time limit stipulated in Article 46(1)(b) does not apply to this case.

c. Duplication of proceedings and *res judicata*

20. The Commission finds that the matter addressed in the petition is not pending settlement before another international organ and is not substantially the same as any matter previously examined by this or any other international organization. Therefore, the requirements set forth in Articles 46(1)(c) and 47(1)(d) have been met.

d. Colorable claim of violation

21. The Commission finds that, in principle, the claim of the petitioner refers to facts that could involve, *inter alia*, a violation of Article 11(2) of the American Convention in so far as they could constitute an arbitrary or abusive interference with her private life. In the merits phase, the Commission will determine the scope of this concept and the protection to be afforded to persons legally deprived of their liberty.

22. Therefore, given that the claim is not manifestly groundless or out of order, the Commission finds that the requirements provided for in Articles 47(b) and 47(c) of the Convention have been met.

VI. CONCLUSIONS

23. The Commission concludes that it is competent to hear this case and that it is admissible pursuant to Articles 46 and 47 of the Convention.

On the basis of the legal and factual arguments presented above, and without prejudging the merits of the case,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS DECIDES:

1. To declare this case admissible;
2. To send this report to the Colombian State and to the petitioner;
3. To continue analyzing the merits of the case, including the scope and meaning of Article 11(2) of the American Convention;
4. To reiterate its offer to place itself at the disposal of the parties with a view to reaching a friendly settlement based on respect for the rights protected in the American Convention; and to invite them to present their positions on such a possibility; and
5. To publish this decision and include it in the Annual Report to the General Assembly of the OAS.

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* Commissioner Alvaro Tirado Mejía, a Colombian national, did not participate in the discussion and decision of this report as required by Article 19(2)(a) of the Commission's Regulations.

[1] Colombia ratified the American Convention on Human Rights on July 31, 1973.

[2] Emphasis added.

[3] *Report 11/96, Case 11,230, Chile, IACHR Annual Report 1996*, paras. 34 and 35.