

REPORT No. 5/12
CASE 12.315
ADMISSIBILITY
CARLOS ALBERTO FERNÁNDEZ PRIETO AND CARLOS ALEJANDRO TUMBEIRO
ARGENTINA
March 19, 2012

I. SUMMARY

1. On July 30, 1999, the Inter-American Commission on Human Rights (hereinafter “the Inter-American Commission,” “the Commission,” or “the IACHR”) received a petition from Sandra E. Arroyo Salgado, a lawyer with the National Public Defender’s Office, on behalf of Carlos Alberto Fernández Prieto, then 52, against the Argentine Republic (hereinafter “Argentina” or “the State”), in which attorney Patricia A.G. Azzi, Official Public Defender in Mar del Plata, subsequently joined as co-petitioner.

2. On March 31, 2003, the Commission received a petition from attorney Eleonora Devoto, Official Public Defender with the Argentine National Public Defender’s Office (hereinafter referred to jointly with the above-mentioned persons as “the petitioners”) on behalf of Carlos Alejandro Tumbeiro. In communications of October 31 and November 15, 2005, the National Public Defender’s Office asked the IACHR to join Mr. Tumbeiro’s petition with Mr. Fernández Prieto’s petition, since both complaints involved similar cases of illegal arrest and infringement of the rights to personal freedom, due process of law, privacy, and freedom of movement within the national territory, as well as the principle of legality, representing violations by the State of Articles I, V, XVIII, and XXV of the American Declaration of the Rights and Duties of Man and Articles 7, 8, 11, and 25 of the American Convention on Human Rights (hereinafter “the American Convention” or “the Convention”), in conjunction with Article 1(1) thereof.

3. On September 24, 2007, the Commission forwarded Mr. Tumbeiro’s petition to the State and informed it that, acting under Article 29(1)(d) of its Rules of Procedure, the Commission had decided to join this petition with Mr. Fernández Prieto’s petition, sent to the State on August 8, 2000, because they addressed similar facts. It informed the petitioners of its joinder decision on the same date.

4. The petitions indicate that Carlos Alberto Fernández Prieto and Carlos Alejandro Tumbeiro were arrested on a public road without a warrant, the former on May 26, 1992 and the latter on January 15, 1998. The petitioners assert that both arrests were based solely on the alleged victims’ supposedly suspicious behavior and that they were tried and convicted in criminal proceedings as a result of these unlawful arrests.

5. The State maintains that the courts involved in Mr. Fernández Prieto’s case accepted the legality of the police procedure after having duly considered the issues surrounding the existence or non-existence of suspicious conditions validating his arrest. The State asserts that Mr. Fernández Prieto had all the procedural rights and that the petitioners are petitioning the Commission to review domestic judgments that were unfavorable to the alleged victim. In the view of the State, the case should therefore be declared inadmissible. With respect to Mr. Tumbeiro’s case, the State did not present any arguments regarding its admissibility and expressed interest in creating a space for dialogue with a view to a friendly settlement, provided that it was divided from Mr. Fernández Prieto’s petition. In this connection, it should be noted that the petitioners have asserted the importance of keeping the petitions joined, with the result that no friendly settlement proceedings have been initiated.

6. After analyzing the positions of the parties, the Inter-American Commission concludes that it is competent to rule on the claim submitted by the petitioners, which satisfies the provisions of Article 46 of the American Convention and is admissible under Articles 7, 8, and 25 thereof, in conjunction with Articles 1(1) and 2 of that instrument, but not with respect to Article 11. Accordingly, it decides to notify the parties, to continue with the analysis of merits with respect to the aforementioned alleged violations, to publish this report of admissibility, and to include it in its Annual Report to the General Assembly of the OAS.

II. PROCEEDINGS BEFORE THE COMMISSION

7. Carlos Alberto Fernández Prieto's petition was lodged with the then Buenos Aires office of the OAS on July 12, 1999 and was received by the Commission on the 30th of that month. The petitioners submitted additional information in November and December 1999. The IACHR forwarded the relevant portions of the petition to the Argentine State on August 8, 2000 and asked it to submit a reply within 90 days. The State submitted its comments on December 18, 2000. The Commission forwarded this reply to the petitioners on December 26, 2000.

8. The petitioners sent additional comments regarding the case of Carlos Alberto Fernández Prieto in communications received on February 26, March 29, May 10,¹ September 5, October 9, and 30 November, 2001; on September 20 and October 22, 2002²; on January 16, March 13, June 18, and October 7, 2003; on January 9, 2004; on October 4, 2005, and on October 11, 2006. All were duly forwarded to the State.

9. The State submitted additional comments regarding this petition on April 27, May 29, August 8, October 5, November 28, 2001; on May 31, and November 5, 2002; on January 24, 2003; on May 30, 2005, and on June 15, 2006, all of which were duly forwarded to the petitioners.

10. Additionally, on March 31, 2003, the Commission received a petition on behalf of Carlos Alejandro Tumbeiro from the attorney Eleonora Devoto, Official public defender with the Argentine National Public Defender's Office, and on October 31 and November 15, 2005, the National Public Defender's Office asked the IACHR to join Mr. Tumbeiro's petition with Mr. Fernández Prieto's petition. On September 24, 2007, the Commission forwarded Mr. Tumbeiro's petition to the State and informed it that, acting under Article 29(1) of its Rules of Procedure, the Commission had decided to join this petition with Mr. Fernández Prieto's petition, which it had notified to the State on August 8, 2000, because they addressed similar facts. It informed the petitioners of its joinder decision on the same date.

11. On November 29, 2007, the State requested an extension for submitting comments on Mr. Tumbeiro's petition, which was granted, and it sent its reply on March 11, 2009. In this reply, it asked the Commission to separate the petitions. This information was forwarded to the petitioners, who indicated in a communication of July 21, 2009 that "such division was inappropriate, given that both cases involve similar facts [...], which, furthermore, reveal an identical pattern of conduct [by the State]." On July 20, 2010, the petitioners sent additional comments. Both communications were duly forwarded to the State.

12. The State submitted additional information on June 13, 2011, reiterating its proposal to create a space for dialogue with a view to exploring the possibility of a friendly settlement in the Carlos Alejandro Tumbeiro case, as well as its request to separate the petitions. This communication was forwarded to the petitioners, who, in a document received on September 30, 2011, reiterated their position on the importance of keeping the petitions joined, owing to their "factual and legal similarity."

III. POSITIONS OF THE PARTIES

A. Petitioners' position

1. Re. Carlos Alberto Fernández Prieto

13. The petitioners recount that on May 26, 1992, officers of the Buenos Aires police force stopped a car in which Mr. Fernández Prieto and two others were traveling, for "suspicious behavior."

¹ In this communication, the petitioners provided the Commission with three expert opinions by doctors Alejandro Carrió, Héctor Mario Magariños, and Juan Carlos Wlasyc.

² In this communication, the petitioners reported that on September 12, 2002 the Argentine Supreme Court had fined professor and judge Héctor Mario Magariños for the opinion on the Fernández Prieto case which they had submitted to the Commission.

14. They add that the only justification given for arresting Mr. Fernández Prieto was suspicious behavior, which had not even been described by the police officers. They indicate that, according to the arrest and seizure report, after stopping and identifying the three suspicious subjects, who produced valid documents proving their identity, the officers called over two witnesses and searched the vehicle, inside which they found six marijuana bricks. They were immediately taken to the police station, where the items were seized and the occupants of the car, arrested. They add that, according to the police report, the accused were held in incommunicado detention. They also indicate that when making a statement during questioning, Mr. Fernández Prieto was not informed of his right to speak freely and confidentially with an appointed lawyer before taking such action.

15. As a result of this incident, criminal proceedings were initiated against Carlos Alberto Fernández Prieto, and on July 19, 1996 he was sentenced to five years in prison and a fine of 3,000 pesos for transportation of narcotic substances. His defense appealed the decision, arguing as before the unlawful nature of the arrest and, consequently, the subsequent investigations. The Mar del Plata Federal Court of Appeals upheld the lower court decision. In response, Mr. Fernández Prieto's defense filed an extraordinary federal appeal (*recurso extraordinario federal*), repeating its argument that the issues transcended individual interest and directly affected the interests of the community. The appeal was denied. After hearing the application for reconsideration of dismissal (*recurso de queja*), the Argentine Supreme Court upheld the arrest and police seizure, leaving Mr. Fernández Prieto's sentence standing.

16. The petitioners allege that at no point in the proceedings did the police indicate that this was a case of *flagrante delicto* or that they had the strong evidence of guilt required by national law, nor did they indicate the circumstances that had led them to consider Mr. Fernández Prieto's behavior suspicious and ultimately arrest him. They maintain that the courts' validation of these actions prevented any effective review of the either lawfulness or the reasonableness of these coercive measures. The arrest and search without warrant were arbitrary and unlawful, and grave violations of fundamental rights.

17. They also allege that the courts that heard the case failed to give substantial consideration to the arguments of Mr. Fernández Prieto's defense or respond to the serious grievances reported by the defense in its appeals. The petitioners invoke the "fruit of the poisonous tree" doctrine, which compels application of the exclusionary rule, under which evidence obtained in violation of a constitutional guarantee may not be used against a person protected by that guarantee, and has been validated by the Argentine Supreme Court itself in various cases.

18. On September 4, 2001, the petitioners reported that a new law, Law 25.434 of June 15, 2001, broadened various aspects of police powers, including with respect to body and vehicle searches, in violation of the American Convention.

2. Re. Carlos Alejandro Tumbeiro

19. According to the petition, on January 15, 1998, federal police officers stopped Carlos Alejandro Tumbeiro around midday on a public road and asked him for proof of identity. As justification for this action, the police officers indicated in the arrest warrant that Mr. Tumbeiro had displayed suspicious behavior by appearing nervous and dubious about the police order and by wearing clothes that did not fit in with local dress.

20. The petitioners indicate that, even though the alleged victim produced personal documents proving his identity, the officers asked him to empty his pockets and show their contents. Next, they made him get into the police vehicle, where they pulled down his pants and underwear. The officers then called over two witnesses, and when they were close enough, the police officer told them that the arrestee had drugs in his possession, picked a newspaper up from the back seat of the patrol car, and showed them that it contained a white substance.

21. On August 26, 1998, Buenos Aires Federal Oral Criminal Court No. 1 sentenced Carlos Alejandro Tumbeiro to one year and six months in prison and a fine of 550 pesos, plus legal fees and costs, after finding him guilty of simple possession of narcotics. The defense appealed in cassation, arguing that

it was impossible to justify arrests based on the mere subjective appreciation of police officers and that a certain way of dressing or signs of nervousness were not sufficient to justify arrest and search. On March 15, 1999, Section I of the National Court of Criminal Cassation reversed the sentence and acquitted the alleged victim of the crime, on the grounds of unlawful police procedure. The Prosecutor General filed an extraordinary federal appeal against this decision, expressly invoking the precedent established in Fernández Prieto, which, he argued, should apply in the Tumbeiro case.

22. They add that on October 3, 2002, the Argentine Supreme Court overturned the acquittal decision of the Court of Criminal Cassation, holding that the police had acted lawfully and that the circumstances had pointed to suspicious conditions warranting the coercive measure.

23. The petitioners assert that both arrests are illustrative of common police practice. They maintain that in the best cases police officers invoke vague reasons for making arrests when there is no real emergency that would justify dispensing with an arrest warrant. They indicate that terms such as “strong evidence” (*indicios vehementes*) or “duly justified circumstances” (*circunstancias debidamente fundadas*), used in a provision of Article 284 of the Argentine Code of Criminal Procedure and in Law 23.950, express the grounds for derogation in a loose, generic fashion, leaving the police free to determine which cases ultimately warrant arrest.

24. In view of the above, the petitioners contend that the Argentine State violated the rights established in American Convention Articles 7, 8, 11, and 25, in conjunction with Articles 1(1) and 2, to the detriment of both Carlos Alberto Fernández Prieto and Carlos Alejandro Tumbeiro.

B. Position of the State

1. Re. Carlos Alberto Fernández Prieto

25. The State denies that the arrest and subsequent search of Mr. Fernández Prieto took place without reasons that objectively established its necessity, which was confirmed by the discovery of marijuana bricks in the car. It contends that the coercive measure was taken in accordance with the State's duty to combat crime, that there were no procedural irregularities, and that witnesses were found immediately for the search of the vehicle. Because drugs and a weapon were discovered, they were taken to the police station. The report was signed by Mr. Fernández Prieto, the two witnesses, and the arresting officers. The State also denies violation of the rights to judicial protection, due process of law, legal representation, a fair judgment, and appellate review of a lower court decision.

26. The State asserts that the existence of objective indications of crime justifies the police action, without implying any diminution of the alleged victim's right to personal freedom. It contends that, as part of its crime prevention activities, noting suspicious behavior such as, in this case, driving through a sparsely populated area at night, constituted more than reasonable grounds for asking the three occupants of the car to show proof of identity. It also indicates that the occupants of the car were arrested after the search, i.e., only once suspicion had been confirmed. It further argues that Mr. Fernández Prieto's confession, in which he indicates that he was carrying drugs from Buenos Aires to Mar del Plata, validates the presumption against him and the action that provided the basis for the proceedings.

27. It adds that, under the Code of Criminal Procedure, police officers have a duty to arrest individuals caught in *flagrante delicto* or against whom there is strong evidence or a *semi-plena probatio* of guilt. The State indicates that the courts have held that the police were motivated to perform the search by prior suspicious conditions in circumstances where it would have been impossible to obtain a warrant first, and that this procedure was carried out without violating any individual guarantees. It adds that the different courts cited both Argentine and United States case law, which allow arrest where there is reasonable suspicion that a crime is being or about to be committed.

28. The State maintains that the courts involved in the case accepted the legality of the police procedure after having duly considered the issues surrounding the existence or non-existence of suspicious conditions validating the arrest of Mr. Fernández Prieto.

29. It adds that the fact that the suspects were traveling by car made it impossible to obtain a warrant first, “for reasons of urgency and the irreparable nature of what would happen in the absence of prompt action”, because they could have escaped from the location or jurisdiction in which the warrant had to be obtained.

30. The State argues that Mr. Fernández Prieto enjoyed due process guarantees, availed himself of all judicial instances, and was tried by competent, independent, and impartial courts. It contends that the petitioner is attempting to have the Commission act as a fourth instance of appeal for domestic judgments. Accordingly, the State asks the Commission to declare the petition inadmissible because it does not tend to establish the existence of human rights violations.

2. Re. Carlos Alejandro Tumbeiro

31. In its note of March 11, 2009, the State indicated that, although the Tumbeiro case and the Fernández Prieto case share certain similarities, they have different factual and legal bases, which was why it had requested that the petitions be separated. In the same note, the State suggested to the Commission and the petitioners the creation of a space for dialogue with a view to exploring the possibility of a friendly settlement with respect to the petition of Carlos Alejandro Tumbeiro. In a note of June 13, 2011, it repeated its proposal of creating a space for dialogue, without commenting on the petition's admissibility. It should be noted that, in their communications of July 21, 2009 and July 20, 2010, the petitioners asserted the importance of keeping the petitions joined, with the result that no friendly settlement proceedings have been initiated.

IV. ANALYSIS DE ADMISSIBILITY

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

32. The petitioners are empowered by Article 44 of the Convention to submit petitions to the Commission. The petition specifies alleged victims who are natural persons, whose rights the State is bound to respect and ensure under the American Convention. As regards the State, the Commission notes that Argentina has been a State party to the Convention since the deposit of its instrument of ratification on September 5, 1984. Accordingly, the Commission is competent *ratione personae* to hear the petition.

33. The Commission is competent *ratione loci* to hear the petition inasmuch as it alleges violations of rights protected by the American Convention that took place within the territory of a State party to that treaty. The Commission is competent *ratione temporis* because the obligation to respect and ensure the rights protected under the American Convention was already in force for the State at the time of the facts alleged in the petition. Lastly, the Commission is competent *ratione materiae* because the petition alleges violations of rights protected under the American Convention.

34. Regarding the alleged violation of Articles I, V, XVIII, and XXV of the American Declaration, it should be noted that when the American Convention entered into force for Argentina, it, and not the Declaration, became the applicable source of law if a petition refers to the alleged violation of rights that are substantially identical in both instruments. In this case, the rights allegedly violated by the State under the Declaration are protected under the Convention, and the events giving rise to the claim took place after the American Convention came into force for Argentina. Consequently, the Commission will confine itself to alleged violations of the Convention, to the exclusion of the Declaration.

B. Other requirements for admissibility of the petition

1. Exhaustion of domestic remedies

35. Article 46(1)(a) of the American Convention provides that, for a petition lodged with the Inter-American Commission to be admissible, the remedies under domestic law must have been pursued

and exhausted, in accordance with generally recognized principles of international law. This requirement was established to allow national authorities the opportunity to consider alleged violations of protected rights and, if applicable, resolve such matters before they are heard by an international body.

36. The petitioners assert that, in the case of both Carlos Alberto Fernández Prieto and Carlos Alejandro Tumbeiro, all of the applicable domestic remedies available in criminal proceedings have been exhausted, up to and including review by the ultimate judicial instance, the Supreme Court. For its part, the State has not submitted any arguments indicating that the domestic remedies have not been exhausted. The Commission considers the provisions of Article 46(1)(a) to have been satisfied by the final Supreme Court decisions.

2. Time limit for presentation of the petition

37. Article 46(1) of the Convention provides that in order for a petition to be admitted it must be submitted within the stipulated period, i.e., within six months from the date on which the party alleging a violation of his rights was notified of a final judgment at the domestic level.

38. In the present case, according to information provided by the petitioners, Mr. Fernández Prieto was not notified personally of the final judgment in the case against him. Notification of this judgment was sent on March 19, 1999 to his defense, which informed the alleged victim. Since the petition was lodged with the Commission on July 30, 1999, the requirement established in Article 46(1)(b) of the American Convention has been satisfied.

39. In the case of Carlos Alejandro Tumbeiro, the Commission notes that the Supreme Court decision is dated October 3, 2002 and that the petition was lodged with the Commission on March 31, 2003, so that, in this case, too, the requirement in Article 46(1)(b) of the American Convention has been satisfied.

3. Duplication of proceedings and *res judicata*

40. Article 46(1)(c) of the Convention provides that admission of a petition is subject to the requirement that the matter "is not pending in another international proceeding for settlement"; and Article 47(d) of the Convention stipulates that the Commission will not admit a petition that is "substantially the same as one previously studied by the Commission or by another international organization." In the case before us, the parties have not reported any such conditions for inadmissibility, and none are apparent from the proceedings.

4. Characterization of the facts alleged

41. Article 47(b) of the American Convention considers inadmissible any petition that does not state facts tending to establish a violation of the rights guaranteed by the Convention. In the present case, it is not for the Commission to decide at this stage in the proceedings whether or not the alleged violations of the American Convention occurred. The IACHR has carried out a *prima facie* evaluation and has determined that the petition describes complaints that, if proven, might conceivably establish possible violations of the rights protected by the Convention.

42. Neither the American Convention nor the IACHR Rules of Procedure require a petitioner to identify the specific rights allegedly violated by the State in the matter brought before the Commission, although petitioners may do so. It is for the Commission to establish in its admissibility reports, on the basis of the system's case law, which provisions of the relevant inter-American instruments are applicable and could be determined to have been violated if the facts alleged are supported by sufficient evidence.

43. In this case, the petitioners contend that the alleged victims were subject to unlawful and arbitrary arrest and seizure, and that, consequently, the substances found in their possession should have been excluded from the criminal investigation. They add that the courts ignored the arguments put forward by the attorneys for the defense, and that the proceedings should have been invalidated because they

arose out of unlawful arrests. The petitioners indicate that the practice of arrest for “suspicious behavior” is widespread and opens the door to the abuse of police power.

44. For its part, the State did not argue the admissibility of the Tumbeiro case. With respect to the Fernández Prieto case, it contended that the arrest had been made lawfully and that Mr. Fernández Prieto had enjoyed all judicial guarantees. It claimed that the petitioners would have the Commission act as a fourth instance of appeal for a domestic judgment that was unfavorable to Mr. Fernández Prieto, and that the petition should therefore be declared inadmissible.

45. The Commission finds that, if proven, the facts alleged by the petitioners could tend to establish violations of Articles 7 (personal freedom), 8 (fair trial), and 25 (judicial protection), of the American Convention in conjunction with Articles 1(1) (obligation to respect and ensure rights) and 2 (duty to adopt domestic legal measures) of that instrument.

46. The Commission further concludes that the information submitted by the parties does not provide sufficient evidence to infer the alleged characterization of violations of Article 11 of the Convention by the Argentine State.

V. CONCLUSIONS

47. The Commission concludes that it is competent to hear the case before it and that the petition is admissible under Articles 46 and 47 of the American Convention.

48. On the basis of the foregoing findings of fact and of law, and without prejudging the merits of the matter,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

DECIDES:

1. To declare the case before it admissible with respect to the alleged violations of Articles 7, 8, and 25, in conjunction with Articles 1(1) and 2 of the American Convention.

2. To declare the petition inadmissible with respect to the alleged violations of Article 11 in conjunction with Article 1(1) of the American Convention.

3. To notify this decision to the parties.

4. To continue its analysis of the merits of the case.

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

Done and signed in the city of Washington, D.C., on the 19th day of the month of March, 2012.
(Signed): José de Jesús Orozco Henríquez, President; Tracy Robinson, First Vice-President; Felipe González, Second Vice-President; Dinah Shelton, Rodrigo Escobar Gil, Rosa María Ortiz and Rose-Marie Antoine, Commissioners.