

OEA/Ser.L/V/II.167
Doc. 22
24 February 2018
Original: Spanish

REPORT No. 18/18
PETITION 1148-08
REPORT ON INADMISSIBILITY

MARIO EUGENIO LÓPEZ VELASCO
ECUADOR

Approved by the Commission at its session No. 2115 held on February 24, 2018
167th Special Period of Sessions

Cite as: IACHR, Report No. 18/18. Petition 1148-08. Inadmissibility. Mario Eugenio López Velasco. Ecuador. February 24, 2018.



I. INFORMATION ABOUT THE PETITION

| | |
|--|---|
| Petitioner: | Mario Fernando López Salazar |
| Presunta víctima: Alleged victim: | Mario Eugenio López Velasco |
| State denounced: | Ecuador |
| Rights invoked: | Articles I (Right to life, liberty, and personal security); XI (Right to the preservation of health and well-being); and XVI (Right to social security) of the American Declaration of the Rights and Duties of Men |

II. PROCEEDINGS BEFORE THE IACHR¹

| | |
|--|---|
| Filing of the petition: | September 30, 2008 |
| Additional information received at the stage of initial review: | November 10, 2009; March 11, 2011; and, May 3, 2012 |
| Notification of the petition to the State: | April 15, 2014 ² |
| State's first response: | October 14, 2015 |

III. COMPETENCE

| | |
|--|---|
| Competence <i>Ratione personae</i>: | Yes |
| Competence <i>Ratione loci</i>: | Yes |
| Competence <i>Ratione temporis</i>: | Yes |
| Competence <i>Ratione materiae</i>: | Yes, American Convention on Human Rights ³ (instrument of ratification deposited on December 28, 1977) |

IV. DUPLICATION OF PROCEDURES AND INTERNATIONAL *RES JUDICATA*, COLORABLE CLAIM, EXHAUSTION OF DOMESTIC REMEDIES AND TIMELINESS OF THE PETITION

| | |
|--|------|
| Duplication of procedures and International <i>res judicata</i>: | No |
| Rights declared admissible: | None |
| Exhaustion of domestic remedies or applicability of an exception to the rule: | No |
| Timeliness of the petition: | n/a |

V. ALLEGED FACTS

1. The petitioner holds that in 2005, the alleged victim, Mario Eugenio López Velasco, was engaged in a process to secure his retirement due to old age with the *Instituto Ecuatoriano de Seguridad Social* [Ecuadorian Social Security Institute] (hereinafter, "IESS"). He states that the IESS was, at that same time, pursuing enforcement action No. 845-2003 for non-payment of social security contributions against Henry Orlando Chérrez Macías, owner of the import firm Kaviga, which had been the alleged victim's last employer. The petitioner alleges that the IESS never notified Mr. López about an auction of Kaviga's inventory, nor was the alleged victim ever made aware of what happened to the money obtained from the auction, which was supposedly to be used to pay the outstanding contributions. Against this backdrop, in September 2007, the alleged victim was reportedly diagnosed with tongue cancer but was unable to seek medical treatment

¹ The observations submitted by each party were duly transmitted to the opposing party.

² On October 6, 2016 the petitioner sent the IACHR a communication concerning the procedural status of his petition.

³ Hereinafter, the "American Convention" or "the Convention."

because of his employer's failure to pay the social security contributions. The petitioner adds that on August 31, 2007, the alleged victim was forced to submit a request for retirement due to disability in order to access IESS medical care.

2. The petitioner notes that, as a result of a public complaint made by the family of the alleged victim on a television channel on November 1, 2007, a meeting was held at which the IESS Provincial Director at the time (hereinafter, "Provincial Director") showed them a document that stated that the alleged victim's retirement benefits would be US\$20,596.85 and indicated that in order to receive the benefits and access IESS medical services, the alleged victim would have to pay the contributions owed by his last employer. The petitioner states that the alleged victim paid the aforementioned debt—US\$2,479.85—on November 7, 2007, having come up with the money through loans. He further indicates that, at the same time, the Provincial Director ordered payment of the liquidation of the firm's liabilities with the understanding that once the employer had paid what was owed, the IESS would reimburse Mr. López for the amount deposited.

3. The petitioner states that on November 19, 2007, IESS officials paid a visit to the home of the alleged victim to have him sign for payment of his pension benefits, US\$15,516, a sum below the one originally indicated. He adds that on January 4, 2008, the alleged victim received a letter from the Provincial Director explaining that an inadvertent error had been made in the amount stated in the "draft document" and that the official sum was the one presented by the officials who had visited the alleged victim's home. The petitioner further states that in February 2008, the IESS approved the alleged victim's retirement, meaning he was then able to seek treatment at the IESS Hospital in March—he died on June 15, 2008. Between September 2007 and March 2008, the alleged victim reportedly had to pay for medical treatment in SOLCA (*Sociedad de Lucha contra el Cáncer* [Anti-Cancer Association]), since he was unable to access public healthcare for the reasons already stated.

4. The petitioner indicates that between 2008 and 2011, Virginia Azucena Salazar Orquera, widow of the alleged victim, filed a number of requests with different IESS departments in an attempt to secure reimbursement of the money contributed by the alleged victim, but to no avail. He notes that on May 4, 2011, Ms. Salazar filed a complaint against the IESS with the Office of the Ombudsman, denouncing the fact that the IESS had committed to continuing the collections process through *Cartera y Cobranzas* [Collections Office], owing to the fact that it had the obligation to reimburse what had been paid to cover the contributions owned by the import firm, Kaviga. The petitioner indicates that the Office of the Ombudsman convened a public hearing in which an agreement was reached that the IESS would conduct the relevant inquiries about the forfeiture resulting from enforcement action No. 845-2003 and the status of the inventory seized six years earlier. He affirms that on September 14, 2011, the Provincial Director initiated a new auction process under the enforcement action in order to return the amount requested and that on February 8, 2012, the Office of the Ombudsman asked the IESS to repay US\$2,479.85 and not US\$811, which was the valuation the IESS had made of the seized inventory. The petitioner alleges that the amount owed was never repaid and that the alleged victim was never paid the pension benefits originally promised, but rather a far lower amount. Based on the information provided, the petitioner alleges violation of the rights to life, liberty, personal security, health and well-being, and social security.

5. The State, for its part, alleges that the petition is inadmissible. The State indicates that, pursuant to the Social Security Law, while Mr. López was able to receive sickness benefits, he was not eligible for special retirement benefits because of arrears on the part of his employer, which is why he himself made a voluntary payment on November 7, 2007 to obtain his pension. It adds that on November 19, 2007, the Sub-Directorate for Pensions of Guayas issued a pension benefits agreement via which the alleged victim was granted a special reduced pension payment of US\$15,000 and "continued to enjoy, in the IESS medical units, all benefits inherent to this right." The State indicates that in January 2008, the alleged victim asked the IESS to reimburse the amount paid and that he died in June, with his family continuing to pursue such request. It notes that on June 17, 2014, in the framework of the process initiated in 2011 by Ms. Salazar with the Office of the Ombudsman of Guayas, it was agreed that the Provincial Sub-Directorate for Pensions would issue an agreement on the grounds of employer liability in favor of the alleged victim in order to have a credit title issued against the employer and proceed to collect via enforcement; this agreement was accepted by Ms. Salazar. The State claims that on August 1, 2014, the Sub-Directorate for Pension Benefits and

Occupational Hazards released a resolution ordering the issue of a credit in the amount of US\$1,273.21, plus interest, against the employer, and that on September 26 the Sub-Directorate agreed to collect. It further notes that on July 28, 2015, the Provincial Sub-Directorate for Pension Benefits and Occupational Hazards of Guayas issued a resolution that ruled the August 1, 2014 resolution groundless under the principle of administrative compliance and enforcement powers. The State argues that, as the alleged victim made a voluntary payment of the amount owed pursuant to provision five of the *Reglamento de Responsabilidad Patronal* [Rules of Procedure for Employer Liability] (Resolution No. C.D. 148 of the IESS Governing Board), one of the conditions precedent for collecting from an employer was that the firm be out of business or closed down, which was not the case here. Lastly, the State noted that, on these grounds, the Sub-Directorate issued an arrangement that same day by which an agreement was reached to void collection of payment from the employer.

6. That State indicates that the petitioner has failed to pursue and exhaust the appropriate and effective domestic remedies, pursuant to Article 46(1)(a) of the Convention, and that in his case none of the exceptions admitted for exhaustion of domestic remedies would apply inasmuch as there is a legal process in place to protect his rights. It claims that while the law does not require exhaustion of administrative avenues as a prerequisite for initiating legal action, the petitioner had the possibility of challenging the administrative decisions handed down by the Provincial Sub-Directorate for Pension Benefits and Occupational Hazards of Guayas before the IESS Provincial Commission on Benefits and Disputes of Guayas. It further maintains that the petitioner could have filed an appeal with the National Appeals Commission, which would exhaust administrative channels. The State further adds that the petitioner had the administrative courts available to him, wherein he could have filed a full-jurisdiction or subjective appeal and potentially, if that had been rejected, a cassation appeal with the National Court of Justice. The State notes that protective action was also a possibility, the objective of which is to safeguard the rights recognized in the Constitution and that this avenue was not pursued either.

7. The State likewise affirms that the facts do not characterize violations of the Convention, inasmuch as the alleged victim does not explain how the rights invoked were allegedly infringed. It further states that the rights to health and social security fall outside the purview of the Commission since these are not rights established under the Convention, nor are they justiciable pursuant to Article 19(6) of the Protocol of San Salvador. The State also notes that, in any case, Mr. López had access to a pension and medical care, indicating that no omissions or deficiencies in his medical attention are being alleged and therefore there were no obstacles to his social security benefits or timely, real, ongoing, or comprehensive treatment.

VI. ANALYSIS OF EXHAUSTION OF DOMESTIC REMEDIES AND TIMELINESS OF THE PETITION

8. The petitioner indicates that a number of different requests were submitted to the IESS between 2008 and 2011, that in May 2011 a complaint was filed with the Office of the Ombudsman, and that to date, his demands have allegedly not been resolved. For its part, the State alleges that the petitioner has not exhausted domestic remedies for the reasons already expressed.

9. Article 46(1)(a) of the American Convention provides that, for a petition lodged with Inter-American Commission in accordance with Article 44 of the Convention to be admitted, remedies under domestic law must have been pursued and exhausted in accordance with generally recognized principles of international law. This requirement aims to ensure that national authorities are cognizant of the alleged violation of a protected right and, where appropriate, have the opportunity to resolve it before it is brought before an international body.⁴

⁴ IACHR, Report No. 150-17. Petition 123-08. Inadmissibility. Hernando de Jesús Ramírez Rodas. Colombia. October 26, 2017, paragraph 8.

10. The information available reveals that the alleged victim and his relatives took actions before the IESS and the Office of the Ombudsman, which does not constitute a judicial remedy for purposes of exhaustion of domestic remedies. Accordingly, the information available provides no evidence that the petitioner invoked and exhausted available legal remedies or that any exceptions to the exhaustion of domestic remedies would apply. In view of the foregoing, the Commission concludes that this petition does not meet the requirement to exhaust domestic remedies set forth in Article 46(1)(a) of the American Convention.⁵

VII. DECISION

1. To find the instant petition inadmissible; and
2. To notify the parties of this decision and to publish this decision and include it in its Annual Report to the General Assembly of the Organization of American States.

Approved in the city of Bogotá, Colombia, on the 24th day of the month of February, 2018. (Signed): Margarete May Macaulay, President; Esmeralda E. Arosemena Bernal de Troitiño, First Vice President; Luis Ernesto Vargas Silva, Second Vice President; Francisco José Eguiguren Praeli, Joel Hernández García, Antonia Urrejola, and Flávia Piovesan, Commissioners.

⁵ IACHR, Report No. 150-17. Petition 123-08. Inadmissibility. Hernando de Jesús Ramírez Rodas. Colombia. October 26, 2017, paragraph 11.