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REPORT No. 42/16
CASE 12.848
FRIENDLY SETTLEMENT REPORT

MRS. N
PANAMA

Approved electronically by the Commission on September 19, 2016.

Modified on March 21st, 2017 by the IACHR, for publication, in its 161 ordinary period of sessions. Per petitioner's request, the IACHR decided to reserve information that could allow the identification as victim of this case.

Cite as: IACHR, Report No. 42/16, Case 12.848. Friendly Settlement. Mrs. N. Panama. September 19, 2016.

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SEPTEMBER 19, 2016¹

I. SUMMARY

1. On January 3, 2008, the Inter-American Commission on Human Rights (hereinafter, “the Commission” or “the IACHR”) received a petition submitted by A (hereinafter, “the petitioners”) in representation of Mrs. N² (hereinafter “the victim”), which alleged the international responsibility of the Republic of Panama (hereinafter, “the State” or “the Panamanian State”) for infecting the victim—who was a minor at that time —with human immunodeficiency virus (HIV) through a contaminated blood transfusion at a public hospital.

2. On November 2, 2011, the IACHR ruled that the petition was admissible for purposes of reviewing it with regard to alleged violation of the rights enshrined in Articles 4 (right to life), 5 (right to humane treatment), 8 (right to a fair trial), 17 (rights of the family), 19 (rights of the child), 24 (right to equal protection), 25 (right to judicial protection), and 26 (progressive development) of the American Convention on Human Rights, in relation to Article 1(1) (obligation to respect rights) and 2 (duty to adopt provisions in domestic law) thereof. The Commission also decided to notify the parties of this decision, and to publish and include this reports in its Annual Report for the General Assembly of the Organization of American States.

3. On May 3, 2012, the Stated informed the IACHR about the initiation of negotiations with the petitioners in order to reach a friendly settlement in the case. From that point, the IACHR facilitated the negotiations between the parties, which signed a friendly settlement agreement on August 7, 2015.

4. In keeping with Article 49 of the Convention and Article 40(5) of the Commission’s Rules of Procedure, this friendly settlement report provides a summary of the facts alleged by the petitioners as well as a transcription of the friendly settlement agreement signed by the petitioners and representatives of the Panamanian State. Furthermore, the agreement signed by the parties is hereby approved and publication of this report in the Annual Report of the IACHR to the OAS General Assembly is hereby agreed upon.

II. PROCEDURE BEFORE THE COMMISSION

5. On November 16, 2011, the IACHR notified the parties of the decision on the admissibility of the petition.

6. The petitioners presented their observations on the merits of the case on January 6, 2012, which were forwarded to the State. On February 16, the State reported that internal consultations had begun to explore the possibility of seeking a friendly settlement in this case; this information was forwarded to the petitioners. On May 3, 2012, the State sent additional information on the negotiations undertaken in Panama, which was sent to the petitioners. On July 24, 2012, the State sent updated information on the status of the negotiations, which was also forwarded to the petitioners.

7. The petitioners, for their part, requested technical advice from the Commission on January 31, 2013, in order to facilitate a consensus between the parties about the points regarding medical services and the amount of compensation for the victim. On March 13, 2013, the parties held a meeting facilitated by

¹ Commissioner Esmeralda E, Arosema Bernal de Troitño, who is a Panamanian citizen, did not participate in the debate or decision in this case, in keeping with Article 17(2)(a) of the IACHR Rules of Procedure.

² The IACHR has kept the victim’s identity secret per her request.

the IACHR, in the framework of its 147th Regular Session in Washington, DC. On April 2, 2013, the State presented updated information on the progress of the consultations and requested technical advice from the IACHR regarding case law on similar matters in order to establish reparation measures with regard to medical care as well as financial compensation.

8. On June 13, 2013, the IACHR sent the parties its response to the question posed, indicating the precedents existing with respect to measures for medical and psychological rehabilitation and financial reparations in similar cases before the IACHR and the Inter-American Court of Human Rights.

9. On September 17, 2013, the petitioners withdrew from the friendly settlement proceedings due to the impossibility of achieving in a potential agreement their principal claim for private medical care; the State was informed thereof and its observations were requested. On September 27, 2013, the State reiterated its willingness to go forward with the friendly settlement negotiations and reported on the review process of a draft agreement before the Social Security Fund (*Caja de Seguro Social*), which was forwarded to the petitioners. On February 19 and April 1, 2014, the State presented additional information, which was sent to the petitioners for their information.

10. On September 28, 2015, the State reported that a friendly settlement agreement was signed with the petitioners and this communication was sent to the petitioners for their information. On October 20, 2015, the State reported that the agreement had been approved pursuant to a cabinet decree of the Office of the President of the Republic, which was sent the petitioners for their information.

11. The State presented additional information on compliance on July 6, 2016, which was sent to the petitioners for their information. Furthermore, in a conversation held with the victim on July 6, 2016, she confirmed the information furnished by the State and her willingness to have the IACHR approve the friendly settlement agreement.

III. THE FACTS ALLEGED

12. The petitioners alleged that Mrs. N had been infected with HIV in a public hospital.

13. According to the petitioners' allegations, Mrs. N was hospitalized in a health clinic, where she was diagnosed with acute abdominal pain and generalized peritonitis. Due to complications of her condition, it was necessary to transfer her to the public hospital in question where she received medical treatment for secondary septic shock and a complicated appendicitis. There she received 3 transfusions of type O negative blood.

14. The petitioners stated that 3 years later, Mrs. N returned to the same hospital, where she was admitted after being diagnosed with pneumonia. As part of the medical evaluation a serological test for HIV was ordered, the result of which was positive.

15. According to the petitioners, since the patient had received a blood transfusion previously at the same hospital, an investigation was launched by the hospital's Epidemiological Investigation Unit. Blood donors' data was requested, including records from the blood bank on donor lists and patient transfusions. According to the allegations, these records indicated that 3 units of blood had been sent to the hospital around the time that Mrs. N received the transfusion.

16. The petitioners recounted that the investigative summary reported that one of the above-mentioned samples, identified with No. 22.623, was reported to have been positive for human immunodeficiency virus. Despite that report, the sample had not been set aside for analysis and confirmation in accordance with the applicable protocols; rather, the blood was left available for clinical use due to hospital staff negligence. The petitioners stated that Mrs. N was transfused with Unit No 22.623 while receiving medical treatment at the public hospital.

17. The petitioners alleged that Mrs. N's was infected at the public hospital due to negligence of the blood bank, as the standard operating procedure for handling positive tests in donors was not followed, leaving the contaminated blood available for clinical use. This had grave consequences for Mrs. N, for whom it led to "the loss of her future career [...], in addition to the psychological and emotional consequences, and the impact of the moral damages on her and her family."

18. The petitioners contended that as result of these events, Mrs. N suffered the physical, emotional, and psychological consequences of HIV. They further contended that as she had no private health insurance she was left in an extremely vulnerable situation and a state of victimization. This forced her to resort to the very public health system she considers responsible for the violations inflicted, which does not have the medications that are of the quality or quantity needed for her treatment.

19. The petitioners held that the victim had not been appropriately compensated and that domestic remedies were ineffective in providing her with legal protection. In that respect, they indicated in general terms that they had filed suit for damages with a judge of the Judicial Circuit of Panama, who had declined to hear the suit as he considered that the matter fell under the jurisdiction of the Supreme Court of Justice, according to a judgement of January 12, 2006. The petitioners also indicated in general terms that they had filed an administrative claim against the Social Security Fund with the Supreme Court of Justice, which also refused to allow the claim. Finally, the petitioners stated that they had lodged a petition for direct reparation of damages with the same chamber of the Supreme Court of Justice and that it was likewise refused on August 2, 2007.

IV. FRIENDLY SETTLEMENT

20. On August 7, 2015, the State of Panama, represented by Farah Diva Urrutia, Director of Legal Affairs and Treaties of the Ministry of Foreign Relations, and the attorney *A*, in representation of the victim in this case, signed a friendly settlement agreement, which reads as follows:

FRIENDLY SETTLEMENT AGREEMENT

The Republic of Panama presents its compliments to the Honorable Inter-American Commission on Human Rights and has the honor to make reference to the friendly settlement proceedings involving the government of the Republic of Panama v. [Mrs. N] for violation of [the right] to life and humane treatment, in keeping with Article 40 of the Rules of Procedure of the Inter-American Commission on Human Rights.

The Panamanian State is pleased to inform the Honorable Commission that by consent of both parties, on June 24, 2015, the friendly settlement proceedings between the Republic of Panama v. [Mrs. N] was successfully concluded with a commitment by the State based on respect for the human rights set forth in the American Convention on Human Rights, the American Declaration, and other applicable principles such as the pertinent case law of the Inter-American Court.

The Vice-President and Minister of Foreign Relations, H.E. Isabel De Saint Malo de Alvarado shall present this agreement to the Cabinet Council that has among its functions those provided for under Article 200(4) of the Panamanian Constitution.

In that regard, we have the honor of submitting the document that finalizes this friendly settlement and the consensual clauses of the agreement, which take the criteria for reparation of damages developed by the inter-American human rights system as a reference.

Factual background:

This case was submitted to the Inter-American Commission on Human Rights and admitted pursuant to the report of November 2, 2011, in which the petitioner alleged violations of the right to judicial protection, rights of the family, right to social security and a fair trial. The case had been filed in Panamanian courts and was then submitted to the inter-American human rights system for proper reparation of the damages caused.

From the outset, the Panamanian State recognized at every juncture its responsibility in this case and expressed its interest in reaching a friendly settlement agreement with the aggrieved party. Inasmuch as both parties established the necessary elements that encompassed comprehensive reparations for the aggrieved party, taking responsibility for the event that occurred and repairing the personal, medical, psychological, social, and work-related damages that were caused. Pursuant to the decision provided for in Note No. 24 of March 25, 2013, the friendly settlement proceedings between the Republic of Panama and representative of the petitioner in the case [Mrs. N] were approved.

The reparation measures subject to this agreement consists of financial compensation that includes medical and psychological care, as well as compensation for pecuniary and non-pecuniary damages:

1. Medical and psychological care:

Given that the damage caused to the petitioner was the result of negligent actions in the public health system, both parties agree that for greater benefit and peace of mind of the aggrieved party, medical, and psychological care is to be provided in the private health care system, which is the preference of the petitioner.

Notwithstanding the foregoing, the State is required at all times to provide access to the public health system under existing legal provisions whenever the petitioner so requires.

2. Scope, coverage, and conditions:

The economic agreement reached with respect to medical and psychological care includes periodic check-ups, provision of medication for her treatment, specialized medical care where circumstances stemming from the illness so require, and physical, surgical, or pharmacological treatments, the purpose of which is to mitigate and counter the consequences of the illness and improve her quality of life.

3. Financial compensation measures:

The Panamanian State commits to paying fair financial compensation based on the proposal made by the actuarial expert's report presented by Mrs. N.

3.1. Pecuniary damages:

Pecuniary damages have been assessed in order to cover the period during which the victim or her family had to incur expenses, including medical, legal, and related fees resulting due to the violation suffered and for which she was not provided immediate reparation.

3.2. Future loss of earnings:

The Panamanian State recognizes her precarious employment status, both with respect to obtaining job offers, as well as the physical consequences that may impact her job performance.

3.3. Non-pecuniary damage:

Taking into account the setbacks suffered by the victim and her family, in addition to the decline in her quality of life due to her medical condition, the Panamanian State acknowledges the physical and psychological difficulties she faces and their impact on her family.

Satisfaction and non-repetition measures:

The Panamanian State commits to providing services in its health system under the best quality standards. It further commits to ensuring that laboratory samples are handled in compliance with safety rules that duly certify such handling and that there is suitably trained personnel so that there are no further instances of operational negligence and health system's users' rights are protected, providing them with safe and proper service.

Amount agreed upon for reparation:

The parties have agreed upon the sum of [...] in financial compensation.

The parties have agreed upon the sum of [...] in medical, psychological, and other kinds of health care in the health facility of the beneficiary's choosing.

Attorneys' and experts' fees:

The parties have agreed upon to pay 6% above the cash sum the petitioner receives, totaling one hundred and six thousand seven hundred and seventy-six dollars and thirty-eight cents (US\$106,776.38) in professional fees to Carlos J. George B., Esq.

Dr. Elsibir Ducreux de Castellero shall receive the sum of [...], plus 7% in ITBM Tax [*Impuesto de Transferencia de Bienes Muebles y Servicios*], totaling [...], in professional fees for the expert studies she conducted and the options worked on during the negotiations.

Execution schedule:

The obligations contained herein shall be executed within a year of the signing of this agreement.

Publication and termination of this agreement:

The friendly settlement agreement shall not be published by the Commission until such time as all aspects and obligations have been fulfilled. The parties may terminate this agreement whenever circumstances so require, which would mean that the Honorable Commission would continue processing the case.

Oversight and compliance:

This agreement and compliance therewith shall be overseen by the Inter-American Commission on Human Rights, which reserves the right to continue processing the case whenever circumstances so require.

Panama City, August 7, 2015

V. DETERMINATION OF CONSISTENCY AND COMPLIANCE

21. The IACHR reiterates that in keeping with Articles 48(1)(f) and 49 of the American Convention, the purpose of these proceedings is to “reach a friendly settlement of the matter on the basis of respect for the human rights recognized in this Convention.” Acceptance of these proceedings expresses the good faith of the State to comply with aims and objectives of the Convention in keeping with the principle of *pacta sunt servanda*, pursuant to which the States must comply in good faith with the obligations undertaken in the treaties.³ It further reiterates that the friendly settlement proceedings provided for in the Convention allow for the termination of individual cases in a non-adjudicatory fashion, and have shown themselves to offer, in cases from different countries, an important means for settlement, which can be utilized by both parties.

22. The Inter-American Commission has closely followed the evolution of the friendly settlement reached in this case and highly values the efforts undertaken by both parties during the negotiation of the agreement to reach a friendly settlement that was consistent with the aims and objectives of the Convention.

23. The IACHR notes that given the information furnished by the parties to date, it is fitting to assess compliance with the friendly settlement agreement reached by the parties in this case. In this regard the IACHR takes note of the Panamanian’s State’s acknowledgement of its responsibility for the events occurred to the detriment of Mrs. N and their commitment to improve the quality standards in the public health system.

24. Furthermore, the IACHR notes that the principal claims in the negotiations of this friendly settlement were medical care and financial reparations. The petitioners’ brief of March 27, 2012 reveals that the specific claims that Mrs. N’s sought under a potential settlement agreement with the Panamanian State were, *inter alia*, private medical care with a doctor of her choosing, indefinite provision of medications, laboratory analyses whenever she requires them, total coverage of private medical services required nationally and internationally, and payment of the fees to the attorney who represented her *pro bono* during the proceedings.

25. Additionally, the IACHR notes that in keeping with the case file, the key ingredient for Mrs. N was the private nature of the medical reparation measures inasmuch as the source of the human rights violation to her detriment resulted from the negligent care she received in a public hospital. In that regard, the parties requested at the time the technical advice of the Commission on this matter in order to draw up parameters for the content of the agreement’s terms.

26. With respect to the foregoing, the IACHR indicated to the parties that the care should be provided immediately, avoiding bureaucratic or other kinds of procedures that would hinder the beneficiary’s access to said care. The IACHR further indicated that medical and psychological rehabilitation measures had been included in friendly settlement agreements⁴ for purposes of aiding victims in overcoming the damages suffered as a result of the events, in particular due to illnesses and deterioration of living conditions. Furthermore, the IACHR identified precedents on the subject, including an alternative to receiving medical care in the public health system, which involved the establishment of a monetary amount to cover the medical expenses, such as the purchase of medications⁵, payment of treatments and surgery⁶ and/or psychological rehabilitation.⁷

³ The Vienna Convention on the Law of Treaties, U.N. Doc A/CONF.39/27 (1969), Article 26: “Pacta sunt servanda”. *Every treaty in force is binding upon the parties to it and must be performed by them in good faith.*

⁴ Petitioners and States decided to include medical and psychological rehabilitation measures in 19 of the 106 friendly settlement agreements that have been approved through a report of the Inter-American Commission on Human Rights from January 1985 to December 2012.

⁵ As part of a friendly settlement agreement signed between the State of Guatemala and the representatives of the family of José Sucunú Panjoj, member of the Council of Runujel Junam Ethnic Entities, who was the victim of enforced disappearance, the State

[continues ...]

27. The IACHR takes notes that according to the provisions of the friendly settlement agreement, the victim opted to present an actuarial expert's report that would liquidate the amounts due in financial compensation and medical and psychological rehabilitation expenses. The Panamanian State accepted this, subject to assessment by an expert appointed by the State.

28. The Commission considers that given the nature of the facts presented in the petition, which took place in a public hospital, and given Mrs. N's specific illness and her need to access a service that provides her the highest quality standard and in which she has total confidence, the establishment of an amount through an expert study on the subject to cover all medical expenses throughout Mrs. N's life at the private center of her choosing, meets the interests of both, the victim as well as the State in this case.

29. The IACHR takes note of Decree 32-A of October 13, 2015, approved by the Cabinet Council of the Ministry of the Office of the President Republic of Panama, which acknowledges as part of the national debt the obligations stemming from the friendly settlement agreement of August 7, 2015, between the Panamanian State and the petitioners in case 12.848. In said decree the Ministry of Economy and Finance (MEF) was designated as the entity charged with executing the corresponding measures to pay the obligations stemming from the agreement. Such payment totaled [...], a sum which is not subject to taxes.

30. Additionally, the Commission takes note of the communiqué of June 22, 2016 from the Panamanian State, which reported that the Ministry of Economy and Finance had delivered to the beneficiary of the friendly settlement a check from the national treasury for the amount of compensation set forth in the friendly settlement agreement. The State reported in this same communiqué that it had delivered a check from the national treasury to the attorney *A.* for the amount agreed to in the settlement for his professional fees. Finally, the State reported that it had delivered a check to Doctor *B* to pay her professional fees for the expert studies she conducted and the options worked on during the negotiations. The State requested the approval of the friendly settlement agreement and assessment of its compliance in this case.

31. Mrs. N, for her part, confirmed by phone the information provided and expressed her satisfaction regarding compliance with the friendly settlement agreement and expressed that she was in favor of the IACH approving said agreement.

32. Taking into consideration all the elements mentioned previously, the IACHR declares that this friendly settlement has been fully complied with, and expresses its recognition to the Panamanian State for the efforts it made in order to fulfill the commitments undertaken in due time and in the manner agreed upon by the parties.

[... continuation]

committed to providing the victim's wife 681.00 quetzales to purchase medications. IACHR, Report No. 19/00 (friendly settlement), José Sucunú Panjoj, Guatemala, February 24, 2000.

⁶ The State of Mexico committed to paying the sum of 500,000 Mexican pesos so that Mr. Luis Rey García Villagrán, who had been deprived of his liberty arbitrarily and was tortured at the hands of state agents, could pay for the medications and surgery he needed. IACHR, Report No. 164/10 (friendly settlement), Case 12.623, Luis Rey García Villagrán, Mexico, November 1, 2010.

⁷ In the friendly settlement signed by the State of Peru and the relatives of María Mamérita Mestanza Chávez, the State committed to paying the sum of \$7,000 dollars so that her husband and children could receive psychological rehabilitation treatment. The agreement stipulated that said amount would be put in trust with a public or private institution, which would perform the function of trustee for purposes of managing the funds allocated for providing psychological care. The institution was to be chosen by common accord of the State and representatives of the Salazar Mestanza family. See IACHR, Report N° 71/03, (friendly settlement), Petition 12.191, María Mamérita Mestanza Chávez, Peru, October 10, 2003.

VI. CONCLUSIONS

**THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS HEREBY
DECIDES TO:**

1. Approve the terms of the agreement signed by the parties on August 7, 2015.
2. Declare that the friendly settlement agreement of August 7, 2015 has been fully complied with.
3. Make this report public and include it in its Annual Report to the OAS General Assembly.

Approved by the Inter-American Commission on Human Rights on the 25th day of the month of September, 2016. (Signed): James L. Cavallaro, President; Francisco José Eguiguren, First Vice President; Margarete May Macaulay, Second Vice President; José de Jesús Orozco Henríquez, Paulo Vannuchi, and Enrique Gil Botero, Commissioners.