

OEA/Ser.L/V/II.159

Doc. 75

6 December 2016

Original: Spanish

REPORT No. 66/16
PETITION 824-12
REPORT ON ADMISSIBILITY

TAMARA MARIANA ADRIÁN HERNÁNDEZ
VENEZUELA

Approved by the Commission at its session No. 2070 held on December 6, 2016.
159th Regular Period of Sessions.

Cite as: IACHR, Report No. 66/16, Petition 824-12. Admissibility. Tamara Mariana Adrián Hernández. Venezuela. December 6, 2016.

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REPORT ON ADMISSIBILITY
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DECEMBER 6, 2016

I. SUMMARY

1. On April 29, 2012, the Inter-American Commission on Human Rights (hereinafter “the Inter-American Commission,” “the Commission” or “the IACHR”) received a petition submitted by Tamara Mariana Adrián Hernández (hereinafter “the petitioner” or “the alleged victim”) on her own behalf against the Bolivarian Republic of Venezuela (hereinafter “Venezuela” or “the State”) over the Venezuela legal system’s alleged failure to provide a suitable and effective remedy for changing an individual’s gender identity in the registry documentation system.

2. The petitioner maintains that the State has violated her human rights by denying her the opportunity to change her registry documentation to match her gender identity. Specifically, she indicates that there has been an unjustified delay of more than 10 years in resolving the protective measure she submitted to request that all public and private records be changed to match her gender identity. She states that as a consequence, she has experienced the restriction of a series of other fundamental rights. For its part, the State argues that the petition is not admissible because domestic remedies were not exhausted and because the rights protected in the American Convention on Human Rights (hereinafter the “American Convention” or the “Convention”) were not violated.

3. Without prejudging the merits of the petition, after analyzing the pleadings of the parties and pursuant to the requirements established in Articles 46 and 47 of the American Convention and Articles 31 through 34 of the Rules of Procedure of the IACHR, (hereinafter the “Rules of Procedure”), the Commission decides to declare this petition admissible regarding the alleged violations of the rights enshrined in Articles 3 (right to juridical personality) 5 (right to humane treatment), 8 (right to fair trial), 11 (right to honor and dignity), 13 (right to freedom of expression), 18 (right to a name), 22 (right to movement and residency), 23 (right to participate in government), 24 (right to equal protection), and 25 (right to judicial protection) of the American Convention, in relation to its Articles 1 and 2, while that instrument was in force; and Articles II (equality before law), IV (freedom of investigation, opinion, expression and dissemination), V (protection of honor, personal reputation, and private and family life), VIII (residence and movement), XVII (recognition of juridical personality), XVIII (fair trial), and XX (vote and participate in government) of the American Declaration of the Rights and Duties of Man (hereinafter the “American Declaration”) with regard to facts and affects taking place prior to moment the renunciation of the Convention took effect. The Commission also decides to notify the parties of this decision, to publish it, and to include it in its Annual Report to the General Assembly of the Organization of American States.

II. PROCEEDINGS BEFORE THE IACHR

4. The IACHR received a petition on April 29, 2012, and on June 7, 2013, it forwarded a copy of pertinent parts to the State, giving it two months to submit its comments, based on Article 30(3) of its Rules of Procedure in force at the time. On September 16, 2013, the State’s response was received. The response was forwarded to the petitioner on September 24, 2013.

5. The petitioner submitted additional comments on June 18, October 23, and November 8, 2013, as well as on January 5, 2015. For its part, the State sent additional comments on October 3, 2013. These comments were duly forwarded to the counter-party.

III. POSITION OF THE PARTIES

A. Position of the petitioner

6. The petitioner indicates that she was registered at birth as a male named Tomás Mariano Adrián Hernández. She said she was diagnosed with “gender identity disorder” for seeing herself and wishing to be socially recognized as a woman. For this reason, following the steps recommended by the World Health Organization, the American Psychiatric Association, and the Latin American Psychiatric Association, she was given social, hormonal, and physical gender reassignment, including definitive and irreversible genital surgery. The petitioner indicates that her gender identity was reaffirmed through sex reassignment surgery on August 3, 2002, outside Venezuela.

7. The petitioner maintains that despite viewing herself and being viewed socially as a woman, all her documents still identify her with a name and sex with which she does not identify. For this reason, she states that she filed for judicial protection in the form of a writ of *habeas data* before the Constitutional Chamber of the Supreme Tribunal of Justice on May 14, 2004. Twelve years later, her request remains pending resolution. The petitioner states that on more than 30 occasions she has submitted pleadings reiterating her case and expanding and adding to her arguments, as well as sought hearings with magistrates and requested certified copies of her case file without ever having received a response. She also indicates that she requested the intervention of the Ombudsman of the People but received no response. The petitioner argues that there is no ordinary procedure in place for protecting her fundamental rights in Venezuela, and that therefore, according to the case law of the Constitutional Chamber for cases in which no legal recourse is available to amend public records, the writ of *habeas data* can fulfill that role.

8. Regarding the State’s pleadings on the failure to exhaust administrative remedies, the petitioner explains that the birth certificate correction procedure only allows changing the name and not the sex assigned on the birth certificate unless the Civil Registry made a mistake when recording the sex. In addition, the correction leaves a marginal note in the certificate that would be visible and publicly accessible. She also argues that the two laws to which the State alludes—the Organic Civil Registry Law and its Regulation No. 1— entered into force in 2010 and in 2013, respectively, so at the time she filed for protection, they were not in force. Finally, she states that following the entry into force of the new law, there have been more than 30 cases of people requesting that their birth certificates be corrected by changing the name and the sex in the registry. However, none of these requests have been resolved, except for one case that was dismissed for having failed to follow the procedure properly, then after reconsideration was requested, it was denied.

9. Finally, the petitioner states that the lack of legal recognition of her gender identity has resulted in numerous professional and personal obstacles. She states that in the exercise of her profession as an attorney, it makes it difficult for her to sign briefs or make filings before courts because her physical identity does not match her name and legal registration as an attorney, forcing her to constantly explain this discrepancy. It also causes problems when she tries to buy airline tickets, travel abroad, pass through routine checkpoints, and live in another country, limiting her right to movement. She adds that this lack of legal recognition of her identity also makes it very difficult for her to participate in political life under equal conditions, as she cannot place her name on candidate lists using the sex and name under which she identifies. In this regard, she states that in 2010, she tried to launch her candidacy to be a deputy with the National Assembly, but that although she had the necessary signatures, her request was objected to because she had used the name with which she identifies herself. Also, she alleges that the silence of the courts is an abusive or arbitrary interference in her private life and violates her right to honor and reputation. The alleged victim argues that the alleged failure of recognition makes it impossible to express her identity through her body.

10. Based on this, the petitioner alleges that the State violated her rights as enshrined in Articles 3, 5, 8, 11, 13, 18, 22, 23, 24 and 25 of the American Convention, in conjunction with its Articles 1 and 2.

B. Position of the State

11. According to the State, the petitioner did not exhaust internal remedies because she did not request the correction of her name on her birth certificate via administrative channels.

12. Specifically, it indicates that the procedure for changing one's name is governed by Regulation No. 1 of the Organic Civil Registry Law under Chapter XI, "On Correcting Certificates and Changing Names." It adds that Article 146 of the Organic Civil Registry Law allows people to change their own names, establishing that: "All individuals can change their own name when it is shameful, causes public ridicule, threatens their moral integrity, honor, or reputation, or does not correspond to their gender, thereby affecting the free development of personality."

13. Moreover, the State indicates that the petitioner also filed a complaint with the Office of the Ombudswoman. It states that once the Ombudswoman became aware of the case, she sent a communication to the President of the Supreme Tribunal of Justice recommending that she "take all available measures toward providing an answer to the matter raised."

14. Finally, the State indicates that it has taken a number of steps toward eliminating discrimination against "sex diverse" individuals and recognizing their rights. It states that gender equality rights were recognized in the 2nd International Gathering of Civil Registry Specialists, organized by the Electoral Authority in March 2011. It notes that "recognition of gender diversity in civil Registry processes depends on legal frameworks to address it." The State indicates that the Office of the Ombudswoman backs the "recognition of, acceptance of, and respect for sexual diversity in [Venezuelan] society." It recognizes that this is a vulnerable group and is taking a number of actions toward raising awareness on the rights of "sex diverse people and the psychosocial aspects of sexual diversity." The State notes that the Office of the Ombudswoman announced in August 2013 that it would create an Office of the Special Ombudsman on Sexual Diversity "to meet the needs of groups struggling against discrimination of sex diverse individuals, perform research, and propose public policies."

15. In conclusion, the State contends that, based on the lack of exhaustion of remedies, the petition is inadmissible and asks the IACHR to declare as much.

IV. ANALYSIS OF JURISDICTION AND ADMISSIBILITY

A. Jurisdiction

16. The petitioner is empowered, in principle, by Articles 23 of the Rules of Procedure and 44 of the American Convention to submit petitions before the Commission. The petition indicates that the alleged victim is a natural person, whose rights as set forth in the Convention the Venezuelan State has committed to respecting and guaranteeing. As concerns the State, the Commission indicates that Venezuela was a State Party to the American Convention from August 9, 1977, the date on which it deposited its ratification instrument, to September 10, 2013, the date on which the State's denunciation of the Convention took effect. The alleged facts that took place subsequent to that date will be analyzed based on the American Declaration. The Commission therefore has *ratione personae* competence to examine the petition. Likewise, the Commission has *ratione loci* competence to hear the petition insofar as the petition alleges violations of rights that would have taken place within the territory of Venezuela.

17. The Commission has *ratione temporis* competence, as the obligation to respect and guarantee the rights protected by the American Convention was already in force for the State on the date on which the facts alleged in the petition would have taken place. Finally, the Commission has *ratione materiae* competence due to the fact that the petition refers to alleged violations of human rights protected under the American Convention.

B. Admissibility requirements

1. Exhaustion of domestic remedies

18. Articles 31(1) of the Rules of Procedure and 46(1) of the American Convention require the prior exhaustion of the remedies available in domestic jurisdiction—in keeping with the generally recognized principles of international law—as a requirement for the admission of the claims presented in the petition. The purpose of this requirement is to allow domestic authorities to hear cases of alleged violations of protected rights and, where appropriate, to resolve the situation before it is brought before an international authority. For their part, Articles 31(2) and 46(2) of the Convention stipulate that the requirement to exhaust domestic remedies is not applicable when i) the domestic legislation of the State concerned does not afford due process of law for the protection of the right or rights that have allegedly been violated; ii) the party alleging violation of his rights has been denied access to the remedies under domestic law or has been prevented from exhausting them; or iii) there has been an unjustified delay in the ruling on the aforementioned remedies.

19. The petitioner argues that there is no legal remedy for recognizing her gender identity, as the remedy for correcting birth certificates does not allow changes to the sex but only changes to the name assigned on the birth certificate. She also alleges an unjustified delay in action on the remedy sought. For its part, the State indicates that internal remedies have not been exhausted pursuant to the provisions of Article 46(1)(a) of the Convention because the petitioner did not request correction of her birth certificate to change the name.

20. According to the State, Article 146 of the Organic Civil Registry Law allows name changes. However, the petition alleges that changing her name this way would leave a marginal note in the certificate that would be visible and publicly accessible. Furthermore, upon reading that article, there is no indication that it allows changes to sexual identity, which, together with the name change, is the object of this petition. The Commission concludes that the remedy indicated by the State is not, *prima facie*, an ideal resource for remedying the situation alleged by the petitioner. Additionally, regarding the alleged unjustified delay in resolving the protective remedy, the petitioner alleges that she filed for the remedy on May 14, 2004, and filed more than 30 briefs requesting a ruling without receiving any response from the Supreme Tribunal of Justice. For its part, the State has not made any pleadings to contest this point. The Commission therefore concludes that in this case, an exception applies to the requirement of exhausting internal remedies established in Article 46(2)(c) of the American Convention and 31(2)(c) of the Rules of Procedure.

2. Timeliness of the petition

21. Articles 46(1)(b) of the American Convention and 32(1) of the Rules of Procedure establish that for a petition to be admissible by the Commission, it must be lodged within a period of six months from the date on which the party alleging violation of his rights was notified of the final judgment. In the claim under analysis, the IACHR has established that the exception to the exhaustion of domestic remedies applies, pursuant to Article 46(2)(c) of the American Convention and 31(2)(c) of the Rules of Procedure. In this regard, Article 46(2) of the Convention and 32(2) of the Rules of Procedure establish that in the cases in which the exceptions to the requirement of prior exhaustion of domestic remedies are applicable, the petition shall be presented within a reasonable period of time, as determined by the Commission. For this purpose, the Commission shall consider the date on which the alleged violation of rights occurred and the circumstances of each case.

22. In the claim under analysis, the IACHR has established that the exception to the exhaustion of domestic remedies applies, pursuant to Article 46(2)(c) of the American Convention and 31(2)(c) of the Rules of Procedure. The petition before the IACHR was received on April 29, 2012, and the alleged material facts of the claim began on May 14, 2004, the date on which the protective remedy was sought, which to this day has not been resolved. It is alleged that the human rights violations remain ongoing. Therefore, in view of the context and the characteristics of this case, the Commission finds that the petition was presented within a reasonable period of time and that the admissibility requirement on the submission deadline is satisfied.

3. Duplication of international proceedings and international *res judicata*

23. The case file does not indicate that the issue addressed in the petition is pending before any other international proceeding, nor that it repeats a petition that has already been heard by this or any other international body. Accordingly, the grounds for inadmissibility established in Articles 46(1)(c) and 47(d) of the Convention and 33(1) and 33(1)(b) of the Rules of Procedure are not applicable.

4. Colorable claim

24. For the purposes of admissibility, the Commission must decide if the facts alleged represent a violation of rights as stipulated in Articles 47(b) of the American Convention and 34(a) of the Rules of Procedure, or if the petition is “manifestly groundless” or “obviously out of order,” pursuant to Articles 47(c) of the American Convention and 34(b) of the Rules of Procedure. The criteria for analyzing admissibility differs from the criteria used to analyze the merits of the petition, as the Commission only performs a *prima facie* analysis to determine if petitioners establish that the violation of a right guaranteed by the Convention is apparent or possible. This is a summary analysis that does not involve prejudging or issuing a preliminary opinion on the merits of the matter.

25. Likewise, the applicable legal instruments do not require the petitioner to identify the specific rights that the State is allegedly violating in the case submitted to the Commission, although the petitioners may do so. It falls to the Commission, on the basis of the system’s case law, to decide in its admissibility reports which provision of the relevant inter-American instruments is applicable and whose violation could be established if the allegations are proven on the basis of sufficient evidence.

26. The petitioner alleges that the Venezuelan legal system lacks a suitable and effective remedy for changing an individual’s gender identity in the registry documentation system. She also alleges that there has been an unjustified delay in resolving the protective measures she filed to request this change. The petitioner also states that the lack of legal recognition of her gender identity has resulted in numerous professional and personal obstacles, and she therefore faces restrictions on a series of her rights, including the rights to exercise her profession as an attorney, to free movement, and to participate in political life. In this regard, she indicates that the situation represents abusive and arbitrary interference in her private life, making it impossible for her to express her gender identity through her body. For its part, the State argues that there is an administrative procedure available for correcting birth certificates that allows name changes. The State indicates that this procedure is not difficult and notes that it has put a series of policies in place to combat discrimination based on gender identity.

27. Generally speaking, the IACHR has established that States must ensure the “rights of trans persons to change the name and gender marker on birth certificates and identity documents, through quick and simple processes.”¹ In this regard, the Commission observes that Article 146 of the Organic Civil Registry Law addresses administrative name changes, but does not allow for changing the sex in identification documents. The IACHR also notes that Article 96 of Regulation No. 1 of the Organic Civil Registry Law establishes that “once the name change has been made, a note will be stamped in the margin of all civil status certificates requested.”

28. In view of the elements of fact and law presented by the parties and the nature of the matter under consideration, the IACHR finds that should they be proven, the facts alleged by the petitioner could represent violations to the rights protected in Articles 3, 5, 8, 11, 13, 18, 22, 23, 24, and 25 of the American Convention, in conjunction with Articles 1(1) and 2 thereof. Also, taking into account the entry into force of the denunciation of the Convention on 10 September 2013, it is possible that the alleged ongoing nature of the affects represents a violation of Articles II (equal protection), IV (freedom of investigation, opinion, expression and dissemination), V (protection of honor, personal reputation, and private and family life), VIII

¹ IACHR, “Violence against LGBTI Persons, OAS/Ser.L/V/II.rev.2 Doc. 36 12 November 2015; IACHR, Press Release No. 075/15, “IACHR Congratulates Mexico and Colombia for Measures Recognizing Identity of Trans Persons,” 1 July 2015.

(residence and movement), XVII (recognition of juridical personality), XVIII (justice), and XX (vote and participation in government) of the American Declaration.

V. CONCLUSIONS

29. Based on the considerations of fact and law described herein and without prejudging the merits of the case, the Inter-American Commission concludes that this petition meets the admissibility requirements established in Articles 31 through 34 of the Rules of Procedure and 46 and 47 of the American Convention.

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

DECIDES:

1. To declare this petition admissible with regard to Articles 3, 5, 8, 11, 13, 18, 22, 23, 24 and 25 of the American Convention, in conjunction with the obligations established in Articles 1(1) and 2 of the same instrument; and admissible with regard to Articles II (equal protection), IV (freedom of investigation, opinion, expression and dissemination), V (protection of honor, personal reputation, and private and family life), VIII (residence and movement), XVII (recognition of juridical personality), XVIII (justice), and XX (vote and participation in government) of the American Declaration.

2. To notify the parties of this decision;

3. To continue with the analysis of the merits of this matter; and

4. To publish this ruling and include it in its Annual Report to the General Assembly of the Organization of American States.

Done and signed in the city of Panama, on the 6th day of the month of December, 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, Esmeralda E. Arosemena Bernal de Troitiño and Enrique Gil Botero, Commissioners.