

OEA/Ser.L/V/
Doc. 185
July 2, 2020
Original: Spanish

REPORT No. 175/20
CASE 12.861
REPORT ON MERITS

LUIS FERNANDO GUEVARA DÍAZ
COSTA RICA

Approved by the Commission on July 2, 2020

Cite as: IACHR, Report No.175/20, Case 12.861 Merits. Luis Fernando Guevara Díaz. Costa Rica

I. INTRODUCTION

1. On July 12, 2005, the Inter-American Commission on Human Rights (hereinafter “the Inter-American Commission,” “the Commission” or the “IACHR”) received a petition lodged by the *Sindicato de Empleados del Ministerio de Hacienda* or Finance Ministry Employees’ Union (hereinafter “the petitioners”), alleging the international responsibility of the Republic of Costa Rica (hereinafter “the Costa Rican State,” “the State” or “Costa Rica”), for the violation of several rights enshrined in the American Convention on Human Rights (hereinafter “the Convention” or “the American Convention”) as a consequence of the competitive hiring selection process in which the alleged victim was not selected because of his disability and that led to his dismissal from the Finance Ministry.

2. The Commission approved Report on Admissibility No. 13/12 on March 20, 2012.¹ On May 12, 2012, the Commission notified the parties of this report and placed itself at their disposal with a view toward reaching a friendly settlement, though the time was not ripe settle the case through that procedure. The parties were given the time provided for in the rules to submit their additional observations on the merits. All information received was appropriately forwarded to the opposing party.

II. POSITIONS OF THE PARTIES

A. Petitioners

3. The petitioners claim that Luis Fernando Guevara Díaz, a Costa Rican national, is a person with a cognitive disability. They assert that he provided services free of charge to the Ministry of Finance of Costa Rica for approximately eight years until, on June 4, 2001, when he was hired on an interim basis under the grade of “Miscellaneous Worker 1.”

4. They report that while performing his duties as an interim worker, the alleged victim voluntarily entered a competitive hiring process to be appointed on a permanent basis to his position. They note that after taking the preliminary tests, for which accommodations were made because of his disability, a slate was drawn up of three eligible candidates, who were subsequently interviewed. The petitioners contend that Mr. Guevara Díaz placed at the top of this slate by virtue of obtaining the highest score (78.97%).

5. They explain that on June 12, 2003, the alleged victim was notified that he was relieved of his position because he had not been selected to hold the position for which he had competed and held on an interim basis and that he found out through unofficial sources that a person from outside the institution, who did not have any disability, had been appointed in his place.

6. The petitioners claim that the main reason why he was not appointed to the position was a Report of the Head of Area of the Ministry of Finance recommending that he not be appointed because of his “problems of mental retardation and emotional blockage” and that he was unqualified for the position. They claim that this person, the head of the area, does not have the professional competence or the formal authority to issue such a recommendation, much less to contradict the judgment of the National Council for Rehabilitation and Special Education (CONARE), the body they claim officially certified Mr. Guevara Díaz as a “miscellaneous” worker.”

7. The petitioners note that the termination of the alleged victim’s interim appointment took effect on June 16, 2003, and as of that date he has been unemployed and has not been able find gainful and decent employment. They report that on June 18, 2003, he filed an appeal for reversal of decision (*recurso de nulidad y revocatoria*), which was found groundless on July 11, 2003 by the Chief Officer and Administrative Directorate of the Ministry of Finance, and then was appealed and denied on June 18, 2003.

¹IACHR. Report No. 13/12. Petition 1064-05. Luis Fernando Guevara Díaz. Costa Rica. March 20, 2012. In this report, the IACHR declared the petition admissible in relation to the alleged violation of Articles 8.1, 24 and 25 of the American Convention in connection with Articles 1.1 and 2 of the same instrument.

8. They assert that, subsequently, on August 5, 2003, the alleged victim filed for constitutional relief via an *amparo* petition against the Ministry of Finance with the Constitutional Chamber of the Supreme Court, which was denied by this body on February 14, 2005, on the grounds that that the agency did not act in a discriminatory manner.

9. The petitioners contend that the rules of the competitive selection process are discriminatory. Specifically, they claim that the appropriate labor authority is able to appoint any of the three persons comprising the slate of proposed candidates, because it has discretionary power to do so, which is a flaw in the system. They argue that, in the instant case, in order to ensure equality, the scores obtained and work performed by the alleged victim during his years of service provided free of charge to the State and as an interim worker must be considered.

10. They explain that, even though interim workers are not granted special rights for purposes of participating in a competitive hiring process for permanent appointment to their position, when persons with disability are involved, they must be given special treatment in the processing and decision-making of the selection. Specifically, the petitioners claim that if a person with a disability has provided years of service to the State, their work history and the services they provided should be taken into consideration, and a reasoned decision should also be made in the final selection and not be merely discretionary, so that such persons are provided equal and fair treatment.

11. As for the law, they claim a violation of the principle of equality in connection with the right to a fair trial and judicial protection. On this score, they contend that the resolution of the Constitutional Chamber was excessively focused on formal procedure, and did not settle the allegation of discrimination, which has led to countless persons with disability being left without a decent job.

B. State

12. The State argues that, contrary to the claims of the petitioners, the alleged victim did not provide service free of charge for eight years to the Ministry of Finance, but accompanied his mother over that time in her job at this institution, inasmuch as she worked for the Ministry of Finance from June 1976 to December 2007 and was in the habit of taking her son to work with her.

13. It reports that on June 4, 2001, Luis Fernando Guevara Díaz was hired for position No. 010179, on an interim basis, by the Ministry of Finance as a miscellaneous worker in the “Technical Unit for Supplying and Services of the Ministry of Finance” (U.T.A.S.). It asserts that in 2002, the Human Resources unit of the aforementioned Ministry proceeded to conduct external competitive hiring process (*concurso externo*) No. 01-02 in order to fill several vacant positions, including the aforementioned position No. 010179 which, as was noted earlier, was held on an interim basis by the alleged victim. The State explains that Mr. Guevara entered the aforementioned selection process on March 18, 2002 to apply for a permanent appointment to the category of miscellaneous worker 1 and 2, as a janitor.

14. The State asserts that, in order to carry out this competitive selection process, the rules pertaining to workers with some degree of disability were applicable and, consequently, special tests were performed on the alleged victim, because he obtained a score of 78.97 points on the general service workers tests and was therefore included on slate of three finalists No. 16-2003 dated March 6, 2003. The State notes that the aforementioned slate of finalist candidates was submitted to the consideration of the Coordinator of the Technical Unit for Supplying and Services, in order to proceed to the interview round, which took place on March 31, 2003, and the winning candidate was subsequently named.

15. It claims that the selection process was carried out in accordance with the Civil Service Statute and notes that discretionary power may be exercised in the aforementioned selection process and it is not mandatory to select the candidate with the highest score since the three candidates making up the slate of finalists come into the interview on an equal footing. It further contends that with respect to the time that Mr. Guevara Díaz worked on an interim basis for the Ministry of Finance, that said period of time does not automatically grant him permanent status in the position, as was established by the Constitutional Chamber of the Supreme Court.

16. The State reports that Mr. Guevara Díaz was relieved of his duties as of June 16, 2003, because he was not selected to fill the vacant position, and he was properly notified of the situation on June 13, 2003, in an official letter dated June 12, 2003.

17. It reports that on June 13, 2003, the Coordinator of the Technical Unit for Supplying and Services – who was in charge of the selection process to fill the vacant position- issued an official letter noting that Luis Fernando’s behavior “has had a negative effect on his future employment and even his attitude may impact his personal safety, I reiterate because of the type of duties that are performed and therefore suggest reconsidering his appointment,” to which was attached a copy of the official letter of June 13, 2003, signed by the Head of the Maintenance Area, Mr. Guevara Díaz’s immediate supervisor to whom the petitioners make reference.

18. The State argues that the Head of the Maintenance Area did not directly take part in the choice of the candidates and that both official letters were received in the Technical Unit for Human Resources on June 13, 2003, that is, one day after the official letter dismissing Mr. Guevara Díaz. The State asserts that the fact of notifying Mr. Guevara Díaz of the termination on the same day that the above-cited official letters were sent to the Technical Unit for Human Resources, is mere coincidence.

19. It claims that on June 18, 2003, the alleged victim filed the appeal for reversal of decision, which was denied on July 11, 2003, when it was ruled that there were no irregularities or unequal treatment in the competitive selection process in question.

20. The State asserts that on August 5, 2003, the alleged victim filed an *amparo* claim against the Ministry of Finance with the Constitutional Chamber of the Supreme Court, which was declared groundless by this court on February 14, 2005, as the Panel of Judges found that the alleged victim had full opportunity to participate in the competitive selection process to be appointed permanently to the position that he had been performing on an interim basis. It notes that this Chamber also found that the fact that the alleged victim was given special tests, which were assessed by a psychologist, ensured that the appellant competed on an equal basis with the rest of the applicants.

21. Additionally, it argued that the officials’ specific choice from the slate of three candidates is based on the exercise of discretionary powers of the administration, which was recognized by the Constitutional Chamber.

22. As for the law, the State contends that it did not violate the principle of equality or the rights to a fair trial or judicial protection because the alleged victim had equal access to participate in the competitive selection process along with the other eligible applicants and candidates, as well as timely and effective access to constitutional relief. In this regard, it asserts that the fact that a particular remedy is unfavorable is not necessarily tantamount to a violation of the right to judicial protection.

III. FINDINGS OF FACT

A. Interim appointment and competitive selection process

23. On June 1, 2001, the alleged victim was appointed on an interim basis to position 010179, the grade of miscellaneous worker of the Ministry of Finance, to begin serving on June 4, of the same year.²

24. Subsequently, the alleged victim entered a competitive selection process to be appointed to permanent status as a miscellaneous worker. On March 6, 2003, the General Coordinator of Technical Unit for Human Resources forwarded a slate of three names as finalists for selection process 010179, including the alleged victim, who had obtained the highest score. In relevant portions of this communication, she writes:

² Annex 1. Official Letter from the General Coordinator of the Ministry of Finance of June 1, 2001. Annex to initial petition of July 12, 2005.

(...) we submit for your consideration the instant list to carry out the appropriate selection:

Name	Score
Guevara Díaz Luis Fernando	78.97
Pérez Valerio Martha	78.50
Pérez Cascante Leonardo	78.49 ³

25. On March 31, 2003, the alleged victim was interviewed at the Technical Unit for Supplying and General Services of the Ministry of Finance.⁴

26. On June 13, 2003, the Head of the Maintenance Area, the direct supervisor of the alleged victim, sent official letter 44-2003 to the General Coordinator of the Technical Unit for Supplying and Services requesting that the alleged victim not be appointed to the position of miscellaneous worker for the following reasons:

Since last June 4, 2001, Mr. Luis Fernando Guevara Días [sic] was appointed to position No 010179 on an interim basis, I want to state that despite the opportunities that have been provided to him in the fields of Maintenance as an assistant, cleaning Buildings, Elevators and other things, his performance is not satisfactory. Based on the foregoing and by virtue of the need we have for personnel, I request appointing another functional person to the position.

Furthermore, I state to you that because of his problems of retardation and emotional blockage he suffers, (information provided by his mother), I consider him not to be an act [sic: apt] person for the position. If we would like to help him there are several ways of doing so.⁵

27. On that same date, the Coordinator of the Services and Supplying Technical Unit, who was in charge of conducting competitive selection process 010179, wrote an official letter to the General Coordinator of the Technical Unit for Human Resources, requesting reconsideration of the appointment of the alleged victim as follows:

Attached to this letter, I am forwarding official letter 044-2003 from Mr. German Mora Salazar, the person in charge of the maintenance and hygiene section, in relation to the employment future of worker Luis Fernando Guevara Díaz and his potential appointment to a miscellaneous position.

As can be surmised from what is mentioned in this official letter, because of the duties that he performs and the opportunities that he has been given in the position the performance of Don Luis Fernando has had a negative effect on his employment future and even his attitudes, can affect his personal safety, I reiterate because of the type of duties that are carried out and therefore suggest reconsidering his appointment.⁶

28. On June 13, 2003, the Chief Officer and Administrative and Financial Director of the Ministry of Finance of Costa Rica informed the alleged victim that he was not selected in competitive hiring process 010179 and therefore his interim appointment as a miscellaneous worker would terminate on June 16, 2003. He stated to him that:

(...) in accordance with Article 121 of the Autonomous Regulations of this Ministry which states: in the case of interim workers, they terminate their service relationship: b) when a candidate is chosen from a slate of three candidates (a) to hold a permanent position.

³ Annex 2. Official Letter of March 6, 2003 from the General Coordinator to the Chief Officer and Administrator and Financial Director. Annex to initial petition of July 12, 2005.

⁴ Annex 3. Official Letter 2003-03-21-02-034903-000-1-28216. Annex to initial petition of July 12, 2005.

⁵ Annex 4. Official Letter from the Head of the Maintenance Area of the Ministry of Finance to the General Coordinator of the U.T.A.S. Annex to initial petition of July 12, 2005.

⁶ Annex 5. Official letter UTAS 124-2003 of June 13, 2003 from the Coordinator of the Technical Unit for Supplying and Services to the General Coordinator of the Technical Unit for Human Resources. Annex to initial petition of July 12, 2005.

On behalf of this Institution, I thank you for the interest and effectiveness that you have displayed in the performance of the duties assigned during your labor relationship; and we reiterate to you our deepest desire to collaborate with you in any step that is related to the administrative function of the institution (...).⁷

B. Appeal for reversal of decision (*Recurso de revocatoria*)

29. On June 18, 2003, the alleged victim filed an “appeal for reversal of decision and to vacate (*recurso de revocatoria con apelación en subsidio y nulidad absoluta*) against the decision that terminated him in his position. He argued that:

(...) in accordance with the certification extended by CENARE on December 13, 1999, it attests that I have “Mental Retardation with serious emotional blockage,” which makes me a person subject to application of Law 7600 and its Regulations and ILO Convention 159, in my case, they [these provisions] have not been observed, leaving me defenseless and perpetrating violations of due process and the right to a defense.

I am unaware whether in my case, the Ministry of Finance followed all of the rules that Law 7600 and the Regulation thereof establish, as well as ILO Convention 159, ratified on July 23, 1991. These [rules] include: determination in line with professional criteria, what tasks could be performed in accordance with my human potential. Impeding me from being in a function that injures my dignity. Or whether my superiors received technical directives to enable me to be better integrated into the job. (...)

From the formal point of view, there are a host of severe omissions that lead to conclude there is no equal treatment, the criterion is that the ADMINISTRATIVE DECISION of dismissal is NULL AND VOID in accordance with Article 63 of Law 7600 (...).⁸

30. On July 11, 2003, the Chief Officer and Administrative Directorate declared the motion groundless. In this regard, they found that:

(...) this office does not find omissions or irregularities in the proceeding that was brought claiming unequal treatment, inasmuch as the particular process determined by law for cases such as the one that concerns us has been irrefutably abided by, ensuring that Mr. Guevara Díaz participated on an equal basis with the other applicants of the competitive selection process and with the other eligible candidates. (...) the time that he worked for this Ministry, on an interim basis, cannot be regarded as qualifying him for a permanent position, as was so established by the Constitutional Chamber (...).

(...) in the case of Mr. Guevara Díaz, the rules regulating the subject matter of workers with some degree of disability were applied, by way of example it should be mentioned that special tests were given to him, such as the specific test for miscellaneous worker and mini-multiple choice questions were used, because of his disability (...).

(...) Moreover, it should be noted that after reviewing the personnel file of Mr. Guevara Díaz, it was determined that there was no report at all about what is termed “alleged unsuitable workplace conduct.” Nonetheless, on this point it should be noted that in using his discretionary power Mr. Eugenio Porras chose the candidate that he considered qualified to perform the job, as was stated above; likewise through official letter UTAS-124-2003 he asserted that “...the behavior of Don Luis Fernando has had a negative impact on his employment future and even his attitudes may affect his personal safety, I reiterate because of the type of duties that are carried out it is therefore suggested to reconsider his appointment.”⁹

31. On July 7, 2003, in response to a request for information, the General Coordinator of the Technical Unit for Human Resources of the Ministry of Finance reported that the alleged victim obtained the highest score of the slate of three finalists of the competitive selection process in which he participated, but another person was selected. She stated that:

⁷Even though this official letter is dated June 12, 2002, both parties concur that it was served notice on June 13, 2003. See Annex XX. Official Letter from the Chief Officer and Administrator and Financial Director of the Ministry of Finance addressed to the alleged victim. Annex to initial petition of July 12, 2005.

⁸ Annex 7. Appeal for reversal of decision and to vacate procedure of June 18, 2003. Annex to initial petition of July 12, 2005.

⁹ Annex 8. Decision of the Chief Officer and Administrative Directorate of July 11, 2003 denying the appeal for reversal filed by the alleged victim. Annex to initial petition of July 12, 2005.

(...) c. the candidate chosen was Mr. Leonardo Pérez Cascante and his permanent appointment went into effect on June 16, of the current year.

d. Furthermore, we inform to you that Mr. Guevara Díaz obtained the score of 78.97, ranking first place of the three members of the slate of finalists.

e. In reviewing the personnel file of said worker it was determined that there is no report of any work-related problems or of conduct. I must not fail to mention that said choice was made by Engineer Eugenio Porras Vargas, General Coordinator of the Technical Unit for Supplying and Services.¹⁰

32. On July 22, 2003, the Office of Legal Counsel of the National Council for Rehabilitation and Special Education issued a report concluding that because he was not selected for the miscellaneous worker position, the alleged victim's termination constituted a violation of the Law of Equal Opportunities for Persons with Disability and a discriminatory work access decision. In said report, it is noted:

(...) Mr. Guevara Díaz was removed from the position that he had been holding because he was submitted to a public competitive selection process and even though Mr. Guevara was assessed as qualified: it was determined to give the position to another candidate. The stance of the person in charge of Maintenance and Hygiene of the Ministry is even more serious, as he noted that the condition of retardation and emotional blockage of the affected person renders him an inapt person for the position.

(...) in the case that concerns us, we could determine a violation of the principles of Law 7600, both by the Ministry of Finance, inasmuch as it did not choose a qualified person because of his condition of "retardation and emotional blockage" and the General Directorate of the Civil Service, inasmuch as it did not establish the specific selection for persons with disability and did not promote the incorporation of this group into employment in the public sector. Notwithstanding, we cannot clearly view the situation without conducting a study or inspection in which an opportunity is provided to the counterpart to exercise its right to defense and introduce the appropriate evidence.¹¹

C. Amparo proceeding

33. On August 5, 2003, the alleged victim filed a petition for constitutional relief via *amparo* with the Constitutional Chamber of the Supreme Court of Justice against the Ministry of Finance arguing "acts of work-place discrimination." He alleged that:

(...) it is timely and necessary to note the severe contradictions and lack of rectitude and humanity of management's representatives, let us look at why:

1. My periodic performance scores, on average are eighty out of a scale of a maximum of one hundred (100%) even though a differential [handicapped] score is not applied to me (See Annexes No 1 and 2)

2. The undersigned ranked FIRST PLACE ON THE SLATE OF THREE CANDIDATES, with a score of 78.97 (See Annex No 3)

3. I have two years of seniority in the position (See Annex No. 4)

4. I have received a letter of congratulations for my performance (See Annex No 5)

5. The Coordinator for Human Resources of the Ministry of Finance in official Letter No UTRH-RSI-827-2003 of July 7, 2003, in the relevant portion writes verbatim: "After reviewing the personnel file of said worker it was determined that there is no report about work-place or behavioral problems (See Annex No. 6).

(...) the discriminatory act is exposed by the statement of the representative of management in saying that because of the problems of retardation and emotional blockage I am not a person apt for exercising the right to work (...) undoubtedly, the dismissal is mainly based on the disability of which I am a bearer and no other valid or rational reason, thus violating fundamental human rights (...).¹²

34. On September 1, 2003, the Chief Officer and Director General of the Ministry of Finance replied to the *amparo* claim rejecting the charges levelled by the alleged victim. He further noted that:

¹⁰ Annex 9. Official letter from the General Coordinator of the Technical Unit for Human Resources addressed to Carlos Navarro of July 7, 2003. Annex to initial petition of July 12, 2005.

¹¹ Annex 10. Report of the Office of Legal Counsel of the National Council for Rehabilitation and Special Education of Costa Rica. Annex to initial petition of July 12, 2005.

¹² Annex 11. *Amparo* petition filed by the alleged victim with the Constitutional Chamber of the Supreme Court on August 5, 2003. Annex to initial petition of July 12, 2005.

(...) using his discretionary power Engineer Porras Vargas, chooses the candidate that he considered suitable to hold the position by means of the interviews held on March 31, 2003. It must be noted that the same day the interviews are conducted the candidate to hold the permanent position is chosen, to wit, this choice was made on March 31, 2003 (...) With relation to official letter UTAS-124-2003 dated June 13, 2003, signed by Engineer Porras Vargas (...) in the aforementioned letter a copy of official letter AM-044-2003 dated June 13, 2003, signed by Mr. German Mora Salazar, Head of the Maintenance Area is forwarded, which makes reference to the *amparo* claimant; it must be clarified that Mr. Mora Salazar acted as Mr. Guevara Díaz's immediate supervisor while he worked for the Ministry, nonetheless, Mr. Mora Salazar did not directly participate in the choice of the candidate to hold the permanent position (...)

It should be clarified that both official letters were received at the Technical Unit for Human Resources on June 13, 2003, at 12:19 PM; to wit, one day after the dismissal notice of Mr. Guevara Díaz was drawn up and signed through official letter UTRH-RSI-420-2003 dated June 12, 2003 and signed by myself, notified on June 13 (...).¹³

35. On October 14, 2003, the Ombudsman of the Inhabitants of the Republic of Costa Rica filed his brief in support of the *amparo* claim and requested that the external competitive selection process for position 010179 be vacated. He found the following:

(...) As far as the facts that prompted the filing of the *amparo* petition by Mr. Guevara Díaz are concerned, it must be noted that even though the Ministry of Finance has discretionary power to appoint any of the members of the slate of three finalists, it cannot exclude any member of it, as has happened in practice with the claimant, based on the fact that he presents a mental retardation with emotional blockage, because that oversteps the limits of the discretionary power as it violates the principle of equality that governs as a limit that is part of the legal system. With the instant brief supporting the *amparo* claim, it is not the intent to directly appoint Mr. Guevara Díaz, but to repeat the competitive selection process free of discriminatory assessments.

(...) Furthermore, after reviewing the file of the aforementioned competitive selection process, there is no document putting on the record the basis for the administrative decision in which the appointment is made. We only have the document of March 6, 2003, in which the slate of three finalists in the competitive selection process are announced and one of the candidates is appointed. The selection was not reasoned, as required by Article 133 of the General Law of Public Administration. Therefore, the appointment in question, as an administrative decision, is rendered absolutely null and void as provided by Article 166 of the General Law of Public Administration.

(...) considers that in the selection process and subsequent appointment that had been carried out to fill the position of General Services Worker (miscellaneous), Mr. Guevara Díaz was discriminated against based on his disability and that in the exercise of the discretionary power of appointment by the administration the principle of equality was not upheld, in view of the clarity that exists in relation to the manifest reason to expressly exclude Mr. Guevara, when no reason to justify the appointment made exists.¹⁴

36. On February 14, 2005, the Constitutional Chamber of the Supreme Court of Justice declared groundless the *amparo* claim filed by the alleged victim, writing the following considerations:

(...) Based on the examination of the evidence introduced in the case proceedings file and on the information provided under oath, it is concluded that the claimant was appointed on an interim basis to the position of Miscellaneous Worker 1 within the respondent Ministry; subsequently, in the interest of filling a vacant position, an external competitive selection process was instituted in which civil servant Guevara Díaz had full opportunity to participate, for which he was given special and specific tests because of his disability, thus abiding by the laws in effect at the time, which were also assessed by the Psychologist of the Technical Unit for Medical Services of that Body. The claimant was eligible to hold the position and fully participate in the election of the candidate to hold the position in question, thus he was one of the members of the respective slate of three finalists. Based on the foregoing, it is evident that the claimant had access to the position of his interest on an equal basis with the other candidates, and no acts are apparent in the procedure that could be considered as discriminatory against him. While it is true that there exists a note from the Head of the Maintenance Area of the Ministry of Finance, in which mention is made of the problems of disability that the appellant suffers from, this Court has been informed in sworn statement (with the consequences of the law) that the selection of the civil servant to hold the vacant position was made prior to the aforementioned note and that in no way did it influence the choice of the suitable person for the position. This being the case and in accordance with the

¹³ Annex 12. Chief Officer and Director General of the Ministry of Finance's reply of September 1, 2003 to the *amparo* petition. Annex to initial petition of July 12, 2005.

¹⁴ Annex 13. Formal brief in support of the *amparo* petition (*Escrito de formal coadyuvancia al recurso de amparo*) filed by the Ombudsman of the Inhabitants of the Republic of Costa Rica on October 14, 2003. Annex to initial petition of July 12, 2005.

consistent judgment of this Constitutional Court, constitutional *amparo* does not provide protection for equal participation of interested parties to be included on a list or be on the respective slate of three finalists and it is improper for it to review the legality, timeliness or appropriateness of the decision of the competent bodies in the specific selection, which is done in the exercise of its discretionary powers.

VII.-In accordance with the foregoing whereas clauses, we reach the conclusion that the constitutional rights of the claimant have not been threatened or violated by the facts that he contends, without prejudice to discussing the legality of the procedure used for the selection of the candidates to hold the position of interest to Mr. Guevara Díaz at the appropriate administrative body, which goes beyond the competence of this Constitutional Court.¹⁵

37. On August 22, 2005, the National Director of Social Security sent an official letter to the Ministry of Labor and Social Security, emphasizing to it that the selection process should be reviewed because it was not objective and did not take into account the Law of Equal Opportunities for Persons with Disability. In this regard, she reasoned:

(...) apparently, based on the argument put forward by the Administration of the Ministry of Finance to not appoint him on a permanent basis was the recommendation of the Head of Maintenance wherein it is asserted that “he does not recommend his appointment to permanent status because of his problems of mental retardation and emotional blockage” which the worker is suffering from and because he does not consider him to be a qualified person for the position (even though he was given the chance to work on an interim basis, he obtained good scores in his performance, his merit at his job was recognized in writing, and he ranked first place among the slate of three finalists).

In conclusion I consider (...) Mr. Guevara Díaz in the time that he has served as a miscellaneous [worker], built up the necessary experience and did so in an effective manner, as the performance evaluations conducted by his superiors note. The disability that he presents never constituted a limitation to the performance of his duties in said position. The reasons put forward by the senior officials to not appoint Mr. Guevara are at odds with the provisions of the Law of Equal Opportunities for Persons with Disabilities, Chapter II referring to Access to Work which reads: ...”additionally it is considered an act of discrimination that a qualified worker is denied employment based on his disability...” if this citation is taken verbatim, the administrative process should be reviewed, inasmuch as on the face of it, the selection was not objective, given that the candidate met all the requirements and has proven effective performance over 12 years.¹⁶

38. On August 29, 2005, in a communication to the President of the Republic of Costa Rica, the Minister of Labor and Social Welfare noted with regard to the instant petition that:

(...) This office forwarded a copy of this case file to the Disability Unit of this Ministry, in order for it to issue a judgment with relation to the case of Mr. Luis Fernando Guevara Díaz (...) said Unit, in short, understands Mr. Guevara Díaz to be qualified to serve as a miscellaneous worker, given that the training and the conclusion of the process of apprenticeship certifies him as such, as granted by the National Council for Rehabilitation and Special Education.

That the reasons put forward by the senior officials to not appoint Mr. Guevara are at odds with the provisions of the Law of Equal Opportunity for Persons with Disability (...) it would seem that we are looking at a case of discrimination.¹⁷

D. Case before the National Directorate of Labor Inspection

39. On August 6, 2003, the Secretary General of the Finance Ministry Employees’ Union filed a grievance with the National Directorate of General Labor Inspection on behalf of the alleged victim for workplace discrimination.¹⁸

¹⁵ Annex 14. Judgment of the Constitutional Chamber of the Supreme Court of Justice of February 14, 2005. Annex to petitioners’ observations submission of August 20, 2010.

¹⁶ Annex 15. Official Letter of August 22, 2005 from the National Director of Social Security to the Ministry of Labor and Social Security. Annex to petitioners’ submission of October 4, 2005.

¹⁷ Annex 16. Official Letter of August 29, 2005 from the Minister of Labor and Social Security to the President of the Republic. Annex to petitioners’ submission of October 4, 2005.

¹⁸ Annex 17. Grievance of the Ministry of Finance Employees’ Union of August 6, 2003 before the Director General of Labor Inspection. Annex to initial petition of July 12, 2005.

40. On November 26, 2003, in resolution 1657- 03 the grievance was denied on the grounds that it was not proven that there actually existed workplace discrimination to the detriment of the alleged victim by the Ministry of Finance.¹⁹

41. On January 27, 2004, the Secretary General of the Ministry of Finance Employees' Union filed an appeal to reverse decision and vacate (*recurso de revocatoria con apelación en subsidio y nulidad*). On February 3, 2004, the National Directorate of General Labor Inspection granted the appeal for reversal of decision. In its reasoning, it puts on the record:

(...) regarding the discrimination of which the worker was the object in official letter AM 044-2003 we have the following (...) we must take into account that note AM 044-2003 is addressed to Mr. Eugenio Porras Vargas General Coordinator U.T.A.S., who upon receiving this note drafts official letter UTAS 124-2003 addressed to Licda. Xinia Madrigal Chávez, Coordinator of the Technical Unit for Human Resources of the Ministry of Finance, who says, regarding what concerns us in this case "...Attached to this letter I am forwarding official letter 044-2003, from Mr. German Mora Salazar, the person in charge of the Maintenance and Hygiene Section, in relation to the employment future of worker Luis Fernando Díaz Guevara and his possible appointment to a miscellaneous [worker] position (...) based on this portion of the note, it is understood that thus far no final decision had been taken about who was going to be appointed to this position and it is confirmed by the following ..." I reiterate because of the type of duties that are carried out it is therefore suggested to reconsider his appointment (...) It is surmised from it that it is because of this situation that it influences the non-appointment of Mr. Guevara Díaz to the above-cited position.

(...) from all of the foregoing, it is apparent that Mr. Eugenio Porras based on the note issued by Mr. Mora Salazar, requests reconsideration of the potential appointment of Mr. Guevara, this by virtue of the note and because it is Mr. Porras Vargas who subsequently appoints the person to the position; this Directorate considers that there was workplace discrimination against Mr. Guevara Díaz.

(...) after analyzing the appeal for reversal against resolution DNI-1657-2003, it is decided to reverse it based on the arguments stated (...) Therefore inspectors Marco Tulio Agüero and Lizzy Valverde are ordered to continue with the respective proceeding and its forwarding to the respective Courts.²⁰

42. On March 5, 2004, the Ministry of Finance Employees' Union sent a communication to the Ministry of Finance telling it that even though resolution DNI-277-04 orders the officials of the National Directorate of Labor Inspection to bring the appropriate judicial suit "it seems to us that we have a very reasonable basis to request the immediate reinstatement on permanent status of our co-worker Luis Fernando Guevara Díaz."²¹

43. On March 18, 2004, the Minister of Finance replied to said communication, noting that reinstatement of the alleged victim was out of order. He stated that:

(...) this office finds that no omissions exist in the proceeding that was carried out, to suggest that there was any unequal treatment, arbitrariness or any other discriminatory act, inasmuch as the procedure determined by law was strictly abided by for these cases, ensuring Mr. Guevara Díaz to participate on an equal basis with the other applicants of the competitive selection process and with the eligible candidates.²²

44. On February 14, the Constitutional Chamber of the Supreme Court of Justice issued its decision in the *amparo* case in the terms noted above. In view of the foregoing, on September 1, 2006, the National Directorate of Labor Inspection of the Ministry of Labor and Social Security archived the case. In its resolution, it wrote:

(...) Having examined Resolution 2005-0142 of the Constitutional Chamber at 16:42 hours of February 14, 2005 (...) The resolution of the above-mentioned Chamber which declares the *amparo* appeal groundless it is concluded that there did not exist any grounds of discrimination (...)

¹⁹ Annex 18. Resolution DNI -277-04 of the National Directorate of General Labor Inspection of February 3, 2004. Annex to initial petition of July 12, 2005.

²⁰ Annex 18. Resolution DNI -277-04 of the National Directorate of General Labor Inspection of February 3, 2004. Annex to initial petition of July 12, 2005.

²¹ Annex 19. Letter of March 5, 2004 from the Ministry of Finance Employees' Union to the Minister of Finance. Annex to initial petition of July 12, 2005.

²² Annex 20. Response of March 18, 2004 from the Minister of Finance to the Employees' Union. Annex to initial petition of July 12, 2005.

(...) In light of this ruling of the Constitutional Chamber and our duty to abide by those rulings because of their binding nature, we order the ARCHIVING WITH PREJUDICE OF THE INSTANT CASE, the judicial body remaining open for them to assert their rights.²³

IV. LEGAL ANALYSIS

A. Right to equal protection and access to work (articles 24²⁴ and 26²⁵ of the American Convention, in connection with Article 1.1 of the same instrument)

1. General standards on equality and non-discrimination

45. The Inter-American Court has held that the notion of equality emanates directly from the unified nature of the human genus and is inseparable from the essential dignity of the person. Therefore, whenever a situation arises in which a particular group is considered superior, leading to preferential treatment, it is incompatible with the Convention. By the same token, should the reverse situation arise, in which a group is considered inferior, with that group being treated with hostility or in any other discriminatory way in terms of the enjoyment of rights that are recognized for people who are not in such a situation, it also runs afoul of the Convention. The legal precedents of the Court have established that, at the current stage of evolution of international law, the fundamental principle of equality and non-discrimination has entered the realm of *jus cogens*. The legal framework of national and international systems of law are predicated upon it and it permeates every legal system.²⁶

46. The Inter-American system not only embraces a formal notion of equality confined to demanding reasonable and objective criteria for distinction and therefore prohibits unreasonable, capricious or arbitrary differences in treatment; but is also moving toward a concept of material or structural equality acknowledging that for certain sectors of the population, affirmative action measures are required to level out the playing field. This involves resorting to differential treatment whenever equal treatment might suspend or limit access to a service, good or the exercise of a right because of the circumstances affecting a disadvantaged group.²⁷

47. The Commission notes that when it examines a case, treatment is presumed to be discriminatory when it is based on a prohibited category of differential treatment as established in Article 1.1 of the Convention,²⁸ which implies: i) permanent traits of persons, with which they cannot dispense without losing their identity; ii) traditionally marginalized, excluded or subordinate groups, and iii) irrelevant criteria for equitable distribution of goods, rights or social burdens.²⁹

48. Specifically, with regard to persons with disability, the IACHR notes that, the social model for disability should be taken into account,³⁰ which implies that disability is not only defined by the presence of a physical, mental, intellectual or sensory impairment, but is interrelated with the barriers or limitations that exist socially for persons to be able to exercise their rights effectively. The types of limitations and barriers commonly

²³ Annex 20. Resolution DNI-801-06 of the National Directorate of Labor Inspection of the Ministry of Labor and Social Security. Annex to State's observations submission of December 3, 2012.

²⁴ Article 24. All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law.

²⁵ Article 26. The States Parties undertake to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires.

²⁶ IA Court of HR. Case of Flor Freire v. Ecuador. Preliminary Objection, Merits, Reparations and Costs. Judgment of August 31, 2016. Series C No. 315. Par. 109.

²⁷ IACHR. Report on Poverty and Human Rights in the Americas. September 7, 2017, par. 160

²⁸ IA Court of HR. Case of San Miguel Sosa et al v. Venezuela. Merits, Reparations and Costs. Judgment of February 8, 2018. Series C no. 348, par.116.

²⁹ IA Court of HR, Case of I.V. v. Bolivia. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 30, 2016, par. 240.

³⁰ In this regard, according to the International Convention on the Rights of Persons with Disability, "disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others." Additionally, the Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disability establishes that disability "can be caused or aggravated by the economic or social environment."

encountered by persons with functional diversity in society include physical or architectural types of barriers, communication, attitudinal or socioeconomic barriers.³¹

49. The Commission has held that positive measures must be implemented to ensure the exercise of the rights of persons belonging to groups that are victims of structural inequality or have been the victims of historic processes of exclusion,³² such as persons with some cognitive disability.³³

50. For its part, the Inter-American Court has held that “it is not sufficient for States to refrain from violating rights, and that it is imperative to adopt affirmative measures to be determined according to the particular protection needs of the subject of rights, whether on account of his personal situation, such as disability.”³⁴ Moreover, the Court has noted that States have the obligation to promote the inclusion of persons with disabilities through equality of conditions, opportunities and participation in all spheres of society. This is in order to ensure that limitations, either of a normative or de facto nature, which perpetuate or deepen this vulnerability and exclusion, are removed. Consequently, it is necessary for States to promote social inclusion practices and adopt affirmative measures to remove such barriers.³⁵

51. The Commission understands disability to be a prohibited basis for discrimination covered under the phrase “any other social condition” established in Article 1.1 of the American Convention, inasmuch as persons with disability make up a traditionally marginalized or excluded group from society, that has endured structural inequalities. In this regard, the Commission notes that the Inter-American Court held that “this protection against discrimination under ‘any other social condition’ also includes the situation of persons living with HIV as an aspect that may lead to disability in those cases in which, in addition to the physical effects of HIV, economic, social and other barriers derived from HIV exist.”³⁶

52. Likewise, the Committee on ESCR has emphasized the requirement set forth in Article 2.2 of the Covenant on Economic, Social and Cultural Rights, which guarantees “the rights enunciated in the present Covenant will be exercised without discrimination of any kind,” based on certain specified reasons “or other status,” which clearly applies to disability-based discrimination.³⁷ Also, the European Court of Human Rights has understood that the catalogue of prohibited basis of discrimination established in Article 14 of the European Convention on Human Rights is not exhaustive, inasmuch as the phrase “or other status” is included and, therefore, there is no question that this article includes the prohibition of disability-based discrimination.³⁸

2. Disability and the right to work

53. Moreover, the IACHR recalls that both bodies of the Inter-American system have reaffirmed their competence to rule on potential violations of Article 26 of the American Convention in the framework of the system of petitions and individual cases.³⁹ Specifically, with respect to the right to work, the Commission and

³¹ IA Court of HR. Case of Furlan and Family v. Argentina. Preliminary Objections, Merits, Reparations and Costs. Judgment of August 31, 2012, Series C no. 246, par.133. IA Court of HR. Case of Chinchilla Sandoval et al v. Guatemala. Supervision of Compliance with Judgment. Resolution of the Inter-American Court of Human Rights of October 7, 2019, par. 207.

³² IACHR, Access to Justice for Women Victims of Violence in the Americas, January 20, 2007, pars. 100 and 101. IACHR. Considerations regarding the compatibility of affirmative action measures designed to promote political participation of women with the principles of equality and non-discrimination, Annual Report, 1999, April 13, 2000, Chapter VI.

³³ IACHR, Access to Justice for Women Victims of Violence in the Americas, January 20, 2007, pars. 100 and 101. IACHR. Considerations regarding the compatibility of affirmative action measures designed to promote political participation of women with the principles of equality and non-discrimination, Annual Report, 1999, April 13, 2000, Chapter VI.

³⁴ IA Court of HR. Case of Furlan and Family v. Argentina. Preliminary Objections, Merits, Reparations and Costs. Judgment of August 31, 2012, Series C no. 246, par. 134.

³⁵ IA Court of HR. Case of Furlan and Family v. Argentina. Preliminary Objections, Merits, Reparations and Costs. Judgment of August 31, 2012, Series C no. 246, par. 134.

³⁶ IA Court of HR. Case of Gonzales Lluy et al v. Ecuador. Preliminary Objections, Merits, Reparations and Costs. Judgment of September 1, 2015. Series C no. 298, par.255.

³⁷ Implementation of the International Covenant on Economic, Social and Cultural Rights, General Comment 5, Persons with disability (11th Session, 1994), U.N. Doc. E/C.12/1994/13 (1994); Also see United Nations, [Disability instruments](#).

³⁸ Case of Glor v. Switzerland, Application 13444/04, Judgment of April 30, 2009, para. 80.

³⁹ See for example, IA Court of HR. Case of San Miguel Sosa et al v. Venezuela. Merits, Reparations and Costs. Judgment of February 8, 2018. Series C No. 348; IA Court of HR. Cuscul Pivaral et al v. Guatemala. Preliminary Objection, Merits, Reparations and Costs. Judgment of August

[continues ...]

the Court have previously established that this right emanates from the aforementioned economic and social provisions in Article 26 of the Convention and, therefore, it is unnecessary to revisit that analysis.⁴⁰ It must be determined whether the State in question breached the obligation of “achieving progressively” full realization of this right, or the general obligations to respect and ensure the right. At this point in the analysis, it is necessary to look at the nature and scope of the obligations that are enforceable on the State under Articles 1.1, 2 and 26 of the Convention, as well as the substance of the right involved.

54. In this regard, the Commission has previously held that Article 26 of the American Convention imposes several obligations on States, which not only prohibit regression, which is merely a correlate of the obligation of progressive achievement, but cannot be understood as a single justiciable obligation in the Inter-American system under this provision. Thus, the Commission asserts that, bearing in mind the interpretive framework of Article 29 of the American Convention, when viewed in light of Articles 1.1 and 2 of the same instrument, Article 26 gives rise to, at least, the following self-enforcing obligations: i) general obligations to respect and ensure, ii) application of the principle of non-discrimination to economic, social and cultural rights, iii) obligations to take steps or adopt measures to achieve the enjoyment of the rights enshrined in said article and iv) offering suitable and effective remedies for the protection thereof. The methodologies or sources of analysis, that are relevant to each of these obligations, should be established in keeping with the particular circumstances of each case.⁴¹

55. The IACHR reiterates that the self-enforcing obligations relating to the right to work protected by Article 26 of the ACHR include the obligation to guarantee the exercise thereof without discrimination of any kind and the obligation to adopt measures or take deliberate and concrete steps aimed at the full realization of this right, as these obligations are not subject to progressive application or contingent upon availability of resources.

56. Specifically, in relation to persons with disability, in its Report *Poverty and Human Rights*, the IACHR emphasized that “having a disability increases the likelihood of living in poverty because the discrimination that comes with living with this condition may lead to social exclusion, marginalization, lack of schooling, and unemployment, in addition to the fact that all of these factors increase the risk of poverty.”⁴² It further noted that one of the main problems faced by persons with disabilities in the region is unemployment and marginalization from the labor market, which is related to, among other factors, companies’ resistance to hiring people with disabilities.⁴³

57. Additionally, different international organizations have cited the right to work of persons with disability without discrimination and the need to adopt measures of positive discrimination to ensure their full inclusion in the labor market. In its General Comment No. 5, the *Committee on Economic, Social and Cultural Rights* underscored that:

The field of employment is one in which disability-based discrimination has been prominent and persistent. In most countries the unemployment rate among persons with disabilities is two to three times higher than the unemployment rate for persons without disabilities. Where persons with disability are employed, they are mostly engaged in low-paid jobs with little social and legal security and are often segregated from the mainstream of the labour market. The integration of persons with disabilities into the regular labour market should be actively supported by States.⁴⁴

23, 2018. Series C No. 359; IACHR, Report No. 25/18, Case 12.428. Admissibility and Merits. Workers of the Fireworks Factory in Santo Antonio de Jesus and their Families. Brazil. March 2, 2018; IACHR. Report No. 148/18. Case 12.997. Merits. Sandra Cecilia Pávez Pávez. Chile. December 7, 2018.

⁴⁰ IA Court of HR. Case of Lagos del Campo v. Peru. Preliminary Objections, Merits, Reparations and Costs. Judgment of August 31, 2017. Series C No. 340. Par. 146; and IA Court of HR. Case of San Miguel Sosa et al v. Venezuela. Merits, Reparations and Costs. Judgment of February 8, 2018. Series C No. 348. Par. 220.

⁴¹ IACHR, Report No. 25/18, Case 12.428. Admissibility and Merits. Workers of the Fireworks Factory in Santo Antonio de Jesús and their Family Members. Brazil. March 2, 2018; IACHR. Report No. 148/18. Case 12.997. Merits. Sandra Cecilia Pávez Pávez. Chile. December 7, 2018.

⁴² IACHR; *Poverty and Human Rights*, OEA/Ser.L/V/II.164 Doc. 147, September 7, 2017, par. 432.

⁴³ IACHR; *Poverty and Human Rights*, OEA/Ser.L/V/II.164 Doc. 147, September 7, 2017, par. 435.

⁴⁴ Implementation of the International Covenant on Economic, Social and Cultural Rights, General Comment 5, Persons with disability (11th Session, 1994), U.N. Doc. E/C.12/1994/13 (1994); Also see, General Comment 18, [The right to work](#).

58. For its part, the *International Labor Organization* has raised both the need to adopt policies to promote employment of persons with disability, and the importance of combating negative stereotypes about them. Specifically, it has said:

(...) Mistaken assumptions about the capacity of disabled persons to participate in the labour force and associated prejudices and stereotypes contribute to the difficulties faced by disabled women and men in finding decent and productive jobs. These assumptions, prejudices and stereotypes are widespread, even though workers with disabilities have demonstrated their capacity to work effectively and to perform well on the job, and many employers actively seek to recruit people with disabilities as they recognize the contribution they make.⁴⁵

(...) employers should adopt a strategy for managing disability as an integral part of overall employment policy and that encompasses: a) recruiting jobseekers with disabilities, including those who have not worked before and those who wish to return to work after a period of non-employment; b) equal opportunity for employees with disabilities; and c) job retention by employees who acquire a disability.⁴⁶

59. Also, in 2017, the *European Parliament* highlighted in its resolution on the application of the European strategy on disability that “access to the labour market is a holistic issue requiring the implementation of support measures that result in a win-win situation for both the individual and the employer, ensuring social inclusion and which should include accessible recruitment procedures, accessible transport from and to the workplace, career progression, and on-going training, as well as reasonable accommodation and accessible work places.”⁴⁷

60. Likewise, in its Program of Action for the Decade of the Americas for the Rights and Dignity of Persons with Disability (2016-2026) the *Organization of American States* underscored as one of the actions to take during this decade: “To guarantee to persons with disabilities the right to decent employment chosen autonomously and independently in open, inclusive, and accessible working environments, in accordance with their capacities and competencies, with all the guarantees provided by law, the possibility of advancement and being promoted and wage-earning equality on an equal footing with others, respecting their right to work and belong to a trade union.”⁴⁸

61. In 2018 the *United Nations Department of Economic and Social Affairs* issued its report on disability and development noting that:

States should ensure that national legislation protects persons with disabilities from discrimination on the basis of disability in all matters of employment and that it includes the denial of reasonable accommodation as a form of discrimination. Reasonable accommodation in most cases does not incur costs or incur just a minimal cost. It is important that States improve and standardize the support available for providing reasonable accommodation in the workplace.⁴⁹

62. For its part, in General Comment No. 6, the *Committee on the Rights of Persons with Disability* wrote that:

To achieve de facto equality in terms of the Convention, States parties must ensure that there is no discrimination on the grounds of disability in connection to work and employment. In order to ensure reasonable accommodation as laid out in article 5 (3) and to achieve or accelerate de facto equality in the work environment as laid out in article 5 (4), the States parties should:

(...) e) ensure proper transition into and out of employment for persons with disabilities in a non-discriminatory manner. States parties are obliged to ensure equal and effective access to benefits and entitlements, such as retirement

⁴⁵ ILO, Trabajo decente para personas con discapacidad: promoviendo derechos en la agenda global de desarrollo, Decent work for persons with disability: promoting rights in the global development agenda, 2015, pg. 167.

⁴⁶ International Labour Organization, ILO Code of Practice. Managing Disability in the Workplace.

⁴⁷ Resolución del Parlamento Europeo de 20 de noviembre de 2017 sobre la aplicación de la Estrategia Europea sobre Discapacidad Resolution of the European Parliament of November 20, 2017 on implementation of the European Disability Strategy (2017/2127/INI), par. 36.

⁴⁸ OAS, Programa de acción para el decenio de las Américas por los derechos y la dignidad de las personas con discapacidad (2016-2026), OAS, Program of Action for the Decade of the Americas for the Rights and Dignity of Persons with Disability (2016-2026). 2018, Pg. 29.

⁴⁹ United Nations Department of Economic and Social Affairs. Realization of the sustainable development goals by, for and with persons with disabilities, UN Flagship Report on Disability and Development 2018, pg. 202.

or unemployment benefits. Such entitlements must not be infringed upon by exclusion from employment, thereby exacerbating the situation of exclusion;

(...) g) Ensure that persons with disabilities enjoy equal opportunities regarding career advancement opportunities through regular assessment meetings with their managers and by defining the objectives to be achieved, as a part of a comprehensive strategy;⁵⁰

63. Also, the Committee on the Rights of Persons with Disability, in the case of *V. F.C vs. Spain*, emphasized that Article 27 (1), of the Convention on the Rights of Persons with Disability requires States parties to recognize the right of persons with disability to retain their job, on an equal basis with others, adopt all appropriate measures, including legislative ones, to prohibit disability-based discrimination in job retention, and make sure that reasonable accommodations are made for people who acquire a disability in the workplace.⁵¹

64. Likewise, several national courts have mentioned how important it is to guarantee for persons with disability the right to work without discrimination and with job security. By way of example, in Judgment T-340/17, the *Constitutional Court of Colombia* ruled about a case of a person who was dismissed because when he signed his labor contract, he failed to mention that he was living with a disability and receiving a pension. In this decision, this court emphasized that:

(...) this Body has specifically said that the Ministry of Labor has the obligation to rule on any dismissal authorizations that are submitted to it, inasmuch as to fail [to fulfill] this duty renders the right to enhanced job security meaningless and heightens the state of vulnerability in which workers with disabilities find themselves. In short: (i) the dismissal of a person in a situation of disability is inadmissible if there is no authorization from the Ministry of Labor, (ii) when the employer alleges a good cause, the Ministry should assess whether the alleged grounds are fair or not, in order to protect the worker who is in a situation of disability, and (iii) even when compensation is recognized, dismissal without prior authorization is inadmissible.

(...) Similarly, legal precedents have indisputably affirmed that persons with disabilities cannot be denied, subjected to conditions or restrictions on access to a job -either public or private - or [denied] the obtention of a license to perform any position, based on the respective disability, unless it is demonstrated that the function that is impaired or diminished is indispensable for the essential duties of the respective position or job.

To that extent, a law or act is unconstitutional if it impedes access to the respective position of persons (i) whose situation of disability is not proven to be incompatible with the essential duties to be performed; (ii) who have disabilities [that are] incompatible with the accidental, accessory or delegable functions of the position, but [are] compatible with the essential functions; (iii) who could adequately perform the duties of the respective position or job if reasonable labor accommodations were made.

(...) The burden of determining whether the job is incompatible with the disease or condition of disability that is presented, cannot rest on the worker. Therefore, it is fundamental that in cases in which the company considers that the presence of any disease and/or situation of disability is incompatible with the position that is intended to be performed, it must provide grounds and put this fact in writing, and likewise communicate it to the candidates, who, in such conditions, immediately have the obligation to assert whether or not they are in the circumstances described.⁵²

65. For its part, the *Supreme Court of Justice of the Nation of Mexico*, in a case relating to the dismissal of a person because she was stricken with cancer, reasoned that:

(...) This Second Chamber finds that when reasonable evidence exists in the *amparo* proceeding (by way of example, suffering from cancer and being removed from her job) to consider that the worker party is in a state of vulnerability, together with alleging a direct violation of Article 1 of the Magna Carta for discrimination, in ruling the judicial bodies must have heightened reasons, pursuant to paragraph three of the aforementioned precept (...) when the worker party claims that she has been removed from her activities because of a situation of discrimination of those [that are] banned by the Constitution, the judicial bodies are obliged to review and closely heed the arguments that are asserted about this aspect, in order to disprove any possible discriminatory flaw.

⁵⁰ Committee on the Rights of Persons with Disability, General Comment No. 6 (2018) on equality and non-discrimination, par. 9, 67 et seq. V

⁵¹ Committee on the Rights of Persons with Disability, Case of V.F.C vs. Spain, April 29, 2019, par 8.5.

⁵² Constitutional Court of Colombia, Judgment Sentencia T-340/17 of May 19, 2017.

(...) some subjects have special protection of their job security, because of the manifest vulnerability in which they find themselves; therefore, it must be presumed that discrimination against a person with disability exists when he or she is dismissed without the employer party alleging a fair cause. (...) Should a dismissal arise without good cause the veiled reason of which is the conditions of manifest vulnerability, it constitutes a discriminatory act, because the lack of interest of the company to meet the particular health requirements of the plaintiff, despite being aware of her state lead this Second Chamber to the conclusion that the dismissal was carried out as a consequence of the company refusing to correctly assume the duty to relocate and train the plaintiff in a job position with suitable functions for her health condition and preferred to unilaterally terminate her contract, abusing a legal power to legitimize its negligent conduct.⁵³

66. Similarly, the *Constitutional Court of Ecuador*, in a case relating to the termination of a contract for the temporary services a person with disability provided to a public entity, it noted that:

(...) We note that in the instant case, it was not proper for the Chamber to conduct a simple analysis of legality in relation to the law regulating public service at that time and that which in fact provided for the possibility to unilaterally terminate and upon its expiration the temporary services contract, but [rather] it was necessary and our duty to conduct a constitutional analysis, in the context of the situation of disability of the plaintiff as a member of a priority attention group. For this reason, it was necessary to examine the situation from the very moment of hiring, the instruments used for it, the function for which she was hired, how the decision to terminate her contract could affect her, in short, to review whether the entity did or did not guarantee her rights and her dignity; additionally, it had to consider as a whole all of the instruments that regulated the subject matter and that have been enacted precisely to provide this group of citizens with priority attention and special protection, in order to ensure for them true equality on the job, as was correctly determined at the trial court level by the First Court of Criminal Guarantees of Santo Domingo de los Tsáchilas. Not considering these parameters and aforementioned domestic and international normative provisions, clearly had a bearing on the Chamber using a false premise as its point of departure - that workers with disabilities work in the same conditions as other workers that are not in a situation of vulnerability- which meant that obviously mistaken conclusions would be reached, such as the decision that no constitutional rights were violated and that consequently the action for protection was inadmissible; a decision that from all standpoints has placed the plaintiff in an evident situation of vulnerability.

(...) In the context of the aforementioned constitutional and statutory provisions, it is necessary to affirm that, in the case at hand, even though the plaintiff entered into a contract to provide temporary services that had a defined duration of time, when it was proven that it involved a person with 50% disability, it should have been considered, under the framework of the guarantee of the right to equality in its material dimension, the situation of disability and special vulnerability of the plaintiff, and because of such a condition she should have been ensured different treatment from the rest of the people who sign this type of instrument, in order to guarantee respect for her constitutional rights, an aspect that was not considered by the Single Chamber of the Provincial Court of Justice of Santo Domingo de los Tsáchilas, thus violating the right to material equality of the plaintiff.

(...) This Court holds that, given the heightened protection that in the interest of ensuring effective protection of their rights, persons with disability must have greater possibilities of access and hiring in the public sector, therefore, every public institution, when selecting its personnel, should prioritize the hiring of persons who belong to this priority group, through arrangements that provide stability. Furthermore, in those cases in which public entities have not hired persons deemed as disabled through arrangements that provide stability, as is established by the normative provisions examined throughout this judgment and have, on the contrary, resorted to temporary contracts, the way to make their labor rights equal and to provide material equality to them, is by establishing legal provisions that afford them special protection.⁵⁴

3. Analysis of the instant case

67. In the instant case, the Commission recalls that the alleged victim was appointed on an interim basis at the Ministry of Finance, as a miscellaneous worker as of June 2001. Subsequently he participated in a competitive selection process to hold the position on a permanent basis, and on June 13, 2003, the Chief Officer and Administrative and Financial Director of the Ministry of Finance advised him that he was not selected in the process he entered and, therefore, his interim position would terminate on June 16, 2003.

⁵³ Supreme Court of Justice of the Nation, Review of Amparo Judgment 3708/2016, May 31, 2017.

⁵⁴ Corte Constitucional del Ecuador, Constitutional Court of Ecuador, Judgment 258-15 of August 12, 2015.

68. The alleged victim argues that the main reason for his not being hired was the report of June 13, 2003 from the Ministry of Finance which recommended not hiring him because of “his problems of retardation and emotional blockage.” The State, in response, argues that said report was not taken into account in the process of selection, and that even though the alleged victim was one of a slate of three finalists, pursuant to the law, the authority has discretionary powers to select any of the three candidates, regardless of their score.

69. Taking into consideration these arguments, the IACHR understands its job to be to determine whether beyond the formality and discretionary power invoked by the State, evidence exists to consider that the actual reason why the alleged victim was not hired in the competitive selection process in which he took part was his condition as a person with a cognitive disability. The Commission will examine the case in light of the presumption of discrimination, which is appropriate for cases in which the difference in treatment is based on one of the categories established in Article 1.1 of the Convention, such as disability, as was noted in the previous section.

70. The IACHR sums up hereunder the evidence it has, aimed at proving that the alleged victim was not hired for the position he applied for because of his condition of disability:

- As is on record in the communication of March 6, 2003 from the General Coordinator of the Technical Unit for Human Resources, the alleged victim obtained the highest score of the three finalists in competitive selection process 010179.

-There are no reports in the record of poor performance of the alleged victim in his interim position and, on the contrary, in different communications, his effectiveness and good performance on the job are recognized.

-On June 13, 2003, the Head of the Maintenance Area wrote an official letter to the General Coordinator of the Technical Unit for Supplying and Services, who is in charge of making the selection, requesting that the alleged victim not be appointed, because he is not functional for the position, and taking into account “his problems of retardation and mental blockage he suffers.”

-On the same date, the General Coordinator of the Technical Unit forwarded the aforementioned official letter in advance to the General Coordinator of the Technical Unit for Human Resources, accepting the recommendation of said report and noting that “because the duties that he performs and the opportunities that have been given to him in his position the behavior of Don Luis Fernando has had a negative impact on his employment future and even his activities can affect his personal safety, I reiterate because of the type of duties that are carried out it is therefore suggested to reconsider his appointment.” When the appeal for reversal filed by alleged victim was denied, again reference was made to the statements made by the General Coordinator of the Technical Unit.

-Also, on June 13, 2003, the alleged victim was advised that he was not selected in competitive hiring process 010179 and therefore his interim appointment would terminate.

71. The Commission takes note of the State’s argument that the memorandum of June 13, 2003 was not taken into consideration in the context of the competitive process in which the alleged victim was not selected, however, it does not understand the reasons why he asked to reconsider his appointment in his communication to the General Coordinator of the Technical Unit for Human Resources, if she had already made the decision to not hire the alleged victim regardless of said communication. Based on this inconsistency, the General Labor Inspection, for example, when it examined the appeal for reversal of judgment filed by the alleged victim it found that at the time the aforementioned note was sent “no final decision had been taken as to who was going to be appointed.”

72. Additionally, the IACHR takes note that different public officials concurred in affirming that the decision to not hire the alleged victim was based on his disability. Specifically:

-The Office of Legal Counsel of the national Council for Rehabilitation and Special Education found that the Ministry of Finance violated the law because it did not choose a qualified person based on his condition of retardation and emotional blockage” and because it did not establish systems to promote the incorporation of persons with disability into the public sector.

-The Ombudsman of Costa Rica found that the Ministry of Finance abused its discretionary power by appointing any of the members of a slate of three finalists while excluding the alleged victim because he presented “mental retardation with emotional blockage.”

- For her part, the National Director of Social Security found that, on the face of it, the selection was not objective because the alleged victim met all the requirements and exhibited an effective performance.
- The Minister of Labor and Social Wellbeing found that the reasons put forward by the senior officials to not appoint Mr. Guevara is at odds with the law and that “it would seem that we are before a case of discrimination.”
- The Inspector General of Labor found that “there was discrimination” because “Mr. Eugenio Porras based on the note issued by Mr. Mora Salazar, requests reconsidering the appointment of Mr. Guevara, this by virtue of the note and being that Mr. Porras Vargas subsequently is who appoints the person to the position.”

73. Furthermore, as for the State’s response, the Commission recalls that it only emphasized the discretionary power held by the authority that was involved in the process of selection to choose any of the candidates comprising the slate of three finalists and noted that ,in the instant case, all due process rights were respected. The State did not provide a detailed and precise response to overcome the presumption of discrimination operating in the instant case, but merely cited the basis for the discretionary power, without introducing any further explanation, which instead served to reinforce the credibility of the evidence against it.

74. The Commission finds that all of these pieces of evidence taken as a whole, as well as the lack of an adequate response from the State, allow it to conclude that the decision to not hire the alleged victim was based on his condition of a person with a cognitive disability. In view of the fact that the case involved covert discrimination, the IACHR finds that it is not appropriate for it to examine the reasonability or proportionality of the difference in treatment, inasmuch as the mere fact of its veiled nature proves that it is an arbitrary restriction⁵⁵ Consequently, the Commission concludes that the State of Costa Rica violated Articles 24 and 26 of the American Convention in connection with Article 1.1 of the same instrument, to the detriment of Luis Fernando Guevara Díaz.

B. Judicial protection⁵⁶ and duty to state grounds⁵⁷

75. The IACHR recalls that the State is bound by the general obligation to provide effective judicial recourse to persons who claim to be victims of human rights violations (Article 25), which must be adjudicated in accordance with the rules of due process of law (Article 8.1). In order for an effective recourse to exist, it is not enough for it to be established by the law, rather it needs to be truly appropriate for establishing whether there has been a human rights violation and for providing whatever is necessary to redress it.⁵⁸

76. As for the duty to state grounds, the IACHR notes that obligation to found decisions is a guarantee related to the proper administration of justice, which protects the right of the people to be tried for the reasons established by law, and lends credibility to judicial decisions in a democratic society. For this reason, decisions made by domestic bodies, that can affect human rights must be duly founded; otherwise they would be arbitrary decisions. In this regard, the considerations of a ruling and certain administrative decisions must reveal the facts, grounds and laws on which the authority based itself to make its decision in order to eliminate any sign of arbitrariness. Furthermore, the justification demonstrates to the parties that they have been heard and, in those cases where the decision can be appealed, allows them to contest the decision and to obtain another examination of the matter before a higher court.⁵⁹

⁵⁵ See by way of example, IA Court of HR. Case of San Miguel Sosa et al v. Venezuela. Merits, Reparations and Costs. Judgment of February 8, 2018. Series C no. 348, par.121.

⁵⁶ 1. Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.

⁵⁷ Article 8.1 of the American Convention establishes that 1. Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.

⁵⁸IA Court of HR, Case of the Dismissed Congressional Employees (Aguado Alfaro et al). Judgment on Preliminary Objections, Merits, Reparations and Costs. Judgment of November 24, 2006. Series C No. 158. Par. 125; IA Court of HR, Case of the Yakye Axa Indigenous Community. Judgment of June 17, 2005. Series C No. 125. Par. 61; IA Court of HR, Case of the “Five Pensioners.” Judgment of February 28, 2003. Series C No. 98. Par. 136.

⁵⁹IA Court of HR. Case of Chocrón Chocrón v. Venezuela. Preliminary Objection, Merits, Reparations and Costs. Judgment of July 1, 2011. Series C No. 227, par.118.

77. The Commission notes that after being advised that he was not selected in the competitive hiring process in which he participated, the alleged victim filed an appeal for reversal of decision, which was denied on July 11, 2003 by the Chief Officer and Administrative Directorate of the Ministry of Finance, on the grounds that no omissions or irregularities in the proceedings were found to suggest unequal treatment and that Mr. Guevara participated in the competitive selection process on an equal basis.

78. Moreover, in the context of the *amparo* petition proceeding, the Constitutional Chamber of the Supreme Court of Justice dismissed said petition finding that it was not its responsibility to conduct an analysis of the legality of the candidate selection procedure, that is conducted in the exercise of discretionary powers, the alleged victim participated in the competitive process on an equal footing with the other candidates, and that no acts that could be considered as discriminatory were detected. Lastly, even though the alleged victim obtained a favorable decision in the appeal for reversal with the General Labor Inspector's Office, the decision was ultimately archived following the decision issued by the Constitutional Chamber of the Supreme Court of Justice.

79. The Commission finds that, in the instant case, the grounds for the decisions were fundamental, inasmuch as it involves an individual entitled to special protection because of his situation of vulnerability and the decision in the context of the competitive selection process left him unemployed, increasing the risk of pushing him into a situation of poverty because of the discrimination that persons with disability have historically faced. In fact, as the alleged victim claimed, from the time of the termination of his interim appointment, he has been unable to find gainful employment.

80. The Commission understands that, in cases such as the one before it, there is heightened reasons for stating the grounds for the decision and, the decision should have included at least the following elements: 1) a substantive analysis of the allegation of disability-based discrimination, that does not merely ratify the authority's discretionary power to make decisions in the context of public hiring selection processes and that succeeds at overcoming the presumption of arbitrary differential treatment operating with respect to the category of disability; 2) should it be proven that the disability was the basis for discrimination, an assessment as to whether or not the disability would be incompatible with the essential duties of the position, even if reasonable accommodations are made; 3) a substantive analysis of compliance with the principle of material equality or the State's duty to adopt positive measures to guarantee access to and retention in the job of persons with disability; 4) an analysis of whether the State made minimum efforts to relocate the alleged victim to another position suitable to his condition, taking into account the effect that a dismissal decision may have on a person with disability.

81. The Commission notes that in the instant case the authorities that denied the appeals for reversal and *amparo* relief filed by the alleged victim did not adequately found their decisions pursuant to the requirements set forth in the previous paragraph, inasmuch as they merely indicated that the alleged victim participated on an equal basis in the competitive hiring selection process, which on the one hand, as noted in the previous section, is at odds with the available evidence, and on the other hand, the State did not take into account that such grounds are not sufficient, because in cases such as the one before it the State has the obligation to adopt positive measures to ensure access to and retention in the job of persons with disability. The Commission finds that it is a violation of the duty to state grounds as explained in this section.

82. The Commission further finds that the response in the context of the petition for constitutional relief via *amparo*, which upholds the denial of the decision to reverse and only notes that it is not its job to conduct an analysis of the legality of the procedure to select candidates, which is conducted in the exercise of discretionary power, constitutes a violation of judicial protection, as it does not allow the alleged victim to have a substantive review of his allegation of discrimination and merely ratifies the grounds of discretionary power in the selection process, which were not sufficient to overcome the presumption of discrimination at issue in cases in which disability-based discrimination is alleged.

83. Based on the foregoing considerations, the Commission finds that the State of Costa Rica violated the rights established in Articles 8.1 and 25.1 of the American Convention in connection with Article 1.1 of the same instrument to the detriment of Luis Fernando Guevara Díaz.

V. CONCLUSIONS AND RECOMMENDATIONS

84. The Commission concludes that the Costa Rican State is responsible for the violation of the rights to fair trial, judicial protection, equal protection and the right to work as established in Articles 8.1, 24, 25.1 and 26 of the American Convention in connection with the obligations set forth in Article 1.1 of the same instrument, to the detriment of Luis Fernando Guevara Díaz.

85. Based on the analysis and conclusions of the instant report,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS RECOMMENDS THE STATE OF COSTA RICA:

1. To reinstate the victim in the civil service to a position of equal or higher grade than the one he was holding at the time of his termination. In the event the victim does not want to be reinstated or there are objective reasons impeding his reinstatement, the State should pay monetary compensation for this reason, which is independent from the reparations relating to the pecuniary and non-pecuniary damages included in the next recommendation.
2. Provide adequate reparation for the human rights violations in the instant report both of a pecuniary and non-pecuniary nature.
3. Adopt the necessary measures of non-repetition to prevent similar future events from happening. Specifically, adopt legislative, administrative or other types of measures to prevent disability-based discrimination and to promote inclusion in employment of said persons: In this context: i) carry out training programs for public employees and justice operators on the prohibition of disability-based employment discrimination and the obligation to adopt positive measures to ensure access to and retention in employment of persons with disability; ii) Adopt measures to promote employment of persons with disability in the public sector and to enable job security and promotions for them at the workplace.