

OEA/Ser.L/V/II.165
Doc. 163
25 October 2017
Original: Spanish

REPORT No. 137/17
CASE 12.383
REPORT ON FRIENDLY SETTLEMENT

NESTOR ALBORNOZ EYZAGUIRRE
PERU

Approved by the Commission at its session No. 2102 held on October 25, 2017.
165 Regular Period of Sessions.

Cite as: IACHR, Report No. 137/17, Case 12.383. Friendly Settlement. Nestor Albornoz Eyzaguirre. Peru. 25 October 2017.

REPORT No. 137/17
CASE 12.383
FRIENDLY SETTLEMENT
NESTOR ALBORNOZ EYZAGUIRRE
PERU¹
25 OCTOBER 2017

I. SUMMARY

1. On July 20, 1998, the Inter-American Commission on Human Rights (hereinafter “the Commission” or “IACHR”) received a petition filed by Néstor Albornoz Eyzaguirre (hereinafter “the petitioner”) alleging that the Peruvian State (hereinafter “the State”) bore responsibility for violation of rights enshrined in Articles 8 (right to a fair trial) and 25 (right to judicial protection) of the American Convention on Human Rights (hereinafter “the Convention” or “American Convention”) on account of his arbitrary dismissal from his position as an employee at a public educational institution. On March 18, 2008, Centro de Asesoría Laboral de Perú (CEDAL) assumed the alleged victim's representation.

2. The petitioner argued that he was arbitrarily and unconstitutionally removed from his position as Director of Augusto Salazar Bondi School (State School No. 2023), against which he filed an application for constitutional relief (*amparo*) that was granted by the Fifth Civil Court of the Judicial District of the Northern Cone of the City of Lima. However, the petitioner says that judgment was overturned on appeal by the Second Civil Division of the Superior Court of Justice of the Northern Cone of the City of Lima, which decision was confirmed by the Constitutional Court of Peru.

3. The parties signed a friendly settlement agreement on February 27, 2002. The petitioner requested the approval of the friendly settlement agreement on March 13, 2008. The State requested the approval of the friendly settlement agreement on August 18, 2017.

4. Pursuant to Articles 49 of the American Convention and 40(5) of the Commission's Rules of Procedure, this friendly settlement report includes a summary of the petitioner's allegations and transcribes the friendly settlement agreement signed on February 27, 2002, by the petitioners and representatives of the Peruvian State. Also, the Commission hereby approves the agreement signed by the parties and decides to publish this report in its Annual Report to the General Assembly of the Organization of American States.

II. PROCESSING BY THE COMMISSION

5. On July 20, 1998, the IACHR received the petition, of which the Peruvian State was notified on July 30, 2001. On October 23, 2001, the Commission informed the parties that it had decided to defer its treatment of admissibility until the debate and decision on the merits, in accordance with Article 37.3 of its Rules of Procedure.

6. The petitioner presented additional information on the following dates: May 13, 2008; September 1, 2011; January 7, 2012; and February 8, 2017. That additional information was relayed to the State.

7. The State presented additional information on the following dates: October 4, 2001; July 29, 2002; March 28 and 31, 2008; June 29 and August 18, 2017. That additional information was forwarded to the petitioners.

¹ Commissioner Francisco Jose Eguiguren, of Peruvian nationality, did not participate in the discussion and decision of this case, in keeping with Article 17.2.a) of the Rules of Procedure of the IACHR.

8. On March 13, 2008, the petitioner requested the approval of the friendly settlement agreement, and on August 17, 2011, and February 8, 2017, the petitioner asked that the case be archived.

9. On March 28, 2008, and July 19, 2017, the State requested that the case be archived.

10. On July 19, 2017, the Commission requested the parties to clarify their position with regard to the possible approval of the friendly settlement agreement by the IACHR.

11. On August 18, 2017, the State asked the Commission to weigh the friendly settlement agreement and its implementation in a report under Article 49 of the American Convention on Human Rights. That communication was relayed to the petitioner. The petitioner did not respond to that request.

III. ALLEGED FACTS

12. The record shows that in 1991 and 1992, members of the Parents Association (hereinafter the "APAFA") of Augusto Salazar Bondy [Tr: sic] School (State School No. 2023) filed complaints against Néstor Albornoz Eyzaguirre, as a result of which an administrative proceeding was instituted against him, as notified by Official Letter No. 1353-92 from Educational Services Unit 06, San Martín de Porres, Los Olivos (hereinafter the "USE"). The alleged administrative violations included irregularly collecting sums of money during the 1991 enrollment period for such items as furniture, report cards, school identity cards, and entrance exams to 1st grade of secondary school; concluding a realty contract harmful to the school's interests; concluding a restroom repair contract; usurping functions and abuse of authority; and the alleged deposit of the funds collected in his personal accounts. The record shows that on May 20, 1992, the USE issued Directorial Resolution No. 479, ordering the institution of administrative proceedings against Néstor Albornoz.

13. The petitioner indicated in broad terms that he had sought to have the disciplinary action invalidated inasmuch as the administrative proceeding against him was time-barred, given that the statute of limitations had run by the time the resolution initiating the proceeding was issued. On December 10, 1992, the USE issued Resolution No. 1792 by which it ruled that the request presented by Néstor Albornoz to have the proceeding declared time-barred and invalid was out of order and ordered that he be temporarily terminated from active duty for two years. In its decision, the USE found that there was sufficient evidence to conclude that he had committed administrative infractions, such as abuse of his official position, usurpation of the functions of the APAFA, negligence in the performance of his official duties and in advising the APAFA, and misuse of school funds, among other violations of the Teachers Law (Law No. 24029).

14. Finally, the Commission finds that on December 30, 1992, the USE issued Resolution No. 1909 by which it refused the appeal for a reversal of the decision (*recurso de reconsideración*) that Néstor Albornoz filed against Resolution No. 1792 on the grounds that it did not provide or support new evidence to refute the findings contained in that decision.

15. The petitioner said that following those three decisions, on May 11, 1993, the Lima Educational Directorate issued Directorial Resolution No. 354, which ruled on the appeal filed against Resolution No. 1909, declaring the appeal well-founded and annulling Resolutions No. 479, 1792, and 1909 of 1992 on the grounds that they were unlawful because they were issued prior to the judgment of the Lima Examining Magistrate's Court on the criminal charges. Consequently, the same decision ordered that the alleged victim be reinstated in his post and his rights restored.

16. The petitioners said that in 1994 he was the subject of a criminal investigation for the offenses of usurpation of public functions, abuse of authority, and extortion to the detriment of the State and the Ministry of Education. In that connection, the petitioners said that an acquittal was issued on May 13, 1994, in the framework of the investigation in proceeding 430-93. According to the documents contained in the record, the charges referred to collection of enrollment fees and deposit of funds in his personal savings accounts. On November 6, 1996, the Criminal Consultation Division of the Supreme Court of Justice ruled that there were no grounds to annul the aforesaid judgment and it confirmed the alleged victim's acquittal.

17. The petitioners said that on May 6, 1996, the General Secretariat of the Ministry of Education issued Resolution No. 196-96 in which it voided Resolution 354 of May 11, 1993, finding that penalties for administrative infractions are separate from any civil or criminal liability that public servants may incur. The petitioner said, without providing details, that he filed an appeal against that decision. The record shows that the Civil Division of the Superior Court of Justice of Lima decided on July 30, 1997, in the context of amparo proceeding 580-97-Civil, that the application for amparo was not a suitable remedy for having the administrative resolution declared non-effective. That decision was confirmed by the Constitutional Court on December 10, 1997.

IV. FRIENDLY SETTLEMENT

18. In Lima on February 27, 2002, the Peruvian State, represented by the Minister of Education, Nicolás Lynch Gamero; Centro de Asesoría Laboral de Perú (CEDAL), represented by Javier Antonio Mujica Petit; and the beneficiary of the friendly settlement agreement, Néstor Albornoz Eyzaguirre, signed a friendly settlement agreement, the text of which established the following:

FRIENDLY SETTLEMENT AGREEMENT Case 12.383, NÉSTOR ALBORNOZ EYZAGUIRRE

This document certifies the friendly settlement agreement entered into by the Peruvian State, on the one hand, represented by Dr. Nicolás Lynch Gamero, Minister of Education, National Identity Document No. [...]; and, on the other, Mr. Néstor Alejandro Albornoz Eyzaguirre, National Identity Document No. [...], and Dr. Javier Antonio Mujica Petit, the person responsible for the human rights program of Centro de Asesoría Laboral del Perú (CEDAL), the same entered into in the city of Lima on the seventeenth day of December in the year two thousand and two, under the following terms and conditions:

ONE. This friendly settlement agreement, entered into in accordance with the provisions of Articles 48(1)(f) and 49 of the American Convention on Human Rights (hereinafter the Commission) (*sic*) and 41 of the Rules of Procedure of the Inter-American Commission on Human Rights (hereinafter the Commission or IACHR), has previously been submitted to the IACHR for prior approval for the relevant purposes.

TWO. The agreement hereby concluded originates from the claim submitted for international settlement by Néstor Alejandro Albornoz Eyzaguirre to the IACHR on July 20, 1998, for violation of his human rights enshrined in Articles 8 and 25 of the American Convention on Human Rights. Acting as co-petitioner in the aforementioned claim is the Human Rights Program of Centro de Asesoría Laboral del Perú (CEDAL), the accredited correspondent in Peru of the International Federation for Human Rights (FIDH).

The alleged violation originated from the termination, by Resolution No. 196-96-ED issued by the General Secretariat of the Ministry of Education on May 6, 1996, of Mr. Albornoz Eyzaguirre as director of State School No. 2023, known as Augusto Salazar Bondy School, situated in the District of San Martín de Porres, Lima. That act prompted the aggrieved to invoke remedies under domestic law challenging the decision, which, however, were not suitable to repair the injuries caused. That fact forced the aggrieved to have recourse to the Commission in exercise of the constitutional right afforded to citizens of Peru by Article 205 of the Constitution in force.

The claim filed gave rise to the institution of case CIDH No. 12.383, a proceeding in which a decision by the Commission on the merits of the matter submitted to its jurisdiction is currently pending.

It should be noted that on September 28, 2001, the Permanent Mission of Peru to the Organization of American States (OAS) forwarded Report No. 77-2001-JUS/CND-SE from the Executive Secretariat of the National Council of Human Rights of the Ministry of Justice, by which the Peruvian State recognized that “the petition lodged meets the requirements of admissibility set forth in the relevant international instruments” as required by the applicable international standards on such matters.

THREE. In accordance with the principle of *pacta sunt servanda* and the provisions contained in Articles 26 and 27(1) of the Vienna Convention on the Law of Treaties, which Peru has formally ratified, the Peruvian Government recognizes that “[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith,” and that it “may not invoke the provisions of its internal law as justification for its failure to perform a treaty.”

In keeping with the above principle and provisions, as well as its declared commitment to promote and defend the human rights of its citizens, the Government of Peru has recognized the need to review events that occurred during the bygone Fujimori regime (1990–2000), in particular any acts that may have led to a violation of their basic rights, and to adopt measures conducive to the comprehensive and effective reparation of injuries caused, in accordance with the law, the Constitution, and the American Convention on Human Rights, to which it is a party.

FOUR. Inspired by such principles, both parties hereby formally register their will to reach a friendly settlement of the disagreement set out in Case 12.383 and, by virtue of that settlement:

- a) The State will repeal Resolution No. 196-96-ED issued by the General Secretariat of the Ministry of Education on May 6, 1996, and reinstate Néstor Albornoz Eyzaguirre to his position and regular working duties as director of State School No. 2023, known as Augusto Salazar Bondy School, situated in the District of San Martín de Porres. The repeal resolution that will be published in the Official Gazette “El Peruano” will include apologies from the Peruvian State for the injuries unnecessarily inflicted on Mr. Albornoz by the regime that governed Peru from 1900 [Tr: sic] to 2000.
- b) The aforementioned reinstatement includes recognition of length of service and all the other rights to which he is entitled by virtue thereof, except the payment of salaries due or of arrears of salaries.
- c) Mr. Néstor Alejandro Albornoz Eyzaguirre, for his part, declines to continue with the proceeding instituted before the IACHR that led to the opening of Case No. 12.383.

This document having been read, it is hereby signed in triplicate in the city of Lima as a sign of agreement on the twenty-seventh day of February two thousand and two.

V. DETERMINATION OF COMPATIBILITY AND COMPLIANCE

19. The IACHR reiterates that, under Articles 48(1)(f) and 49 of the American Convention, this procedure has the objective of “reaching a friendly settlement of the matter on the basis of respect for the human rights recognized in this Convention.” The State’s consent to pursue this avenue is evidence of its good faith to honor the Convention’s purposes and objectives, based on the principle of *pacta sunt servanda*. According to that principle, States must comply in good faith with the obligations undertaken in treaties. The IACHR also wishes to point out that, with the friendly settlement procedure provided for in the Convention, individual cases can be settled in a non-contentious manner. In cases involving a number of countries, the friendly settlement procedure has proven to be a useful vehicle that both parties can utilize to arrive at a solution.

20. The Inter-American Commission has closely monitored the progress of the friendly settlement reached in the present case and greatly values the efforts that both parties in negotiating this friendly settlement agreement, which is compatible with the object and purpose of the Convention.

21. In keeping with the requests of the parties that the IACHR approve the friendly settlement agreement under Article 49 of the American Convention on Human Rights, the IACHR finds that the parties have provided sufficient information regarding the performance of the friendly settlement agreement and that it must weigh the Peruvian State's fulfillment of the commitments that it adopted.

22. In that connection, the Commission takes note of the communication from the petitioner of March 13, 2008, confirming the fulfillment of what the parties had agreed and requesting the agreement's approval. Among the documents furnished is Resolution 150-2002-ED of April 9, 2002, adopted by the General Secretariat of the Ministry of Education, by which it abrogates Resolution No. 196-96-ED of May 6, 1996, and reinstates Mr. Néstor Albornoz in the position of director of State School No. 2023 (Augusto Salazar Bondy School) in the District of San Martín de Porres, Lima. The resolution also recognizes the length of service and all the social benefits due to the beneficiary of the agreement. The resolution also contains an apology to Mr. Albornoz for the injuries caused.

23. On June 29, 2017, the State informed that Mr. Néstor Albornoz had been a pensioned retiree since December 30, 2014, and that he had been recognized 42 years, 7 months, and 24 days of uninterrupted official service, as well as the relevant social benefits. The State said that the beneficiary was reinstated in 2002 and terminated at his own request in order to become a pensioner. The State submitted documents from the Ministry of Education showing the fulfillment of the agreement.

24. In light of the above information, the Commission finds that the Peruvian State has carried out the measures established in the friendly settlement agreement in favor of Mr. Albornoz and, therefore, declares that the agreement has been fully implemented.

VI. CONCLUSIONS

25. Based on the foregoing and in keeping with the procedure provided for in Articles 48(1)(f) and 49 of the American Convention, the Commission would like to reiterate its satisfaction at the efforts made by the parties and its satisfaction that a friendly settlement has been arrived at in the present case on the basis of respect for human rights and consistent with the object and purpose of the American Convention.

26. Based on the considerations and conclusions contained in this report,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

DECIDES:

1. To approve the terms of the friendly settlement agreement that the parties signed on February 27, 2002.
2. To declare fully implemented the friendly settlement agreement of February 27, 2002.
3. To make the present report public and include it in its Annual Report to the General Assembly of the OAS.

Approved by the Inter-American Commission on Human Rights in the city of Montevideo, Uruguay, on the 25 day of the month of October, 2017. (Signed): Margarete May Macaulay, First Vice President; Esmeralda E. Arosemena Bernal de Troitiño, Second Vice President; José de Jesús Orozco Henríquez, Paulo Vannuchi and Luis Ernesto Vargas, Commissioners.