

Alfredo Díaz Bustos v. Bolivia, Case 14/04, Report No. 97/05, Inter-Am. C.H.R., OEA/Ser.L/V/II.124 Doc. 5 (2005).

REPORT Nº 97/05

PETITION 14/04

FRIENDLY SETTLEMENT

ALFREDO DÍAZ BUSTOS

BOLIVIA

October 27, 2005

I. SUMMARY

1. On January 8, 2004, the Inter-American Commission on Human Rights (hereinafter “the Commission” or “the IACHR”) received a petition lodged by the Ombudsman of the Republic of Bolivia, (hereinafter “the petitioner”), which alleges that the State of Bolivia (hereinafter, “the State” or “the Bolivian State”) violated Articles 1(1), 2, 12, 24, and 25 of the American Convention on Human Rights (hereinafter “the Convention” or “the Inter-American Convention”) to the detriment of Alfredo Díaz Bustos.

2. The petitioner states that Alfredo Díaz Bustos is a Jehovah’s Witness whose right to conscientious objection has been violated by the State, directly affecting his freedom of conscience and religion, and that the State has failed to fulfill its obligation to respect and ensure the rights established in the American Convention, to which Bolivia is a party. The petitioner further alleges that the Bolivian State violated his client’s right to equal protection before the law. The petitioner says Mr. Bustos was discriminated against as a Jehovah’s Witness because the Bolivian National Defense Service Act provides unequal treatment for Roman Catholics and adherents of other faiths, because the former qualify for exemption from military service while the latter do not. Finally, the petitioner alleges that the Bolivian State has violated the alleged victim’s right to judicial protection because the final judgment of the Constitutional Court established that matters concerning conscientious objection to compulsory military service cannot be submitted to the courts, so violations of the right to freedom of conscience and religion on grounds of conscientious objection to military service cannot be brought to justice.

3. On July 4, 2005 the Bolivian State signed an agreement for friendly settlement under the terms of Articles 48(1)(f) and 49 of the American Convention on Human Rights. In a note of August 22, 2005, the Ombudsman of Bolivia requested closure of the case upon certification of compliance with the friendly settlement. Accordingly, Mr. Díaz Bustos was given his military service record and a ministerial resolution that stipulated that in the event of armed combat he would not serve in battle.

4. This friendly settlement report, as provided in Article 49 of the Convention and Article 41(5) of the Commission's Rules of Procedure, contains a brief statement of the facts alleged by the petitioner and of the solution reached, and calls for it to be published.

II. PROCESSING BY THE COMMISSION

5. The original petition was received at the Commission on January 8, 2004, and forwarded to the Government on February 12, 2004. The Bolivian Government was given a two-month period in which to submit information. The State presented its arguments on September 2, 2004, which were forwarded to the petitioners on September 10, 2004. On April 26, 2004, the Commission sent a communication to the State, forwarding to it additional information received from the petitioner and repeating the request for information. It gave the State 30 days to send its observations.

6. On November 16, 2004 the Commission transmitted to the parties the Report on Admissibility No. 52/04 approved by the Commission on October 13, 2004 during its 121st regular session. In these communications the Commission noted that petition No. P14/04 had been registered as Case 12.475.

7. On January 19, 2005 the Commission received a communication from the petitioners with their substantive observations. On February 24, 2005 the Commission received a second note from the petitioner. Both communications were forwarded to the State.

8. On March 4, 2005 the Commission received the State's observations on the Report on Admissibility approved by the Commission, which were forwarded to the petitioner.

9. On July 25, 2005 the Commission acknowledged receipt of two communications from the parties in which they reported to the Commission on the signing of an amicable settlement on July 4, 2005 between the Bolivian Minister of Defense on behalf of the State and Alfredo Díaz Bustos under the auspices of the Ombudsman. In a note to the parties, the IACHR put itself at their disposal and offered its good offices with regard to the friendly settlement reached. It also asked the parties to

keep it informed of the agreement's progress so that the IACHR could proceed as required by paragraphs (5) and (6) of Article 41 of its Rules of Procedure.

10. On August 25, 2005 the Commission received a communication from the petitioners reporting to the Commission on the State's compliance with the commitments contained in Clause Three I, paragraphs (a), (b), and (c) of the friendly settlement of July 4, 2005. The note was forwarded to the State on September 8, 2005.

III. FACTS

11. The petitioner contends that on February 29, 2000, the alleged victim, Bolivian citizen Alfredo Díaz Bustos, was called up for military service. He went to recruitment center XII-A, where he explained that for reasons of religion and conscience he could not perform military service. The petitioner states that because military regulations do not make provision for conscientious objection as grounds for exemption, the military service officials gave the alleged victim a Military Service Exemption Certificate, which classified the alleged victim as Class "A" Auxiliary Service Personnel, a category reserved for "those recruits who have some partial or minor handicap and weak constitution, but are able to perform duties commensurate with their condition."^[1]

12. On October 8, 2002, Mr. Díaz Bustos went to the Ministry of National Defense. There, in the General Territorial Office, he made his case for conscientious objector status based on Article 12 of the American Convention on Human Rights.^[2] The petitioner states that the authorities' response was that Article 12 of the American Convention did not apply to military service, so that no solution could be found to the situation. On October 9, 2002, the alleged victim wrote to the Minister of Defense, recounting the facts of his case and requesting that his Class "A" Auxiliary Service Personnel classification be changed and that he not be charged the military tax required of persons declared exempt from military service under Article 77 of the National Defense Service Act. The alleged victim argued that he should not be charged that tax because -his beliefs which do not permit him to receive military instruction also forbade him to make financial payments to institutions of that nature. On November 12, 2002, the alleged victim received a reply to his note in which he was told that his request was denied based on Article 8(a) and (f) of Bolivia's Constitution.^[3] Other arguments for denying his request cited Article 22 of the National Defense Service Act, which provides that military service is compulsory for all Bolivian males between the ages of 18 and 45, except in cases of proven disability, and Article 77 of that same law, which requires payment of a one-time military tax, stipulating that those who violate the law in question shall be subject to a fine and arrest, under Article 79.

13. On January 16, 2003, the alleged victim turned to the Minister of Defense to appeal the November 12, 2002 note, and requested that the decision taken be rescinded, that his conscientious objector status be recognized and that he be provided with the military service document, as that was essential to exercise other political, economic, social, and cultural rights. On May 20, 2003, the Minister of Defense declared that “the challenge filed by Mr. Alfredo Díaz Bustos is out of order.” In his note, the Minister wrote that:

[t]he economy of our legal system is such that no law on conscientious objection has been enacted ... [f]urther, nowhere in our laws is there any provision that could be invoked, even by analogy, to give ourselves some option other than compliance with Article 213 of the Constitution. Until such time as the National Congress fills that gap in our laws, every Bolivian is required to obey that Article of the Constitution and the National Defense Service Act.

14. Once the administrative recourse had been exhausted, on September 1, 2003 the Ombudsman, as the alleged victim’s representative, filed a petition with the First Social and Administrative Chamber of the La Paz District Superior Court seeking constitutional relief and accusing the Minister of Defense of violating Articles 3, 6(l) and 35 of the Constitution, Articles 1(1), 12 and 24 of the American Convention on Human Rights, and Articles 2(1), 18, and 26 of the International Covenant of Civil and Political Rights. On September 4, 2003, the First Social and Administrative Chamber of the La Paz District Superior Court dismissed the petition seeking constitutional relief. With that, the District Court automatically referred the case file and its decision to the Constitutional Court for review and a final ruling. On November 17, 2003, the Constitutional Court upheld the September 4, 2003 decision rendered by the First Social and Administrative Chamber of the La Paz District Superior Court.[4] Under Article 42 of Law 1836, the Constitutional Court’s decision is final and not subject to appeal.[5]

15. The petitioner alleges that the Bolivian State took measures that violated the alleged victim’s right to freedom of conscience and religion by virtue of the Constitutional Court’s ruling that conscientious objection is not a claimable right because nothing in the law makes it so. The petitioner argues that Article 49(i) of the National Defense Service Act states that in peacetime, clergy, seminarians, religious, and novices are exempt from military service; the petitioner argues that the alleged victim has therefore been the victim of discrimination for being a Jehovah’s Witness, inasmuch as he was not covered under the exemptions allowed under Article 49(i) of the National Defense Service Act.[6] The petitioner argues that the alleged victim is not just a faithful member of the Jehovah’s Witness religious congregation, but also a Ministerial Servant and as such serves as Assistant Principal of the Theocratic Ministry School that operates in La Paz’ Kingdom Hall of the Jehovah’s Witnesses. The petitioner argues that the only thing that distinguishes the alleged victim from Catholic theological students is the religion they practice: the former is a Jehovah’s Witness, while the latter are Catholics.[7]

IV. FRIENDLY SETTLEMENT

16. The State and the petitioners signed the friendly settlement agreement, the text of which follows:

AMICABLE SETTLEMENT

This document, which can become a public document upon certification of the signatures and seals, consists of the following agreement signed by the parties as contained in these clauses:

One. Parties- The parties to this agreement are:

Gonzalo Méndez Gutiérrez, Minister of National Defense, representing the Bolivian State, and

Alfredo Díaz Bustos, Bolivian citizen with identity card CI 3483469 LP of legal standing and domiciled in the City of La Paz.

Two. Background.- On December 30, 2003, after exhausting domestic remedies, Alfredo Díaz Bustos, under the auspices of the Ombudsman, lodged a petition with the Inter-American Commission on Human Rights (IACHR) in which he accused the Bolivian State of refusing to recognize his status as a conscientious objector to compulsory military service, thereby violating his rights guaranteed in Articles 12, 24, and 25 of the American Convention on Human Rights.

On October 13, 2004, the IACHR issued Report No. 52/04 on Case 12.475 (petition P-14/04) Alfredo Díaz Bustos v. Bolivia, in which it declared the admissibility of the case for the purpose of determining, in its examination of the merits, whether the Bolivian State violated Articles 1(1), 2, 12, 13(1), 22, 23, 24, and 25 of the American Convention on Human Rights to the detriment of Alfredo Díaz Bustos.

In June 2005 The Bolivian government inquired if the Ombudsman Alfredo Díaz Bustos would be willing to resolve the case with a friendly settlement. That initiative led to this agreement that will resolve the matter presented to the Inter-American Commission.

Three. Agreement.-

I. The Bolivian State, represented by the Ministry of Defense, agrees:

a) to give Alfredo Díaz Bustos his document of completed military service within thirty (30) working days after he submits all the required documentation to the Ministry of Defense;

b) to present the service document free of charge, without requiring for its delivery payment of the military tax stipulated in the National Defense Service Act, or the payment of any other amount for any reason or considerations of any other nature, whether monetary or not;

c) at the time of presentation of the service record, to issue a Ministerial Resolution stipulating that in the event of an armed conflict Alfredo Díaz Bustos, as a conscientious objector, shall not be sent to the battlefield nor called as an aide;

d) in accordance with international human rights law, to include the right to conscientious objection to military service in the preliminary draft of the amended regulations for military law currently under consideration by the Ministry of Defense and the armed forces;

e) together with the Deputy Ministry of Justice, to encourage congressional approval of military legislation that would include the right to conscientious objection to military service;

f) upon signature of this document, the Ministry of Foreign Affairs will immediately inform the IACHR of the agreement reached so that the Commission can recognize it and process Case 12.475 in accordance with the procedure for friendly settlement established in Articles 48.1.f and 49 of the American Convention on Human Rights and Article 41 of the Rules of Procedure of the IACHR.

II. For his part, Alfredo Díaz Bustos agrees:

a) for internal administrative purposes of the Ministry of Defense, to present a statement sworn before a competent judge in accordance with Article 78 of the National Defense Service Act;

b) once he has received the record of completed military service and the Ministerial Resolution is issued by the Ministry of Defense in the terms stipulated in Clause Three I of this document, to

request through the Ombudsman that the IACHR assign Case 12.475 to the status of friendly settlement as provided in Articles 48.1.f and 49 of the Convention on Human Rights and Article 41 of the Rules of Procedure of the IACHR;

c) once the record of completed military service and Ministerial Resolution of the Ministry of Defense are delivered to the interested party, he will renounce all costs and damages arising from the processing of the case and agree not to lodge a new administrative or legal action in a domestic or international jurisdiction concerning the same facts that gave rise to the petition to the IACHR, provided that the Bolivian State fully carries out all its agreements assumed in this document in Clause I a, b, c, and f.

Four. Compliance in good faith and acceptance.- The parties freely accept the agreed points for strict compliance in good faith, in token whereof they hereto affix their signatures in the City of La Paz on the fourth day of July, two thousand five.

V. DETERMINATION OF COMPATIBILITY AND COMPLIANCE

17. In a note of August 22, 2005, the Ombudsman of Bolivia, following a communication in the same sense from Mr. Díaz Bustos, asked the Commission to close the case because the friendly settlement had been completed. On August 19, 2005, in Military Region No. 1 of La Paz, the petitioner received his completed military service record 060407, without charge, and Ministerial Resolution No. 834 of August 18, 2005, of the Ministry of Defense. This resolution provides that in case of armed conflict Mr. Díaz will not be sent to combat. Furthermore, as regards the commitments of the Bolivian State in Clause Three I (d) and (f), regarding promotion of legislative reforms to establish the right of conscientious objection to military service, the Ombudsman says the Bolivian State “must honor them in the future.”

18. The IACHR reiterates that in accordance with Articles 48(1)(f) and 49 of the Convention, the purpose of this procedure is “reaching a friendly settlement of the matter on the basis of respect for the human rights recognized in this Convention.” The acceptance of this process expresses State’s good faith to comply with the purposes and objectives of the Convention by virtue of the principle of *pacta sunt servanda*, according to which States must comply in good faith with their treaty obligations. The Commission also wishes to reiterate that the friendly settlement procedure contemplated in the Convention permits solution of individual cases without litigation, and in cases involving various countries has proved to be an important tool for settlement that can be useful for both parties.

19. The Commission considers that this friendly settlement is fully consonant with the evolving nature of international human rights law, which protects the status of conscientious objector in those countries in which that status has been established by law.

20. General Comment 22 of the UN Human Rights Committee is a significant reference in this regard. In this 1993 statement, the Committee interpreted the right to freedom of thought, conscience, and religion established in Article 18 of the Convention. On recognition of the protection of conscientious objection, paragraph 11 of that Comment stated:

Many individuals have claimed the right to refuse to perform military service (conscientious objection) on the basis that such right derives from their freedoms under article 18. In response to such claims, a growing number of States have in their laws exempted from compulsory military service citizens who genuinely hold religious or other beliefs that forbid the performance of military service and replaced it with alternative national service. The Covenant does not explicitly refer to a right to conscientious objection, but the Committee believes that such a right can be derived from article 18, inasmuch as the obligation to use lethal force may seriously conflict with the freedom of conscience and the right to manifest one's religion or belief. When this right is recognized by law or practice, there shall be no differentiation among conscientious objectors on the basis of the nature of their particular beliefs; likewise, there shall be no discrimination against conscientious objectors because they have failed to perform military service. The Committee invites States parties to report on the conditions under which persons can be exempted from military service on the basis of their rights under article 18 and on the nature and length of alternative national service.

21. The Commission greatly appreciates the efforts put forth by both parties to achieve this settlement, which is compatible with the objective and purpose of the Convention.

VI. CONCLUSIONS

22. Based on the foregoing considerations, and in accordance with the procedure prescribed Articles 48(1)(f) and 49 of the American Convention, the Commission wishes to reiterate its deep appreciation for the parties' efforts and its satisfaction with the attainment of friendly settlement in this case, based on the objective and purpose of the American Convention.

23. In view of the considerations and conclusions expressed in this report,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,

DECIDES:

1. To approve the terms of the friendly settlement agreement signed by the parties.
2. To continue to follow up and monitor each and every one of the points of the friendly settlement.
3. To publish this report and include it in its Annual Report to the General Assembly of the OAS.

Done and signed at the headquarters of the Inter-American Commission on Human Rights, in the city of Washington, D.C., on the 27th day of October 2005. (Signed): Clare K. Roberts, President; Susana Villarán, First Vice-President; Paulo Sérgio Pinheiro, Second Vice-President; Commissioners José Zalaquett; Evelio Fernández Arévalos, Freddy Gutiérrez and Florentín Meléndez.

[1] Regulations MD-DGTR-152 on Military Health for Recruitment, Article 1(g). The petitioner states that in order to classify Alfredo Díaz Bustos as Class "A" Auxiliary Personnel, military officials used the scar on the victim's right forearm as the basis for invoking Article 57(h) of the Regulations on Military Health for Recruitment, which states the following: [Those with] dislocation in upper limb joints, varus elbow, shall be exempt from military service."

[2] The petition mentions IACHR admissibility report N° 45/0[2][1], ADMISSIBILITY, PETITION 12.219, CRISTIÁN DANIEL SALÍ VERA ET AL., CHILE, October 9, 2002. Published in the 2002 Annual Report.

[3] Subparagraphs (a) and (f) of Article 8 of the Constitution of Bolivia read as follows:

Article 8: Every person has the following basic duties:

a) To honor and obey the Constitution and laws of the Republic;

...

f) To render the civil and military service that the nation requires for its development, defense, and preservation;

...

[4] Among other arguments the Constitutional Court held that:

it has not been institutionalized in law; in other words, no law has been enacted that makes conscientious objection grounds for exemption from compulsory military service (...) Therefore, as conscientious objection is neither established nor regulated in the State's legal system, persons of military service age cannot invoke such a right as grounds for exemption from compulsory military service; correspondingly, Armed Forces officials cannot entertain a request from persons claiming a conscientious objector exemption.

[5] Article 42 of the Constitutional Court Law (Nº 1836 of April 1, 1998) provides that decisions of the Constitutional Court are not subject to appeal.

[6] Article 49(i) of the National Defense Service Act lists the following among the exemptions to compulsory military service (active duty) in peacetime: "Theology students (under the Agreement concluded with the Holy See on the subject of ecclesiastical military jurisdiction, November 29, 1958), provided they do not abandon their studies or ordinations until age 27." Article X of that Agreement on Ecclesiastical Military Jurisdiction provides that "in peacetime, clerics, seminarians, religious and novices shall be exempt from military service." Agreement between the Holy See and the Republic of Bolivia on Ecclesiastical Military Jurisdiction and Religious Assistance of the Armed Forces.

[7] The petitioner states that for Jehovah's Witnesses, ordination is theocratic; in other words, all the faithful are ministers ordained and dedicated by God at baptism. The structure of a Jehovah's Witness congregation is as follows: the Elders, the Ministerial Servants, the regular pioneers and auxiliary pioneers. The alleged victim in this case is a Ministerial Servant.