

INTER-AMERICAN COURT OF HUMAN RIGHTS*

CASE OF AZUL ROJAS MARÍN *ET AL.* V. PERU

JUDGMENT OF March 12, 2020

(*Preliminary objections merits, reparations and costs*)

OFFICIAL SUMMARY ISSUED BY THE INTER-AMERICAN COURT

On March 12, 2020, the Inter-American Court of Human Rights (hereinafter “the Court”) delivered judgment in which it declared the international responsibility of the Republic of Peru (“the State”) for the violation of the rights to personal liberty, personal integrity, privacy, not to be subjected to torture, to judicial guarantees and judicial protection, of Azul Rojas Marín, in relation to the obligations to respect and to ensure those rights without discrimination and to adopt domestic legal provisions. The Court also declared that the State was responsible for violating the right to person integrity of Azul Rojas Marín’s mother, Juana Rosa Tanta Marín.

I. Facts

The Court verified that, at the time of the facts and even today, strong prejudices against the LGBTI population exist among Peruvian society and, in certain cases, this is revealed by acts of violence. At times, these violent acts are committed by state agents, including members of the national police and the private security services (*serenazgo*), as in this case.

Azul Rojas Marín was born on November 30, 1981. At the time of her arrest, on February 25, 2008, she identified herself as a gay man. Currently, she identifies herself as a woman.

On February 25, 2008, at 00:30 hours, Ms. Rojas Marín was walking home alone when a police car approached her and one of the occupants asked her where she was going and said to her: “So late? Be careful because it’s very late!” Twenty minutes later, the state agents returned; they searched her, they hit her, and they made her get into the police car while they shouted “*cabro concha de tu madre*” [queer, motherfucker]. During her detention, they continued to insult her using disparaging terms clearly referring to her sexual orientation. She was taken to the Casa Grande Police Station where she was forcibly undressed, beaten from time to time, and the victim of torture and rape, because the state agents twice introduced a police baton in her anus. The victim remained at the Police Station until 6 a.m. without her arrest being recorded.

On February 27, 2008, the victim filed a complaint with the Casa Grande Police Station of the National Police of Peru. On March 24, 2008, the prosecution service ordered the opening of a preliminary inquiry against police agents of the Casa Grande Police Station for the offense against the sexual freedom of Azul Rojas Marín. On April 2, 2008, the prosecution service ordered that a formal preliminary investigation be opened for the offenses of rape and abuse of authority against three police officers.

On May 5, 2008, Ms. Rojas Marín requested the expansion of the complaint and the investigation to include the crime of torture. On June 16, 2008, the prosecutor decided not to

* Composed of the following judges: Elizabeth Odio Benito, President; L. Patricio Pazmiño Freire, Vice President; Humberto Antonio Sierra Porto; Eduardo Ferrer Mac-Gregor Poisot; Eugenio Raúl Zaffaroni and Ricardo Pérez Manrique. Judge Eduardo Vio Grossi did not take part in the deliberation and signature of this judgment for reasons beyond his control, accepted by the full Court.

expand the investigation. Ms. Rojas Marín appealed against this decision, but it was confirmed on August 28, 2008.

On October 21, 2008, the prosecutor requested the dismissal of the proceedings instituted against the three police officers. On January 9, 2009, the court dismissed the proceedings for the offenses of aggravated rape and abuse of authority, ordering that the case be closed.

On November 20, 2018, in compliance with the recommendations made in the Merits Report of the Inter-American Commission on Human Rights in this case, the prosecutor ordered the re-opening of the investigation against those presumed to be responsible for the crime of torture against Ms. Rojas Marín. On January 16, 2019, the prosecutor asked the criminal judge to annul all the actions in the proceedings against the three police officers for the offenses of rape and abuse of authority against Azul Rojas Marín. On August 14, 2019, the court declared the request for annulment inadmissible. The prosecutor appealed this decision, but the appeal was declared inadmissible.

II. Preliminary objections

The State presented three preliminary objections relating to: (A) failure to exhaust domestic remedies; (B) the subsidiary nature of the inter-American system, and (C) the fourth instance objection. The Court rejected these preliminary objections.

III. Merits

A. General considerations on the right to equality and non-discrimination

The Court reiterated that the LGBTI community has historically been a victim of structural discrimination, stigmatization, different forms of violence, and violations of fundamental rights, and that a person's sexual orientation and gender identity or gender expression are categories protection by the Convention. Consequently, the State may not discriminate against a person based on their sexual orientation, their gender identity and/or their gender expression. The Court clarified that violence against LGBTI people has a symbolic purpose because the victim is chosen in order to send a message of exclusion or of subordination.

B. Right to personal liberty

The Court determined that the detention of Azul Rojas Marín was unlawful in light of Article 7 of the American Convention because it did not meet the requirements established in article 205 of the Code of Criminal Procedure for detention for identification purpose. In addition, the Court indicated that, in the absence of a legal reason why Ms. Rojas Marín was subjected to an identity check, together with the existence of elements that suggested unlawful discriminatory treatment based on sexual orientation or gender expression, it must presume that Ms. Rojas Marín was detained for discriminatory reasons. Therefore, the detention was manifestly arbitrary. Lastly, the Court indicated that Ms. Rojas Marín was not informed of the reasons for her detention.

Consequently, the Court declared the international responsibility of Peru for the violation of Articles 7(1), 7(2), 7(3) and 7(4) of the American Convention on Human Rights, in relation to the obligations to respect and to ensure these rights without discrimination established in Article 1(1) of this instrument, to the detriment of Azul Rojas Marín.

C. Right to personal integrity and privacy

Following an analysis of the statements made by the victim, the forensic medical report, the reports of the psychological assessments, the report on the blood test and clothes of the victim, as well as various indications of the discriminatory treatment of the victim, the Court concluded that Ms. Rojas Marín was forcibly undressed, beaten on several occasions, the state

agents made derogatory remarks about her sexual orientation, and she was the victim of rape. The Court examined the intentionality, the severity of the suffering and the purpose of the act, and concluded that the abuse and aggression suffered by Azul Rojas Marín, including rape, constituted an act of torture by state agents.

Consequently, the Court declared the international responsibility of Peru for the violation of the rights to personal integrity, privacy and not to be subjected to torture contained in Articles 5(1), 5(2) and 11 of the American Convention, in relation to Article 1(1) of this instrument and Articles 1 and 6 of the Inter-American Convention to Prevent and Punish Torture to the detriment of Azul Rojas Marín.

D. Rights to judicial guarantees and judicial protection

The Court has developed specific standards on how sexual violence should be investigated in cases in which the victims have been women. These standards are based, above all, on the provisions of the Istanbul Protocol and the World Health Organization's Guidelines for medico-legal care for victims of sexual violence, which describe the measures that should be taken in cases of sexual violence, irrespective of whether the victims are men or women. Therefore, the said standards are applicable in this case.

Taking, those standards into account, the Court determined that the State did not act with due diligence to investigate the sexual torture. The Court emphasized that: (i) the different statements made by Ms. Rojas Marín, and especially the judicial inspection and reconstruction procedure, constituted acts of revictimization; (ii) the medical examination was performed more than 72 hours after the incident and the report did not include an explanation of the probable relationship between the physical symptoms and the aggression reported by the presumed victim; (iii) there were important omissions in the collection of evidence and the presumed victim's clothing and the police baton possibly used were not secured immediately to submit them to testing, and (iv) during the investigation, several state agents used stereotypes that prevented the facts from being examined objectively.

Additionally, the Court highlighted that the inappropriate definition of torture in the law in force at the time of the facts prevented the investigation being expanded to include the ill-treatment suffered by Ms. Rojas Marín. The Court also stressed that the judicial authorities did not take into account the special characteristics of investigations into torture and rape, unduly discrediting the victim's statements, failing to accord the necessary significance to the tests conducted, and assuming that the victim had harmed herself.

Therefore, the Court concluded that the State had violated the rights to judicial guarantees and judicial protection recognized in Articles 8(1) and 25(1) in relation to Articles 1(1) and 2 of the American Convention and Articles 1, 6 and 8 of the Inter-American Convention to Prevent and Punish Torture to the detriment of Azul Rojas Marín.

E. Right to personal integrity of Azul Rojas Marín's mother

Taking into account the presumption applicable to the right to personal integrity of family members in cases of torture, and the evidence in this case, the Court concluded that the State had violated the right to personal integrity of Juana Rosa Tanta Marín, Azul Rojas Marín's mother. Consequently, the State violated Article 5 in relation to Article 1(1) of the American Convention to the detriment of Juana Rosa Tanta Marín.

III. Reparations

The Court ordered the State: (a) to facilitate and to continue the investigations required to identify, prosecute and punish, as appropriate, those responsible for the acts of torture perpetrated against Azul Rojas Marín; (b) to make the publications of the judgment and its official summary; (c) to hold a public act to acknowledge international responsibility; (d) to

provide medical and psychological and/or psychiatric treatment to Azul Rojas Marín; (e) to adopt a protocol for the investigation and the administration of justice in criminal proceedings in cases involving members of the LGBTI community who are victims of violence; (f) to create and implement a plan to raise awareness and provide training on violence against members of the LGBTI community; (g) to design and implement a system for producing and compiling statistics on violence against members of the LGBTI community; (h) to eliminate the indicator of “eradication of homosexuals and transvestites” from Peru’s district and regional Public Security Plans, and (i) to pay the amounts established in the judgment as compensation for pecuniary and non-pecuniary damage, to reimburse costs and expenses, and to reimburse the Victims’ Legal Assistance Fund.

The Inter-American Court of Human Rights will monitor full compliance with the judgment, in exercise of its attributes and in fulfillment of its duties under the American Convention on Human Rights, and will consider the case closed when the State has complied fully with the provisions of the judgment. The full text of the judgment may be consulted at the following link: http://www.corteidh.or.cr/docs/casos/articulos/seriec_402_esp.pdf