

INTER-AMERICAN COURT OF HUMAN RIGHTS
Case of Atala Riffo and daughters v. Chile
Judgment of February 24, 2012
(Merits, Reparations, and Costs)

SUMMARY*

The facts of this case relate to the custody process that was filed with the Chilean courts by the father of M., V. and R. girls against Mrs. Karen Atala Riffo, considering that her sexual orientation and living with a same-sex couple would damage the three girls. In this regard, the Court had to decide, *inter alia*, the international responsibility of the State for the alleged discriminatory treatment and arbitrary interference in private and family life suffered by Mrs. Atala in the judicial process resulted in the withdrawal of the care and custody of her daughters M., V. and R. For this purpose, the Court analyzed, amongst others, the arguments put forward by the judgment of the Supreme Court and the decision on interim custody of the Juvenile Court in Villarrica.

The Court specified that does not perform functions of court of "fourth instance," thus they could not establish whether the mother or father of the three girls offered a better home for them, assess evidence for that specific purpose, or decide on the custody of M., V. and R. girls, aspects that stayed outside the scope of this case.

In the custody process, the Juvenile Court in Villarrica adopted, *inter alia*, two decisions. The first one focused on deciding on a provisional custody requested by the father. On May 2, 2003, this court granted provisional custody to the father, but acknowledged that there was no evidence to presume grounds for legal incapacity of the mother. In that judgment, the court led to the decision, *inter alia*, with the following arguments: i) "[...] that the defendant, making an explicit sexual option, lives in the same home that houses her daughters with her partner [...] altering their normal family routine, giving priority to her interests and personal well-being [over the] emotional well-being and proper socialization process of her daughters" and ii) "that the defendant has privileged her welfare and personal interest on the fulfilling of her maternal role, in conditions that may affect the further development of the [girls], leading to the conclusion that the claimant has more favorable arguments for the best interests of girls, arguments that in the context of a traditional heterosexual society, have great importance."

On October 29, 2003 the Juvenile Court in Villarrica adopted a second decision rejecting the demand for custody considering that based on existing evidence, it had been established that the sexual orientation of the defendant did not represent an impediment to the development of responsible motherhood, who showed no psychiatric

* See I/A Court H.R. *Case of Atala Riffo and daughters v. Chile*. Judgment of February 24, 2012. Series C No.239. Available at: <http://www.corteidh.or.cr/docs/casos/articulos/seriec_239_ing.pdf>.

disorder that prevented her from exercising her "mother role" and that there were no indicators to presume the existence of causes of maternal inability to take personal care of the girls. That decision was appealed. On March 30, 2004 the Court of Appeals of Temuco upheld the judgment.

Later, the father filed a complaint against the Court of Appeals of Temuco. On May 31, 2004 the Fourth Chamber of the Supreme Court of Chile upheld the appeal complaint, granting permanent custody to the father. In that judgment, the Supreme Court stated that "in all actions concerning [children], it is essential to consider the best interests of the child over other considerations and rights related to their parents and that may make it necessary to separate them from their parents." In addition, the Supreme Court based its decision on the following arguments: i) "it has been dispensed the testimony [...] regarding the deterioration experienced in the social, family and educational environment in which unfolds the existence of the minors since the mother began to live at home with her homosexual partner and that the girls could be subject to social discrimination arising from this fact;" ii) "the testimony of those close to the minors, such as the domestic employees, refer to games and attitudes demonstrating confusion at the maternal sexuality derived from living at home with her new partner;" iii) Mrs. Atala "has placed her own interests, postponing those of her daughters, especially when starting a life with her homosexual partner in the same household in leading to effect the raising and care of her daughters separately from their father;" iv) "the possible confusion of sexual roles that can arise in them by the lack at home of a male parent and the replacement by another person of the female gender, sets up a risk for the overall development of minors from which they must be protected;" v) "it is obvious that their exceptional family environment differs significantly from those having their colleges and friends of the neighborhood in which they live, exposing them to be subjected to isolation and discrimination also affecting their personal development." Therefore, the Supreme Court found that the conditions were "qualified" in accordance with Article 225 of the Civil Code to justify the award of custody to the father, as the current situation constituted "a picture showing risk damage, which could become irreversible for the interests of children, whose protection should be preferred to all other considerations."

Moreover, the present case is also related to the disciplinary investigation and the extraordinary visit that was brought against Mrs. Atala in April 2003. That investigation was ordered by the full of the Court of Appeals of Temuco in order to investigate "two fundamental facts: first, the publications in the newspapers *Las Últimas Noticias* [...] and "the Fourth" [...] which would make reference to the condition of lesbian attributed in such publications to Mrs. Atala;" and the other was for the use of elements and staff to meet proceedings ordered by the Juvenile Court in Villarrica in which she was a part. Regarding the sexual orientation of Mrs. Atala, the minister who performed the extraordinary visit concluded in his report that the "peculiar emotional relationship of Mrs. Atala transcended the private sphere to the publications mentioned, which clearly

damages the image of both Mrs. Atala and the judiciary" and that this "is of a gravity that deserves to be observed by the [...] Court of Appeals."

Considerations of the Court

1. Conclusions regarding the disputes about the custody process

1.1. Equality and non-discrimination, and the sexual orientation as protected categories under Article 1.1 of the American Convention

The Court reiterated that Article 1.1 of the Convention is a rule of general scope which extends to all provisions of the treaty, and provides for the obligation of States Party to respect and ensure the full and free exercise of rights and freedoms there recognized "without discrimination." That is, whatever the origin or form it takes, any treatment that can be considered discriminatory with respect to the exercise of any of the rights guaranteed in the Convention is *per se* incompatible with it.

In addition, concerning the right to equality and non-discrimination, the Court established that sexual orientation and gender identity are categories protected by the American Convention under the term "other status" referred to in Article 1.1 of the Convention. Therefore it is prohibited by the Convention any standard, act or practice of discrimination based on the sexual orientation of the person. Consequently, no rule, decision or practice of domestic law, whether by state authorities or individuals, may diminish or restrict, in any way, the rights of a person based on the sexual orientation.

1.2. The principle of the best interests of the child and assumptions of risk

The Inter-American Court stressed that the overall objective of protecting the best interests of the child is, in itself, a legitimate aim and is also imperative. In the same vein, in order to ensure to the greatest extent possible the prevalence of the best interests of the child, the preamble of the Convention on the Rights of the Child stipulates that they require "special care" and Article 19 of the American Convention states that they must receive "special protection measures."

Similarly, the Court found that the determination of the best interests of the child in cases of care and custody of minors must be done from the evaluation of specific parental behaviors and their negative impact on the welfare and development of children, for example, damages or real and proven risks, not speculative or imaginary. Therefore, may not be admissible speculation, assumptions, stereotypes or generalized considerations of personal characteristics of parents or cultural preferences for certain traditional concepts of the family.

The Court noted that being in abstract the "best interests of the child" a legitimate purpose, the reference to it without proving the risks or damages that could cause the sexual orientation of the mother for the girls, cannot serve as a suitable measure for the restriction of a right protected such as the exercise of all human rights without discrimination based on the sexual orientation of the person. The best interests of the child cannot be used to cover discrimination against the mother or father by the sexual orientation of any of them. Thus, the judges cannot consider this status as an element to decide about custody.

The Court added that a determination from unfounded and stereotyped parental capacity and suitability to guarantee and promote the welfare and development of children is not adequate to ensure the legitimate aim of protecting the interests of the child. The Court deemed that considerations based on stereotypes about sexual orientation, for example, pre-conceptions of attributes, behaviors or characteristics possessed by homosexual people or the impact these allegedly may have on girls and boys are not admissible.

1.2.1. Alleged social discrimination

The Court considered that in order to justify a difference in treatment and restriction of a right, it cannot serve as a legal basis the alleged possibility of social discrimination, tested or not, faced by minors because of conditions of the mother or the father. While it is true that certain societies can be intolerant to conditions such as race, sex, nationality or sexual orientation of a person, States cannot use this as justification for perpetuating discriminatory treatments. States are internationally obliged to take the necessary measures in order "to enforce" the rights established in the Convention, as stipulated in Article 2 of the American Convention, which should tend precisely to confront intolerant and discriminatory acts in order to avoid exclusion or denial of a certain condition.

The Court found that aimed at more inclusive development of all life choices of citizens, social, cultural and institutional changes occur in the context of contemporary societies, as evidenced in the social acceptance of interracial couples, mothers or single parents or divorced couples, which at other times had not been accepted by society. In this sense, law and States should help the social progress; otherwise, there is a serious risk of legitimizing and consolidating various forms of discrimination infringing human rights.

On the other hand, regarding the argument that the principle of the best interests of the child may be affected by the risk of rejection by the society, the Court considered that a possible social stigma because of the sexual orientation of the mother or father cannot be considered as a "valid damage" for the purposes of determining the best interests of the child. If judges who analyze cases such as this confirm the existence of social discrimination, it is totally unacceptable to legitimize such discrimination on the grounds of protecting the interests of the minor. In the present case, the Court noted

that, in addition, Mrs. Atala was not obliged to suffer the consequences that in their community, girls could have been discriminated because of her sexual orientation.

Therefore, the Court concluded that the argument of the possible social discrimination was not adequate in order to meet the declared aim of protecting the best interests of M., V. and R girls.

1.2.2. Alleged confusion of roles

Regarding the alleged confusion of roles in the three girls because of the cohabitation of Mrs. Atala with her partner, the Court found that in the case of the prohibition of discrimination based on sexual orientation, any restriction of a right requires rigorous foundation, also reversing the burden of proof, which means that corresponds to the authority show that the decision did not have a purpose nor a discriminatory effect. Indeed, it is the State the one that has the burden of proof to show that the court decision under discussion is based on the existence of a concrete, specific and real damage in the development of girls. The Court noted that, in this case, the Supreme Court did not judge based on an abstract analysis of the alleged impact of the sexual orientation of the mother in the development of girls, but invoked the alleged existence of concrete evidence. However, the judgment was limited in its considerations to the application of a test of speculative damage limited, regarding the alleged damage, to the "eventual confusion of sexual roles" and "risk for the development" of girls. Therefore, the Court concluded that the Supreme Court did not meet the requirements of a strict test analysis and support of a concrete and specific injury allegedly suffered by the three girls because of the cohabitation of their mother with a same sex partner.

1.2.3. Allegedly privilege of interests

Regarding the alleged privilege of the interests of Mrs. Atala, the Court stated that the scope of the right to non-discrimination based on sexual orientation is not limited to the status of being homosexual in itself, but includes expression and the necessary consequences in the project of life of people. The Court stated that the scope of protection of the right to privacy has been interpreted broadly by international human rights courts, noting that it goes beyond the right to privacy.

In this sense, sexual orientation of a person is also linked to the concept of freedom and the possibility of every human being to self-determinate and freely choose the options and circumstances that give meaning to his/her existence, according to his/her own choices and convictions. Therefore, "[t]he emotional life with the spouse or permanent companion, within which is, of course, sex, is one of the main aspects of this area or sphere of intimacy."

In this regard, the Court held that under the prohibition of discrimination based on sexual orientation should be included as protected rights, conducts in the exercise of

homosexuality. Also, if sexual orientation is an essential component of identity of the person, it was unreasonable to require Mrs. Atala to postpone her project of life and family. It cannot be considered as "legally reprehensible" that Mrs. Atala had made the decision to rebuild her life. In addition, it was not found any proven damage that had harmed the three girls.

Accordingly, the Court found that requiring the mother to condition her life choices involves using a "traditional" conception of the social role of women as mothers, according to which it is socially expected that women bear the main responsibility for raising their sons and daughters and after this she should have given priority to raising children, giving up an essential aspect of her identity. Therefore, the Court stated that under this motivation about the privilege of the personal interests of Mrs. Atala, the objective of protecting the interests of the three girls could not be met either.

1.2.4. Allegedly right to a "normal and traditional" family

Finally, before the alleged right of girls to live in a "normal and traditional" family, the Court noted that in the American Convention is not determined a closed concept of family, or defined and protected only a "traditional model" of family. The concept of family life is not confined solely to marriage, and other family ties where the parties are living together outside of marriage should be covered.

In the present case, the Court found that the language used by the Supreme Court of Chile related to the alleged need for girls to grow up in a "family normally structured and appreciated in their social environment" and not in an "exceptional family," reflected a limited and stereotypical perception of the concept of family that has no basis in the Convention because of the absence of a specific family model.

1.2.5. Conclusion

The Court concluded that although the judgment of the Supreme Court and the decision of provisional custody sought protection of the best interests of M., V. and R. girls, it was not proven that motivation was brandished in appropriate decisions to that end, since the Supreme Court and the Juvenile Court in Villarrica did not demonstrate that the cohabitation of Mrs. Atala with her partner negatively affected the interests of the minors and, on the other hand, used abstract, stereotyped and/or discriminatory basis for the decision arguments, so such decisions constitute a discriminatory treatment against Mrs. Atala, violating Articles 24 and 1.1 of the American Convention.

In addition, the Court noted that girls and boys cannot be discriminated against because of their own conditions, and that prohibition also extends to the conditions of their parents or relatives, as in this case because of the sexual orientation of their mother.

The Court noted that, having taken as a basis for its decision the sexual orientation of the mother, the decision of the Supreme Court discriminated, in turn, the three girls, since it took into account considerations which would not have used if the process of custody would have been between two heterosexual parents. In particular, the Court reiterated that the best interests of the child is a guiding principle for the development of standards and their application in all orders relating to the child's life.

Moreover, discriminatory treatment against mother had an impact on girls, because it was the basis for deciding that they would not continue living with her. Therefore, the Court concluded that Article 24 in conjunction with Articles 19 and 1.1 of the ACHR were violated to the detriment of the girls M., V. and R.

1.3. Right to privacy and family life

The Court noted that Article 11 of the Convention prohibits any arbitrary or abusive interference in the private lives of people, enunciating different areas of the same as the private lives of their families. In that regard, the Court held that the scope of privacy is characterized by being exempt and immune from abusive or arbitrary invasions or attacks by third parties or the public authority. Private life is a broad concept that is not susceptible to exhaustive definitions, and includes, amongst other, protected areas, sex life and the right to establish and develop relationships with other human beings. That is, private life includes how the individual sees himself/herself and how and when you choose to project to others.

Since the domestic courts had weight as a reference the sexual orientation of Mrs. Atala when deciding on custody, they presented various aspects of her private life throughout the process. The Court found that the reason given by those courts to interfere in the sphere of private life of Mrs. Atala was the same that was used for discriminatory treatment, *v.gr.*, the protection of an alleged interests of the three girls. The Court held that although that principle is related in abstract with a legitimate purpose, the measure was inadequate and disproportionate to fulfill this purpose because the Chilean courts should have been limited to studying parenting behaviors which could be part of private life, but without making an exhibition and screening of the sexual orientation of Mrs. Atala.

The Court found that during the process of custody, from a stereotypical view of the scope of sexual orientation of Mrs. Atala, an arbitrary interference in her private life was caused, because sexual orientation is part of the privacy of a person and has no relevance to analyze aspects related to good or bad parenthood. Therefore, the Court concluded that the State violated Article 11.2, in conjunction with Article 1.1 of the American Convention, to the detriment of Karen Atala Riffo.

Regarding the right to protection of the family life, the Court reiterated that Article 11.2 of the American Convention is closely linked to the right to family and live in it

recognized in Article 17 of the Convention, according to which the State is obliged not only to decide and directly implement measures to protect children, but also to promote, in the broadest way, the development and strength of the family. The Court noted that various human rights bodies have indicated that there is no a single family model. In the present case, the Court determined that a household was constituted and it was thus protected by Articles 11.2 and 17.1 of the American Convention, because there was coexistence, frequent contact and a personal closeness between Mrs. Atala, her partner, her eldest son and the three girls. Therefore, the Court concluded that the separation of the family consisting of the mother, her partner and girls constituted an arbitrary interference with the right to private and family life.

1.4. Judicial Guarantees

Regarding the alleged violation of judicial guarantees of independence and impartiality to the detriment of Mrs. Atala, the Court considered that no specific evidence was offered to rebut the presumption of impartiality of judges and convincing evidence to allow questioning the objective impartiality in the judgment of the Supreme Court. So that an interpretation of the rules of the Chilean Civil Code contrary to the American Convention on the exercise of custody of minors by a homosexual person is not enough, in itself, to declare a lack of impartiality. Accordingly, the Court found that the State had not violated the judicial guarantees recognized in Article 8.1 of the Convention regarding the decision of the Supreme Court.

Moreover, the Court concluded that the judgment of the Supreme Court violated the right of girls to be heard enshrined in Article 8.1, in conjunction with Articles 19 and 1.1 of the American Convention, and that the Supreme Court did not explain how the preferences of minors were taken into account. Indeed, the Court found that the Supreme Court did not adopt a decision in which they reasoned on the importance attached by that Court to the preferences of coexistence expressed by minors and the reasons why it departed from the will of the three girls. On the contrary, the Supreme Court merely based its decision on the alleged interests of the three minors, but did not motivate or justify why it considered legitimate to contradict the will expressed by the children during the custody. Therefore, the Court concluded that the judgment of the Supreme Court violated the right to be heard of girls and be duly taken into account enshrined in Article 8.1, in conjunction with Articles 19 and 1.1 of the American Convention in the detriment of the girls M., V. and R.

2. Conclusions on disputes regarding the disciplinary investigation

As for the facts regarding the disciplinary investigation, the Court stated that it did not observe any relationship between a desire to protect the "image of the judiciary" and the sexual orientation Mrs. Atala since sexual orientation cannot constitute, under any circumstances, the foundation to carry out disciplinary proceedings, as there is no

relation between the proper performance of the professional work of the person and his/her sexual orientation. Therefore, the Court concluded that the State violated Article 24 in conjunction with Article 1.1 of the Convention, to the detriment of Karen Atala Riffo.

Moreover, the Court found that although the disciplinary investigation began with a legal basis and did not end with a disciplinary sanction against Mrs. Atala because of her sexual orientation, investigations were performed arbitrarily, all of which constituted an interference to the right to privacy of Mrs. Atala, which extended to the professional field. Therefore, the State is responsible for the violation of the right to private life as recognized in Article 11.2 in conjunction with Article 1.1 of the American Convention to the detriment of Karen Atala Riffo.

Regarding the protection of the security of subjective impartiality, the Court found that there were prejudices and stereotypes that were expressed in the report issued by the inspector minister, showing that those who made and approved the report were not objective on this point and, on the contrary, they left reflected their personal position on the sexual orientation of Mrs. Atala in a disciplinary area where it was not acceptable nor legitimate legal blame for this, so it was established that the extraordinary visit and disciplinary investigation were performed without the necessary subjective impartiality. Therefore, the Court concluded that the State violated Article 8.1, in conjunction with Article 1.1 of the Convention, to the detriment of Karen Atala Riffo.

Reparations

Regarding reparations, the Court established that the judgment constitutes *per se* a form of reparation and additionally ordered the State the following measures: i) to provide free and immediate, adequate and effective medical and psychological or psychiatric care through its public institutions to victims who request it; ii) to publish the official summary of the judgment in the Official Gazette and in a newspaper of national circulation, and the entire Judgment on an official website; iii) to hold a public act of acknowledgment of international responsibility for the facts of this case; iv) to continue implementing, within a reasonable time, permanent programs and education courses for public servants at regional and national level and particularly judicial officers from all areas and echelons of the judicial branch, and v) to pay certain amounts for compensation for material and moral damage, and reimbursement of costs and expenses, as appropriate.