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CONSULAR PROTECTION DUAL NATIONALITY (PROTECCIÓN CONSULAR DOBLE NACIONALIDAD)

CASE: *Amparo Directo en Revisión 496/2014*

REPORTING JUSTICE: Alfredo Gutiérrez Ortiz Mena

DECISION ISSUED BY: First Chamber of Mexico's Supreme Court of Justice

DATE OF THE DECISION: October 8, 2014

KEY WORDS: political-electoral rights, right to equality and non-discrimination, right to freedom of expression, gender parity, affirmative action, voting abroad.

CITATION OF THE DECISION: Supreme Court of Justice of the Nation, *Amparo Directo en Revisión 496/2014*, First Chamber, Alfredo Gutiérrez Ortiz Mena, J., decision of October 8, 2014, Mexico.

The full text of the decision may be consulted at the following link:

<https://www.scjn.gob.mx/derechos-humanos/sites/default/files/sentencias-emblematicas/sentencia/2022-01/ADR496-2014.pdf>

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SUMMARY OF THE *AMPARO DIRECTO EN REVISIÓN* 496/2014

BACKGROUND: On December 3, 2006, the petitioner of this *amparo* allegedly seized a van owned by a third party, who reported the incident to the Public Prosecutor's Office (PP) for which the preliminary investigation was initiated. On October 28, 2011, an order for pretrial detention was issued against the petitioner. Subsequently, the judge in the case admitted an appeal filed by the detainee and his counsel against the detention. The Court of Justice of the State of Jalisco issued a decision confirming the challenged decision. The private defense attorney of the petitioner presented a birth certificate of the latter to prove that he was born in the United States of America (USA), for purposes of triggering article 36 of the Vienna Convention on Consular Relations (Vienna Convention) and so he would be provided consular assistance. The judge handed down a decision acquitting the detainee of the crime he was charged with. The PP filed an appeal. The court of appeal overturned the decision and held the accused criminally liable for committing the crime of aggravated robbery and sentenced him to five years in prison and a twenty-day fine. The accused filed an *amparo* lawsuit against this decision, which was denied by the Collegiate Court. Accordingly, the accused filed a *recurso de revision*, which was admitted by the Mexico's Supreme Court of Justice. (this Court).

ISSUE PRESENTED TO THE COURT: Whether the Collegiate Court's decision that a Mexican person with dual nationality is a national for all legal purposes was correct, and determine whether this interpretation of article 30 of the Constitution was respectful of the *pro persona* principle established in article 1 of that law.

HOLDING: The *amparo* was granted for the following reasons. This case concerns the right to consular assistance of a person who has dual nationality. This Court first analyzed the public international law on the right to consular assistance in the case of persons with dual nationality, when one nationality is of the State in which the individual is being prosecuted (receiving State), and then it analyzed the right to consular assistance as a human right. From the point of view of public international law, no distinction may be made in the recognition of the right to consular notification, contact, and assistance when the detained person has a foreign nationality and when the person, in addition to being a national of a foreign State, is a national of the State in which he or she was detained. Likewise, the right to consular notification, contact, and assistance

recognized in article 36 of the Vienna Convention is a human right that has the characteristics of universality, interdependence, indivisibility, and progressivity, in accordance with article 1 of the Constitution. The argumentation of the Collegiate Court is contrary to article 1 of the Constitution, which recognizes human rights from an international source, because it does not consider the failure to attend the complainant's request to exercise the right to notification, contact, and consular assistance a violation of those rights. When an authority, be it police, prosecutor or judge, prevents an alien from using the means made available to him by article 36 of the Vienna Convention, this not only limits the full satisfaction of the right to an adequate defense, but in fact makes it impossible. The human right to consular notification, contact, and assistance could not be displaced by the fact that a person has dual or multiple nationality. Understanding a human right as something that can be displaced or eliminated by another protective condition is not compatible with the *pro persona* principle recognized in article 1 of the Constitution. In determining the effects of the absence of consular notification, only the extent to which such omission may have affected the defendant's rights of defense may be taken into account. Therefore, this Court considered that the *amparo* should be granted to reinstate the proceedings up to the trial stage, which is the moment when the complainant reported his dual nationality.

VOTE: The First Chamber decided this case by a three-vote majority of justices Olga Sanchez Cordero de Garcia Villegas, Arturo Zaldívar Lelo de Larrea and Alfredo Gutiérrez Ortiz Mena. Justices José Ramón Cossío Díaz and Jorge Mario Pardo Rebolledo voted against (they reserved the right to issue a dissenting opinion).

The vote may be consulted at the following link:

<https://www2.scjn.gob.mx/ConsultaTematica/PaginasPub/DetallePub.aspx?AsuntoID=161881>

EXTRACT OF THE *AMPARO EN REVISION* 496/2014

p.1 Mexico City. The First Chamber of Mexico's Supreme Court of Justice (this Court), in session of October 8, 2014, issues the following decision.

BACKGROUND

p.1-2 On December 3, 2006, a person allegedly seized a van owned by a third party, who filed a complaint with the PP, and a preliminary investigation was initiated. The petitioner of this *amparo* lawsuit testified before the PP in the company of his private attorney and said he was Mexican from Lagos de Moreno, Jalisco.

The PP's agent brought criminal charges against the petitioner of this lawsuit for his presumed liability in the commission of the crime of aggravated robbery. A day later, the judge issued an arrest warrant against him.

Subsequently, the investigating police brought the accused before the court, as a detainee, in compliance with the arrest warrant. In his preparatory statement before the judge, the detainee stated that he was a Mexican national. The judge then informed him of the guarantees afforded to him by article 20 of the Constitution, and the accused stated that he was informed of these guarantees and that he did not have a private lawyer for his defense, therefore the judge appointed a public defender for him.

p.2-3 Later, the detainee appointed a private lawyer as his counsel and the judge ordered the pretrial detention of the accused, who filed an appeal against this determination. The Second Chamber of the Supreme Court of Justice of the State of Jalisco upheld the contested decision. Subsequently, the detainee's private counsel presented a birth certificate for the detainee in order to prove that he was born in the United States of America (USA), and requested consular assistance for him, in accordance with article 36 of the Vienna Convention on Consular Relations (hereinafter Vienna Convention).

p.3-4 The judge acquitted the detainee of the crime he was accused of, since in his initial statement he did not note the existence of any evidence by which his rights were made

known to him, which violates the prerogatives of legal security and adequate defense recognized in article 20 of the Constitution.

The PP filed an appeal against such decision, and it was determined that the detainee was criminally liable for committing the crime of aggravated robbery, for which he was sentenced to five years in prison and a twenty days' fine.

- p.4 The accused filed an *amparo* lawsuit against the decision of the court of appeal in which he claimed that his rights under articles 14 and 16 of the Constitution had been violated. The Collegiate Court denied the *amparo*, so the accused filed a *recurso de revisión* against this decision. The appeal was referred to this Court.

STUDY OF THE MERITS

- p.13 In this case, this Court analyzed whether the interpretation of article 30 of the Constitution by the Collegiate Court was respectful of the *pro persona* principle contemplated in the first article of the Constitution and whether it violated the right to consular assistance contained in article 36 of the Vienna Convention.
- p.14 In some precedents, this Court has ruled on the scope of the right to consular notification, contact and assistance. The Chamber noted that the right to consular notification, contact and assistance, as recognized in the Vienna Convention, is part of the domestic legal order in accordance with article one of the Constitution, which recognizes two sources of human rights: the Constitution and the international treaties to which the Mexican State is a party.
- p.15 Thus, according to this Court's precedents, once a foreigner has been arrested or is in any kind of custody in Mexico, the authorities must inform him, immediately, that he has the right to communicate with the consular office or representation of his country. If the alien decides to contact his consulate, the authority must immediately inform the consular office closest to the place where the detention was made and must ensure communication, visit, and contact between the alien and his consulate so that the latter can provide immediate and effective assistance.

p.18 However, in this case, this Court considered whether or not its precedents in the matter of a foreigner's right to consular assistance are applicable when the foreign person being prosecuted also has Mexican nationality.

I. The position of public international law on the right to consular assistance in the case of dual nationality, when one of the nationalities is of the receiving State

p.19 The Vienna Convention clearly protects the right of each State to defend its nationals. Therefore, there is an international obligation to respect this right. Thus, the obligation of the receiving State (where the individual is being prosecuted), if the foreign person requests it, is to contact the State concerned to report that one of its nationals is being prosecuted in the receiving country. If the notified State decides not to assist the detained person, this is not the responsibility of the receiving State and with such notification its inter-State obligation is considered fulfilled.

In addition, the right to consular notification, contact and assistance, originally conceived as an interstate right, has been recognized as a human right. In this regard, the Inter-American Court of Human Rights has emphasized that Article 36 of the Vienna Convention is not limited to the rights of States, but extends to individuals.

p.20 Based on the foregoing, this Court determined that, while it is true that the Vienna Convention does not address the topic of dual or multiple nationality, the right of a State to defend one of its nationals, even if he or she also has the nationality of the receiving State, is consistent with the current development of customary international law. In that regard, the First Report on Diplomatic Protection of the Rapporteur of the UN International Law Commission clearly opted for diplomatic protection for dual nationality. The Rapporteur of that Commission has stressed that the principle that a State should exercise diplomatic protection on behalf of one of its nationals against another State, of which that person is also a national, reflects the current position of customary international law and is consistent with the development of international human rights law, which grants legal protection to individuals even before a State in which such persons are also nationals.

p.20 Considering the above mentioned, this Court concluded that, under public international law, a distinction cannot be made in the recognition of the right of consular notification, contact and assistance when the detained person, in addition to being a national of a foreign State, is a national of the receiving State.

II. The right to consular assistance as a human right

p.21 This Court emphasizes that the content of a human right recognized in international treaties to which Mexico is a party is not limited to the express text of the norm recognizing that right but extends to its interpretation by the agencies authorized to interpret, over time, each body of laws.

The case of the human right to consular assistance is a clear example of how, at the national and international levels, the content and scope of this right have developed over time, creating a parameter of constitutional regularity over it. The law under consideration has been recognized by various international tribunals, specifically by the Inter-American Court of Human Rights and the International Court of Justice (ICJ).

p.22-23 On the one hand, in Advisory Opinion OC-16/99, the Inter-American Court of Human Rights interpreted the spectrum of Article 36 of the Vienna Convention and stressed that the right to consular assistance provides detained foreigners with individual rights that are the counterpart of the correlative duties of the host State. The Inter-American Court of Human Rights also pointed out that it is essential to take into account the circumstances of disadvantage in which an alien finds himself, so that the notification of the right to communicate with the consular representative of his country contributes to considerably improving his possibilities of defense and to ensuring the procedural acts in which he intervenes are carried out with greater adherence to the law and respect for the dignity of persons. Consequently, the Inter-American Court concluded that the individual right to consular notification must be recognized and considered within the framework of the minimum guarantees to provide foreigners with the opportunity to properly prepare their defense and have a fair trial.

p.23 On the other hand, the ICJ recognized, in the Avena case, that article 36 of the Vienna Convention enshrines a genuine fundamental right for individuals detained abroad and that States must promote all possible measures granted by their legal system to indemnify foreigners for violations of this right.

Consequently, the human right to consular notification, contact and assistance is fully recognized in our Mexican legal framework through article 1 of the Constitution.

III. Harmonization of the right to consular assistance, the prerogative of dual nationality and the *pro persona* principle

p.24 This Court concludes that the answer to the question of whether having another nationality, in addition to having that of the receiving State, eliminates the right of the person to consular notification, contact, and assistance is necessarily negative. That right cannot be eliminated because it is a human right that, according to article one of the Constitution, has the characteristics of universality, interdependence, indivisibility and progressivity. Thus, the human right to consular notification, contact, and assistance could not be displaced by the fact that a person has a dual or multiple nationality. Understanding a human right as something that can be displaced or eliminated by another protective condition is not compatible with the *pro persona* principle recognized in the Constitution.

Consequently, this Court considers that dual or multiple nationality, recognized in articles 30 and 32 of the Constitution, cannot be understood as being contrary to the human right to consular notification, contact and assistance. On the contrary, it is a prerogative that is perfectly compatible with that right.

p.26-27 This Court considers it important to highlight the intention of the Congress in the 1997 reform, when including dual or multiple nationality within the constitutional text. The Congress made this legal amendment to allow Mexicans with residence abroad and who will have another nationality, to maintain their Mexican nationality and thus be able to exercise their rights, among which are consular ones. However, there is a limitation established in article 32 of the Constitution for Mexicans by naturalization with dual or multiple nationality, which refers to access to certain public positions. This Court

determined that this rule does not establish any express limitation on a person with dual or multiple nationality to having access to other rights to which he is entitled, such as consular assistance. On the contrary, it is clear from the various opinions of this Court that one of the main reasons for recognizing dual or multiple nationality was to assist – even in a consular manner – Mexicans abroad.

p.28 If this is the case, there is no reason to conclude that a person with dual or multiple nationality should not be entitled to a right that, as a national of another State –in addition to Mexican nationality– is recognized for him. Thus, the dual protection that arises from a dual nationality cannot be understood as an impact on the constitutional order, but as a benefit for a person who is seeking an adequate defense. This is a legitimate aspiration and not contrary to the legal order. The human right to consular notification, contact and assistance should at least be seen as a possibility of a latent benefit that cannot be denied or impeded by the authority of the country in which the person is deprived of his liberty. Thus, as soon as the authorities (police, investigators or judges) are informed or become aware that the person arrested has one or more nationalities (regardless of whether he also has Mexican nationality), they are obligated both to ask him whether he wishes to notify the State or States in question, and to notify the respective consulate if he so wishes. Failure to inform the detainee of his right and failure to notify the consulate at the latter's request would mean denying a possible benefit and enjoyment of rights or, at least, a possibility of broader protection.

IV. The analysis of the decision of the collegiate court in this specific case

p.29 This court record contains evidence of the defendant's status as a foreigner because he was born in the United States. However, when the *amparo* authority assessed the conviction, it did not consider the failure to give consular notification as a violation of due process, as established in article 36 of the Vienna Convention. According to the collegiate court, the right to consular assistance was not violated because the accused could not be considered a foreigner, since his parents were born in Mexico, so he has dual nationality, in accordance with article 30 of the Federal Constitution. The collegiate court also pointed out that the fundamental rights of the accused were not violated because the constitutional

rights he has as a Mexican who is in his country were respected and added that the fact that he has dual nationality does not imply that he has to be treated as a foreigner.

p.30 This Court determined that the argumentation of the collegiate court is contrary to article one of the Constitution which recognizes human rights from an international source, such as the right to consular assistance. In this regard, given that the defendant's request for the implementation of article 36 of the Vienna Convention was not granted and the collegiate court validated that determination, it is clear that the defendant's human rights to consular notification, contact and assistance, and to an adequate defense, were violated. When an authority, be it police, prosecutor or judge, prevents an alien from using the means made available to him by article 36 of the Vienna Convention, he not only limits the full satisfaction of the right to an adequate defense, but in fact makes it impossible. Thus, the constitutional interpretation by the collegiate court is not in accordance with the criteria of the First Chamber on consular assistance or with the full recognition of human rights.

V. Effects

p.31 Although the right to consular assistance of a foreign person who is also Mexican is a human right that must always be recognized, this Court considers that what may vary in each case are the specific effects of the violation of this right, in relation to the right to a defense.

p.32-33 In order to analyze the possible effect of the lack of protection of the right contained in article 36 of the Vienna Convention, it is essential to consider whether, in the specific case, the right to an adequate defense, a central pillar of the right to consular notification, contact and assistance, as established by the Inter-American Court of Human Rights and this Court, was fulfilled. It is important to note that in this stage, the elements of the person's national identity, such as language, residence, and family ties, among others, are not evaluated. What is reviewed is whether, on the basis of the right to due process and access to effective judicial protection, the person had at his disposal adequate means of defense. Thus, in view of the fundamental pillar of adequate defense on which the right to

consular assistance is based, the determination of the effects of the lack of consular notification must take into consideration the extent to which such omission may have affected the right of defense in a specific case with these characteristics. This does change the fact that, regardless of whether the person with dual or multiple nationality has had an adequate defense, when the failure to protect his right is verified, access to it must be guaranteed immediately, at any stage of the proceedings.

- p.34 This Court must analyze this specific case based on the above arguments. There is no information in the case file that would establish that the police and prosecuting authorities were aware that the person was a dual national. In fact, it is recorded that the defendant stated on several occasions that he was Mexican. For that reason, it was not possible to require the prosecuting and judicial authorities to give effect to the right to notification, contact and consular assistance of the accused, until they were aware that he had a nationality other than Mexican nationality. However, as soon as the defendant informed the judge of his dual nationality and requested consular notification, the judge should have immediately contacted the United States consulate to inform it of the prosecution of one of its nationals. Despite this, the judge in the case did not inform the consulate, and instead concluded that the accused should be acquitted because there was no record of his rights being made known to him and no reference was made to the complainant's dual nationality.
- p.36 The defendant informed the judicial authorities of his dual nationality before the issuance of the trial court decision and, despite this, his right to notification, contact and consular assistance was not made effective for him, which should have been done from the moment the authorities became aware of this fact. In this specific case, if the right referred to had been made effective when the accused had requested it and the consulate had decided to grant assistance, this would have had an effect on the evidentiary stage and conclusions of that procedural stage, prior to the issuance of the trial court decision. This omission could have had negative effects on the complainant's defense. Therefore, in this case, the *amparo* must be granted to reinstate the proceedings as of the very moment

when the defendant reported his dual nationality, which corresponds to the trial court stage.

DECISION

p.36-37 This Court determines that the constitutional interpretation by the First Collegiate Criminal Court of the Third Circuit, in relation to the right to consular notification, contact and assistance, of the prerogative of dual nationality and the *pro persona* principle recognized, respectively, in articles 36 of the Vienna Convention and 30, 32 and 1, second paragraph of the Political Constitution of the United Mexican States, is not in accordance with the parameter of constitutional regularity.

Consequently, the decision under appeal is overturned and the defendant is granted the *amparo* and protection of the federal courts, so that the responsible authority reverses the decision and the judge in the case is ordered to reinstate the proceedings at the very moment when the defendant reported his United States nationality, which corresponds, in this case, to the trial court stage, so that the right of the petitioner of the *amparo* to notification, contact and consular assistance may be made effective.