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THE IMPORTANCE OF ADMINISTRATIVE APPEALS AS SECOND INSTANCE BODIES TO STRENGTHEN MIGRATION AND ASYLUM SYSTEMS

By Gabriela Richard Rodriguez¹

ABSTRACT*

According to data from UNHCR's Report, "Global Trends - Forced Displacement in 2022,"¹ there were 108.4 million forcibly displaced people worldwide in 2022; in the first half of 2023 alone, there were 110 million displaced people, indicating that 2023 could double the figures of 2022. Based on my experience as an administrative judge in the Administrative Migration Tribunal in Costa Rica—a body of second instance in the migration system—I consider that, in view of the impact that the migration and asylum systems had had in countries of transit and destination, it is essential that there be second instances with specialized personnel who are independent with objective knowledge in the field. Further, they must review the due process of applications to different migratory and asylum categories to guarantee effective access to justice and review of due process. The purpose of this article is to highlight the importance of strengthening immigration and asylum systems through the implementation of specialized appellate instances. These bodies must independently review, without being influenced by political interests, appeals filed by migrants and asylum seekers against unfavorable decisions in the regularization processes in host countries.

INTRODUCTION

It is essential to ensure effective access to justice and due process in regularization applications in transit and destination countries for migrants and those in need of protection to ensure that their fundamental rights are respected. Often, people in situations of human mobility, and when they are

outside their country of origin, face conditions of vulnerability, especially if they lack legal immigration status in the host country. Faced with the growing number of people in these contexts of mobility who are forced to leave their countries of origin in search of better life opportunities, enjoyment of fundamental rights, and general international protection, different governments around the world have implemented robust regulatory frameworks to manage migration appropriately. However, the challenges in providing real options for regularization and legal certainty in destination countries, as well as true integration that includes durable solutions for these people who cannot return to their countries of origin, remain extensive. Specialized bodies can provide second chances to millions of people who seek a migratory category and to those who were unable to obtain it in the first place.

I. ANALYSIS

A. THE ADMINISTRATIVE MIGRATION TRIBUNAL IN COSTA RICA

The Administrative Migration Tribunal ("TAM") was established by the General Law on Migration and Aliens No. 8764 of 19 August 2009, defining itself as: "*(...) a body of maximum deconcentration attached to the Ministry of the Interior and Police, with exclusive competence and functional independence in the performance of its powers. The Court's decision will exhaust the administrative remedies. The Administrative Migration Tribunal shall have its seat in San José and shall have jurisdiction throughout the national territory (...)*"²

¹ Gabriela Richard Rodriguez has dedicated her work for the last 20 years to human rights, international migration, and international refugee law. This work focuses on issues related to human mobility, including migrants, forcibly displaced persons, and people in need of protection in Latin America. She has served as a coordinator in multilateral spaces in the region related to the attention of migration, especially for populations with the greatest conditions of vulnerability, and has helped formulate public policies concerning them. From 2017 to 2023, she was an appointed judge of the Administrative Migration Tribunal in Costa Rica, which has the only one in Latin America. She studied at the University of Salamanca, where she received a degree in clinical psychology and an Ibero-American Master's Degree in Anti-Corruption Policies. She focused her studies there on internal mechanisms for the promotion and protection of human rights, as well as the use of the Inter-American System for the Protection of Human Rights.

* This article was originally written in Spanish.

The TAM is the only judicial body like this in Latin America, and its purpose is to: (1) hear appeals filed against the final resolutions of the General Directorate of Migration and Foreigners in migratory matters and precautionary measures, and (2) review the final resolutions of the Commission on Restricted Visas and Refuge in matters of refuge, to (3) ensure that the actions of these bodies are in accordance with the legal system in guaranteeing the legality, efficiency, and effectiveness of legal certainty regarding the acts that affect the rights of migrants and refugees that are brought to their attention.³

Articles 26 and 27 of Law 8764 establish the process for appointing the judges who will make up the Court, as well as the professional profile of the three judges and three alternate judges.⁴ Article 27 outlines the necessary criteria for becoming an eligible judge: "(...) *To be a full and alternate member of the Administrative Migration Tribunal, you must have a minimum degree of bachelor's degree and at least five years' experience in migration or other related matters. Two owner members and their respective alternates shall be lawyers. (...)*"⁵ In my case, I had the opportunity to be a judge from May 2017 to May 2023. This tribunal allows two of the judges to be lawyers, while the third requires professional experience in immigration and asylum issues.⁶ My role as a judge during this training fell under the latter category as a psychologist by profession with experience in immigration and asylum issues. Moreover, the people who are part of the decision-making process and who work on implementing migration laws and policies must have comprehensive and specialized training in the field. They are not only lawyers, but can be integrated into multidisciplinary teams for a greater understanding and application of laws in countries and the international commitments undertaken by States in the broad range of human rights.

TAM has a good practice that, since it began its function in 2012, has strengthened Costa Rica's migration and asylum systems, for it has been a country that has received migrants and applicants for international protection for many years—having submitted a total of 225,594 asylum applications between 2018 and 2023.⁷

This institution has also generated jurisprudence that has been a reference at the national and regional level. In 2019, TAM won the Special Mention award in the Fourth Sentencing Competition - Access to Justice for Migrants or Persons Subject to International Protection, regarding its application of the expanded definition of refugee of the Cartagena Declaration.⁸ This was applied for the first time in Costa Rica, and in 2020, TAM won second place for applying the best interests of the minor related to the human rights of migrants in the same sentencing contest.⁹ The development of jurisprudence of this type of review bodies regarding administrative appeals processes is of great relevance to strengthen the resolution of cases correctly and to apply national legislation and international commitments assumed by countries.

B. DUE PROCESS AND ACCESS TO JUSTICE WITH THE STRENGTHENING OF IMMIGRATION AND ASYLUM SYSTEMS

Migratory movements have increased significantly internationally, and this trend is expected to only continue to rise. This situation is due to a number of known causes, such as social, political, and economic instability, security crises, the effects of climate change, and the inability of States to guarantee decent living conditions and adequate protection for their citizens. The mobility processes of people have undergone changes that require comprehensive and differentiated approaches, considering the individuality and characteristics of the different people who are part of these movements. It is essential that the migration systems, the asylum systems, the laws, and the policies of these countries of transit and destination that have large, mixed flows of migrants, and those in need of international protection, are adapted to the current realities of this population in order to provide adequate care, while taking into account various actors involved in the respective care. Governments must have effective regularization procedures to guarantee legal security for migrants and refugees, and thus guarantee adequate documentation. This is essential for them to access basic service such as education, decent and safe work, and access to health and effective integration processes. These regularization procedures act as a key element to achieve respect for human rights and prevent discrimination against these populations.

It is necessary that there be specialized bodies with functional and decision-making independence so that there is impartial and objective review dedicated exclusively to the final decisions of the first migratory instances. Moreover, this is required so that there is a different body that hears appeals filed by migrants and asylum seekers. This is important as a tool to strengthen the specialization of the migration and asylum systems in order to resolve cases and prevent them from being resolved based solely on political interests, or with security-focused approaches, which sometimes criminalizes these populations. Without an independent third party reviewing these final decisions, there is widespread violation of standards recognized by States, such as international migration and refugee law.

The Inter-American Commission on Human Rights approved "*The Inter-American Principles on the Human Rights of All Migrants, Refugees, Stateless Persons, and Victims of Trafficking in Persons*"¹⁰ in Resolution 04/19 of December 7, 2019, taking into account Article 41.b of the American Convention on Human Rights. Importantly, Principle 40: Access to justice and the right to an effective remedy, states: "(...) *Every migrant has the right to an effective remedy against acts that violate his or her rights guaranteed by relevant national law, as well as by international law, including those recognized herein. (...)*"¹¹ Moreover, during my six years of experience as a judge, I understood the importance of having independent second instances, as they are essential to guarantee effective access to appeals against unfavorable decisions in the first instance—whether it is the General Directorate of Migration or the Migration Institute, depending on the country. These decisions must be reviewed while considering the procedure followed and the legal bases on which the denial of requests by persons accessing the systems is based. The objective of these bodies must be to improve the quality of procedures in the processes of regularization of persons, based on national migration laws. However, it cannot be ignored that an exhaustive analysis must be made regarding the obligations and commitments of the States in relation to the different ratified international conventions.

In this regard, I would like to mention the example of the countries that are parties to the American Convention on Human Rights and the application of

the Control of Conventionality, as it is a tool for justice operators related to resolving cases regarding immigration and asylum procedures. Articles 1(1) and 2 of the American Convention on Human Rights¹² indicate the obligation of State Parties to comply with the provisions of that treaty for the protection of human rights while maintaining harmony between domestic and international laws to which they have committed:

"(...) The Inter-American Court of Human Rights has established that it is aware that domestic authorities are subject to the rule of law and, therefore, are obliged to apply the provisions in force in the legal system. However, it has specified that when a State is a party to an international treaty such as the American Convention, all its organs, including its judges and other organs involved in the administration of justice at all levels, are also subject to the treaty, which obliges them to ensure that the effects of the provisions of the Convention are not diminished by the application of rules contrary to its object and purpose, so that judicial or administrative decisions do not render illusory the total or partial fulfillment of international obligations. In other words, all state authorities are obliged to exercise ex officio control of the conventionality of domestic norms and practices and the American Convention, within the framework of their respective competences and the corresponding procedural regulations. (...)"¹³

Further, migration and asylum systems must guarantee due process, as they are the fundamental tools for migrants, asylum seekers, and refugees to have access to regularization options under national law. However, they must ensure compliance with international law and the obligations that countries have assumed:

"(...) As the Inter-American Court of Human Rights has established, '[t]he treaty obligations of the States Parties bind all branches and organs of the State,' that is, 'that all branches of the State (Executive, Legislative, Judicial, or other branches of government) and other public or State authorities, at any level, including the highest courts of justice thereof, have a duty to comply in good faith with international law. (...)"¹⁴

These requirements of such control of conventionality entail significant challenges, insofar as the different public authorities of a State are bound not only by their domestic law, but also by the sovereign consent of human rights international law through signature,

ratification, or accession of the respective treaties.¹⁵ A good practice of the application of the Control of Conventionality and the application of jurisprudence by a second instance specialized in migration matters is that of the Administrative Migration Court with judgments 1072-2017-TAM and 937-2020-TAM.¹⁶ Both were awarded in the Judgment Competition - Access to Justice for Migrants or Persons Subject to International Protection, mentioned previously.¹⁷ Judgment 1072-2017-TAM related to an international protection case, and the right to life and effective access to health were analyzed.¹⁸ The Court carried out a legal analysis, ruling on international instruments such as the 1951 Convention relating to the Status of Refugees, the Protocol relating to the Statutes of Refugees, and the expanded definition of refugees in the Cartagena Declaration, as well as Costa Rica's domestic legislation, the General Law on Migration and Aliens No. 8764, and the Refugee Regulations of the same law.¹⁹ The appellant related in the case was diagnosed with HIV-positive in his country of origin.²⁰ Due to the political, social, and economic conditions of this country at that time, he did not have effective access to his medical treatment; he was without treatment for his disease for approximately two years, which deteriorated his health in other aspects as a consequence of suffering from other collateral diseases.²¹ The Administrative Migration Tribunal considered the fact that the appellant would not have effective access to adequate medical treatment if he returned to his country of origin, which was a condition that, in the future, could lead to a violation of his fundamental rights—such as effective access to health—and put his life at risk.²²

Just as the 1967 Protocol relating to the Status of Refugees broadened the definition of refugee—removing the limitation of time and space from the 1951 Convention—the 1984 Cartagena Declaration on Refugee expanded the definition of refugee, proposing new approaches to the humanitarian needs of refugees.²³ Further, the Administrative Migration Tribunal is the only one of its kind in Latin America, and according to Costa Rican migration legislation, it must give relevance to human rights instruments and carry out Conventionality Control, which implied commitment and responsibility for the protection of persons.²⁴ Judgment 1072-2017-TAM carried out

an analysis based on the principles established in the Declaration of Cartagena, foreseeing what would be the danger that this person would run upon when returning to his country with his illness, while wanting to ensure his right to life and access to health.²⁵ The expanded definition of the Cartagena Declaration was not taken into account in the Migration and Aliens Law 8764, which motivated the TAM to carry out Conventionality Control.²⁶

The Constitutional Chamber of Costa Rica has interpreted that the human rights instruments in force in Costa Rica—to the extent that they grant greater rights or guarantees to individuals—**take precedence over the constitution**. By control of conventionality, it is the responsibility of the administrative justice systems of the States—which are responsible for the primary care of the protection of human rights—in order to safeguard human dignity and the satisfaction of individual rights enshrined in international instruments and incorporated into domestic systems. Thus, Costa Rica accepted and incorporated the Cartagena Declaration, since it **was recognized and reaffirmed in the framework** of the 1994 Declaration of San José. The Contentious Administrative Tribunal, Section IV, of Resolution No. 103-2014-IV, states: "(...) *the Court concludes that the Constitutional Court has incorporated the aforementioned declaration into domestic law as a parameter of constitutionality, which in the light of canon thirteen of the Law on Constitutional Jurisdiction requires it to be so for all jurisdictional and administrative bodies. (...)*"²⁷

In the present case, it was considered that the 1951 Convention was not sufficient to provide international protection, and the application of the Cartagena Declaration became necessary.²⁸ The TAM considered that the lack of access to the specific medication for antiretroviral treatment would lead to the death of the appellant.²⁹ It was determined that there was the threat of persecution in the event of returning to their country of origin due to the violation of the human rights of health, life, and human dignity.³⁰ This persecution must be assessed under the following reasons: other circumstances that disturb public order—which at the time directly affected people suffering from HIV, in that they are obliged to

maintain their treatment to continue living; and not having access to medicines in their country of origin, meaning their lives were endangered and thus violating a universal right.³¹

In case 937-2020-TAM, the rights analyzed related to: the Human Rights of Migrants and the Best Interests of the Minor; international instruments such as the Convention on the Rights of the Child and the American Convention on Human Rights; and domestic legislation like the General Law on Migration and Aliens No. 8764 and the Costa Rican Children and Adolescents Code.³² The case of the appellant was related to the fact that the General Directorate of Migration ("DGME") and Aliens denied him the status of Permanent Residence due to a first-degree blood relationship with Costa Rican minors, since the foreigner had a prison sentence of eight months with a suspended execution of the sentence for three years for the crime of reckless driving.³³ The TAM considered that the contested resolution did not make an assessment of the appropriateness and convenience of the denial and the impact on the rights of minors, as they were separated from the parent.³⁴ Additionally, the first instance did not carry out an analysis of conventionality in relation to the best interests of the minor, the principles of reasonableness and proportionality in accordance with the Costa Rican legal system, and in observance of international human rights treaties and conventions set out in articles 1, 3, and 5 of Law 8764.³⁵

Moreover, it was the duty of the DGME to request a psychosocial report from the National Children's Trust (the governing institution for children in Costa Rica), so that the possible impact on the rights of minors when separated from one of the parents could be assessed.³⁶ The TAM analyzed various factors, and the absence of due control of the conventionality of the appealed decision.³⁷ They concluded that, at that time, the appropriate thing to do was to annul the resolution denying the appellant's migratory status, so that the due analysis of the best interests of the minors could be carried out by the DGME.³⁸ Additionally, they concluded that the analysis by the National Children's Trust of the effects that the children of the appellant could have in the future, if they were separated from the parent without having a legal status in Costa Rica,

would lead to execution of deportation to their country of origin.³⁹ There was a lack of analysis of the Control of Conventionality, which is required by both the Constitutional Chamber of Costa Rica and the Inter-American Court of Human Rights.⁴⁰ Moreover, there must be this analysis of whether they are jurisdictional or administrative through their pronouncements as public entities.⁴¹

Of the utmost importance in both of these cases is article 7 of the Costa Rican Constitution, which states that: "*Public treaties, international conventions and concordats duly approved by the Legislative Assembly shall have, from their promulgation or from the day they designate, authority superior to the laws.*"⁴² The institutions, and in this case, the specialized courts in migration matters, are essential tools to guarantee respect for rights enshrined in international law for the analysis of appeals cases of migrants and refugees.

C. SHARED RESPONSIBILITIES FOR THE COMPREHENSIVE CARE OF MIGRANTS AND REFUGEES IN MIGRATION AND ASYLUM SYSTEMS

In December 2018, under the auspices and support of the United Nations, several States committed to ensuring the implementation of the different initiative contained in the Global Compact for Safe, Orderly and Regular Migration⁴³ and the Global Compact on Refugees,⁴⁴ both with clear principles, to guarantee shared responsibility for a comprehensive approach to migrants, refugees, and applicants for international protection in the countries of origin, transit, and destination. Both covenants have objectives related to effective access to the enjoyment of the fundamental rights of migrants and refugees—which is only possible with having effective access to regularization processes to obtain documentation in the host countries, and being in a regular administrative condition.⁴⁵ Integrating migrants and refugees in destination and host countries must be an essential element to comprehensively address these populations, and to promote conflict prevention actions to generate lasting solutions.

Strengthened migration and asylum systems are essential to ensure effective regularization

procedures. The second instances in these systems will strengthen these procedures, becoming tools within the systems as controlling entities of legality by applying principles to guarantee due process and compliance with the international commitments assumed by the countries. The current situations of large migratory flows require coordinated actions in the different countries of the region, which can create initiatives to standardize procedures to resolve cases, guaranteeing a true management of mobility processes that take into account the different stages of the migratory cycle. Access to appeals by individuals is essential, and having access to specialized and independent bodies in the field is equally essential.

IV. CONCLUSION

First, the creation of second instances of appeal or Administrative Migration Tribunals must be based on essential principles such as the specialization, efficiency and quality of the decision-makers, as well as the officials who make them up. This will ensure a more specialized body to resolve cases in accordance with the corresponding law.

Second, migration and asylum systems must be able to adapt to the current realities of people on the move. It is essential to manage migration processes effectively, as the benefits not only accrue to migrants and refugees, but also to transit and destination countries, and host communities.

Third, shared responsibility on the part of States that are part of different migratory dynamics today is essential to generate coordinated commitments. This will contribute to strengthening and improving the quality of migratory administrative processes, providing guarantees to people in regularization processes.

Fourth, professionals and decision-makers involved in all stages related to access to regularization and international protection procedures must have specialized experience and training in the field. They must resolve cases with a holistic approach, applying national norms and laws, and taking into account international commitments to the protection of human rights.

Fifth, migration and seeking asylum are human rights enshrined in different international instruments.

Countries must ensure that people in mobility processes are guaranteed their fundamental rights, including access to adequate procedures to be able to regularize. Having specialized appeals bodies will guarantee the quality of procedures, promoting the regularization of people in host countries, preventing irregular migration and the consequences that it entails in the different sectors of the host communities.

ENDNOTES

¹ Global Trends: Forced Displacement in 2022, THE U.N. HIGH COMM'R FOR REFUGEES 2023,

<https://www.unhcr.org/global-trends>.

² Law 8764 of 2009, art 25, Costa Rica.

³ *See generally id.*

⁴ *Id.* at art 26-7.

⁵ *Id.* at art 27.

⁶ *See generally id.*

⁷ This comes from my own personal knowledge from working in the TAM, but for further information, *see* UNHCR, *Costa Rica*, GLOBAL FOCUS, <https://reporting.unhcr.org/operational/operations/costa-rica>.

⁸ For more information on this award, *see* International Committee of the Red Cross, *Call for proposals: Judgments Award 2023* (May 19, 2023), <https://www.icrc.org/en/document/call-proposals-judgments-award-2023>.

⁹ *See generally id.*

¹⁰ Resolution 04/19 of 2019 (IACHR). "*The Inter-American Principles on the Human Rights of All Migrants, Refugees, Stateless Persons, and Victims of Trafficking in Persons.*" 7 December 2019.

¹¹ *Id.*

¹² American Convention on Human Rights, Arts. 1.1 and 2. July 1978.

¹³ Inter-American Institute of Human Rights, *Self-training manual for the application of conventionality control aimed at justice operators*, p. 49, IIHR (2015).

¹⁴ *Ibid.*, p. 64.

¹⁵ *Id.*

¹⁶ 1072-2017-TAM, Administrative Migration Court of Costa Rica (2017); 937-2020-TAM, Administrative Migration Court of Costa Rica (2020).

¹⁷ *See* International Committee of the Red Cross, *Call for proposals: Judgments Award 2023*.

¹⁸ 1072-2017-TAM, Administrative Migration Court of Costa Rica.

¹⁹ *See generally id.*

²⁰ *See generally id.*

²¹ *See generally id.*

²² *See generally id.*

²³ *See generally id.*

²⁴ *See generally id.*

²⁵ *See generally id.*

²⁶ *See generally id.*

²⁷ Resolution No. 103-2014-IV, The Contentious Administrative Tribunal, Section IV (2014).

²⁸ 1072-2017-TAM, Administrative Migration Court of Costa Rica.

²⁹ *See generally id.*

³⁰ *See generally id.*

³¹ *See generally id.*

³² 937-2020-TAM, Administrative Migration Court of Costa Rica.

³³ *See generally id.*

³⁴ *See generally id.*

³⁵ *See generally id.*

³⁶ *See generally id.*

³⁷ *See generally id.*

³⁸ *See generally id.*

³⁹ *See generally id.*

⁴⁰ *See generally id.*

⁴¹ *See generally id.*

⁴² Constitution of the Republic of Costa Rica, Article 7 (as amended by Law No. 5699, Jun. 5, 1975).

⁴³ A.G. UN, 2018, A/RES/73/195.

⁴⁴ A.G. UN, 2018, A/RES/73/151.

⁴⁵ *See generally id.*; *see also* A.G. UN, 2018, A/RES/73/195.