

**Inter-American Court of Human Rights\***

**Case of Atala Riffo and Children vs. Chile**

**Official Summary Issued By the Inter-American Court of the Decision,  
February 24, 2012  
(Merits, Relief and Costs)\*\***

[\*Consisting of the following judges: Diego García-Sayán, President; Manuel E. Ventura Robles, Vice President; Leonardo A. Franco, Justice; Margarette May Macaulay, Justice; Rhadys Abreu Blondet, Justice, and Alberto Pérez Pérez, Justice. Justice Eduardo Vio Grossi, of Chilean nationality, did not participate in the present case, pursuant to Article 19.1 of the Court Rules. The Court Secretary is Pablo Saavedra Alessandria and the Assistant Secretary is Emilia Segares Rodríguez.]

[\*\*English Translation by Stephanie Plotin]

*Summary*

The facts of the present case are related to the custody process that was brought before the Chilean court by the father of the girls M., V. and R.<sup>1</sup> against Ms. Karen Atala Riffo, alleging that her sexual orientation and her co-habitation with a partner of the same sex would cause harm to the three girls. In this sense, the Court had to resolve, among other issues, the international responsibility of the State for the alleged discriminatory treatment and the arbitrary interference in her private and family life that Ms. Atala has suffered due to her sexual orientation as part of the judicial process which resulted in the girls M., V. and R. being removed from her care and custody. In order to do so, the Court analyzed the arguments expressed in the Supreme Court's decision, and the temporary custody order of the Villarrica Juvenile Court.

In this manner, the Inter-American Court determined that it did not fulfill the functions of a court of "fourth review," and therefore it was not within the Court's jurisdiction to establish if the mother or the father of the three girls offered a better home for said girls, to examine evidence to prove this particular proposition, or to make a determination

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<sup>1</sup> At the request of the Inter-American Commission and its representatives, the identity of the three daughters of Ms. Karen Atala Riffo, here identified with the initials "M., V. and R" will not be made public. Regarding the participation of the girls M., V. and R. in the present case, a delegation of the Inter-American Court conducted a private proceeding with the girls M. and R. During this proceeding, neither parent nor any of the parties were present. Based on what was stated by the girls, the Court has considered them to be the alleged victims in this case. The child V. did not participate in said proceeding due to unforeseeable circumstances. Regarding her absence, the Court determined that there was no reason to believe that the child V. was not in the same circumstances as her sisters. Nevertheless, regarding the relief determined by the court, the appropriate National Authority for the rights of children should confirm privately the true opinion of the child V. regarding whether she wants to be considered an injured party.

regarding the custody of the girls M., v. and R, aspects that are outside of the purpose of the present case.

In its Decision, the Court found Chile internationally responsible for having violated: i) the right to equality and non-discrimination established in Article 24 [\*Page 2] (equality before law), in relation to Article 1.1 (obligation and guarantee of respect) of the American Convention, causing injury to Karen Atala Riffo; ii) the right to equality and non-discrimination established in Article 24 (equality before law) in relation to Articles 19 (rights of the child) and 1.1 (obligation and guarantee of respect) of the American Convention, causing injury to the children M., V. and R.; iii) the right to private life established in Article 11.2 (protection of honor and dignity) and 17.1 (protection of the family), in relation to Article 1.1 (obligation and guarantee of respect) of the American Convention, causing injury to Karen Atala Riffo; iv) Article 11.2 (protection of honor and dignity) and 17.1 (protection of the family) in relation to Article 1.1 (obligation and guarantee of respect) of the American Convention causing injury to Karen Atala Riffo and to the children M.,V. and R.; v) the right to be heard established in Article 8.1. (judicial guarantees) in relation to Articles 19 (rights of the child) and 1.1 (obligation and guarantee of respect) of the American Convention causing injury to the children M., V. and R., and vi) the guarantee of impartiality consecrated in Article 8.1 (judicial guarantees) in relation to Article 1.1 (obligation and guarantee of respect) of the American Convention, with respect to the disciplinary investigation, causing harm to Karen Atala Riffo. Additionally, the Court determined that the State did not violate the judicial guarantee of impartiality established in Article 8.1 (judicial guarantees) of the American Convention, with regard to the decisions of the Supreme Court of Justice and the Villarrica Juvenile Court.

#### *Summary of the Principal Facts*

During the custody proceedings, the Villarrica Juvenile Court decided (among others) two issues. The first was to rule on a provisional custody measure requested by the father. On May 2, 2003, said Court gave provisional custody to the father, even though it recognized the absence of elements that would permit it to presume grounds of legal incompetency of the mother. In said decision, the Court supported its decision, *inter alia*, with the following arguments: i) “that [...] the defendant, living openly her sexual orientation, co-habits with her female partner in the same home in which her daughters reside, thereby disturbing along with her partner the normalcy of the family routine, privileging her interests and personal well-being above her daughters’ emotional well-being and appropriate socialization process”; and ii) “that the defendant has privileged her well-being and personal interests above the fulfillment of her maternal role, in a manner that could affect the later development of the minors, and in consideration of this we cannot but conclude that the plaintiff presents more favorable arguments on behalf of the greater well-being of the children, arguments which in the context of a heterosexual and traditional society, take on great importance.”

On October 29, 2003, the Villarrica Juvenile Court issued a second decision in which it rejected the custody suit, considering that, based on existing evidence, it had been

established that the defendant's sexual orientation did not represent an impediment to developing a responsible maternal role, that the defendant presented no psychiatric pathology that would prevent her from exercising her "maternal role" and that there were no indicators that would allow the Court to presume grounds for maternal incapacity that would prevent her from caring for the minors. Said order was appealed. On March 30, 2004, the Temuco Court of Appeals upheld the Decision.

Subsequently, the girls' father filed a petition in error with the Temuco Court of Appeals. On May 30, 2004, the Fourth Chamber of the Supreme Court of Justice of Chile accepted the petition, granting final custody to the father. In said decision, the Supreme Court stated that "in all things that concern [sons and daughters], it is most important to attend to the best interest of the child over other considerations and rights relating to their parents and that could make it necessary to separate a child from his parents." Moreover, the Supreme Court based its decision in the following arguments:

[\*Page 3] i) "dispensing with the oral testimony, [...] with respect to the deterioration felt in the social, family and educational environment inhabited by the minors, after the mother began to co-habit in the home with her homosexual partner and that the children could be the objects of social discrimination based on this fact"; ii) "the house [sic], they make reference to games and attitudes of the girls that demonstrate confusion about their mother's sexuality that must have been perceived due to living in the home with their mother's new partner"; iii) Ms. Atala "has placed her own interests above those of her daughters, especially by co-habiting with her homosexual partner in the same home in which she raised and cared for her daughters without their father:" iv) "the eventual confusion of sexual roles which can be produced by the lack of a father of the male sex and his replacement by another person of the female gender, creates a situation of risk for the integral development of the minors from which they should be protected", and v) "it is evident that the girls' exceptional family environment was significantly different from that of their friends from school and from the neighborhood, thereby exposing them to be the objects of isolation and discrimination that will equally affect their personal development." Consequently, the Supreme Court ruled that the conditions described constituted "qualified cause" pursuant to Article 225 of the Civil Code, to justify a grant of custody to the father, given that the current situation created a set-up giving rise to the risk of injury, which could become irreversible, to the interests of the minors, whose protection should be preferred above any other consideration."

Additionally, the present case is also related to the disciplinary investigation and the extraordinary inspection brought against Ms. Atala in April, 2004. Said investigation was ordered by the Temuco Court of Appeal en banc in order to inquire into "two fundamental facts: one, the articles which appeared in the newspapers '*Las Ultimas Noticias*' and '*La Cuarta*' which made references to the lesbian character attributed to Ms. Atala" and the other dealt with the use of elements and personnel [of the court where she served as judge] to carry out proceedings decreed by the Judge of the Villarrica Juvenile Court in which she was a party. Regarding Ms. Atala's sexual orientation, the special investigating judge who made the inspection concluded in his report that "Ms. Atala's peculiar emotional relationship has gone beyond the private sphere once it

appeared in the newspapers mentioned earlier, which clearly damages the image of Ms. Atala as well as the image of the Judiciary” and that this “takes on a seriousness that deserves to be examined by the [...] Court” of Appeal.

As a consequence of this investigation the Temuco Court of Appeals brought charges against Ms. Atala for using elements and personnel [of the court where she served as judge] to carry out proceedings decreed by the Juvenile Court Judge, the improper use of a Court Seal and the articles appearing in the press which gave information about the custody battle and her sexual orientation.

### *Findings and orders of the Court*

#### *1. Findings relating to the controversies surrounding the custody proceedings*

##### *1.1. Equality and non-discrimination and sexual orientation as a category protected by Article 1.1. of the American Convention*

The Court reiterated that Article 1.1 of the Convention is a Rule of a general nature whose content extends to all the provisions of the treaty, and directs the obligation of the Member States to respect and guarantee the full and free exercise of the rights and freedoms [\*Page 4] recognized therein “without any discrimination.” In other words, no matter what its origin or what form it might take, all treatment that could be considered discriminatory regarding the exercise of any of the rights guaranteed in the Convention is *per se* incompatible with the Convention itself.

Moreover, regarding 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 social condition” established in Article 1.1 of the Convention. Therefore, the Convention prohibits any discriminatory norm, act or practice based on a person’s sexual orientation. As a consequence, no norm, decision or practice of internal law, be it by state or private authorities, can diminish or restrict in any way a person’s rights due to his or her sexual orientation.

##### *1.2 The principle of the best interest of the child and presumptions of risk*

The Inter-American Court emphasized that the general objective of protecting the best interest of the child is, in itself, a legitimate end, and is, additionally, imperative. In the same sense, the Court indicated that in order to assure, to the greatest extent possible, the prevalence of the best interest of the child, the preamble to the Convention on the Rights of the Child establishes that this requires “special care”, and Article 19 of the American Convention notes that children should receive “special measures of protection.”

Likewise, the Inter-American Court confirmed that the determination of the best interest of the child, in cases of care and custody of minors, should be based on an evaluation of specific parental behaviors and their negative impact on the well-being and development of the child according to the case, as well as injuries and risks which are real and proven,

not speculative and imaginary. Therefore, speculations, presumptions, stereotypes or generalizations regarding the parents' personal characteristics or cultural preferences with respect to certain traditional concepts of the family are not admissible.

The Court observed that while, in the abstract, the "best interest of the child" is a legitimate aim, merely referencing this standard without concrete proof of the risks or harms that could be caused by the sexual orientation of the children's mother could not serve as a suitable means of restricting a protected right, such as the right to exercise every human right without any discrimination, based solely on a person's sexual orientation. The best interest of the child cannot be utilized to protect discrimination against a mother or a father due to the sexual orientation of either. Therefore, the judge cannot consider this social condition as an element when determining custody matters.

The Court added that a determination based on unfounded presumptions and stereotypes about the parental capacity and suitability to guarantee and promote the well-being and development of the child is not sufficient to guarantee the legitimate aim of protecting the best interest of the child. The Court concluded that considerations based on stereotypes about a person's sexual orientation are not admissible; that is to say, pre-conceptions of the attributes, conduct or characteristics of homosexual persons, or the impact that these could presumably have on girls and boys.

#### *1.2.1 Alleged social discrimination*

The Court concluded that the alleged possibility of social discrimination, proven [\*\*Page 5] or not, that the children might face due to the mother's or father's situation, could not legally serve as justification for different treatment or for the restriction of a right. While it is true that certain societies can be intolerant of conditions such as the race, sex, nationality or sexual orientation of a person, States cannot use this as justification for perpetuating discriminatory treatment. The States are internationally bound to adopt the measures necessary "to implement" the rights established in the Convention, as is stipulated in Article 2 of said inter-American instrument, and therefore should be disposed to confront expressions of intolerance and discrimination, in order to avoid the exclusion or denial of a particular condition.

The Court noted that, within the framework of contemporary societies, social, cultural and institutional changes are leading to developments which are more inclusive of a greater range of life options for all citizens. These changes are demonstrated by the social acceptance of interracial couples, single mothers and fathers, and divorced couples, which previously were not socially acceptable options. In this sense, both laws and the States themselves should assist society in advancing; otherwise, we run the serious risk of legitimizing and consolidating different forms of discrimination which violate human rights.

Turning to the argument that the principle of the best interest of the child could be affected by the risk of societal rejection, the Court concluded that a possible social stigma due to the sexual orientation of the mother or father could not be considered a valid

“injury” when making the best interest of the child determination. If judges that analyze cases like the present one confirm the existence of social discrimination, it is totally inadmissible to legitimate this discrimination with the argument of protecting the best interest of the child. In the present case, the Court also emphasized that there is no reason why Ms. Atala should have to suffer the consequences if it is presumed that in her community, her daughters have been discriminated against due to her sexual orientation.

Therefore, the Court concluded that the argument of possible social discrimination was not appropriate to further the declared purpose of protecting the best interest of the children M., V. and R.

### *1.2.2. Contended Role Confusion*

As far as the alleged role confusion that could be generated in the girls due to Ms. Atala’s co-habitation with her partner, the Court concluded that with regard to the prohibition on discrimination based on sexual orientation, the eventual restriction of a right demands a rigorous and weighty foundation, inverting the burden of proof, which means that the authorities must demonstrate that their decision has neither a discriminatory purpose nor a discriminatory effect. Indeed, it is the State that has the burden of proving that the judicial order under debate was based on the existence of a concrete, specific and real injury to the children. The Court observed that, in the present case, the Supreme Court of Justice did not rule based on an analysis in the abstract of the alleged impact of the mother’s sexual orientation on the development of the children; rather, it invoked the supposed existence of concrete evidence. Nevertheless, it limited its analysis to the application of a test of speculative injury, only mentioning, with regard to the alleged injury, “eventual confusion of sexual roles” and the “situation of risk to the development” of the girls. Therefore, the Court concluded that the Supreme Court of Justice did not fulfill the requirements of a strict analysis test and were unable to prove any concrete, specific injury supposedly suffered by the three girls due to their mother’s cohabitation with a same-sex partner.

### *1.2.3. Contended Privileging of Interests*

[\*Page 6] With regard to Ms. Atala’s alleged privileging of her interests, the Court indicated that achieving the right of non-discrimination based on sexual orientation is not limited to the condition of simply being homosexual; rather, it includes the expression and the necessary consequences in people’s life projects. The Court specified that the scope of protection of the right to private life has been interpreted broadly by international human rights courts, when they indicated that it goes beyond the right to privacy.

In this sense, a person’s sexual orientation is also linked to the concept of freedom and the possibility for every human being to enjoy self-determination and the ability to choose freely the options and circumstances that give meaning to his or her existence, according to his or her own options and convictions. Therefore, “[t]he emotional life

with one's spouse or life partner, which includes, logically, sexual relations, is one of the principal aspects of this sphere or circle of intimacy.”

Regarding this issue, the Court concluded that the prohibition on discrimination based on sexual orientation should include, as protected rights, the conduct inherent in an exercise of homosexuality. Moreover, if sexual orientation is an essential component of a person's identity, it was not reasonable to demand of Ms. Atala that she postpone her life plan or family. It cannot be considered “legally reproachable or reprehensible” that Ms. Atala has decided to make a new life for herself. Additionally, there has been no proof of any damage that may have harmed the three girls.

Consequently, the Court concluded that demanding that the mother limit her life choices would mean utilizing a “traditional” idea of women's social role as mother, according to which it is socially expected that women have the principal responsibility for raising their sons and daughters, and that in order to fulfill this responsibility, a woman should privilege the raising of boys and girls, thereby renouncing an essential aspect of her identity. Therefore, the Court declared that the Ms. Atala's supposed privileging of her personal interests was not an element that endangered the objective of protecting the best interests of the three children.

#### *1.2.4. Contended right to a “normal and traditional” family*

Finally, with regard to the presumed right of the children to live in a “normal and traditional” family, the Court observed that the American Convention does not contain any specified, closed concept of a family, let alone defining and protecting only a “traditional” family model. The concept of family life is not solely reduced to marriage, and should embrace other family ties where the parties have a shared life outside of marriage.

In the present case, this Court concluded that the language utilized by the Supreme Court of Chile related to the girls' supposed need to grow up in a “normally structured family, esteemed in its social medium” and not in an “exceptional family,” reflected a limited and stereotypical perception of the concept of family that has no basis in the Convention, as the Convention does not define any specific family model (the “traditional family.”)

#### *1.2.5 Conclusion*

Taking into account everything summarized previously, the Court concluded that although the decision of the Supreme Court and the order of provisional custody were supposedly intended to protect [\*Page 7] the best interests of the children M., V. and R., in fact it was not proven that the reasoning brandished about in the decisions was adequate to achieve said purpose, given that the Supreme Court of Justice and the Villarrica Juvenile Court did not prove in the specific case that Ms. Atala's cohabitation with her partner negatively affected the best interest of the minors, and, to the contrary, they employed abstract, stereotypical, and/or discriminatory arguments to support their

decisions; therefore, said decisions constitute discriminatory treatment of Ms. Atala which violates Articles 24 and 1.1 of the American Convention.

Moreover, the Inter-American Court emphasized that girls and boys cannot be discriminated against based on their own circumstances, and said prohibition extends, in addition, to the circumstances of their parents or family members, as in the present case, to the sexual orientation of the mother.

The Court pointed out that by taking as the basis for their decision the mother's sexual orientation, the Supreme Court's decision discriminated, in turn, against the three girls, because it took into account considerations that it would not have utilized if the custody proceeding would have been between two heterosexual parents. Specifically, the Court reiterated that the best interest of the child is a governing criterion for the elaboration of norms and their application in all orders relating to the life of a child.

Additionally, the discrimination against the mother had repercussions for the children, because it was the basis for deciding that they would no longer continue living with her. In this manner, the decision has a ripple effect as they were separated from their mother as a consequence of their mother's sexual orientation. Therefore, the Court concluded that there was a violation of Article 24, in relation to Articles 19 and 1.1 of the American Convention, thereby causing injury to the children M., V. and R..

### *1.3 Right to private life and to family life*

The Court pointed out that Article 11 of the Convention prohibits any arbitrary or abusive interference in people's private lives, delineating different spheres within that concept, such as the private life of one's family. In this sense, the Court maintained that the sphere of privacy was characterized by remaining exempt or immune to abusive or arbitrary invasions or aggressions either by third parties or by public authorities. Private life is a broad concept that is not susceptible to exhaustive definitions, and which contains, among other protected spheres, sexual life and the right to establish and develop relationships with other human beings. That is, private life includes the manner in which the individual sees him or herself and how and when he or she decides to present herself or himself to others.

Given that the internal courts had as their reference point Ms. Atala's sexual orientation when they were making the custody determination, they exposed various aspects of her private life throughout the process. The Court pointed out that the reason given by said courts for interfering in Ms. Atala's sphere of private life was the same one which motivated the discriminatory treatment, that is, the protection of an alleged best interest of the three girls. The Court concluded that, although said principle was related in the abstract to a legitimate end, the means were inadequate and disproportionate to achieve this end; therefore the Chilean courts should have limited themselves to examining parental conduct—that could have been part of private life—but without exposing and scrutinizing Ms. Atala's sexual orientation.

The Court confirmed that during the custody proceedings, a stereotypical notion about the influence of Ms. Atala's sexual orientation created an [\*Page 8] arbitrary interference in her private life, given that sexual orientation is part of a person's intimate life and is not relevant when analyzing aspects related to good or bad parenting by mothers or fathers. Therefore, the Court concluded that the State violated Article 11.2, in relation to Article 1.1 of the American Convention, thereby causing injury to Karen Atala Riffo.

With regard to the right to protection of family life, the Court reiterated that Article 11.2 of the American Convention is closely related to the right for the family to be protected and to live in a family, recognized in Article 17 of the Convention, according to which the State is required not only to make available and directly execute measures of protection for children, but also to favor, in the broadest sense, the development and the strength of the family unit. The Court pointed out that various human rights bodies created by treaties have indicated that a single family model does not exist; consequently, this model may vary. In the present case, the Court determined that it was clear that there existed a family unit that, by virtue of its existence, was protected by Articles 11.2 and 17.1 of the American Convention, because there was evidence of living together, frequent contact, and an emotional and personal closeness between Ms. Atala, her partner, her oldest son, and the three girls. Therefore, this Court concluded that the separation of the family consisting of the mother, her partner and the girls, represented an arbitrary interference with the right of private and family life.

#### *1.4 Judicial Guarantees*

With respect to the presumed violation of the judicial guarantees of independence and impartiality to the detriment of the Ms. Atala, the Court determined that there were no specific elements of proof to weaken the subjective presumption of impartiality of the judges; nor were there convincing elements that would permit the Court to question the objective impartiality of the Supreme Court's decision. In this instance, an interpretation of the norms of the Chilean Civil Code which differed from that of the American Convention regarding the right of a homosexual person to custody of minor children was not enough, in itself, to declare a violation of objective impartiality. Consequently, the Court determined that the State did not violate the judicial guarantees recognized in Article 8.1 of the Convention in relation to the decision of the Supreme Court of Justice in the present case.

On the other hand, the Court concluded that the decision of the Supreme Court of Justice violated the right of the children to be heard, established in Article 8.1, in relation to Articles 19 and 1.1 of the American Convention, because the Supreme Court did not explain in its decision how it evaluated or took into account the declarations and preferences expressed by the minors that were recorded in the file. Indeed, the Court confirmed that the Supreme Court did not adopt a decision which contained analysis of the relevance attributed by said Court to the preferences expressed by the minors regarding where they wished to live and the reasons why the decision diverged from the wishes of the three girls. To the contrary, the Supreme Court based its decision on the alleged best interest of the three minors, but without explaining or substantiating why it

considered it legitimate to contradict the wishes expressed by the girls during the custody proceedings, taking into account the relationship between a child's right to participate and the objective of acting to further the best interest of the child. Therefore, the Court concluded that the decision of the Supreme Court of Justice violate the girls right to be heard and properly considered, established in Article 8.1, in relation to Articles 19 and 1.1. of the American Convention, thereby causing injury to the children M., V. and R..

[\*Page 9]

## *2. Findings s about the dispute over the disciplinary investigation*

Regarding the disciplinary investigation, the Court stated that it did not see any relation whatsoever between a desire to protect the "image of judicial power" and Ms. Atala's sexual orientation, since sexual orientation or its exercise cannot constitute, under any circumstances, a basis for initiating a disciplinary proceeding, because there is absolutely no relationship between a person's proper fulfillment of her professional duties and her sexual orientation. Therefore, the Court concluded that a disciplinary investigation related to sexual orientation was discriminatory. And therefore, the State violated Article 24 in relation to Article 1.1 of the Convention, causing injury to Karen Atala Riffo.

The Court also confirmed that, even though the disciplinary investigation began on a legal basis and did not conclude with disciplinary sanctions against Ms. Atala due to her sexual orientation, the investigation was carried out in an arbitrary manner, constituting interference with Ms. Atala's right to private life, which extends to her professional sphere. Therefore, the State is responsible for the violation of right to private life, recognized in Article 11.2 in relation to Article 1.1 of the American Convention, causing injury to Karen Atala Riffo.

With respect to the protection of the guarantee of subjective impartiality, the Court determined that prejudices and stereotypes were present in the report issued by the investigating judge, demonstrating that those who wrote and approved said report were not objective; to the contrary, they openly expressed their personal opinions regarding Ms. Atala's sexual orientation in a disciplinary forum in which such a legal reproach was not acceptable nor legitimate. Such action established that the extraordinary inspection and the disciplinary investigation were carried out without the necessary subjective impartiality. Therefore, the Court concluded that the State violated Article 8.1, in relation to Article 1.1 of the Convention, causing injury to Karen Atala Riffo.

## *Relief*

With regard to relief, the Court established that its Decision constitutes *per se* a form of relief and additionally, ordered the State to provide the following measures of relief: i) provide free, immediate, adequate and effective medical, psychological or psychiatric treatment, through specialized public health institutions, to the injured parties that request it; ii) publish this official summary of the Decision, for one day, in the Official Gazette and in a national newspaper of wide general circulation, in addition to posting this

Decision in its entirety on an official web site; iii) Organize a public event acknowledging international responsibility for the facts of the present case; iv) continue implementing, on a reasonable timetable, permanent educational programs and courses directed at civil servants at the regional and national levels, and particularly at judicial personnel in all spheres and levels of the judicial branch, and v) pay determined quantities as indemnification for material and non-material damages and also for the reimbursement of costs and expenses, as necessary.

The Inter-American Court of Human Rights will supervise the complete fulfillment of the Decision and will conclude this case once the State has fulfilled each and every one of its duties specified in the Decision.