

SPECIALIZED JUDICIAL UNIT No.4 FOR FAMILY, WOMEN, CHILDHOOD AND
ADOLESCENCE

RECORD OF THE HEARING OF THE HABEAS CORPUS ACTION

Cause No.-2013-7332

In the city of Guayaquil, on March twenty of the year of two thousand thirteen, at the eleventh hour and thirty nine minutes; before the Judge of the Specialized Judicial Unit No.4 for family, women, childhood and adolescence of Guayaquil, ATTORNEY IVONNE E. HERNANDEZ VEGA, and undersigned secretary ATTORNEY PATRICIA ALUME JARAMILLO, appear for the plaintiff Mister JORGE ARMANDO CARRILLO SAMANIEGO, identity card #09278073-3 accompanied by Attorney Carlos Campodonico Moreno, professional registration 10113, from the Guayas Bar Association; for the defendants appear Doctor RUBEN LOOR LOOR, identity card 09064879-9, Doctor Rommel Humberto Ramirez Palma, identity card #091070042-6 and Attorney Juan Enrique Veliz Salavarría, identity card 0905806691. At the date and time appointed in the preceding decision, the Judge set the hearing.- It is granted the permission to speak to the plaintiff, who through his lawyer expresses: I appear before you Judge, representing Mister JORGE ARMANDO CARRILLO SAMANIEGO, present today, to underpin the action of Habeas Corpus which the doctrine and the foreign jurisprudence denominate as restricted, because as it is true it does not exist a deprivation of liberty in the classic detention terms or preventive detention, there is a restriction on the right of freedom of movement, hence its doctrinal denomination. Initially this restriction on the right of freedom of movement is made by an organism from the public administration which lacks capacity as a judge to order the restriction against the affected person, because the Constitution clearly states in its article 66 paragraph 14: "...the prohibition to leave the country only can be ordered by a competent judge..." If liberty, in all its dimension, is a constitutional right, as might be imagined, that the constituent legislator, when drafting the cited text, has had in mind "any judge", however, he refers, evidently, to a judge juris, as they are the judges who guarantee the rights of the people, not only as "the mouth that pronounces the words of the law", but in the new constitutional role, as "judges of the Constitution". But that is only the background overall picture, since, once the prohibition to leave the country was ordered, by an administrative collective organism, and once denied without giving any reason, the revocation, it was brought before the Court an exception

lawsuit so the controversy, and above all, the competente to decide over the faculty of the administrative organism in this concrete case, the motivation, the porportionality of the measure, is now on the other party as judges of the Tax Court where the exception lawsuit fell, and upon whose omission, this action is about. It is very important at this moment to cite, to offer further illustration of the veracity of our assertions, judgement #009-12-SIN-CC (constitucional action) in which on page 42 of the Suplement of the Official Registration No.743 of July 11 of 2012 (second paragraph), Dr. Alexis Mera Giler representing the President of the Republic of Ecuador (Executive Function) manifests: **“...if not agree with the collection action, the taxpayer can file an exception lawsuit against it, lawsuit which would take place before the Tax District Court, SO THE MAGISTRATES OF ONE OF THE CHAMBERS OF THIS COURT WOULD BE THE ONES TO ESTABLISH THE PERTINENCE OF LIFTING OR NOT THE CITED PRECAUTIONARY MEASURES...”** In accordance with the above is demonstrated that is not our invention that the appointed chamber for this process is competent to decide over the lifting of the desproporionate and arbitrary measure which is restrictive of the individual freedom of movement. In other words, the Head (President of the Republic of Ecuador) of the Executive Function to which the organism that originally issued the wrongful and restrictive act, belongs, agrees that the legitimized gentleman in this constituional process are the ones with the competence to decide over the request, raised by the affected party since October 18 of 2012 at 08h47. The damages, not necessarily material, but moral or inmaterial in many ocssions, not only are given by an action, like in this case, but by an omission, as a measure, that is clearly disproportionate, arbitrary and restrictive wihout motivation, of a fundamental right, cannot be supported by omission, by Jugdes juris, who are the ones called to respect, but above all, to enforce the Constitution. The rules I advocate in favor of my claim are: The Constitution of the Republic in its article 66 paragraph 14: **“...the prohibition to leave the country ONLY can be ordered by a competent judge...”** The article 7.2 of the “San Jose Pact” says: **“...Nobody can be deprived of his physical liberty, except for the causes and conditions fixed in advance by the Political Constitutions of the States parties or by the laws established pursuant thereto...”** One more time it is imperative to analyze the supranational text to further understand the gravity of the restriction, its arbitrariness: the physical liberty that the supranational legislation talks about includes, as part of its essential contents or hard core, the right of freedom of movement; that the conditions to restrict the right of liberty in all its aspects (essential content) must be pre-fixed or in another words, declared or established in advanced, in the Ecuadorian case, that pre-fixed, constitucional condition is that whoever impose the restrictive measure has the condition of judge juris; that is a norm-rule of legal standing to establish the procedures or requirements for the restriction of the right of liberty in all its aspects (hard core or essential content of the law), but not any law but one that (FALTAN ESTAS PALABRAS)

people”...In like manner, the guarantee for a non arbitrary restriction to the personal freedom is found in 1. Universal Declaration of Human Rights: Article 9; International Pact of Civil and Political Rights: Article 9.1. In the book entitled “In Defense of Personal Freedom”, Palestra Publishing Company, Lima, 2008, page 92, Luis Alberto Guerrero Huerta says: **“...from the definition (of Restricted HC) it shows that the restricted habeas corpus is mainly defined in correlation to the wrongful act, without being a detention, as in the restorative habeas corpus, but it manifests through acts that disrupt the exercise of personal freedom, and in some cases they are directly related to the right of freedom of movement...”** For its part, the Organic Law of Jurisdictional Guarantees and Constitutional Control (from here LOGJYCC) in its article 43 establishes: **“...the action of habeas corpus has the objective to protect liberty (...) AND OTHER RELATED RIGHTS of the private person or RESTRICTION OF LIBERTY (...) SUCH AS...”** As it can be appreciated: the pertinent law, which regulates the exercise of the action of HC is wider and illustrates us on the dark aspects of the constitutional guarantee, for here is mentioned about: a) related rights (to liberty); b) restriction of liberty, i.e, not necessarily deprived from liberty (imprisoned or detained); the constitutional Infra says at the end of the article: **“...such as”**, meaning that the numbering that follows 10 numerals is NOT restrictive, but serves to exemplify and it is admitted then, that so many factual situations exist which deprive or restrict individual freedom. Now, likewise, the order of prohibition to leave the country has been ordered by an official of the Executive Function, public server or billing agent and not by A COMPETENT JUDGE JURIS, for what, it has to be annulled by a competent constitutional judge, moreover, before the silence of the appointed Court. The VIOLATED RIGHTS that we estimate have been infringed on detriment of the affected party are: Right of the freedom of movement, to leave the country and to re-enter freely with no restrictions that the ones determined by a COMPETENT JUDGE JURIS previously made up by the law. (Article 66.14 of the Constitution) The related rights to liberty: Due process; 1.- Right to Petition; 2.- Effective, impartial and expeditious legal protection; 3.- Legal certainty; only to display the relation between the rights and the right of freedom, I transcribe the judgement No. 020-10-SEP-CC (S. R/O NO. 228 of July 5 of 2010) that says: **“...Security is formed by a series of conditions, means and efficient legal procedures, that allow the personality of the citizens to develop when exercising their rights without fear, uncertainties, threats, damages or risks, which provide a predictable environment, not only over the behaviour of others, but on our own behaviour, and cause protection actions before arbitrariness and the infringement of the legal order caused not only by the State but by private persons. Legal Certainty , states Eduardo Espin, has to be understood as “the regularity or accordance with the law, and the predictability of the performance of public Powers, and specially, as the interpretation and application of the law by the public administrations, judges and courts.”** This predictability in the performance of the authorities , among them the judges, excludes

the possibility of arbitrary modification to pre-existing legal situations, on the contrary, in other words, unpredictable actions cause legal uncertainty, whose effect could be the violation of rights that may lead to damages; it also means the awareness of the legal system. The predictability in the application of the law implies: to provide indirectly to particular persons a considerable certainty of the probable conduct of other persons...”

RELATED ACTIONS BETWEEN THE RIGHT OF FREEDOM AND OTHER FUNDAMENTAL RIGHTS.- There is a disproportion between the prohibition (restriction to the right of freedom of movement) and the aim pursued, because the fact that the affected person leaves the country or not does not guarantee the payment, as, in his capacity as natural person is not subject for real precautionary measures like the embargo or seizure, and in Ecuador there is no imprisonment for non-payment of debts so prohibit him of leaving the country does not guarantee the end, constitutionally valid, for collecting taxes, nor the measure is necessary for the desired goal nor suitable (judgement of proportionality in the broader sense), as there are other equal alternative measures and/or more efficient for collecting than the restriction of freedom and that were incidentally implemented also in the initial administrative decision which has been contested. All these aspects should have been considered by the appointed court to favorably resolve the request to revoke the measure restricting the individual freedom, nevertheless, given the silence of the court (omission and violation of the petition right), I explained them before you, as in your capacity as Constitutional Judge, with a sort of constitutional subrogation of the court, and for being a constitutional right the one that is restricted, you will proceed to rule in the judgement: the violation of the right of freedom of movement of the affected person; therefore, **lift the measure for the prohibition of leaving the country**, issued by order of September 28 of 2012 at 08h30 by Economist Miguel Aviles Murillo, billing agent designated by the highest authority of the SRI by the resolution No. NAC-DNFRSGE12-00592 of September 25 of 2012, so that the right of freedom of movement is fully restored to the affected person, and in this way standing in for the omission to pronounce of the appointed judges. To officiate the immigration authorities so they can eliminate from their records and from their systems of control, the prohibition of leaving the country issued by order of September 28 of 2012 at 08h30 by Economist Miguel Aviles Murillo, billing agent designated by the highest authority of the SRI by the resolution No. NAC-DNFRSGE12-00592 of September 25 of 2012 against the affected person, that is, Attorney Alvaro Fernando Noboa Ponton, identity card # 090368696-2. I reserve the right to respond. So far for my first intervention.- **In this state the defendants are now allowed to speak, Doctor Ruben Loor intervenes, who manifests the following:** In my capacity of Judge of the Fourth Chamber of the District Tax Court No.2 based in Guayaquil, current president of that Court, I am going to start from the last part mentioned by Doctor Campodonico regarding the judgement No. 009-12-SIN-CC of the date

of April 17 of 2012 regarding the freedom of movement in general, in an extraordinary action for injunction provided by the Vernaza Brothers about precautionary measures for the prohibition to travel outside the country, it was discussed in that extraordinary action for injunction if it was constitutional or not that the implementing officials of the tax administration issued such measures, to what the Constitutional Court, in that judgement, determined in the sub-paragraph of the conclusions "The article 164 of the General Tax Code, does not infringe the right to move freely stated in numeral 14 of article 66 of the Constitution for it does not exist unconstitutionality for the material substance; because it is evident that the tax administration, through these officials, could implement the tax policy principles such as efficiency, administrative simplicity and inadequate collection, there is no other way to explain that the General Tax Code, after its entry into force, has forseen the possibility that the implementing officials, as judges of the collections court, are provided with the legal tools which will allow them to collect taxes when taxpayers who are in arrears failed to address their tax obligations, in that measure can hardly accuse the phrase that the prohibition to leave the country violates the constitutional right to move freely within the nacional territory". This only in reference to the exposed by Doctor Campodonico regarding the constitutional guarantee claimed in favor of his client. Regarding the especific action on why the judges of the Fourth Chamber of the District Tax Court No. 2 based in Guayaquil have failed to address the revocation request to the prohibition to leave the country provided by the implementing official of the Internal Revenue Service Southern Coast within the payment order No. RLS-03855-2012 issued on September 28 of 2012, at 08h30, entered by the Secretary Rapporteur of the Court, which points out that within the exception lawsuit 0114-2012-S4 EXPORTADORA BANANERA NOBOA, at the request of the defendant, has guaranteed with an insurance policy from Seguros Condor S.A. , the 10% of the total amount of the debt, according to what it is established in Article 233.1 of the current General Tax Code. For the lifting of the precautionary measures, subject for which we are present here today before the judge under the constitutional petition requested by Jorge Armando Carrillo Samaniego in favor of Mister Alvaro Fernando Noboa Ponton, in the tax lawsuits where precautionary measures are issued over goods and persons, for its lifting or for the suspension or cessation of the precautionary measures it should apply to the provisions in Article 248 of the current General Tax Code which states: "Guarantees .- to cease the precautionary measures issued within the implementation procedures or the process of the contentious-tax action, the tax obligations should be guaranteed with a value that will cover the total amount, the interests generated to the date of the issuing of the guarantee, an additional 10% for interests to earn and costs..." Guarantee that is not shown in the process, what is mentioned and established in Article 248 regarding the guarantees is totally different regarding the 10% that the plaintiffs must cover in Contentious Tax lawsuits, according to what is established in

Article 233.1 of the General Tax Code. **In this state the judge gives permission to speak to Dr. Rommel Humberto Ramirez Palma who intervenes and manifests:** Justice operators, Judge of Jurisdictional Guarantees, regarding the habeas corpus action filed by Mr. Jorge Armando Carrillo Samaniego in favor of the supposedly affected Attorney Alvaro Fernando Noboa Ponton, I report the following: The exception lawsuit No. 0114-2012 brought to our attention has been conducted under the Organic Tax Code through Article 212 and the following, the plaintiff claims that a petition to lift the precautionary measures of October 18 of 2102 has not been processed, regarding that I cite article 248 of the Organic Tax Code which specifically establishes the process to follow in this legal act and the petitioner Alvaro Noboa Ponton has not complied with it nor he has requested it, neither are registered the providing of guarantees or bail according to the provisions of the legal norm invoked. Regarding the violation of the constitutional rights we must assert the following. The excepcion lawsuit 0114-2012 has been processed according with what it is established by the law, as it has been registered, so the plaintiff cannot assert that the due process has been violated in regard of the rights of contribution, effective legal protection and legal certainty, to date, all the writings have been dispatched, not only the ones provided by the plaintiff but the ones provided by the defendants, and the plaintiff in his drive to delay the sustaining of the cause has generated a series of procedural matters that must be resolved in accordance with the law, in the appropriate moment in the proceedings and with the formalities determined by the Organic Code. In relation to everything else, I agree with all that was exposed by my predecessor, Attorney Ruben Loor, President of the Fourth Chamber. In this state Dr. Juan Veliz Salavarría, from the defendants, is now allowed to speak, who intervenes and manifests: My peers have said everything, the rights of Alvaro Noboa Ponton have not been violated and I echo the words of Dr. Ruben Loor and Dr. Rommel Ramirez, the procedure has been carried out in accordance with the law. **In this state Dr. Julio Cesar Cueva is allowed to speak and manifests:** I wish to state that the defense of the three judges has been carried out with an argumentation of legal nature when we face a constitutional action, therefore, the omission should be justified within the constitutional rules, it is true that the Constitutional Court has authorized the collection judge, but that does not mean that every precautionary measure in a concrete case is constitutionally valid, because for that to happen the acting administrative or judicial official at the moment of issuing a decision that restricts a fundamental right has to conduct a proportionality judgement to make sure that the restrictive measure to be adopted is not arbitrary and above of all disproportionate, when that is not done by the administrative official, the Infra constitutional norms which regulates the exercise of the constitutional right to a effective legal protection, provide that the judges juris be the ones to determine if the restrictive measure was, among other things , proporcional and has being

required from the judges since October 18 of 2012, it is not necessary in the case of a personal precautionary measure to enter into legal details about if there was a violation or not, for a simple reason, it is sufficient that the measure is disproportionate to cannot or must be sustained by a person, now a judgement of proportionality has 3 sub-principles; a restrictive measure must pass through 3 filters, if it does not pass one of them the measure is disproportionate and has to be revoked, let's see briefly if the concrete case is proportional 1. -The prohibition to leave the country for a person that has not paid his taxes pursues an aim valid constitutionally speaking. Yes, we cannot deny that, is it suitable? 2.- The second sub-principle address the question that the judge must ask himself, does the prohibition to leave the country guarantees the payment. In this concrete case it is demonstrated that it does not. Article 27 of the Organic Code of the Judiciary exempts me of proving public and notorious facts, it is public and notorious that the affected person left the country before the issuing of the measure and the taxes were not collected, it was public and notorious that the affected person returned to the country while the measure was in force and the taxes were not collected. 3.- Necessity, is the measure necessary?, the answer is No, I am going to exhibit an interview, this is a recent video that demonstrates that, no more than 3 weeks ago, the highest tax authority recognized in public that the seized assets could cover the total debt. You have listened to those statements in the video, I ask then, if the material goods are enough to cover the debt because as I have demonstrated the restrictive measure does not guarantee the payment. I exhibit before you a clipping of El Universo newspaper from October 2 of 2012, public and notorious fact, in which is listed all the assets that cover the debt, it is evident then, that the measure restricting the freedom does not match 2 of the 3 sub-principles, so it should have been declared disproportionate, and if it is disproportionate it is unconstitutional and if it is unconstitutional there is no legal norm that justifies the measure to be sustained, therefore we ratified our petition that is included in the initial lawsuit, reminding you Article 14 of the Organic Law. **In this state intervenes Dr. Rommel Ramirez, using my constitutional right to respond, I manifest before this Court:** Over the allegations cited previously. 1.- Interpreting the constitutionality of the filed action has to be carried out by the honourable judge. 2. My peer, Mr. Ruben Loo Loo, President of the Fourth Chamber, has referred rightly to the right claimed by the plaintiff by reading the pertinent part on constitutional matters of the judgement No.009-12-SIN-CC related to the case No. 0050-09-IN. 3.- We, the judges of the Fourth Chamber of the District Tax Court No. 2 ratified our procedures and actions, procedurally framed in the Organic Tax Code and that in all of our cases we respect the Constitution. **In this state intervenes Dr. Julio Cesar Cueva who manifests:** This action of Habeas Corpus is not attacking the precautionary measures imposed to the affected person, in fact an Habeas Corpus does not resolve the main issue of a process, what is attacked is the Particular Act of the omission of the court which failed to decide on the measure restricting the personal freedom of a citizen and that, it has been demonstrated that is unsuitable and not necessary to guarantee the

the aim, constitutionally valid, of collecting taxes, consequently if it is disproportionate must be revoked, because that omission that is serving to uphold, for almost six months, a restriction of liberty, which is unjustified and arbitrary and cause a lasting harm, consequently an integral reparation is appropriate, I conclude with the following reflection: If a human being cannot be subject of embargo or retention, neither can a person be auctioned to pay the obligation, and if it was publicly recognized that his assets are enough to cover the debt, what is the justification for him to continue to be deprived of his freedom of movement, the answer goes without saying, so far for my intervention. **In this state, in accordance** to what establishes Article 44, paragraph 3 of the Law of Jurisdictional Guarantees and Constitutional Control, therefore, be it resolved: 1.- The signed Constitutional Judge of the Special Unit of Family, Women, Childhood and Adolescence of Guayaquil is competent to process and resolve this action of Habeas Corpus, in accordance to the regulatory draw stated in Article 7 of the Organic Law of Jurisdictional Guarantees and Constitutional Control. 2.- This action of Habeas Corpus has been processed according to the law and it has been observed the prescribed formalities for this type of constitutional procedures, paying particular attention to the principle of informality and celerity, so it is declared valid. 3.- Therefore, the signed Constitutional Judge, **ADMINISTERING JUSTICE, IN THE NAME OF THE SOVERIGN PEOPLE OF ECUADOR AND BY THE CONSTITUTION AUTHORITY AND THE LAWS OF THE REPUBLIC, RESOLVES:** to declare admissible the demand of Habeas Corpus submitted in favor of Attorney Alvaro Fernando Noboa Ponton. 4.- It is declared the violation of the right of freedom of movement of the affected person Attorney Alvaro Fernando Noboa Ponton by omission of the defendants in resolving the revocatory request, which restricts unjustifiably, the above-mentioned right. 5.- For integral reparation it is ordered to restore the integral exercise of the right of freedom of movement to Attorney Alvaro Fernando Noboa Ponton, for what is rendered void the order of prohibition to leave the country against Attorney Alvaro Fernando Noboa Ponton issued by Economist Miguel Aviles Murillo, billing agent of the Internal Revenue Service Southern Coast, on September 28 of 2012. 6.- It is required from today, that the Provincial Head for Immigration and Foreigners of Guayas eliminates from the physical and electronic records in their charge, at national level, the prohibition to leave the country issued by order of September 28 of 2012 at 08h30 by Economist Miguel Aviles Murillo, billing agent designated by the highest authority of the Internal Revenue Service, SRI, by resolution DNFRSGE12-00592 of September 25 of 2012 against Attorney **Alvaro Fernando Noboa Ponton, identity card #09036869-2**. As provided by Article 89 third section of the Constitution, it is warned to the Office for Immigration and Foreigners that this sentence must be complied immediately without any observation or excuse, under legal measures, without prejudice to the written notification of this resolution. 7.- It is set aside the right of the affected person to claim through contentious-administrative proceedings for an economic compensation if he think he is entitled.

The actuarial of the Office states “reason” today of this verbal Resolution, without prejudice of the written judgement that the Constitutional Judge will notify within the legal timeframe.

Reason: I feel, Mrs. Judge that the legitimized gentleman, in accordance with the provisions of Article 8, paragraph 4 of the Organic Law of Jurisdictional Guarantees and Constitutional Control according with Article 86 paragraph 2 of the Constitution of the Republic, gave the facilities to proceed and notify with this Action of Habeas Corpus to the Judges of the Fourth Chamber of the District Tax Court No. 2 based in the city of Guayaquil, Dr. Ruben Loo Loo, Dr. Juan Enrique Velez Salavarría and Dr. Rommel Humberto Ramirez Palma, as it is registered in the paper notices annexed to process of March 19 of 2013. I certify it.

Guayaquil, March 20 of 2103

R. of E.

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OF GUAYAQUIL