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Title/Style of Cause:	Nelson Ivan Serrano Saenz v. Ecuador
Doc. Type:	Decision
Decided by:	President: Clare K. Roberts; First Vice-President: Susana Villaran; Second Vice-President: Paulo Sergio Pinheiro; Commissioners: Evelio Fernandez Arevalos, Jose Zalaquett, Freddy Gutierrez, Florentin Melendez.
Dated:	24 October 2005
Citation:	Serrano Saenz v. Ecuador, Petition 191/03, Inter-Am. C.H.R., Report No. 52/05, OEA/Ser.L/V/II.124, doc. 5 (2005)
Represented by:	APPLICANT: Alejandro Ponce Villacis
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I. SUMMARY

1. On March 10, 2003, following express instructions given by María del Carmen Polit Molestina and Alfredo Luna Serrano (hereinafter "the petitioners"), Dr. Alejandro Ponce Villacís lodged a petition with the Inter-American Commission on Human Rights (hereinafter "the Commission" or "the IACHR") against the Republic of Ecuador (hereinafter "the State"), alleging violations of the following rights protected by the American Convention on Human Rights (hereinafter "the Convention" or "the American Convention"): right to humane treatment (Article 5), right to personal liberty (Article 7), right to a fair trial and to judicial protection (Articles 8 and 25), freedom from ex post facto laws (Article 9), right to privacy (Article 11), right to nationality (Article 20), right to freedom of movement and residence (Article 22), and right to equal protection (Article 24), in conjunction with the violation of the obligations set out in Article 1(1) thereof, with respect to Nelson Iván Serrano Sáenz (hereinafter "the victim"), an Ecuadorian national.

2. The allegations made by the petitioners are based on the actions of the State in the arrest of Mr. Serrano Sáenz and his subsequent conveyance to the United States. They argue, in sum, that since he is an Ecuadorian citizen, it was incorrect for the Ecuadorian authorities to proceed with his deportation to the United States, a procedure that is only applicable to foreign nationals; instead, if anything, they should have pursued extradition proceedings.

3. In turn the State claims, in sum, that the petition is inadmissible because the actions it alleges do not constitute violations of rights protected by the American Convention and, consequently, it should be dismissed.

4. In this report the IACHR concludes, without prejudging the merits of the case, that the petition is admissible under the terms of Articles 46 and 47 of the Convention. Consequently, the Commission believes that it should notify the parties of this decision, continue with its analysis of the alleged violations of Articles 1, 5, 7, 8, 20, 22, and 25 of the American Convention, and also publish this decision in its Annual Report.

II. PROCESSING BY THE COMMISSION

5. The petition was lodged with the Inter-American Commission on March 10, 2003, and recorded as No. P191/03. On April 28, 2003, the Commission conveyed this petition, dealing with Nelson Iván Serrano Sáenz's situation, to the Government of Ecuador.

6. On August 4, 2003, the Republic of Ecuador replied to the allegations contained in the petition, maintaining that the complaint should be dismissed as groundless and inadmissible. On September 30, 2003, the Commission forwarded the relevant parts of the State's reply to the petitioners and asked them to submit any further comments with a period of one month.

7. The petitioners submitted their comments on the State's reply on February 20, 2004, and these were conveyed to the state on February 23, 2005. No additional information or comments from the parties have been received since then.

III. POSITIONS OF THE PARTIES

A. Petitioners

8. The petitioners state that Nelson Iván Serrano Sáenz, an Ecuadorian citizen, acquired U.S. nationality in December 1971 by means of naturalization proceedings. They report that on August 10, 1998, Ecuador adopted a new Constitution, Article 11 of which provides that: "Ecuadorians by birth who become or who have become naturalized citizens of other countries may retain their Ecuadorian citizenship."

9. They say that in accordance with this article, Mr. Serrano Sáenz visited the Consulate of Ecuador in Miami and requested that he be issued with an Ecuadorian passport, which was duly delivered to him on May 8, 2000. Using that passport, Mr. Serrano entered the Republic of Ecuador on August 21 of that year.

10. They report that on May 17, 2001, on an indictment from a grand jury, the courts of Polk County, Florida, United States of America, ordered Mr. Serrano's arrest on four counts of murder in the first degree.

11. They say that under that order, on August 31, 2002, the General Intendent of Police for Pichincha began deportation proceedings against Mr. Serrano Sáenz. That same day, the Intendent also ordered that the adjudication hearing be held and that the constitutional detention warrant be issued. They report that after an exceedingly short proceeding, the Police Intendent

issued a judgment ordering the deportation of Nelson Iván Serrano Sáenz, in spite of his Ecuadorian citizenship.

12. The petitioners report that although no prior notification was involved, the judgment was carried out immediately; in other words, on August 31, 2002. Mr. Serrano was therefore taken to Mariscal Sucre Airport and, after spending the night detained in an animal cage, was placed on a flight headed for the United States, during which time he was kept incommunicado.

13. They say that after been informed of the situation, on September 2, 2002, his family lodged an appeal remedy with the Interior Minister; this was turned down on September 12, on the grounds that Article 30 of the Migration Law specifically states that deportation decisions admit no appeals whatsoever.

14. The petitioners claim that Mr. Serrano Sáenz was the victim of a clear violation of his right to humane treatment as set out in Article 5 of the Convention, in that he was kept incommunicado both before and after his deportation trial and was denied contact with his defense counsel. They also claim that the fact he was kept for more than seven hours in a cage intended for animals and not suitable for human detention constitutes cruel, inhuman, and degrading treatment.

15. They also state that the incidents they describe entail several violations of Mr. Serrano Sáenz's rights under Article 7 of the Convention: the absence of an arrest warrant against him when he was arrested; the fact that he was not taken before an official of the judiciary following his arrest; the failure to notify him of the charges against him; and the extremely short time it took to resolve the deportation proceedings (one hour and 20 minutes), during which he was not allowed to either analyze or question the legality of his arrest.

16. They claim that the actions of the Ecuadorian State violated Article 8 of the Convention, in that Mr. Serrano Sáenz was denied a hearing before an independent and impartial tribunal in the deportation proceedings brought against him, since the Intendent of Police, the official who ruled on his deportation, is an official of the executive branch and may freely be removed from his position by the Interior Minister.

17. In addition, in the petitioners' opinion, the right to due process was also affected in that the State used deportation proceedings to carry out what was really an extradition. Thus, say the petitioners, in order to circumvent explicit legal and constitutional impediments on the extradition of Ecuadorian citizens, the Ecuadorian State used a different procedure to achieve what was, in practical terms, the extradition of Nelson Iván Serrano Sáenz.

18. They claim that even had he been a foreign citizen, the deportation would still have been inadmissible since there was a clear danger that he would face the death penalty.

19. Finally, as regards Article 8 of the Convention, the petitioners claim that section (2)(h) was violated in that Ecuador's laws prohibit any appeal against deportation rulings handed down by the Intendent of Police (Article 30 of the Migration Law).

20. They also maintain that the Ecuadorian State's actions undermined the principle of legality contained in Article 9 of the Convention, in that Nelson Iván Serrano Sáenz received a punishment – namely, deportation – for a nonexistent and logically impossible offense: the illegal presence in his own country of an Ecuadorian national.

21. They also hold that the Ecuadorian State's behavior violated the right to nationality as protected by Article 20 of the Convention: although Mr. Serrano had earlier renounced his Ecuadorian nationality, with the enactment of the new Constitution he had recuperated his Ecuadorian citizenship automatically and by constitutional mandate.

22. The petitioners also believe that the State's actions violated Article 22 of the Convention in that, as a result of his deportation to the United States, Nelson Iván Serrano Sáenz was denied the right to move about and reside in Ecuador.

23. They also point to a violation of the right to equal treatment enshrined in Article 24 of the Convention, in that the State applied, to an Ecuadorian citizen, precepts that are only applicable to foreigners who are in the country illegally: in other words, he was denied the right of not being expelled from his own country that, in similar situations, is upheld with respect to other citizens.

24. They also maintain that Nelson Iván Serrano Sáenz was denied the right to judicial protection described in Article 25 of the Convention: because of the fact that he was kept incommunicado; because the unreasonable brevity of the proceedings made him unable to invoke any protective mechanism that might have prevented his deportation; and, in addition, because Article 30 of the Migration Law prevents any administrative or judicial challenge being filed against such a decision.

25. Finally, as regards compliance with the admissibility criteria, the petitioners state that with the decision handed down by the Interior Minister, they exhausted the remedies offered by domestic jurisdiction as required by Article 46(1)(a) of the Convention and that, in addition, their petition was lodged within the six-month period set by Article 46(1)(b).

B. State

26. In its reply of October 23, 2003, the Ecuadorian State maintained, first of all, that when Mr. Serrano Sáenz acquired U.S. nationality in 1971, the Constitution of 1967 in force in the Republic of Ecuador provided that Ecuadorians would lose their status as nationals of that country if they were naturalized by any other state. In turn, the text of the new Constitution of 1998 expressly allows Ecuadorian-born citizens who become naturalized citizens of other countries to maintain their Ecuadorian nationality (Article 19).

27. However, reports the State, to enjoy the constitutional right of dual nationality, individuals who renounced their status as Ecuadorian nationals while the previous regulations were in force have to undergo a procedure to reclaim their nationality, which essentially entails lodging a formal request with the Ministry of Foreign Affairs.

28. In light of this, the State maintains that at no time did it attempt to deprive Mr. Serrano Sáenz of his right to nationality and that, in that regard, the government has the competence to determine and regulate, in compliance with the constraints imposed by legislation, the enjoyment of the right to nationality.

29. The State then argues that since Mr. Serrano Sáenz was a foreign citizen (since he never pursued the recovery of his Ecuadorian nationality), the use of deportation proceedings was not a violation of due process.

30. It also maintains that the deportation proceedings were in accordance with Ecuador's domestic law applicable to procedures of that kind and, to support that claim, details the different courses of action followed during the deportation proceedings in compliance with the terms of the Migration Law. In particular, it notes the prior serving of an order for preventive custody, the timely issuing of the deed of imprisonment (which, it claims, is dated one day before the date it was actually issued, on account of a material error), the appointment of defense counsel, and the fact that the detainee's wish to remain silent was respected.

31. As regards the passport given to Mr. Serrano at the Ecuadorian Consulate in Miami, the State explains that it is merely a traveling document and not an identity document, as a result of which its possession does not confer Ecuadorian nationality. The State holds that Mr. Serrano made use of his Ecuadorian birth certificate to obtain the passport fraudulently, failing to tell them that he had lost his nationality. The situation as described indicates actions taken in bad faith in order to induce the authorities into an error and allow him to travel to Ecuador, even though, as was known, he was under investigation in the United States on four counts of murder.

32. The State acknowledges that while expulsion or deportation to another country is not admissible when the right to life or freedom are in danger on account of race, nationality, religion, social status, or political opinions, that is not the situation in Mr. Serrano Sáenz's case. His freedom was threatened, but legitimately and legally so by an arrest warrant duly issued by a judicial authority in the United States.

33. As regards Article 30 of the Migration Law, which states that decisions by the Intendent of Police on the admissibility of deportation admit no appeals, the State notes that although that provision was repealed by a ruling of the Court of Constitutional Guarantees in 1993, the Supreme Court of Justice did, one year later, overturn that judgment, ruling that deportation proceedings were not an administrative procedure but rather a special form of criminal trial.

34. Finally, the State claims that Mr. Serrano Sáenz is attempting to use the Commission as a mechanism to avoid appearing before U.S. criminal courts. It explains that once he saw he was in trouble with the law in the country where he had lived for almost three decades, he tried to invoke Ecuadorian nationality – without having followed the procedure for its recovery – in order to avoid appearing before the criminal justice system.

IV. ANALYSIS OF ADMISSIBILITY

A. Competence of the Commission Ratione Materiae, Ratione Personae, Ratione Temporis, and Ratione Loci

35. The Commission has competence ratione materiae to hear this petition, in that the petitioners allege violations of Articles 1, 5, 7, 8, 9, 11, 20, 22, 24, and 25 of the American Convention.

36. The petitioners are entitled, in principle, under Article 44 of the American Convention, to lodge complaints with the IACHR, in that the alleged victim of the alleged incident is a person with respect to whom Ecuador has undertaken to ensure and uphold the rights enshrined in the American Convention. In addition, the Commission notes that Ecuador has been a state party to the American Convention since December 28, 1977, when its instrument of ratification was deposited. The Commission therefore has competence ratione personae to examine the complaint.

37. The Commission has competence ratione temporis since the obligation of respecting and ensuring the rights protected by the American Convention was already in force for the State on the date on which the incidents described in the petition allegedly occurred.

38. The parties do not dispute that the incidents described in the petition took place on Ecuadorian soil, in an area under the jurisdiction of the State, and so the Commission has competence ratione loci to hear this petition.

B. Other admissibility requirements

1. Exhaustion of domestic remedies

39. Exhaustion of domestic remedies is one of the admissibility requirements for all petitions lodged with the Inter-American Commission. In this case, the petitioners claim the violations of Nelson Iván Serrano Sáenz's rights arose, chiefly, from the various incidents that occurred during the deportation proceedings brought against him by the Ecuadorian authorities, culminating in an order for him to be transferred to the United States of America.

40. In this context, in order to exhaust the remedies offered by domestic jurisdiction and thus satisfy the requirement under analysis, the petitioners must show that they questioned that decision before the local courts at all the internal venues available for the purpose.

41. In connection with this, we note, first of all, that Article 30 of Ecuador's Migration Law provides that:

Article 30. The decision of the Intendent General of Police ordering the deportation of a foreigner shall admit no administrative or judicial appeals and shall be carried out by police officers in the established fashion, conditions, and timeframe. (emphasis added)

42. Given the content of this provision, it is clear that the decision taken by the Intendent of Police in Pichincha exhausted, in and of itself, the remedies offered by domestic jurisdiction; this

is because, as stated by Ecuadorian law and acknowledged by the State itself, no administrative or judicial remedies are admissible against such decisions.

43. It should be noted, however, that regardless of the provisions of the above article, the petitioners submitted evidence that on September 2, 2002, they nonetheless lodged an appeal against the deportation ruling, and that this appeal was rejected by the Interior Minister on September 12, 2002, chiefly on the grounds that under Article 30 of the Migration Law, the decision in question admits no appeals.

44. To this must be added, on the one hand, the fact that the State's replies do not claim that the petitioners have not exhausted the remedies offered by domestic jurisdiction – a situation which, as this Commission has held on several previous occasions, allows it to conclude that the State has tacitly waived the right to invoke the nonexhaustion of local remedies in its defense.[FN1]

[FN1] See, inter alia: Report on admissibility No. 3/04, "Horacio Verbitsky et al.," Argentina, February 24, 2004; Report on admissibility No. 4/04, "Rubén Luis Godoy," Argentina, February 24, 2004; Report on admissibility No. 21/04, "José Luis Tapia González et al.," Chile, February 24, 2004; Report on admissibility No. 7/04, "Gabriela Perozo, Aloys Marín, Oscar Dávila Pérez et al.," Venezuela, February 27, 2004.

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45. On the other, the deportation order issued against Mr. Serrano was executed immediately and so, even if there were a suitable internal remedy for protecting the allegedly violated rights, in the case at hand it would not have been in any way effective.

46. In consideration of the above, the Commission concludes that with decision of the Intendent of Police of Pichincha ordering Mr. Serrano Sáenz's deportation and the subsequent dismissal of the appeal lodged with the Interior Minister, in the instant case the remedies offered by domestic jurisdiction were exhausted and, consequently, the requirement set out in Article 46(1)(a) of the Convention must be taken as having been met.

2. Filing period

47. According to Article 46(1)(b) of the American Convention, petitions must, as a general rule, be lodged within a period of six months "from the date on which the party alleging violation of his rights was notified of the final judgment."

48. In the case at hand, the deportation ruling was handed down to Nelson Iván Serrano Sáenz on August 31, 2002. In turn, the decision of the Interior Minister rejecting the appeal lodged by the petitioners on September 2, 2002, was notified to them the following September 12. The petitioners then lodged their case with the Commission on March 10, 2003: in other words, within the aforesaid period of six months.

49. In light of all the above, it must be concluded that the petition was lodged in accordance with the deadlines set out in the Convention.

3. Duplication of international proceedings and res judicata

50. The Commission understands that, as indicated in the information furnished by the parties, the matter of the petition is not pending in any other international settlement procedure and is not substantially the same as any other petition previously studied by the Commission or by another international organization. Consequently, it believes that the requirements established in Articles 46(1)(c) and 47(d) of the Convention have been met.

4. Characterization of the alleged facts

51. Under Article 47, sections (b) and (c), of the American Convention, the Commission is required to consider inadmissible any petition or communication that "does not state facts that tend to establish a violation of the rights guaranteed by this Convention" or when "the statements of the petitioner or of the state indicate that [it] is manifestly groundless or obviously out of order."

52. The Commission believes that, prima facie, the claims made by the petitioners, if proved true and there is no information to contradict them, do not appear manifestly groundless. The State's response, noted above, maintaining that its actions are compatible with the American Convention will be closely analyzed in ruling on the merits of the case since, at this stage in the proceedings, they are not sufficient to demonstrate that the claim is either manifestly groundless or obviously out of order.

53. In this regard, it should be noted that the Commission's constant practice has been to maintain that whether or not alleged facts constitute violations of the American Convention should not be determined during the admissibility phase. On the contrary, it falls to the Commission to conduct a preliminary determination of whether the actions could tend to establish a violation; thus, the standard is significantly lower than what applies when deciding on the merits of a case.

54. In this context, the petitioners' claims (unchallenged by the State) that Mr. Serrano was kept overnight in a cage intended for animals prior to his transfer to the United States; the fact that he was kept incommunicado throughout the entire deportation proceedings; the decision taken by the Ecuadorian authorities to proceed with his deportation, considering him to be a foreign national, without allowing him to question that classification and in spite of his claiming to be an Ecuadorian citizen; and finally, the existence of a precept in domestic law (Article 30 of Ecuador's Migration Law) that establishes that decisions regarding the deportation of foreigners whose papers are not in order, taken by an administrative official lacking the impartiality and independence of judicial magistrates, admit no judicial or administrative appeals: all these, if not somehow contradicted, could tend to establish violations of the right to humane treatment, to personal liberty, to a fair trial and due process, to nationality, to freedom of movement and residence, and to judicial guarantees and judicial protection as set forth in Articles 5, 7, 8, 20, 22, and 25 of the American Convention, together with the State's general obligations of respecting

and ensuring those rights and of adopting such domestic legal provisions as may be necessary to give them effect, established in Articles 1(1) and 2 of the aforesaid instrument.

55. In contrast, the Commission believes that the alleged incidents, as presented by the parties, do not tend to establish violations of the rights protected by Articles 9, 11, and 24 of the American Convention.

V. CONCLUSION

56. Based on the foregoing legal and factual considerations and without prejudging the merits of the case, the Commission concludes that the instant case satisfies the admissibility requirements set out in Articles 46 and 47 of the American Convention.

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

DECIDES:

1. To declare this petition admissible as regards Articles 5, 7, 8, 20, 22, and 25 of the American Convention, together with the general obligations of respecting and ensuring those rights, and of bringing domestic law into line, set out in Articles 1(1) and 2 thereof.
2. To declare this petition inadmissible as regards Articles 9, 11, and 24 of the American Convention.
3. To convey this report to the petitioners and to the State.
4. To continue with its analysis of the merits of the case.
5. To publish this report and to include it in its Annual Report to the General Assembly of the OAS.

Done and signed at the headquarters of the Inter-American Commission on Human Rights, in the city of Washington, D.C., on the 24th day of October 2005. (Signed): Clare K. Roberts, President; Susana Villarán, First Vice-President; Paulo Sérgio Pinheiro, Second Vice-President; Commissioners Evelio Fernández Arévalos, José Zalaquett, Freddy Gutiérrez, and Florentín Meléndez.