

Institution:	Inter-American Commission on Human Rights
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Session:	Hundred Thirty-Fifth Regular Session (3 – 8 August 2009)
Title/Style of Cause:	Wellington Geovanny Peñafiel Parraga v. Ecuador
Doc. Type:	Decision
Decided by:	President: Luz Patricia Mejia Guerrero; First Vice President: Victor Abramovich; Second Vice President: Felipe Gonzalez; Commissioners: Sir Clare K. Roberts, Paulo Sergio Pinheiro, Florentin Melendez, Paolo Carozza.
Dated:	5 August 2009
Citation:	Peñafiel Parraga v. Ecuador, Petition 4392-02, Inter-Am. C.H.R., Report No. 73/09, OEA/Ser.L/V/II., doc. 51, corr. 1 (2009)
Represented by:	APPLICANT: Miguel Angel Redroban Arroyo
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I. SUMMARY

1. On October 23, 2002 the Inter American Commission on Human Rights (hereafter “the Commission”) received a petition presented by Wellington Geovanny Peñafiel Parraga and Miguel Angel Redroban Arroyo (hereafter “the petitioners”) in which it is alleged that the Republic of Ecuador is responsible for a presumed violation of the right to not be detained without a court order, the right to defense and other judicial guarantees against Wellington Geovanny Peñafiel Parraga in the process by which he was dismissed as an agent of the National Police, on August 5, 1999. It is also alleged that Wellington Geovanny Peñafiel Parraga has suffered mental anguish and distress for the treatment he received during the 31st Border Protection Course 1997-1998.

2. The petitioners allege that the State was responsible for a violation of their rights to personal liberty, judicial guarantees, to compensation and judicial protection, as established in articles 7, 8, 10 and 25 of the American Convention on Human Rights (hereafter “Convention” or the “American Convention”). For its part, the State alleged that the petitioners’ claims were inadmissible, as they do not meet the requirement for prior exhaustion of internal resources, as established in article 46.1 of the American Convention.

3. After analyzing the position of the parties and compliance with the requirements as established in articles 46 and 47 of the American Convention, the Commission concluded that it was competent to examine the presumed violation of articles 5.1, 7 and 8.1 and 25.1 in accordance with article 1.1 of the American Convention, and decided to notify the parties and order the publication of a report.

II. PROCEDURE BEFORE THE COMMISSION

4. The Commission registered the petition under the number 4392-02, and on April 7, 2003 proceeded to send a copy of the pertinent parts to the State with two months to respond. On September 26, 2003 the State's response was received, which was notified to the petitioner on October 5, 2003 with a month to respond and present his observations.

5. On December 22, 2003, the petitioners presented their response, which was notified to the State on March 11, 2004, for presentation of their observations within one month. On May 23, 2006, an offer for an amicable solution was presented by the petitioners, which was sent to the State on June 22, 2006, asking for a response within one month.

6. On December 15, 2008, the amicable solution proposal of the petitioners was reiterated to the State. In response, on March 6, 2009, the State asked the Commission to declare the claim as inadmissible.

III. POSITION OF THE PARTIES

A. Position of the petitioners

7. The petitioners allege that Wellington Geovanny Peñafiel Parraga was assigned to the Guayas Regiment No. 2 of the National Police at the chapel and the officer's club for three years, ten months and five days. They indicate that Wellington Peñafiel suffers psychological distress since 1998. The petitioners allege that Wellington Peñafiel's condition was caused by ill treatment he supposedly received during the XXI Border Protection Course during 1997 and 1998[FN1] and by "the negligence of the human resources office of the National Police [...] as they did not complete a medical checkup which according to Law they should do for any police officer in order to determine if he is able to undergo such a course[FN2]". They indicate that the symptoms appeared six months after the course due to its consequences on his health.

[FN1] The petitioners allege that in said course they "were treated like animals- they hit them every day, exercised them to exhaustion, connected them to high voltage electricity, to such a degree that in the province of El Oro, during this same kind of training, 5 police officers died from heart attacks,...such as the case of Sub-Lieutenant Robles who died from abusive treatment being a member of the Armed Forces of Ecuador". Original petition received on October 23, 2002.

[FN2] The petitioners indicate that this was the last Border Protection Course held in the Armed Forces of the National Police. Original petition received on October 23, 2002.

8. They indicate that this psychological distress creates mental gaps and cause him to commit "various acts without consciousness and intent." Among such acts, it mentions that on June 9, 1999, Mr. Peñafiel took a workmate's motorcycle home with him in order to pressure the man into paying a debt. They indicate that after a few days, Mr. Peñafiel returned the motorcycle

and apologized to the owner. In response, the workmate detained Wellington Peñafiel and took him to the Rural Headquarters in the city of Quevedo, Los Ríos province, where he filed a police report for theft. They indicate that on July 6, 1999, he was transferred to Guayas Headquarters No. 2, where he worked, and was placed in a cell on the orders of the Special Investigations Unit of the National Police (UIES).

9. They indicate that he remained there for 30 days, without a warrant for his detention from a competent authority. After 23 days he was evaluated by the Police psychiatrist who concluded that Wellington Peñafiel required immediate hospitalization in a specialized psychiatric facility. They allege that the National Police did not act upon the doctor's recommendation, as the petitioner remained in said compound. They allege also that his mental state deteriorated as a consequence of his continued detention. The petitioners allege that the very fact that Wellington Peñafiel was sent to a cell without any order from a competent authority, be it civil or police, and having detained him for 30 days is a violation by the State of article 7 paragraphs 2 and 6 of the American Convention.

10. They indicate that on August 5, 1999, Wellington Peñafiel appeared before the Disciplinary Tribunal of the National Police. They allege that Wellington Peñafiel was not properly informed about the constitution of the Tribunal or his appearance before the same, with sufficient time to either obtain a lawyer or prepare his defense. They allege that "as he was in distress he opted to maintain his silence by right". They indicate that said Tribunal expelled him from the force, applying articles 63 and 64 of the Discipline Rules of the National Police [FN3]. They allege that the Tribunal did not take into account Wellington Peñafiel's psychological distress and he was disciplined "as a normal person". They allege that said resolution was not signed by the president or the other members of the Tribunal[FN4] and he was not notified. The petitioners allege that by handing down such sentences "Art. 15 of the Code of the National Police has been disregarded, which establishes that no member of the National Police may be sanctioned for an act covered by this Law if it was not committed willfully and consciously in accordance with Art. 17 of the aforementioned body of law".

[FN3] The petitioners indicate that the Discipline Rules of the National Police establish that: "Misconduct or third class offenses constitute: paragraph 31.- Improperly taking money, pawning, specie, etc., property from members of the institution the value or worth of which will not be taken into consideration[3]" and article 63, of the same document, which establishes that: "those guilty of misconduct or third class offenses will be sanctioned with dismissal or reduction, 30 to 60 days arrest or 21 days confinement or severe repression. Article 63 of the Discipline Rules of the National Police Original petition received on October 23, 2002.

[FN4] The petitioners deduce that it was not signed because they were aware of the unjust procedures applied. Original petition received on October 23, 2002.

11. They allege that said irregularities were not appealed to higher organs of the National Police as police legislation establishes that sanctions imposed by the Disciplinary Tribunal are irreversible and therefore not subject to appeal[FN5]. They allege that they could not appeal this error to a higher organ of the National Police, as there is no enforceable sentence from a

competent authority, which is why they consider that the State has violated article 8.2.h) of the American Convention. The petitioners consider that the State has violated Wellington Peñafiel's right to be heard with all due guarantees, thereby contravening what is established in article 8 paragraphs 1 and 2 sections b) and c) of the American Convention.

[FN5] The petitioners cite article 79 of the Law of Personnel of the National Police which establishes that: "removal is irreversible no matter the cause. Those who aspire to officers and police are subject to the regulations of the respective schools". Article 84 of the Discipline Rules of the National Police establishes that: "sanctions imposed for breaches may be appealed, except for those imposed by the Disciplinary Tribunal or by order of the President de la Republic". Original petition received on October 23, 2002.

12. They indicate that in the beginning of 2000 an unconstitutionality suit was presented to the Ombudsman, so that it be qualified and put in process before the Constitutional Tribunal, but it was denied. They indicate that on October 31st, 2001 they presented a constitutional amparo action. The Second Civil Judge of Pichincha denied this resource on November 20, 2001, indicating that the act was undertaken based on the norms of the disciplinary regulations of the National Police, making it a legitimate act and accordingly not subject to amparo[FN6]. This sentence was appealed before the Constitutional Tribunal, which on March 21, 2002 resolved to confirm the resolution to reinstate rank and deny the amparo action[FN7].

[FN6] The petitioners include the resolution of the Second Civil Court of Pichincha, by which the constitutional amparo action of November 20, 2001 was denied.

[FN7] The petitioners include Resolution number 982-2001-RA of the First Chamber of the Constitutional Tribunal of March 21, 2001, attached to the original petition received on October 23, 2002.

13. They allege that the Disciplinary Tribunal of the National Police's resolutions are promulgated solely to judge disciplinary issues, and as Wellington Peñafiel was judged for a crime, he should have been tried by a police or criminal judge[FN8]. Regarding this, they allege that Wellington Peñafiel was removed by mistake by the National Police by way of the Disciplinary Tribunal, which was not the competent authority, by which it is considered that the State violated article 10 of the American Convention.

[FN8] Alleges that article 4 of the Judicial Function Law of the National Police establishes that "the only ones allowed to pass sentence are: 1) the Supreme Court, 2) The Superior Court of Justice, 3) District Courts and Tribunals, 4) the Crime Tribunal and 5) the Service Grading Board".

14. The petitioners allege that the Second Civil Judge of Pichincha and the Constitutional Tribunal did not guarantee Wellington Peñafiel's fundamental rights and left him absolutely helpless and that accordingly the State did not proportion adequate and effective resources for the protection of his rights. In view of the aforementioned, the petitioners consider that the State violated article 25 of the American Convention.

15. The petitioners indicate that no challenge was presented before the Contentious-Administrative District Tribunal because Wellington Peñafiel was in mental distress, to such an extent that six months after being removed from the force, on February 15, 2000, family members interned him at the Lorenzo Ponce Psychiatric Hospital because he continued having "mental gaps and severe depression with psychotic symptoms", and that he escaped from the hospital and was later treated in clinics and with private psychiatrists.

16. The petitioners allege that after much therapy the outpatient psychiatrist from Lorenzo Ponce hospital indicated that Wellington Peñafiel is "completely normal", and may rejoin the National Police. They indicate that Wellington Peñafiel is willing to undergo corresponding psychiatric examinations in the hopes of overturning the order removing him from the police force.

17. Regarding exhaustion of internal resources, the petitioners indicate that on November 2, 2001 the Second Civil Court of Pichincha denied the amparo action interposed by Wellington Peñafiel relating to the events contained in the petition. This resolution was appealed before the Constitutional Tribunal which, on March 21, 2002, confirmed the decision. Faced with the State's allegation concerning lack of exhaustion of the contentious administrative recourse (see *infra* III B) the petitioners respond that if the highest Constitutional Tribunal has decided to deny the solicited amparo, "it can hardly be revoked by a Contentious administrative district tribunal...because it is simply an organ of lesser authority". It is considered that "the resolutions of the Constitutional Court cannot be appealed."

18. In summary, the petitioners allege that the Ecuadorian State is responsible for a violation of the right of personal integrity, the right to judicial guarantees and to judicial protection, as well as for failing to comply their generic obligation to respect and guarantee the rights protected in the American Convention to the detriment of Wellington Geovanny Peñafiel Parraga.

B. Position of the State

19. The State alleges that the petitioners' complaint is inadmissible as the resources of internal jurisdiction had not been exhausted, as the American Convention stipulates. Regarding the same, it notes that the petitioners have not exhausted the contentious administrative annulment recourse. It alleges that another resource would have been effective, within the framework of the contentious administrative process, that of cassation. It alleges that this is the appropriate remedy against the sentence of the Contentious Administrative District Tribunals, in the case of the tribunals committing an error in *iudicando* or in *procedendo*.

20. It alleges that the supposed mental distress of Wellington Peñafiel does not excuse him from exhaustion of the available contentious administrative annulment recourse and it affirms

that there is no legal basis in either internal legislation or international law for the petitioners' stance. It argues that the Inter-American Court of Human Rights has maintained that there being resources and these not having been utilized by the petitioners, it is impossible to attribute to the State the non-existence of said resources.

21. Regarding the petitioners allegation concerning the violation of the right to judicial protections, the State responds that Wellington Peñafiel has had at his disposition all the resources established by Ecuadorian law. The State considers that a violation to the right of defense exists only when there is a breach of the norms of due process, when there are events that affect the impartiality or independence of the judges or that do not guarantee a just and legal process, and that in this case the free exercise of all judicial rights has been guaranteed. It maintains that the petitioners had free access to the judicial apparatus and at no time was Wellington Peñafiel impeded in his exercise of his right to be heard by the competent organs of the State[FN9].

[FN9] Attorney General of the State, Republic of Ecuador, Writ Number 03556 of September 11, 2003.

22. The State maintains that the petition does not meet the requirements established in the American Convention. The State asks the Commission to declare the inadmissibility of the complaint of the petitioners.

IV. ANALYSIS OF COMPETENCY AND ADMISSIBILITY

A. Competency

23. The petitioners are entitled, in principle, by article 44 of the American Convention to present petitions before the Commission. The petition highlights an individual person as the presumed victim, to whom the Ecuadorian State undertook to respect and guarantee the rights enshrined in the American Convention. In what concerns the State, the Commission expresses that Ecuador is a state that is party to the American Convention as of December 8th, 1977, the date when it presented its instrument of ratification. Accordingly, the Commission has competency *ratione personae* to examine the petition.

24. Also, the Commission has competency *ratione loci* to know of the petition, as within it petitioners allege violations of rights protected in the American Convention that would have occurred within the territory of Ecuador, a state that is party to said treaty. The Commission has competency *ratione temporis* regarding the obligation to respect and guarantee the rights protected in the American Convention as they were law for the State on the date in which the actions alleged in the petition would have occurred. Finally, the Commission has competency *ratione materiae*, because in the petition possible violations of human rights protected by the American Convention are denounced.

B. Requirements of admissibility

1. Exhaustion of internal resources

25. Article 46.1.a) of the American Convention requires the prior exhaustion of the available resources within the internal jurisdiction according to generally recognized principles of international law, in order to admit presumed violations of the American Convention.

26. According to the norms established by the Inter-American Court, any time a State alleges the lack of exhaustion of internal resources on the part of the petitioners, it has the responsibility to demonstrate that said resources which have not been exhausted are adequate to address the alleged violation, it is important to note that the function of these resources within the internal legal system is appropriate to protect the legal situation infringed upon[FN10].

[FN10] I/A Court H.R., Velasquez Rodriguez Case. Judgment of July, 29, 1988, paragraph 64.

27. In this case, the State alleges that the petitioners' complaint does not satisfy the requirement for prior exhaustion of internal judicial resources, as provided for in article 46.1 of the American Convention as the petitioners did not exhaust available resources of contentious administrative recourse of the decision of the public entities. On the other hand, the petitioners allege that the internal resources were exhausted with the refused amparo recourse of November 2, 2001, as appealed before the Constitutional Tribunal and denied on March 21, 2002.

28. Firstly, it is essential to clarify which are the internal resources that should be exhausted in this case. The Inter-American Court has indicated only those resources adequate to redress of a possible violation should be exhausted. Said resources being adequate means that

The function of these resources within the internal legal system is appropriate to protect the legal situation infringed upon. In all internal legal systems there are multiple resources, but not all of them are applicable in every circumstance. If, in a specific case, the resource is not adequate, it is obvious that it need not be exhausted. This is indicated in the principle that the norm is designed to produce an effect and cannot be interpreted in the sense that it does not produce one or its result is manifestly absurd or irrational[FN11].

[FN11] I/A Court H.R., Velasquez Rodriguez Case. Judgment of July, 29, 1988, paragraph 63.

29. According to what appears in the allegations of the parties, after the resolution of dismissal as dictated by the Disciplinary Tribunal on August 5, 1999[FN12], the petitioners interposed a claim of unconstitutionality before the Ombudsman at the beginning of 2000, so that it be qualified and put in process with the Constitutional Tribunal, which was denied. On October 31, 2001, they interposed a Constitutional amparo action regarding the presumed violation of the right to personal liberty and judicial guarantees as based on the events listed in the petition[FN13]. Said resource was denied by the Second Civil Judge of Pichincha, on

November 20, 2001 after determining that the process followed by the Disciplinary Tribunal was valid, respected the right to a defense, the resolution adopted was decided according to the stipulations of article 63 of the Discipline Rules of the National Police, which is signed by the President and judges of the tribunal[FN14]. Said sentence was appealed before the Constitutional Tribunal, which resolved to confirm the resolution to reinstate rank and deny the amparo action, considering that the petitioner was granted a defense and the contested act was legitimate[FN15], on March 21, 2002.

[FN12] The Disciplinary Tribunal of the National Police found Wellington Geovanny Peñafiel Parraga guilty of the infraction contained in paragraph 31 of Art. 64 of the Discipline Rules of the National Police currently in force. Declaration of dismissal of the Disciplinary Tribunal of the National Police on August 5, 1999 the resolution of which appears in General Order number 181 of the General Command of the National Police on Monday, September 20, 1999. Annex to the original petition received on October 23, 2002

[FN13] Constitutional amparo action interposed by the petitioners on November 1, 2001 before the Second Civil Court of Pichincha. Annex to the original petition received on October 23, 2002.

[FN14] The judge considers that “the defendant was duly notified of a public appearance with the attendance of the legal representation of the parties who will do their part to represent their respective legal.- Sufficient time has been given ”. Sentence of the Second Civil Judge of Pichincha of November 20, 2001, annex to the original petition received on October 23, 2002.

[FN15] The Constitutional Tribunal indicates that the defendant was a given a defense through “his attorney, police reports, as well as the investigation already done of the incident as related in report No. 0695-P2-CP-2 of July 16 , 1999...”. It also establishes that Wellington Peñafiel suffers from paranoid schizophrenia and that, though the Disciplinary Tribunal did not consider art. 30 letter m) of the Discipline Rules of the National Police currently in force states that “any kind of aggravating circumstance will be taken into account ´...which, as decided by a superior officer, may augment the gravity of the deed or lead to a description of the guilty party as dangerous´..., it is evident that according to the medical report ...the defendant suffers from mental distress and taking into account the job of a police officer, this could create a dangerous element not only for his comrades but society at large, accordingly the decision to remove him from the force, in conjunction with having applied the relevant legal norms, is appropriate for this case ...the defendant’s contention that he received ill treatment in the border course done in 1997 and 1998, has not been proven” Resolution number 928-2001-RA of the Ecuadorian Constitutional Tribunal on March 21, 2002 annex to the original petition received on October 23, 2002.

30. The Commission observes that despite no exhausting the contentious administrative recourse, the petitioners utilized the amparo action and additionally exhausted the constitutional route on March 21, 2002. Consequently, it is recognized that the State has been able to know of and resolve the complaints in the pertinent manner. Accordingly, given the characteristics of the present case, particularly what the petitioners denounced in their resources the alleged violation of their rights to personal liberty, judicial guarantees and judicial protection; the Commission

considers that the petitioners complied with the requirement of prior exhaustion of internal resources, as established in article 46.1 of the American Convention.

2. Timeliness

31. Article 46.1.b of the American Convention establishes that for a petition to be admissible by the Commission it should be presented within a period of six months from the date in which the alleged victim received notification of a final decision. In this case the petition was presented on October 23, 2002 and the decision of the Constitutional Tribunal by which the available resources were exhausted received notification on April 29, 2002[FN16]. Therefore, the petition was presented within the six month period established in article 46.1.b of the American Convention.

[FN16] Notification from the Constitutional Tribunal on April 21, 2002, April 29, 2002, annex to the original petition received on October 23, 2002.

3. Duplication and Res Judicata

32. It is evident from the dossier that the petition is not currently pending in any other procedure of international law, nor that it is a copy of a petition already examined by this or any other international organ. Accordingly, the requirements established in articles 46.1.c) y 47.d) of the Convention have been satisfied.

4. Characterization of the alleged acts

33. Faced with the facts and laws presented by the parties and the nature of the matter being brought to its attention, the Commission finds that in the present case it is necessary to establish that the petitioners' allegations relative to the presumed violation of the right to personal liberty, judicial protection and guarantees could characterize violations of the rights protected in articles 7, 8.1 and 25.1 in concordance with article 1.1 of the American Convention. Regarding a lack of substance or the irrelevance of these aspects of the claim not being evident, the Commission considers the requirements as established in articles 47.b) and c) of the American Convention to be satisfied.

34. On the other hand, the petitioners allege a violation of article 10 of the American Convention with the notion that Wellington Peñafiel's removal was due to "an error of the Disciplinary Tribunal of the National Police." Having analyzed the claims presented before the Constitutional Court, as well as those presented in this petition, and taking into account that internal legal recourse was exhausted as related to the rights of personal liberty, judicial protection and guarantees, the Commission considers that there is not sufficient evidence to establish the characterization of a possible violation of article 10 of the Convention, thereby requiring a declaration of said pretension as inadmissible.

35. Likewise, given the factual elements of the present petition and in application of the principle *iura novit curia*, it corresponds to the Commission establish the possible responsibility of the State for the presumed violation of the right to personal integrity provided for in article 5.1 of the American Convention in that relating to Mr. Wellington Peñafiel's health during his detention.

V. CONCLUSIONS

36. The Commission concludes that it is competent to examine the claims of a presumed violation of articles 5.1, 7 and 8.1 and 25.1 in concordance with article 1.1 of the American Convention and that these are admissible, in accordance with the established requirements in articles 46 and 47 of the American Convention.

37. With a foundation in the heretofore presented arguments of fact and law and without prejudging the merits of this case,

THE INTER AMERICAN COMMISSION ON HUMAN RIGHTS,

DECIDES:

1. To declare admissible the present case regarding articles 5.1, 7, 8.1 and 25.1 of the American Convention in relation to article 1.1 and to declare the claim inadmissible as regards the alleged violation of Article 10 of the American Convention.
2. Notify the Ecuadorian State and the petitioners of this decision.
3. Continue with an analysis of the merits of this question.
4. Publish this decision and include it in its Annual Report to the OAS General Assembly.

Done and signed in the city of Washington, D.C., on the 5th day of the month of August 2009.
(Firmado): Luz Patricia Mejía Guerrero, President; Víctor E. Abramovich, First Vice-president; Felipe González, Second Vice-president; Sir Clare K. Roberts, Paulo Sérgio Pinheiro, Florentín Meléndez, and Paolo Carozza, Members of the Commission.