

OEA/Ser.L/V/II.165  
Doc. 166  
26 October 2017  
Original: English

**REPORT No. 140/17**  
**PETITION 677-08**  
REPORT ON ADMISSIBILITY

FABIÁN PÉREZ OWEN  
COLOMBIA

Approved by the Commission at its session No. 2104 held on October 26, 2017.  
165<sup>th</sup> Regular Period of Sessions.

**Cite as:** IACHR, Report No. 140/17, Petition 677-08 Admissibility. Fabián Pérez Owen.  
Colombia. October 26, 2017.

**REPORT No. 140/17<sup>1</sup>**  
**PETITION 677-08**  
 REPORT ON ADMISSIBILITY  
 FABIÁN PÉREZ OWEN AND FAMILY  
 COLOMBIA  
 OCTOBER 26, 2017

**I. INFORMATION ABOUT THE PETITION**

<b>Petitioner:</b>	Jaime Salazar Grisales
<b>Alleged victim:</b>	Fabián Pérez Owen and family
<b>State denounced:</b>	Colombia
<b>Rights invoked:</b>	Article 4 (life) of the American Convention on Human Rights <sup>2</sup> and Articles I (life), VI (family), XI (health), and XVI (social security) of the American Declaration of the Rights and Duties of Man <sup>3</sup>

**II. PROCEDURE BEFORE THE IACHR<sup>4</sup>**

<b>Date on which the petition was received:</b>	June 6, 2008
<b>Additional information received during the initial stage:</b>	November 30, 2012
<b>Date on which the petition was transmitted to the State:</b>	December 4, 2013
<b>Date of the State's first response:</b>	April 4, 2014
<b>Additional operations from the petitioning party:</b>	May 22, 2014, and April 15, 2015
<b>Additional operations from the State:</b>	November 11, 2014

**III. COMPETENCE**

<b>Competence <i>Ratione personae</i>:</b>	Yes
<b>Competence <i>Ratione loci</i>:</b>	Yes
<b>Competence <i>Ratione temporis</i>:</b>	Yes
<b>Competence <i>Ratione materiae</i>:</b>	Yes, American Convention (instrument of ratification deposited on July 31, 1973) and American Declaration

<sup>1</sup> Commissioner Luis Ernesto Vargas Silva, a Colombian national, did not take part in the discussion or voting on this petition, pursuant to Article 17.2 of the Inter-American Commission's Rules of Procedure.

<sup>2</sup> Hereinafter "Convention" or "American Convention."

<sup>3</sup> Hereinafter "Declaration" or "American Declaration."

<sup>4</sup> All of the observations were duly forwarded to the opposing party.

**IV. ANALYSIS OF DUPLICATION OF PROCEDURES AND INTERNATIONAL *RES JUDICATA*, COLORABLE CLAIM, EXHAUSTION OF DOMESTIC REMEDIES, AND TIMELINESS OF THE PETITION**

<b>Duplication of procedures and international <i>res judicata</i>:</b>	No
<b>Rights declared admissible:</b>	Articles 4 (life), 8 (fair trial), 25 (judicial protection), and 26 (progressive development) of the American Convention, in connection with Articles 1.1 and 2 thereof; and Article XI (health) of the American Declaration
<b>Exhaustion of domestic remedies or applicability of an exception to the rule:</b>	Yes, February 14, 2008
<b>Timeliness of the petition:</b>	Yes, June 6, 2008

**V. ALLEGED FACTS**

1. The petitioner states that Fabián Pérez Owen (hereinafter “the alleged victim”) had suffered from a heart condition since 1994. He notes that on May 1, 1995, the alleged victim joined the National Social Security Fund [Caja Nacional de Previsión Social] (hereinafter CAJANAL), a state enterprise that contracts health service provider institutions and professionals to provide the services included in the Mandatory Health Plan. He notes that on April 11, 2002, the specialist physician referred the alleged victim to a hospital for an aortic and mitral valve replacement and bypass surgery, indicating that the procedure was urgent as the patient’s life was in danger. Since the surgery required by the alleged victim was complex, it had to be performed at a hospital with the proper facilities.

2. The petitioner alleges that CAJANAL disregarded the medical orders by indicating that there were no beds available, and additionally, that it did not have an agreement in place with the San Rafael Clinic in Bogotá, which did have the facilities for the operation. The alleged victim was thus admitted to a clinic run by the company COMSUSALUD IPS (a CAJANAL contractor). The petitioner alleges that the services at this clinic were completely inadequate and that it barely met the standards of a health or urgent care center. He states that the alleged victim was hospitalized at that institution for three weeks without receiving the surgery that he so desperately needed. Because of this, the petitioner filed an action to enforce protection of the alleged victim’s constitutional right to life [*acción de tutela*]. However, on May 30, 2002, Fabián Pérez Owen died as a result of overall heart failure, which occurred as a complication of his condition. On June 12, 2002, the court with jurisdiction refused to grant the protection, finding the action to be unfounded since Fabián Pérez Owen had died two days after it was filed.

3. The petitioner maintains that CAJANAL was aware that COMSUSALUD IPS did not have the facilities required for the operation, for which reason it had requested a quote from the Ibagué Heart Institute, received on May 29, 2002. On August 13, 2002, 73 days after the alleged victim’s death, CAJANAL deposited the sum of 17,361,612 Colombian pesos for the Ibagué Heart Institute, to pay for the surgery.

4. The petitioner reports that on January 31, 2003, he filed a direct compensation claim with the Tolima Administrative Tribunal. This claim was rejected on September 14, 2007, on the grounds that the alleged victim had been provided with the appropriate services. Specifically, the Tribunal pointed out that the alleged victim died the day after CAJANAL had received the quote, and that the fact that CAJANAL had made the payment for the medical procedure demonstrates that it was not avoiding its legal duty to provide healthcare services. The petitioners indicate that since the proceedings were deemed of single instance of jurisdiction in light of the bill of damages, they filed an action for the enforcement of constitutional rights with the Council of State, against the Tolima Administrative Tribunal’s decision. On November 1, 2007, the Council of State ruled that the action lacked merit, stating that it was not applicable against court rulings. Lastly, on February 13, 2008, a request to persist [*solicitud de insistencia*] was made to the Office of the Inspector General, for intervention against the Constitutional Court to have the case reviewed. The Office of the Inspector General, using its discretionary powers, refused that request on February 14, 2008.

5. The State maintains that the petition is inadmissible. It sets forth that all of the domestic procedures and the competent authorities' decisions had complied with due process and judicial guarantees, and that the fact that the petitioner's claims were overruled does not imply that fundamental rights were violated. Along these lines, the State alleges that declaring this petition admissible would turn the Commission into a court of appeals. Lastly, the State considers that the acts reported by the petitioner do not even represent *prima facie* violations of the rights guaranteed by the American Convention.

## VI. EXHAUSTION OF DOMESTIC REMEDIES AND TIMELINESS OF THE PETITION

6. The petitioner affirms that on May 28, 2002, he filed for protection of Fabián Pérez Owen's constitutional right to life. He indicates that after the alleged victim died, he filed a direct compensation claim with the Administrative Tribunal of Tolima. This claim was rejected. Given that he was unable to file an appeal against the ruling in view of the bill of damages, the petitioner filed for the enforcement of constitutional rights with the Council of State. When this action was dismissed, he filed a request to persist at the Office of the Inspector General, which was also dismissed, on February 14, 2008. The State has not presented arguments on the exhaustion of domestic remedies, nor has it disputed what the petitioner has set forth on the matter. Accordingly, the Commission concludes that the alleged victim exhausted the available domestic remedies with the ruling dated February 14, 2008, in compliance with Article 46.1.a of the Convention. Given that the petition was presented on June 6, 2008, the Commission concludes that it does comply with the requirement set forth in Article 46.1.b of the Convention.

## VII. ANALYSIS OF COLORABLE CLAIMS

7. In view of the elements of fact and law presented by the parties and the nature of the matter brought to its attention, the Commission believes that, if proved, the lack of appropriate medical care in the face of the imminent danger to the health of the alleged victim, and the lack of compensation in a single-instance legal process<sup>5</sup> may constitute possible violations of the rights recognized in Articles 4 (life), 8 (fair trial), 25 (judicial protection), and 26 (progressive development) of the Convention, in accordance with Articles 1.1 and 2 thereof.

8. As to the alleged violations of the American Declaration, in light of the provisions of Articles 23 and 49 of its Rules, the Commission is in principle competent *ratione materiae* to assess violations of the rights enshrined in said Declaration. However, the IACHR has previously established that once the American Convention comes into effect for a State, it is this instrument –not the Declaration– which becomes the specific source of law that the Inter-American Commission will apply whenever a petition alleges violations of substantially identical rights enshrined in both instruments and provided that an ongoing situation is not involved.

9. In this matter, since the American Convention does not have any articles substantially identical to the Declaration's Article XI (health and well-being), the Commission will analyze the potential applicability of that regulation hereto in the merits stage. The Commission observes that the petitioners have not presented sufficient elements for it to declare the alleged violation of Article XVI (social security) admissible. The IACHR further observes that there is a similarity of matter between Article I (right to life, liberty, and personal security) of the Declaration and Articles 4 (life) and 5 (humane treatment) of the Convention. The Commission observes that the petitioner does not offer allegations or grounds for the alleged violation of Article VI (family) of the Declaration, and consequently that claim shall not be declared admissible.

<sup>5</sup> IACHR, Report No. 108/17, Petition 562-08, Pedro Herber Rodríguez Cárdenas, Colombia, September 7, 2017, par. 16.

**VIII. DECISION**

1. To find this petition admissible in relation to Articles 4, 8, 25, and 26 of the American Convention, in connection with Articles 1.1 and 2 thereof; and in relation to Article XI of the American Declaration;
2. To find Article XVI of the American Declaration inadmissible;
3. To notify the parties of this decision;
4. To continue with the analysis on the merits; and
5. To publish this decision and include it in its Annual Report to the General Assembly of the Organization of American States.

Approved by the Inter-American Commission on Human Rights in the city of Montevideo, Uruguay, on the 26<sup>th</sup> day of the month of October, 2017. (Signed): Francisco José Eguiguren Praile, President; Margarete May Macaulay, First Vice President; Esmeralda E. Arosemena Bernal de Troitiño, Second Vice President; José de Jesús Orozco Henríquez, Paulo Vannuchi, y James L. Cavallaro, Commissioners.