

OEA/Ser.L/V/II.
Doc. 125
3 July 2019
Original: Spanish

REPORT No. 116/19

PETITION 1780-10

REPORT ON ADMISSIBILITY

CARLOS FERNANDO BALLIVIAN JIMÉNEZ
ARGENTINA

Approved electronically by the Commission on July 3, 2019.

Cite as: IACHR, Report No. 116/19, Petition 1780-10. Admissibility. Carlos Fernando Ballivián Jiménez. Argentina. July 3, 2019.

I. INFORMATION ABOUT THE PETITION

Petitioner:	Elena Carmen Moreno and Myriam Carsen
Alleged victim:	Carlos Fernando Antonio Ballivián Jiménez
Respondent State:	Argentina
Rights invoked:	Article 8 (right to a fair trial), Article 24 (right to equal protection), and Article 25 (right to judicial protection) of the American Convention, in relation to its Article 1 (obligation to respect rights)

II. PROCEEDINGS BEFORE THE IACHR¹

Filing of the petition:	December 14, 2010
Additional information received at the stage of initial review:	January 2 and September 4, 2013 and June 8, 2016
Notification of the petition to the State:	January 9, 2017
State's first response:	September 11, 2017
Additional observations from the petitioner:	October 11, 2017
Additional observations from the State:	July 16, 2018

III. COMPETENCE

Competence <i>Ratione personae</i>:	Yes
Competence <i>Ratione loci</i>:	Yes
Competence <i>Ratione temporis</i>:	Yes
Competence <i>Ratione materiae</i>:	Yes, American Convention (deposit of instrument of ratification made on September 5, 1984)

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

Duplication of procedures and International <i>res judicata</i>:	No
Rights declared admissible	Article 8 (right to a fair trial), and Article 25 (right to judicial protection) of the American Convention in relation to its Article 1 (obligation to respect rights)
Exhaustion of domestic remedies or applicability of an exception to the rule:	Yes, in the terms of Section VI
Timeliness of the petition:	Yes, in the terms of Section VI

¹ The observations submitted by each party were duly transmitted to the opposing party.

V. FACTS ALLEGED

1. The petitioners argue that Mr. Carlos Ballivián Jiménez was forced into exile from Argentina with his family, in order to safeguard his as well as his family's life and liberty, for being part of the "Peronist resistance" and for participating in the "political militancy."²

2. They indicate that the alleged victim filed an application for the granting of benefits set by the provisions of Law No. 24,043 before the Ministry of Justice and Human Rights due to his forced exile, which was dismissed by Resolution No. 3671/08 of December 3, 2008. The petitioners state that the Human Rights Secretariat acknowledged that the alleged victim was forced into exile abroad but considered, in accordance with the Nation's Procurator General's opinion No. 146-06, that the provisions of Law 24,043 did not cover compensation for exile not preceded by a deprivation of liberty. Thus, the petitioners claim that the Ministry of Justice and Human Rights by attending to the ruling of the Procurator General, ignored the numerous compensation cases granted under the same circumstances.

3. The petitioners state that the alleged victim filed an appeal before the National Court of Appeals in Contentious Administrative Matters in order to contest the arbitrary decision of the Secretariat and to obtain a ruling on the scope of Law 24,043 regarding cases of forced exile. The petitioners point out that the Chamber IV of the Court upheld the rejection of the claim on August 6, 2009, on the grounds that the alleged victim's departure from the country should be considered as voluntary self-exile.

4. They add that an extraordinary federal appeal was filed against this decision before the Supreme Court of Justice alleging the unconstitutionality and arbitrariness of the decision, as well as the disregard for international provisions governing economic reparation, and a breach of the legal principle of equality before the law since reparation had been paid in similar situations, including in the case of the alleged victim's spouse, who was in the same situation and produced the same evidence. Although the Supreme Court issued a decision on February 9, 2010, granting the extraordinary appeal, the Court on June 1st decided that it was inadmissible on the ground that the appeal failed to meet the requirement relating to the number of lines per page required in Article 1 of Regulation 4/2007. The decision was served on the petitioners on June 16, 2010. They indicate that upon learning of the remedy's denial in other similar cases, due to the same reasons, they filed the same extraordinary federal appeal with a 26 line per page layout, without modifying its content or exceeding the required extension. However, the court ordered its return and then refused to deal with the complaint.

5. The State highlights the delay in notifying the petition, which it received approximately 6 years after it was filed before the Commission. Likewise, it argues a failure to exhaust domestic remedies given that the appropriate and effective remedy for the alleged violation was the extraordinary federal appeal before the Supreme Court of Justice, which was dismissed on formal deficiency grounds attributable solely to Mr. Ballivián. In addition, it argues that he also had at his disposal the ordinary system of compensation in the courts with an action for damages against the National State and the extraordinary appeal.

6. The State argues that the alleged victim has failed to state facts characterizing a violation of human rights, and that it is clear from the case that the Commission is being asked to act as a fourth instance in order to review the factual and legal assessments made by the administrative and judicial courts acting within their sphere of competence.

² In particular, the petitioners describe that in 1976 he, his wife Liliana Belloni, his children and his wife's family were victims of persecution, home raids and seizures, and alleges that security agents went to their children's school asking about their family. They argue that his brother-in-law, Manuel Eduardo David Belloni, was murdered on March 8, 1971, by security forces of the dictatorship and that his mother-in-law, Mrs. Lidia Massaferró, was arrested and then threatened by the Triple AAA forcing her into exile in Italy in 1975. According to the case file, Mr. Ballivián Jiménez, his wife and children were internally displaced in Argentina, and on April 14, 1977, the alleged victim managed to take his children to Bolivia, and rejoin his wife there in October of that year. Finally, they describe that, with the help of the Spanish Refugee Aid Committee and his mother-in-law, they moved to Spain in 1978 where the UNHCR recognized their refugee status and where they remained until December 1983.

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

7. The State argues that the extraordinary appeal filed before the Supreme Court of Justice was established as the appropriate and effective remedy against the alleged violation. Therefore, the fact that petitioners have failed to file the relevant appeal under the current regulations governing the formal requirements for admissibility of pleadings, demonstrates an improper exhaustion of domestic remedies. It indicates that the National Supreme Court of Justice has argued that the appropriate remedies in relation to the interpretation of a federal rule must be exercised in the manner established by the respective laws, that are mandatory and of strict observance. Therefore, by failing to comply with the provisions of the applicable rules governing this remedy, the State was not given an opportunity to adequately respond to their complaints at the domestic level.

8. The petitioner argues that the dismissed extraordinary federal appeal is not an ordinary domestic remedy but is extraordinary, limited to a review of the constitutionality of the laws and their application. Therefore, without prejudice to the fact that it is considered adequate and effective by the party, the manner of its rejection for exclusively formal reasons - in violation of the right of access to substantial justice - casts doubt on its effectiveness as a remedy for the reinstatement of Ballivián Jiménez's rights. Thus, the petitioners indicate that the court ordered the return of same document presented with the proper layout and refused to consider the complaint on strictly formal issues that it prevented to rectify. The constant changes of criterion as to whether or not the extraordinary federal appeals were admissible confirms that this remedy is randomly adequate and effective for the reinstatement of rights. Consequently, the petitioners insist that they have exhausted all applicable domestic remedies, including the extraordinary one.

9. With respect to this point, the Commission observes that Law 24,043 governs the filing of an application before the Ministry of the Interior, whose resolution is appealable before the National Court of Appeals for Federal Contentious Administrative Matters of the Federal Capital. The Commission observes that the alleged victim complied with the ordinary remedies established by the Law 24,043. As regards the extraordinary federal remedy, the Commission has already established that it is an extraordinary, exceptional and discretionary remedy³ and, as such, is not an instance available in all proceedings, but rather it functions as a new, reduced and partial instance, available to ensure the supremacy of the Constitution, with a restrictive interpretation as to its accessibility.⁴ In view of this, its exhaustion is not necessarily required by the Commission⁵ and, in fact, taking into account the circumstances of each claim, numerous petitions in the past have been declared admissible without such an appeal having been filed.⁶ In the instant case, the appeal was filed, but the alleged circumstances leading to its dismissal are part of the substance of this complaint.

10. With respect to the admissibility analysis, the Commission understands that the allegations regarding the alleged arbitrariness and excessive formalism preventing the petitioners from correcting the extraordinary appeal may eventually be analyzed at the merits stage. Delving into such an issue is inappropriate for the admissibility stage.

11. In view of the ordinary system of judicial reparation, the IACHR observes that the State does not allege the lack of suitability of Law 24,043 for similar circumstances, but rather the availability of the ordinary system of reparation in the courts. In this regard, the Commission has indicated that the requirement of exhaustion of domestic remedies does not mean that the alleged victims have an obligation to

³ IACHR, Report No. 17/06, Petition 531-01, Admissibility, Sebastián Claus Furlan and Family, Argentina, March 2, 2006, para. 39; IACHR, Report No. 69/08, Petition 681-00, Admissibility, Guillermo Patricio Lynn, Argentina, October 16, 2008, para. 41.

⁴ IACHR, Report No. 55/97, Case 11.137, Juan Carlos Abella, Argentina, November 18, 1997, paras. 264 and 265.

⁵ IACHR, Report No. 26/08, Petition 270-02, Admissibility, César Alberto Mendoza and others, Argentina, March 14, 2008, para. 72; IACHR, Report No. 83/09, Case 11.732, Merits, Horacio Anibal Schillizzi Moreno, Argentina, August 6, 2009, para. 62.

⁶ IACHR, Report No. 46/15, Petition 315-01, Cristina Britez Arce, Argentina, July 28, 2015, para. 42; IACHR, Report No. 12/10, Admissibility, Case 12.106, Enrique Hermann Pfister Frías and Lucrecia Pfister Frías, Argentina, March 16, de 2010, para. 39; IACHR, Report No. 117/06, Petition 1070-04, Admissibility, Milagros Fornerón and Leonardo Aníbal Javier Fornerón, Argentina, October 26, 2006, para. 42; IACHR, Report No. 17/06, Petition 531-01, Admissibility, Sebastián Claus Furlan and Family, Argentina, March 2, 2006, para. 40.

exhaust all available remedies at their disposal.⁷ In view of the fact that the avenue filed by the alleged victim is recognized and considered an appropriate remedy, the IACHR observes that in this case the issue was raised before one of the valid and adequate alternatives according to the domestic legal system and the State had the opportunity to remedy the issue in its jurisdiction; therefore, the purpose of the international standard must be considered fulfilled.⁸ Hence, the ordinary trial was not a remedy that had to be exhausted prior to resorting to the Inter-American human rights system, and the IACHR considers that domestic remedies have been exhausted sufficiently for the purposes of this admissibility stage, thus complying with the provisions of Article 46.1.a of the Convention.

12. Regarding the timeliness requirement for submission, the Commission notes that the final decision issued by the National Supreme Court of Justice was served to the alleged victim on June 16, 2010, and this petition was received on December 14, 2010. Therefore, the Commission considers that the petition was filed within a reasonable time and that the admissibility requirement is fulfilled.

13. On the other hand, the Inter-American Commission takes note of the State's complaint alleging the untimely notification of the petition. In this regard, the IACHR states that after a petition has been received, there is no deadline for it to be referred to the State under neither the American Convention nor the Commission's Rules of Procedure. It also affirms that the time periods established in the Rules and the Convention for other processing stages do not apply by analogy.

VII. ANALYSIS OF COLORABLE CLAIM

14. In view of the factual and legal elements alleged by the petitioner, the Commission considers that, if proven, the alleged facts related to the procedure followed to obtain compensation for the alleged victim arising from his forced exile could characterize violations of the rights established in Articles 8 (right to a fair trial) and 25 (right to judicial protection) of the American Convention in relation to its Article 1.1, to the detriment of Mr. Carlos Fernando Antonio Ballivián Jiménez.

15. In relation to the alleged violation of Article 24, the Commission has indicated that "the right to the equal protection of the law cannot be assimilated to the right to have the same resolution granted in all the proceedings concerning the same matter".⁹ The Commission considers that the mere citation of other decisions made on the same matter with different results does not suffice to *prima facie* establish a possible violation of Article 24 of the Convention.

Finally, the State argued that the petitioner is using the Commission as a fourth instance, insofar as it seeks to review the decisions handed down by the administrative and judicial authorities acting within their sphere of competence. With this respect, the Commission notes that by admitting this petition, it is not claiming to supersede the competence of domestic judicial authorities; rather, it will examine at the merits stage of the instant petition whether domestic judicial proceedings complied with all of the guarantees of due process and judicial protection and offered proper protection of access to justice for the alleged victim, as provided for under the American Convention.

VIII. DECISION

1. To declare the petition admissible as regards to Articles 8 and 25 of the American Convention, in conjunction with Article 1.1 of the same instrument; and

⁷ IACHR, Report No. 76/09, Petition 1473-06, Admissibility, Community of la Oroya. Peru, August 5, 2009, para. 64; IACHR, Report No. 40/08, Petition 270-07. Admissibility. I.V. Bolivia, July 23, 2008, para. 70.

⁸ IACHR, Report No. 76/09, Petition 1473-06, Admissibility, Community of la Oroya. Peru, August 5, 2009, para. 64; IACHR, Report No. 57/03, Case 12.337, Marcela Andrea Valdés Díaz. Chile, October 10, 2003, para. 40; and IACHR, Report No. 12/10. Case 12.106. Admissibility. Enrique Hermann Pfister Frías and Lucrecia Pfister Frías. Argentina. March 16, 2010, para. 10.

⁹ IACHR, Report No. 39/96, Case 11.673, Admissibility, Santiago Marzióni, Argentina, October 15, 1996, para. 43; IACHR 1997 Annual Report, para. 56.

2. To declare the petition inadmissible with respect to Article 24 of the American Convention;
and

3. To notify the parties of this decision; to continue with the analysis on the merits; and 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 on the 3rd day of the month of July, 2019. (Signed): Esmeralda E. Arosemena Bernal de Troitiño, President; Joel Hernández García, First Vice President (dissenting opinion); Antonia Urrejola, Second Vice President (dissenting opinion); Margarette May Macaulay, Francisco José Eguiguren Praeli, Luis Ernesto Vargas Silva and Flávia Piovesan, Commissioners.