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REPORT No. 178/19
PETITIONN 1276-09
REPORT ON INADMISSIBILITY

JORGE ORLANDO CAICEDO ROJAS
COLOMBIA

Approved by the Commission on December 5, 2019 in San Salvador, El Salvador.

Cite as: IACHR, Report No. 178/19. Inadmissibility. Jorge Orlando Caicedo Rojas. Colombia.
December 5, 2019.



I. INFORMATION ABOUT THE PETITION

Petitioner:	Jorge Orlando Caicedo Rojas
Alleged victim:	Jorge Orlando Caicedo Rojas
Respondent State:	Colombia ¹
Rights invoked:	Articles 24 (equal protection) and 25 (judicial protection) of the American Convention on Human Rights ² ; II (equality before the law) and XVIII (fair trial) of the American Declaration on the Rights and Duties of Men ³ ; and 6 (work) of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights “Protocol of San Salvador”. ⁴

II. PROCEEDINGS BEFORE THE IACHR⁵

Filing of the petition:	October 14, 2009
Notification of the petition to the State:	March 26, 2015
State’s first response:	November 9, 2015
Additional observations from the petitioner:	April 18, 2016
Additional observations from the State:	October 29, 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 on July 31, 1973)

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	None
Exhaustion of domestic remedies or applicability of an exception to the rule:	Yes. October 9, 2008
Timeliness of the petition:	No. October 14, 2009.

¹ In accordance with article 17.2.a of the Commission’s Rules of Procedure, Commissioner Luis Ernesto Vargas Silva, a Colombian national, did not take part in the debate or decision of the instant matter.

² Hereinafter, “the American Convention”.

³ Hereinafter, “the American Declaration”.

⁴ Hereinafter, “the San Salvador Protocol”.

⁵ The observations from each party were duly transmitted to the opposing party.

V. SUMMARY OF ALLEGED FACTS

1. Jorge Orlando Caicedo Rojas (hereinafter “the petitioner” or “alleged victim”) claims violations to his human rights, alleging that he was removed from his position as Local Prosecutor through an unfounded resolution and that he was discriminatorily denied access to effective judicial protection.

2. The petitioner explains that on June 16, 1994, he took part in a merit selection process called by the Office of the Attorney General of Colombia, after which he was provisionally appointed to the position of Local Prosecutor in the Sectional Direction of Prosecution Offices of Cundinamarca. The petitioner alleges that he remained in this position until he was dismissed from the position, on August 23, 1995, through a resolution that did not include grounds of any kind. He filed an annulment action against this resolution, arguing that his was a career public servant position and that he could not be discretionally removed but, rather, only on the basis of an unsatisfactory evaluation of his services, which he never received. The annulment action was rejected on June 13, 1997, by the Administrative Tribunal of Cundinamarca. The petitioner appealed this decision before the Administrative Litigation Chamber of the State Council, which ruled on May 4, 2000, declaring the annulment of the contested decision and ordering the petitioner's reinstatement. However, the Office of the Attorney General challenged this decision by means of an extraordinary appeal for reversal, resulting in that, on April 27, 2004, the Plenary Chamber of Administrative Litigation annulled the decision of the second instance and reestablished that of the first instance, unfavorable to the petitioner.

3. According to the petitioner, in parallel to his case the courts heard the case of another person who had also been provisionally appointed to a position in the prosecution offices system, from which he was removed by an unfounded resolution. Like the petitioner, this person filed an annulment action and received a favorable decision from the second instance, which was later reversed through an extraordinary appeal for reversal. This other former prosecutor then initiated an action for the protection of constitutional rights, which resulted in the Constitutional Court issuing judgment on March 7, 2006, in which it recognized that his right to due process of law had been infringed by the lack of grounds of the act that dismissed him from his position.

4. The petitioner points out that, on July 13, 2006, he filed an action for the protection of constitutional rights against the judgment that reversed the decision ordering his reinstatement, arguing that his right to due process and his right to work had been infringed, and that the right to equal protection required that he be afforded the same constitutional protection that had been recognized to the other former prosecutor. This action was rejected by the Fourth Section of the Administrative Litigation Chamber of the State Council on the grounds that actions for the protection of constitutional rights were inadmissible against judicial decisions.

5. Against this decision the petitioner filed On March 11, 2008 a second action for the protection of constitutional rights (on the same grounds) before the Disciplinary Jurisdictional Chamber of the Cundinamarca Sectional Council of Magistrates. This second action was sent to the State Council where it was rejected by the First Section of the Administrative Litigation Chamber on July 24, 2008, on the grounds that it was inadmissible against a judicial decision. The file for this action was referred to the Constitutional Court, which did not select it for review.

6. On December 3, 2008, the petitioner filed a third action for the protection of constitutional rights, arguing that his right of access to justice had been infringed through the rejection of his previous two actions without them being decided. This third action was rejected on January 19, 2009, by the Cundinamarca Sectional Council of Magistrates, which considered that the decision of the Constitutional Court not to select for review the decisions that had rejected the previous two actions had the effect of establishing constitutional *res judicata* with regards to the petitioner's claim. Lastly, the petitioner filed a claim before the Constitutional Court, on the basis of Order 100 of April 16, 2008,⁶ requesting that the decisions that rejected his actions for the protection of constitutional rights be selected for review. This request was rejected on March 20, 2009, through an official letter that was presented to the petitioner on April 20, 2009.

7. The petitioner considers that his right to equal protection was infringed as he was not afforded the same judicial protection of his right to work and right to due process that the other former prosecutor received, despite both cases being identical. In addition, the petitioner argues that his right to justice was

⁶ This order established that, in cases where the fundamental rights of access to the administration of justice and effective judicial protection are infringed as a result of the lack of selection of an action for the protection of constitutional rights, a person could “request the Secretary General of the Constitutional Court that it place the judicial decision adopted for selection”.

infringed as all of his actions for the protection of constitutional rights were rejected without being decided on the merits. The petitioner adds that the system used by the Constitutional Court for selecting review actions for the protection of constitutional rights does not guarantee the protection of fundamental rights.

8. The State, for its part, considers that the petitioner inadmissibly seeks that the Commission act as a fourth instance to review domestic judicial decisions that were unfavorable to him, on the basis of his mere disagreement with such decisions. It points out that all the processes related to the legal actions brought by the petitioner were carried out in accordance with the rules of due process and resulted in duly motivated decisions. And that the decisions of the administrative justice unfavorable to the petitioner were duly based on the fact that it was verified that he did not have any status or privilege of immobility and that there was no evidence of deviation of power. With respect to the rejection of the first two actions for the protection of constitutional rights, it indicates that the courts determined that the action did not meet the requirement of immediacy and that the contested judicial decision was not adopted outside of the competence or due process, so that the action against it was not appropriate. As for the third action, it indicates that the rejection was duly based on the basis of constitutional *res judicata*.

9. With regards to the process of the Constitutional Court to select decisions for review, the State explains that not all decisions are selected for review, but rather only those that have some sort of constitutional relevance.⁷ The State argues that the decision not to select for review the judgments that were unfavorable to the petitioner was well founded on the discretion of the Constitutional Court to select those cases that, in its good judgment, possess a constitutionally relevant function.. It adds that, in accordance with the principle of judicial autonomy, the existence of different judicial treatment of similar cases does not *per se* imply the *prima facie* existence of an alleged violation of equality before the law; and argues that the petitioner has not submitted sufficient elements justifying that his case is comparable to that he claim is alike to his.

10. The State also argues that the Commission lacks *ratione materiae* competence to address possible violations of Article 6 of the San Salvador Protocol and of rights under the American Declaration. Likewise, it deems that the petition is inadmissible as it was not filed within the period established by article 46.1(b) of the American Convention. It considers that domestic remedies were exhausted and that such period started on October 9, 2008, when the Constitutional Court decided not to select for review the decision that rejected the second action for the protection of constitutional rights filed by the petitioner. It argues that the third constitutional action and the later request that his actions be selected for review were reckless actions that did not constitute an adequate or effective remedy to address the legal situation of the petitioner. It adds that, even if such recklessness were ignored, the final decision with regards to the third action for the protection of constitutional rights was adopted on January 19, 2009, 10 months before the petition was filed. Likewise, it argues that the period to file the petition would have been exceeded by close to four weeks if the date on which the request to select his actions for review, March 20, 2009, were to be taken as relevant.

VI. EXHAUSTION OF DOMESTIC REMEDIES AND TIMELINESS OF THE PETITION

11. The Commission notes that both parties agree that domestic remedies have been exhausted, and only disagree with respect to which decision should be considered as the final decision for the purposes of determining the period to file the petition established in article 46.1(b) of the American Convention. In this respect, the State claims that the petition was not timely because on its opinion the final decision was that of October 9, 2008, through which the Constitutional Court decided to not select the second constitutional action filed by the petitioner; and that the subsequent actions by the petitioner were reckless.

12. With regards to the timeliness requirement, the Commission observes that article 46.1(b) of the American convention requires that the petition be lodged with the IACHR “within a period of six months from the date on which the party alleging violation of his rights was notified of the final judgment”. Naturally, this proviso refers to the final decision which exhausts or with which the internal judicial processes attempted by the petitioner to vindicate his rights in the domestic jurisdiction are concluded. In this respect, the IACHR had pronounced itself regarding those resources which are adequate and effective, and that thus must generally be exhausted, as well as the procedural continuity of domestic remedies in those cases in which in addition to exhausting these remedies, the petitioner continues litigating at the domestic level through the filing of

⁷ The State indicates that, on average, a total of 40,000 cases involving actions for the protection of constitutional rights from the whole country are examined monthly and that only 60 of those are selected for review.

additional remedies or claims. This procedural continuity of the remedies exhausted at the domestic level is relevant for the determination of which remedy should be considered the definitive one that finalizes the domestic process on the terms of the already referred to article 46.1(b) of the American convention, and hence for establishing whether the petition was lodged within the term established by this provision.

13. In this sense, the Commission has established as a general criterion that if a petitioner attempted those subsequent, additional, or extraordinary remedies “in the reasonable expectation that they will obtain a favorable result, then these should be deemed as validly exhausted remedies when determining the petition's compliance with the admissibility requirements”. In addition, the IACHR takes into consideration, as an important sign of the relevance or feasibility of these remedies, whether they were admitted for processing and decided by the relevant tribunals, and not directly rejected as groundless.⁸

14. In the Instant case, the Commission deems reasonable the first constitutional action filed by the petitioner on July 13, 2016 and decided against his interests on August 31 of the same year by the Fourth Section of the Contentious Administrative Chamber of the Council of State, on considering that these actions were not admissible remedies against judicial decisions. At the time the petitioner had become aware of a case in which the constitutional justice had granted protection to a person in a situation he alleges was similar to his, because of which it was logical for him to think that his constitutional action, given this circumstance, could have a reasonable probability of success. However, his remedy was denied, despite of which he attempted a second constitutional action whose procedural road ended with its non-selection by the Constitutional Court, a decision which was notified to the petitioner on October 9, 2008 and that really represents the will of the highest domestic judicial authority on the matter. Juridically, “constitutional res judicata”, as the Sectional Council of the Judicature of Cundinamarca indicated to the petitioner on its resolution of January 19, 2009. This consideration is consistent with prior decisions of the IACHR in which the notification of non-selection for review of a constitutional action has been taken as the final decision which exhausted the domestic process⁹.

15. Attending to the considerations already referred to, and taken into consideration that the petition was lodged on October 14, 2009, the Commission concluded that this petition does not comply with the timeliness requirement established by article 46.1(b) of the American Convention

VIII. DECISION

1. To find the instant petition inadmissible; and
2. 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 5th day of the month of December, 2019. (Signed): Esmeralda E. Arosemena Bernal de Troitiño, President; Joel Hernández García, First Vice President; Antonia Urrejola, Second Vice President; Margarette May Macaulay, Francisco José Eguiguren Praeli and Flávia Piovesan, Commissioners.

⁸ IACHR, Report No. 156/17, Petition 585-08. Admissibility. Carlos Alfonso Fonseca Murillo. Ecuador. November 30, 2017, para. 17; IACHR, Report No. 27/16, Petition 30-04. Inadmissibility. Luis Alexander Santillán Hermoza. Peru. April 15, 2016, paras. 25 and 26.

⁹ IACHR, Report No. 48/17, Petition 338-07. Admissibility. Luis Fernando Leyva Micolta. Colombia. May 25, 2017, para. 10.