

**REPORT No. 51/19**

**PETITION 368-08**

REPORT ON ADMISSIBILITY

PETER ANDREW WENZELL OJEDA *ET AL*.

CHILE

OEA/Ser.L/V/II.172

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**I. INFORMATION ABOUT THE PETITION**

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| **Petitioner:** | Peter Andrew Wenzell Ojeda |
| **Alleged victims:** | Peter Andrew Wenzell Ojeda and others[[1]](#footnote-2) |
| **Respondent State:** | Chile[[2]](#footnote-3) |
| **Rights invoked:** | Articles 8 (fair trial) and 25 (judicial protection) of the American Convention on Human Rights[[3]](#footnote-4) |

**II. PROCEDURE BEFORE THE IACHR[[4]](#footnote-5)**

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| **Filing of the petition:** | March 28, 2008 |
| **Additional information received at the stage of initial review:** | April 28, June 4 and October 14 and 27, 2009; March 15, April 6, June 28, June 6, 2010 |
| **Notification of the petition to the State:** | September 30, 2010 |
| **State’s first response:** | December 29, 2010 |
| **Additional observations from the petitioner:** | March 17, April 28, May 24, October 31, 2011; March 12 and December 6, 2012 |
| **Additional observations from the State:** | January 17, 2012 |
| **Notification of the possible archiving of the petition:** | May 26, 2017 |
| **Petitioner’s response to the notification regarding the possible archiving of the petition:** | June 14, 2017 |

**III. COMPETENCE**

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| **Competence *Ratione personae:*** | Yes |
| **Competence *Ratione loci*:** | Yes |
| **Competence *Ratione temporis*:** | Yes |
| **Competence *Ratione materiae*:** | Yes, American Convention (deposit of ratification instrument on August 21, 1990) |

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

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| **Duplication of procedures and International *res judicata*:** | No |
| **Rights declared admissible** | Articles 5 (humane treatment), 8 (fair trial), 17 (rights of the family), 19 (rights of the child) and 25 (judicial protection) of the American Convention, in relation to Article 1.1 (obligation to respect rights) thereof |
| **Exhaustion of domestic remedies or applicability of an exception to the rule:** | Yes; May 20, 2009 |
| **Timeliness of the petition:** | Yes; March 28, 2008 |

**V. ALLEGED FACTS**

1. Mr. Peter Andrew Wenzell Ojeda, the petitioner and alleged victim, (hereinafter “Mr. Wenzell” or “the father”) indicates that on October 17, 1996 he married Ms. T.F.I.C.,[[5]](#footnote-6) the mother of his three children (girls M. and T. and boy P.). He claims that on January 17, 2005 she left the house where they lived, in the city of La Serena, taking the children with her.
2. He indicates that on April 1, 2005 he applied for the legal custody of his children before the Eighth Juvenile Court of Santiago claiming that the mother was incapable of parenting them since her behavior was dangerous and she had physically abused them in the past. He also claims that on April 11, 2005 he filed an application for the return of the children before the Eighth Juvenile Court of La Serena and that on April 12, 2005 the judge, having not listened to the parties, granted the children’s custody to the mother.
3. He indicates that at the same time, on July 28, 2005 he applied for a protection measure before the Sixth Juvenile Court of Santiago alleging violent behavior on the part of Ms. T.F.I.C. However, on September 1, 2005 it was dismissed on the grounds that the children were in excellent living conditions by their mother, who possessed the necessary material resources and emotional and moral qualities to fulfill her role. He submits that in October 2006 he appealed the denial and again filed an application for protection measures, which was dismissed by the Court of Appeals of Santiago on May 2, 2007.
4. Furthermore, he contends that on May 2, 2007, in the child custody proceeding, the judge of the Family Court of La Serena granted his application for the return of the children. Nevertheless, due to the insistence of his ex-wife’s family, on May 12, 2007 the judge of the First Family Court of Santiago ordered the children’s return to the mother as it considered only Ms. T.F.I.C.’s claims and disregarded the alleged victim’s allegations in the hearing. He remarks that on August 1, 2007 he applied for an innovative precautionary measure before the First Family Court of Santiago seeking to obtain a neuropsychological test of T.F.I.C. and that his application was not resolved although the law establishes 30 days period for that.
5. The petitioner claims that in October 2008 in the framework of the child custody proceeding, the Seventh Court ordered a social worker’s report on the current situation of the children. He submits that in the report it was established that T.F.I.C. was not incapable of developing daily activities. However, the alleged victim claims that in that study neither the father nor the children were interviewed. He moreover submits that for the purpose of that report the school representatives limited their answers and did not mention children P.’s and M.’s statements to their teachers, which referred to physical abuse from their mother. He claims that he impugned the report on grounds of incompleteness.
6. He affirms that on October 17, 2008 the Seventh Juvenile Civil Court of Santiago ruled to grant child custody to Ms. T.F.I.C. arguing that her physical and mental health was not an obstacle for her to parent the children, that she protected them and had significant family support. The petitioner alleges that the judgment was arbitrary and without duly substantiating because in confidential hearings and according to the judge, the three children showed empathy toward their father and interest in living with him. The alleged victim also indicates that in those confidential hearings girls M. and T. told the judge that their mother hit them. He indicates that on October 17, 2008 he appealed that decision before the Court of Appeals of Santiago, which rejected his claim and upheld the judgment on May 20, 2009 based on Law 19968 concerning the best interests of the child.
7. The alleged victim pleads that on May 4, 2010 he left Chile due to unfavorable circumstances, including employment difficulties and the influence of T.F.I.C.’s family, and that as a result of this and the unfavorable judicial decisions on his application for child custody, he was unable to protect the children from the abuse and maltreatment from their mother. He contends that during that period his communication with the children was very limited. He argues that in January 2012, when he lived in Brazil, a detention order was issued against him because of a child support debt. He submits that the order was lifted on March 22, 2013 after he paid the claimed amount.
8. The petitioner indicates that in April 2011 his daughter M. was several times beaten by her mother as a result of which she had scratches on her face and bruises. He claims that because of these signs the girl’s classmates mocked her. He alleges that the teachers and authorities of the school that M. attended did not report such maltreatment or similar acts from the past to the competent authorities because of the influence of T.F.I.C.’s family over the school authorities.
9. He maintains that in September 2012, Ms. T.F.I.C. threw daughter M., then aged 14, out of the house, thus the girl was forced to live in the streets and with several families in different towns in the metropolitan region of Santiago. He submits that such situation caused M. to consume alcohol, drugs and tobacco during that time. He indicates that the girl was arrested by police officers once and that, with the consent of a judge, she was illegally held for a whole night but her legal custodian or her relatives were not notified.
10. The petitioner indicates that in December 2012 the principal of the school where M. used to attend filed a protection measure before the First Family Court against Ms. T.F.I.C. because the girl had stopped attending school in September 2012. He claims that in this proceeding the court ordered that the mother and the daughter undergo psychotherapy for six months. He submits that in June 2013 the psychologist in charge of the case presented a report to the judge where she showed her confidence in the father if he was given the girl’s custody, due to signs of mental deficiency in the mother and the damage suffered by the girl. He asserts that, despite the foregoing, in December 2013 the judge inexplicably and without any argumentation ruled that M. continued living with the mother, thus disregarding the psychological assessment report. He alleges that after several years of judicial proceedings that infringed his rights, he was given M’s custody only when she attained 16 years of age and T’s custody in 2015, and that in June 2016 he obtained boy P’s, his youngest child, temporary custody.
11. The State claims that the instant petition must be declared inadmissible because domestic remedies have not been exhausted—it alleges that the petitioner has failed to exhaust procedural remedies available under the national laws. It argues that when the instant petition was filed, the child custody proceeding filed by the alleged victim was still pending settlement. It remarks that the trial court’s resolution was issued on October 17, 2008 and that the sentence that settled the appeal was issued on May 20, 2009. It indicates that in family court proceedings, like child custody proceedings, judgments are not final and may be reviewed later.
12. Lastly, the State claims that the IACHR is not competent to act as a court of fourth instance because it is not legally entitled to review factual or legal errors in a judgment. It asserts that the instant petition seeks to challenge a judicial resolution that is unfavorable to the petitioner’s interests. Therefore, the State contends that the Commission lacks competence to hear this case inasmuch as the alleged victim has not fulfilled the admissibility requirement established in Article 46 of the Convention.

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

11. The petitioner indicates that in order to obtain the custody of his children he filed a petition for child custody before the Eighth Juvenile Court of Santiago on April 1, 2005 and that, as it was dismissed, he presented an appeal on October 17, 2008. He moreover claims that on grounds of the children’s best interests he applied in 2005 for an order for their return, a protection measure before the Sixth Juvenile Court of Santiago on July 28, 2005 and an innovative protection measure before the First Family Court on August 1, 2007. For its part, the State maintains that domestic remedies have not been exhausted, for the appropriate and effective remedy would have been another legal action before the family court, claiming that decisions made on child custody proceedings are not final.

12. The Commission observes that in proceedings related to child custody as well as those regarding visitation effects are not permanent; that is, decisions are not final. The Commission also takes into account that the petitioner’s main allegation concerns the lack of effective judicial protection in the framework of the proceeding over his children’s custody and his inability to obtain a judicial decision to protect the children’s rights, as a result of the aforementioned lack of judicial protection and due diligence in the processing and investigation of the several applications and remedies he filed, and of the development of the custody proceeding, as it violated the reasonable period. In that regard, the Commission observes that the alleged victim presented a petition for the legal custody of his children, applied for an order for their return and even requested protection measures twice. Consequently, the Commission deems that domestic remedies have been duly exhausted and that the petition meets the admissibility requirement established in Article 46.1.a of the Convention.

13. In addition, the petition was lodged to the IACHR on March 28, 2008 and the last decision of the Court of Appeals of Santiago was issued on May 20, 2009. Thus, domestic remedies were exhausted when the petition was under study at the IACHR. Therefore, in view of the context and the characteristics of the instant case, the Commission believes that the petition meets the requirement set forth in Article 46.1.b of the Convention.

**VII. ANALYSIS OF COLORABLE CLAIM**

14. In view of the legal and factual elements submitted by the parties and the nature of the matter brought to its attention, the Commission finds that the alleged violation of the alleged victim’s right to a fair trial, the purported irregularities in the child custody and return proceedings regarding his children, the alleged disregard for the best interest of the child, the child’s right to be heard and have their views considered and the child’s right to protection from all forms of violence, as well as the lack of motivation in these judicial decisions, and the lack of measures to protect and restore rights, if proven, all could establish violations of Articles 5 (humane treatment), 8 (fair trial), 17 (rights of the family) and 25 (judicial protection) of the American Convention in relation to Article 1.1 thereof (obligation to respect rights) to the detriment of the alleged victims. Likewise, the facts may also constitute a violation of Article 19 (rights of the child) of the Convention, in connection with Article 1.1, to the detriment of girls M. and T. and boy P.

**VIII. DECISION**

1. To find the instant petition admissible in relation to Articles 5, 8, 17, 19 and 25, in connection with Article 1.1 of the American Convention;
2. To notify the parties of this decision; to continue with the analysis on the merits; 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 4th day of the month of May, 2019. (Signed): Esmeralda E. Arosemena Bernal de Troitiño, President; Joel Hernández García, First Vice President (dissenting opinion); Margarette May Macaulay, Francisco José Eguiguren Praeli (dissenting opinion), Luis Ernesto Vargas Silva (dissenting opinion) and Flávia Piovesan, Commissioners.

1. The petitioner and his three minor children: girl M., girl T., and boy P. [↑](#footnote-ref-2)
2. Pursuant to Article 17.2.a of the IACHR Rules of Procedure, Commissioner Antonia Urrejola Noguera, a Chilean national, did not participate in the debate or the analysis of the instant matter. [↑](#footnote-ref-3)
3. Hereinafter the “Convention” or “American Convention.” [↑](#footnote-ref-4)
4. The observations submitted by each party were duly transmitted to the opposing party. [↑](#footnote-ref-5)
5. The mother’s identity is kept confidential in order to preserve the children’s identity. [↑](#footnote-ref-6)