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REPORT No. 122/24

PETITION 639-14

REPORT ON ADMISSIBILITY

HERNAN ELIAS SALAZAR RESTREPO
COLOMBIA

Approved electronically by the Commission on August 29, 2024.

Cite as: IACHR Report No. 122/24. Petition 639-14. Admissibility.
Hernan Elias Salazar Restrepo. Colombia. August 29, 2024.



I. INFORMATION ABOUT THE PETITION

Petitioner:	Hernan Elias Salazar Restrepo
Alleged victims:	Hernan Elias Salazar Restrepo
Respondent State:	Colombia ¹
Rights invoked:	Articles 24 (equal protection) and 25 (judicial protection) of the American Convention on Human Rights, ² read in conjunction with its articles 1(1) (obligation to respect rights) and 2 (duty to adopt domestic legal effects)

II. PROCEEDINGS BEFORE THE IACHR³

Filing of the petition:	April 28, 2014.
Notification of the petition to the State:	October 15, 2019
State's first response:	September 18, 2020.
Additional comments from the petitioner:	January 13, October 21 and 22, and December 8, 2020; February 9, April 28, and May 3, 2021
Additional observations from the State:	November 24, 2020.

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 (ratification instrument deposited 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:	Articles 8 (judicial guarantees), 23 (right to participate in government), 24 (judicial protection), 25 (judicial protection) and 26 (economic, social and cultural rights) of the American Convention, read in conjunction with articles 1(1) (obligation to respect rights) and 2 (duty to adopt domestic legal effects)
Exhaustion of domestic remedies or applicability of an exception to the rule:	Yes, October 31, 2013
Timeliness of the petition:	Yes, April 28, 2014

¹ Commissioner Carlos Bernal Pulido, of Colombian nationality, did not participate in the deliberations nor in the decision in this matter, in keeping with the provisions of Article 17(2)(a) of the Rules of Procedure of the Commission.

² Hereinafter "the American Convention" or "the Convention."

³ The observations presented by each party were duly transmitted to the opposing party. In a communication dated January 30, 2019, the petitioner expressed his interest in the processing of the petition.

V. FACTS ALLEGED

The petitioner

1. Hernan Elias Salazar Restrepo (hereinafter, "Mr. Salazar" or the "petitioner") alleges that the State is internationally responsible for his arbitrary dismissal as an investigator of the Technical Investigation Corps of the Office of the Attorney General of the Nation, arguing that the decision was not duly grounded and based solely on the provisional nature of the position. The subsequent appeals filed by the petitioner were rejected in the ordinary and constitutional jurisdictions.

2. The petitioner states that on June 30, 1992, he joined the Office of the Attorney General of the Nation (FGN) on a provisional basis in the position of grade seven clerk. Subsequently, via Order 0-0935 of April 17, 1996, he was provisionally appointed as Judicial Investigator 1, assigned to the Sectional Directorate of the Technical Investigation Corps of the FGN, a position which he began on May 7, 1996. Six years later, through Order 0-0031 of January 15, 2003, the Attorney General's Office vacated his appointment as Judicial Investigator 1.

3. In response to this institutional decision, on January 31, 2003, Mr. Salazar asked the Attorney General of the Nation to reconsider the aforementioned order. However, through an official letter dated February 7, 2003, the General Secretariat of that entity determined that due to his provisional status, Mr. Salazar could be freely appointed and removed in accordance with the provisions of article 251 of the Constitution.⁴

4. As he disagreed with this, on June 18, 2003, Mr. Salazar filed an action for annulment and reestablishment of rights. However, in a judgment of December 4, 2009, the 29th Administrative Court of the Medellín Circuit denied his claims, finding that he did not demonstrate that an alleged abuse of office had been committed in dismissing him from his position. Mr. Salazar appealed this decision before the Administrative Court of Antioquia. However, in a decision of its Decongestion Chamber (Labor Subsection), issued on June 21, 2012, the court fully upheld the appealed decision.

5. Subsequently, on January 16, 2013, the petitioner filed suit for constitutional protection before the Council of State, alleging violation of his fundamental rights inasmuch as the trial and appeals court rulings did not apply the case law established by the Constitutional Court recognizing that the fundamental rights of other former officials of the Attorney General's Office had been violated when they were removed from service without justification.

6. However, in a judgment of March 7, 2013, the Adversarial Administrative Chamber, Second Section, Subsection B of the Council of State rejected the suit for constitutional protection, stating, among things, the following: "[...] Upon reviewing the rulings under appeal, it is observed that the trial and appeals court judges issued their rulings in full observance of the vertical precedent set by the high court of the Administrative Disputes Jurisdiction, upon finding that acts to remove the individual from a position held on a provisional basis, pursuant to Law 443 of 1998, did not require grounds [...]."

⁴ Article 251.- The following are special functions of the Attorney General of the Nation: [...] 2. Appoint and remove, in accordance with the law, the employees under its authority.

7. Mr. Salazar appealed this denial of constitutional protection before the Council of State, but on June 13, 2013, the Fourth Section of the court's Adversarial Administrative Chamber upheld the judgment and determined that the suit failed to meet the immediacy requirement, considering that the appeal court judgment in question, issued within the adversarial-administrative process, was issued on June 21, 2012, and notified by edict on July 14, 2012; however, the suit for constitutional protection was filed on January 16, 2013, that is to say, almost seven months after receiving notification. Regarding immediacy, the Council of State found as follows:

[...] Consequently, although the constitutional protection action does not have a statute of limitations, it must be taken into account that "the immediacy with which the action is exercised is a determining factor in the judgment, because although there is no deadline for filing the action, in any case, due to its nature, the purpose of the protection, and the aim of the judicial defense mechanism, any suit for political protection must be filed within a reasonable period of time, which makes it possible to immediately protect the fundamental right indicated in article 86 of the Political Constitution." Therefore, the requirement of immediacy is a prerequisite for a suit for constitutional protection to be granted, since it prevents "this constitutional mechanism from being used as a tool that permits actors to be negligent or indifferent, or foster legal uncertainty." - Quote from judgment T-123 of 2007, issued by the Colombian Constitutional Court.

Therefore, anyone interested in seeking constitutional protection for fundamental rights must file suit for protection upon learning of consolidation of the fact, act, or omission constituting the violation or threat, as that moment marks the starting point for analyzing whether the suit was filed in a timely manner. An unjustified delay in filing suit undermines the purpose of the constitutional protection, rendering it inadmissible.

8. In the aforementioned judgment, the Council of State referred the constitutional protection case file to the Constitutional Court for review; however, in an order of October 31, 2013, the court issued notification that the suit for constitutional protection had not been selected for review.

9. In sum, the petitioner alleges that the decision that terminated his appointment as an investigator of the Sectional Directorate of the Technical Investigation Corps of the Office of the Attorney General of the Nation was not duly grounded. In addition, he argues that in the framework of both the adversarial-administrative process and in the constitutional protection process, domestic courts did not adhere to the standards set by the Constitutional Court in similar cases, where it determined that the power to freely appoint and remove does not supersede the obligation to duly ground decisions to remove officials appointed on a provisional basis, specifically citing judgment T-456A of 2011 handed down by the Constitutional Court. He therefore alleges a violation of his rights to judicial guarantees, equal protection, and judicial protection enshrined in articles 24 and 25 of the American Convention.

The Colombian State

10. Colombia asks that this petition be declared inadmissible because, in its opinion, the petitioner is seeking for the Commission to act as a court of appeal or "international fourth instance."

11. Closely in line with this, the State argues that, in ruling on the motion for annulment and reestablishment of rights, the 29th Administrative Court of the Circuit of Medellín based its denial on an analysis of the substantive issues raised by the petitioner. In addition, it notes that the second instance decision issued by the Administrative Court of Antioquia states its rationale for departing from the criterion issued by the Constitutional Court in its decision T-456A of May 27, 2011. It adds that the aforementioned court, in resolving the appeal, considered the following case law of the Constitutional Court in the specific case:

[...] In the past, there was a marked difference between the jurisprudence of the Constitutional Court and the Council of State with respect to the requirement to include proper grounds when issuing an administrative act dismissing employees appointed on a provisional basis to a staff position. The Constitutional Court held that regardless of whether the employees were appointed on a provisional basis, an administrative act dismissing them must provide grounds, as failing to do so would place the

employee in a situation of defenselessness, as they would not be able to know the entity's grounds for dismissing them.

The Council of State, meanwhile, drew a distinction between employees appointed on a provisional basis and those appointed permanently, in contrast to equating provisional employees with employees in a role where they can be hired and fired at will.

12. Additionally, with respect to the suit for constitutional protection, Colombia indicates that upon issuance of its trial court decision, the Second Section of the Council of State analyzed whether the decisions issued in the adversarial-administrative jurisdiction violated Mr. Salazar's fundamental rights to due process, equal protection, and defense, concluding that they did not. With respect to the appeals court judgment handed down by the Fourth Section of the Council of State, which upheld the rejection of the constitutional protection suit, it indicates that the court did not examine the merits of the petitioner's claims because the suit did not comply with the requirement of timeliness.

13. In this regard, the State argues that "The court rulings analyzing the constitutionality and legality of the administrative acts whereby Hernan Elias Salazar Restrepo was dismissed from his position complied with standards set forth in the Convention. Consequently, review thereof by the bodies of the inter-American human rights system would amount to it acting as a court of appeals."

Reply of the petitioner

14. In response to the State's argument regarding the lack of timeliness of the suit for constitutional protection, the petitioner maintains as follows:

[...] the Constitutional Court indicates in Decision T-730 of 2003 that there are cases in which more than one year has elapsed from the time of the violation of the alleged right, yet it was determined that the timeliness requirement for hearing the constitutional protection suit was met. Therefore, from that year and through to the present day, in each specific case, the Constitutional Protection Judge must analyze whether or not there has been a delay or too much time has passed for filing the action. This is in spite of the legal gap in Colombian law and the decrees regulating constitutional protection suits, as no procedural or legal deadline or time period has been determined or ordered in writing based on which the time passed could be calculated and it could thereby be established from that moment whether a constitutional protection suit is late or time-barred.

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

15. This petition deals with the dismissal of Mr. Salazar Restrepo from the position of investigator of the Technical Investigation Corps of the Attorney General's Office by means of a dismissal declaration that he alleges was not properly grounded. The petitioner argues that he exhausted domestic remedies with the Constitutional Court's decision, adopted on October 31, 2013, not to review the suit for constitutional protection. For its part, the State does not question the exhaustion of domestic remedies by the petitioner, declining to mount a defense in this regard.⁵

16. In this regard, as it has found in previous decisions,⁶ the IACHR concludes that the appropriate remedies to exhaust in cases in which violations of due process and other human rights are alleged in the course of criminal proceedings are generally the ones provided for under national procedural law that allow for observance, in the course of the proceeding in question, of the actions and decisions taken over the course of

⁵ IACHR Report No. IACHR, Report No. 88/17, Petition 1286-06. Admissibility. Rivas Family. El Salvador. July 7, 2017, para. 13.

⁶ See, among other examples: IACHR, Report 92/14, Petition P-1196-03. Admissibility. Daniel Omar Camusso and son. Argentina. November 4, 2014, paras. 68 *et seq.*; IACHR, Admissibility Report 104/13, Petition 643-00. Admissibility. Hebe Sánchez de Améndola and daughters. Argentina. November 5, 2013, paras. 24 and following; and IACHR Report IACHR, Report No. 85/12, Petition 381-03. Admissibility. S. et al., Ecuador. November 8, 2012, paras. 23 and following.

the proceeding, particularly the ordinary judicial remedies available, as well as an extraordinary ones filed by the alleged victims to assert their rights.

17. The Commission notes that Mr. Salazar filed an action for annulment and reestablishment of rights against the resolution of the Prosecutor General's Office terminating his appointment to the position he was holding; however, this action was denied on December 4, 2009, by the 29th Administrative Court of the Medellín Circuit. He appealed this; however, on June 21, 2012, the Decongestion Chamber (Labor Subsection) of the Administrative Court of Antioquia upheld the decision. He subsequently filed a suit for constitutional protection before the Council of State, which was denied on March 7, 2013, by its Adversarial Administrative Chamber, Second Section, Subsection B. In response to a challenge of this denial, on June 13, 2013, the Fourth Section of the court's Adversarial Administrative Chamber upheld the lower court and found that the suit for constitutional protection failed to meet the immediacy requirement. Lastly, the suit for constitutional protection was sent for review before the Constitutional Court, which, in a decision dated October 31, 2013, issued by its Selection Chamber, issued notification that the suit was not selected for review.

18. Likewise, the Commission notes that although the judicial instances that heard both the suit for nullification and the suit for constitutional protection dismissed his arguments on the merits, they affirmed their competence to hear the claims and declared that the requirements for both actions to proceed were met. In this regard, although the Fourth Section of the Adversarial Administrative Chamber, acting as a court of appeal to review the suit for constitutional protection filed by the petitioner, included among its grounds that the suit was time-barred, the Commission observes that this is an argument after the fact— that is to say, it is not the reason for which the Adversarial Administrative Chamber, Second Section, Subsection B of the Council of State rejected the suit as the trial court. Rather, it processed the claim and decided on the merits, and it did not reject it for being time-barred. Therefore, for the purposes of this analysis of the admissibility of the petition, it is not relevant that the appeals court concluded that the suit was filed out of time.

19. Thus, taking into account that the decision by the Constitutional Court to not select the suit for constitutional protection for review was notified on October 31, 2013; that this petition was lodged on April 28, 2014; and that the State has not disputed the deadline for lodging the petition, the Commission also finds that it complies with the provisions of Article 46(1)(b) of the Convention.

VII. ANALYSIS OF COLORABLE CLAIM

20. The Commission observes that this petition involves allegations that Mr. Salazar Restrepo was dismissed from a position he held on a provisional basis without any grounds being given, as well as allegations that domestic courts violated his right to due process when they failed to take the case law of the Constitutional Court into account that found that decisions to remove officials appointed to positions on a provisional basis must be duly justified.

21. With regard to the State's arguments regarding the so-called "fourth instance" formula, The Commission reiterates that, for purposes of admissibility, it must decide whether the facts alleged tend to establish a violation of rights, as provided for in Article 47(b) of the American Convention, or whether the petition is "manifestly groundless" or "obviously out of order," as per Article 47(c). The criterion for the evaluation of these requirements differs from those used to issue an opinion on the merits of a case. Likewise, within the framework of its mandate, it is competent to declare a petition admissible when it refers to domestic proceedings that could violate rights guaranteed by the American Convention.⁷ In other words, in accordance with the aforementioned norms under the Convention, as well as with Article 34 of its Rules of Procedure, the admissibility analysis focuses on the verification of such requirements, which refer to the existence of elements.⁸

⁷ IACHR Report No. IACHR, Report No. 72/11, Petition 1164-05. Admissibility. William Gómez Vargas. Costa Rica. March 31, 2011, para. 52.

⁸ IACHR Report No. 143/18, Petition 940-08, Admissibility. Luis Américo Ayala Gonzales. Peru. December 4, 2018, para. 12; and IACHR Report No. 293/20, Petition 434-09, Admissibility, Gabriel Ulises Valdez Larqué and family members. Mexico. October 13, 2020, para. 22.

22. In view of the subject matter of the petition, the IACHR considers it pertinent to note that the Inter-American Court has found as follows:⁹

job security does not mean remaining in the position with no limitations, but rather, refers to respect of this right, among other measures, by granting due guarantees of protection to the worker so that if he or she is dismissed, it be with justification, which means that the employer must provide sufficient reasons to impose this sanction with the due guarantees, and that the worker may appeal this decision before the domestic authorities, who must verify that the justification given is not arbitrary or unlawful. Likewise, the Court has indicated in the *Case of San Miguel Sosa et al. v. Venezuela* that the State fails to fulfill its obligation to guarantee the right to work and, consequently, job security, when it does not protect its state officials from arbitrary terminations of their employment relationships

23. In view of these considerations and upon examination of the elements of fact and law set forth by the parties, the Commission concludes that the petitioner's allegations are not manifestly groundless and must be examined on their merits, as should the facts alleged be found to be true, they could represent violations of articles 8 (judicial guarantees) 23 (right to participate in government), 24 (equal protection), 25 (judicial protection), and 26 (economic, social, and cultural rights) of the American Convention read in conjunction with its articles 1(1) (obligation to respect rights) and 2 (duty to adopt domestic legal effects), to the detriment of Hernan Elias Salazar Restrepo.

VIII. DECISION

1. To declare this petition admissible with respect to articles 8, 23, 24, 25, and 26 of the American Convention read in conjunction with Articles 1(1) and 2 thereof.

2. To notify the parties of this decision; proceed to the analysis of 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 29th day of the month of August, 2024. (Signed:) Roberta Clarke, President; José Luis Caballero Ochoa, Second Vice President; Arif Bulkan, and Gloria Monique de Mees, Commissioners.

⁹ IACHR Report No. 143/18, Petition 940-08, Admissibility. Luis Américo Ayala Gonzales. Peru. December 4, 2018, para. 12; and IACHR Report No. 293/20, Petition 434-09, Admissibility, Gabriel Ulises Valdez Larqué and family members. Mexico. October 13, 2020, para. 22.