

OEA/Ser.L/V/II.
Doc. 126
25 April 2020
Original: português

REPORT No. 116/20
PETITION 221-12
REPORT ON ADMISSIBILITY

CLAUDIO ROGÉRIO RODRIGUES DA SILVA
BRAZIL

Approved electronically by the Commission on April 25, 2020.

Cite as: IACHR, Report No. 116/20. Petition 221-12. Admissibility. Claudio Rogério Rodrigues da Silva. Brazil. April 25, 2020.



I. PETITION DETAILS

Petitioners:	Claudio Rogério Rodrigues da Silva and Gustavo Marchiori
Alleged victim:	Claudio Rogério Rodrigues da Silva
Respondent State:	Brazil ¹
Rights invoked:	Articles 5 (right to humane treatment), 8 (fair trial rights), 10 (right to compensation), 11 (right to privacy), 14 (right of reply), 24 (equal protection) and 25 (judicial protection) of the American Convention on Human Rights, ² all in connection with Article 1.1 thereof; Articles II (equality), V (honor and private life), XIV (work), XVII (recognition of juridical personality), XVIII (fair trial), XXIV (right of petition) and XXVI (presumption of innocence) of the American Declaration of the Rights and Duties of Man ³

II. PROCEEDINGS BEFORE THE IACHR⁴

Filing of the petition:	February 9, 2012
Notification of the petition to the State:	October 2, 2013
State's first response:	December 27, 2013
Petitioners' additional observations:	February 24, May 30 and December 16, 2014, September 23, 2019
State's additional observations:	April 11, 2014

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 (ratified on September 25, 1992)

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 5 (humane treatment), 8 (fair trial), 11 (privacy), 24 (equal protection) and 25 (judicial protection) of the American Convention, all in connection with Article 1.1 thereof
Exhaustion of domestic remedies or applicability of an exception to the rule:	Yes
Timeliness of the petition:	Yes, December 15, 2014

V. ALLEGED FACTS

1. The petitioners claim that the Brazilian State is responsible for the violation of the right to humane treatment, privacy and equal protection, as well as the fair trial rights of Claudio Rogério Rodrigues da

¹ Pursuant to Article 17.2.a of the Commission's Rules of Procedure, Commission member Flávia Piovesan, a Brazilian national, did not take part in the discussion or decision-making on the instant matter.

² Hereinafter "American Convention" or "Convention".

³ Hereinafter "American Declaration" or "Declaration".

⁴ Each party's observations were appropriately forwarded to the opposing party.

Silva (hereinafter “Mr. Rodrigues da Silva” or “the alleged victim”), a member of the military police, who was expelled from officer training course because of a decision in an administrative proceeding, that was based on the sexual orientation of the alleged victim.

2. The petitioners assert that the alleged victim has been a military police member since September 2002 and that, in 2009, he won a place in an officer training course through a competitive process and, thus, was invited to participate in the classes, which began on February 9, 2009. On April 22, 2009, he underwent a “social investigation,” which led to his expulsion from the course the following month, based on the findings of the investigation. They contend that he was not told the reason for the expulsion because it was sealed information. They claim that even though he did not have access to that information, he was discriminated against based on his sexual orientation, given the nature of the questioning. The questions posed during the social investigation were related to his sexual orientation and to private details of his personal relationships. They argue that his co-workers and neighbors were questioned about his sexual orientation.

3. In response to the failure to provide an explanation for his expulsion, Mr. Rodrigues da Silva filed for a preliminary injunction (*Mandado de Segurança*) on May 21, 2009. The injunction was granted and on May 23, 2009, the alleged victim was able to return to the officer training course. According to the injunction, the reason provided by the commanding officer of the Military Police Academy of Barro Branco (hereinafter “APMBB”) was that the alleged victim failed to report an incident when he had been taken to the police district station and charged with a criminal offense that was “incompatible with the duties of a military policeman.” The alleged victim, however, denied the charges. Mr. Rodrigues da Silva was expelled from the course the morning of May 15, 2009, based on an official letter issued that same morning. The petitioners contend, however, that the document referred to a decision made by a commission that convened on that same day in the afternoon. The alleged victim argues that the letter was issued by a different body, on a subsequent date, and that homophobia was the reason.

4. On December 16, 2009, the Preliminary Injunction was denied on its merits and also on appeal on September 21, 2010, by the Court of Justice of the State of São Paulo (hereinafter “TJSP”). The appeal decision was challenged via motions for clarification of judgment (*Embargos de declaração*), which were also denied on March 15, 2011. According to the alleged victim, the judicial authorities accepted as true all of the arguments put forward by the APMBB, even though they were untrue. The alleged victim filed *Embargos de Declaração* against the appeals court decision, which were denied by the TJSP. On May 25, 2011, the petitioners claim that he filed a motion for leave to appeal (*Recurso Extradordinário*) with the Federal Supreme Court (hereinafter “STF”) and a special appeal (*Recurso Especial*) to the Superior Court of Justice (hereinafter “STJ”). Lastly, they note that he filed an interlocutory appeal (*Agravo*) against the decision denying leave to appeal to the Supreme Court (*Recurso Extradordinário*), reporting that as of time of the last communication in 2017, the appeal had not been ruled upon.

5. The petitioners claim that he reported the case to the Office of the State’s Public Prosecutor, which led to the opening of a civil investigation on July 7, 2011. However, he was told that because it could not be proven that the discriminatory treatment was a pattern within the organization, the investigation was closed. In February 2011, the alleged victim reported the case to the Secretariat of Justice and Defense of Citizens of the State of São Paulo claiming violations of Law 10948/2001, which prescribes punishment for sexual orientation-based discriminatory practices. The complaint was forwarded to the Secretariat for Public Security (hereinafter the “SPP”) and, subsequently, to the Office of Internal Oversight of the Military Police (*Corregedoria da Polícia Militar*) in March 2011. In September of the same year, Mr. Rodrigues da Silva requested information about the status of the case from the Office of Internal Oversight of the Military Police (*Corregedoria da Polícia Militar*), which denied the request and said it would only forward information to the requesting body (the SSP). He then appealed to the Secretariat for Public Security (SSP) and was told that information about his case must be sought from the Office of the External Inspector of the Police (*Ouvidoria da Polícia*), from which he never obtained any response. Finally, he appealed to the Secretariat for Human Rights of the Office of the President of the Republic, which referred him to the Office of the Ombudsman of the State of São Paulo; however, no information was provided to him about any action being taken. Lastly, the petitioners claim that he was deprived of liberty based on a fabricated proceeding, which was instituted on August 15, 2019.

6. The State does not dispute the facts put forward in the petition. It claims that the Preliminary Injunction was denied because it was understood that the alleged victim engaged in behavior that was incompatible with his career, inasmuch as in order to aspire to hold such a position, one must have an irreproachable and unblemished reputation. It further argued that students have only an expectation of the right to training and not the right to remain in the ranks of the corporation. It noted that the Special Appeal (*Recurso Especial*) filed with the STF was denied on March 13, 2013 and the motion for leave to appeal (*Recurso Extraordinário*) to the STF was denied on April 18, 2013. It further asserted that the investigation being conducted by the External Inspector's Office of the Police (*Ouvidoria da Polícia*) has still not reached a final conclusion and, therefore, the administrative proceeding is still pending. Consequently, it alleges failure of exhaustion of domestic remedies. Additionally, it claims that there is no colorable claim of a violation of rights protected by the American Convention, because the alleged victim has been unable to prove his allegations and it contends that it is not the job of the Commission to review decisions issued previously by domestic courts.

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

7. The alleged victim claims unwarranted delay by the State in ruling on the interlocutory appeal (*Agravo*) against the decision denying leave to appeal (*Recurso Extraordinário*) to the Supreme Court (STF). He contends that the delay in ruling on his case adversely affects his ability to become an officer, in view of the fact that he is growing older and time is running out for him to progress in his career. The State, in response, asserts that domestic remedies were not exhausted and that, in addition, it is not the role of the Commission to review domestic decisions.

8. Based on available and publicly accessible information, the Commission is able to ascertain that the STF found the aforementioned interlocutory motion to be inadmissible on December 15, 2014. The Commission notes that, generally speaking, exhaustion of special appeals is not required, but when such appeals prove to be suitable and effective for a specific situation that is the subject of a petition, it could be determined that they must be exhausted. Thus, if the petitioner decides to exhaust it, he must do so in accordance with the appropriate rules of procedure. In the instant case, the Commission notes that the alleged victim filed all ordinary and special appeals available to report the alleged discrimination based on his sexual orientation. Consequently, it understands the requirement of exhaustion of domestic remedies to have been fulfilled as provided for by the American Convention.

9. Regarding timeliness of the petition, the Commission reiterates that its consistent position in determining whether domestic remedies have been exhausted is for the situation at the time of the ruling on admissibility to prevail, because the situation at the time of the filing of the petition is different from the situation at the time of the ruling on admissibility.⁵ In light of the foregoing, it finds that the petition meets the requirement under the Article 46.1 of American Convention.

VII. ANALYSIS OF COLORABLE CLAIM

10. The Commission considers that the instant petition includes allegations regarding discrimination based on sexual orientation against Claudio Rogério Rodrigues da Silva during his admission to the Military Police and the officer training course, from which he was expelled after an interview where he was asked questions relating to his sexual orientation. Furthermore, the IACHR notes that the instant petition is related to the administrative proceeding, which led to the expulsion of Mr. Rodrigues da Silva from the aforementioned course, during which interviewers pried into his private life and sexuality.

11. Firstly, the Commission recalls that in the past it has established that it is competent to declare a petition admissible and rule on the basis for it when the petition involves a domestic court judgment, that was handed down without regard to due process or which on its face violates any other right guaranteed by the Convention. The Commission recalls that it has previously admitted petitions when it transpires from the

⁵ IACHR. Report 4/15, Admissibility, Petition 582-01, Raúl Rolando Romero Feris, Argentina, January 29, 2015, par. 40.

arguments of the parties *prima facie* that court judgments or the procedures followed could have been arbitrary or have involved arbitrary unequal treatment or possible discrimination.⁶

12. In light of the above considerations and after examining the evidence of fact and law introduced by the parties, the Commission finds that the petitioners' allegations are not manifestly groundless and require an examination of the merits, inasmuch as the alleged facts, if proven to be true, may tend to establish violations of the rights protected in Articles 5 (humane treatment), 8 (fair trial), 11 (privacy), 24 (equal protection) and 25 (judicial protection) of the American Convention, all in connection with Article 1.1 thereof. As for Article 10 (right to compensation) and Article 14 (right of reply), the Commission finds that the information provided by the petitioners is insufficient to be able to presume, *prima facie*, that the alleged facts could tend to establish a violation of the aforementioned articles. Particularly with regard to Article 10, the Commission notes that this article guarantees the right of the alleged victim to be "compensated in accordance with the law in the event he has been sentenced by final judgment through a miscarriage of justice." Thus, since there were no allegations of a miscarriage of justice, the reparation to which the alleged victim refers, would be provided for under Article 63 of the American Convention.

13. As for the contentions of the alleged victim that his rights were violated under the American Declaration, the Commission underscores that it has previously established that once the American Convention went into force with respect to a particular State, it and not the Declaration would become the primary source of applicable law, provided that the petition involves an alleged violation of identical rights in both instruments and it does not involve a situation of an ongoing violation.

VIII. DECISION

1. To declare the instant petition admissible with regard to Articles 5 (humane treatment), 8 (fair trial rights), 11 (right to privacy), 24 (equal protection) and 25 (judicial protection) of the American Convention, all in connection with Article 1.1 thereof;

2. To declare the instant petition inadmissible with respect to Articles 10 (right to compensation) and 14 (right of reply) of the American Convention; and

3. To notify the parties of the instant decision; to proceed to the examination of the merits of the matter; 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 25th day of the month of April, 2020. (Signed): Joel Hernández, President; Antonia Urrejola, First Vice President; Margarete May Macaulay, Esmeralda E. Arosemena Bernal de Troitiño, Julissa Mantilla Falcón, and Stuardo Ralón Orellana, Commissioners.

⁶ IACHR, Report No. 64/14, Petition 806-06. Admissibility. Laureano Brizuela Wilde. Mexico. July 25, 2014, par. 43.