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**REPORT No. 165/20**  
**PETITION 209-11**  
INADMISSIBILITY

JESÚS ALBERTO FELIZZOLA GUERRERO AND FAMILY  
COLOMBIA

Approved electronically by the Commission on July 2, 2020.

**Cite as:** IACHR, Report No. 165/20, Petition 209-11. Inadmissibility. Jesus Alberto Felizzola Guerrero and family. Colombia. July 2, 2020.

**I. INFORMATION ABOUT THE PETITION**

<b>Petitioner:</b>	Jesús Alberto Felizzola Guerrero and Nerio José Alvis Barranco
<b>Alleged victim:</b>	Jesús Alberto Felizzola Guerrero and family <sup>1</sup>
<b>Respondent State:</b>	Colombia
<b>Rights invoked:</b>	Articles of the American Convention on Human Rights <sup>2</sup> are not specified but other international instruments are invoked <sup>3</sup>

**II. PROCEEDINGS BEFORE THE IACHR<sup>4</sup>**

<b>Date of receipt</b>	February 21, 2011
<b>Additional information received at the stage of initial review:</b>	February 25, 2011, December 30, 2011, February 15, 2012, April 11, 2012, May 24, 2012, June 11, 2012
<b>Notification of the petition to the State:</b>	April 12, 2017
<b>State's first response:</b>	February 9, 2018
<b>Additional observations from the petitioner</b>	July 17, 2017, September 25, 2018

**III. COMPETENCE**

<b>Competence <i>Ratione personae</i>:</b>	Yes
<b>Competence <i>Ratione loci</i>:</b>	Yes
<b>Competence <i>Ratione temporis</i>:</b>	Yes
<b>Competence <i>Ratione materiae</i>:</b>	Yes, American Convention (deposit of the instrument of ratification made on July 31, 1973)

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

<b>Duplication of procedures and International <i>res judicata</i>:</b>	No
<b>Rights declared admissible</b>	None.
<b>Exhaustion of domestic remedies or applicability of an exception to the rule:</b>	Yes, the exception of Article 46.1 (a) of the American Convention applies.
<b>Timeliness of the petition:</b>	No

<sup>1</sup> The petitioner names his permanent partner Rosmary Barrera Rojas and his daughter Andrea Carolina Felizzola Barrera as alleged victims.

<sup>2</sup> Hereinafter "the American Convention".

<sup>3</sup> Articles 8, 9 and 10 of the Universal Declaration of Human Rights; and "international treaties on trade union association rights O.I.T".

<sup>4</sup> The observations submitted by each party were duly transmitted to the opposing party.

## V. FACTS ALLEGED

1. Jesús Alberto Felizzola Guerrero and Nerio José Alvis Barranco (hereinafter "the petitioner") denounce alleged violations of the human rights of Jesús Alberto Felizzola (hereinafter "the alleged victim") and his next of kin alleging that he was removed from the position that he held in the Comptroller General of the Republic of Colombia's Office in violation of the trade union rights that protected him and without prior process.

2. The petitioner reports that on June 9, 1992, the alleged victim was appointed as a grade 3 typist in the Office of the Comptroller General of the Republic (hereinafter "the Comptroller's Office"), and was subsequently registered as an administrative assistant in grade 06 in the career ladder on May 15, 1995 after having won a meritocracy contest. He adds that while serving the Comptroller's Office, the alleged victim completed a career as a public accountant. In addition, it indicates that the alleged victim acquired protection as a union leader after being designated an active member of the board of directors of the Association of Public Servants of the Comptrollers of Colombia (hereinafter "ASDECCO") Subdirective Sectional Cesar.

3. It is further reported that in 1999 a restructuring of positions occurred in the Comptroller's Office with the alleged purpose of improving the service and professionalizing the entity. It indicates that in the framework of the restructuring process, the designation "grade 06 administrative assistants" was changed to "assistance staff", being agreed in a bipartite commission composed of directors of the entity and of the unions, that the positions occupied under the old designation would be homologated to the new one based on the following incorporation criteria: (seniority 35%, experience 35%, studies 30%). In addition, it indicates that it was also agreed that public workers who were protected as trade union leaders would not be dismissed or disadvantaged. He alleges that, despite what was agreed regarding the union rights' protection and that the alleged victim obtained the highest rating (92/100) in the evaluation made by the Human Talent Management of the Comptroller's Office based on the agreed criteria, the alleged victim was not incorporated into the new plant of the Comptrollers' Office. It is worth noting that the other 5 people who held positions of administrative assistant grade 06 prior to the restructuring were incorporated as assistants, despite having received a lower score than that of the alleged victim.

4. It indicates that the alleged victim was dismissed from the position he held on March 16, 2000 but that on June 13, 2000, he was provisionally appointed as a Grade 01 University Professional, indicating that he would eventually be reinstated definitively. However, on April 26, 2001, he was notified that he had been definitively removed. Petitioner indicates that against the irregularities committed, the alleged victim filed an action for annulment and reinstatement, which was resolved against him by the Administrative Court of Cesar on October 1, 2002. He explains that the Court declared the application inept, considering that it had not been directed against the correct administrative act. The petitioner adds that the petitioner appealed the inept demand decision, but the appeal was not studied based on the fact that the matter was considered to be a single instance due to its amount. It adds that the permanent partner of the alleged victim filed a tutela action against the Comptroller's Office on January 19, 2010, which was denied by the Superior Court of Valledupar on February 8, 2010 after considering that the demand did not meet the requirement of immediacy, having been presented 10 years after the removal of the alleged victim. This decision was later confirmed by the Supreme Court of Justice on July 22, 2009 and excluded from review by the Selection Chamber of the Constitutional Court; therefore, the file corresponding to the action was filed on October 14, 2010.

5. The petitioner considers that the claim of nullity and restoration of the right has been declared inept by a formal error and thus does not imply that the alleged victim has incurred undue exhaustion. It maintains that, if the court considered that the lawsuit was not directed against the correct act, it should have warned this when admitting or denying the lawsuit instead of waiting several years and proceeding with all the evidentiary stages to finally issue a ruling, inhibiting itself from ruling on the merits. It highlights that after the aforementioned decision, the concepts of inept demand and inhibitory rulings have been overcome in Colombia, being now established that judges have an obligation to rule on the merits and that judges must notice the shortcomings of the demands and request their correction. Likewise, it maintains that the petition should not be considered out of time because of the tutela action being rejected due to an alleged lack of immediacy, since tutelas are legal actions allowed in Colombia. It stands out that the alleged victim, despite his lack of technical training, has complied with using and exhausting all the legal tools allowed by internal law.

6. The State, for its part, considers that the petition should be inadmissible for having been submitted out of time. It maintains that the decision that definitively resolved the legal situation of the alleged victim at the domestic level was that by which the Council of State determined that the appeal filed by the latter against the denial of his claim for nullity and restoration of the right was inadmissible due to the process being single instance by reason of its amount. It indicates that the alleged victim was notified of this decision on March 13, 2003, while the petition was presented to the Commission on February 21, 2011, having elapsed almost 8 years between the two acts and greatly exceeding the 6-month period provided for in Article 46.1 (b) of the American Convention. It maintains that the filing of a tutela action by the permanent partner of the alleged victim in 2010 could not suspend or revive the period provided for in article 46.1 (b) given that said action was manifestly inadmissible. The State explains that the Constitutional Court had determined that "immediacy" is a requirement for the admissibility tutela actions in Colombia and that, although each particular case requires a particular analysis of the period that can be considered immediate or not, the filing, in this case, of a petition for tutela 7 years after the final decision of the contentious administrative jurisdiction was issued was clearly contrary to the principle of immediacy.

7. It also alleges that the petition must be inadmissible because the alleged victim committed undue exhaustion of domestic remedies. It indicates that the Administrative Court of Cesar determined that the claim for nullity and restoration of the right filed by the alleged victim was inept because it had been directed against the general act that ordered the establishment of the new staff of the Comptroller's Office, while the act that should have been sued was the one that decided not to link him to the new plant. It maintains that the judge of first instance was not empowered to modify the procedural path selected by the actor by virtue of the principle of "requested justice" that governs the contentious administrative specialty in Colombia. It adds that the constitutional jurisdiction was not duly exhausted either because the action was rejected for causes attributable to the plaintiffs such as the extemporaneous filing of the lawsuit in violation of the principle of immediacy and the fact that the lawsuit was filed by the permanent companion of the alleged victim without a the power of attorney to legitimize her to act on her behalf. The State adds that the alleged victim at no time used the ordinary labor action for reinstatement, which was the ideal procedural route if he considered that his union rights had been violated.

8. In addition, it states that the petition must be inadmissible based on Article 47 (b) of the American Convention because the facts set forth in it do not characterize violations of the rights enshrined in said Convention. It considers that the impossibility of appealing the decision of the Administrative Court of Cesar by reason of the amount does not imply violation of the rights of the alleged victim, since the right to appeal the decision and access a second instance court is not absolute and can be submitted to restrictions evaluated from reasonableness and proportionality. It also indicates that the separation of the alleged victim did not lead to a violation of his right to work since neither the Colombian law nor the Colombian Constitution prohibit the restructuring of positions because jobs are occupied by administrative career servers. It highlights that the Constitutional Court has concluded that "when there are reasons of general interest that justify the removal of charges from a public entity, it is legitimate for the State to do so, without it having to challenge the career rights of the officials since those must yield in the general interest".

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

9. The Commission observes that the petitioner has indicated that the alleged victim has complied with using and exhausting all the legal weapons permitted by domestic law. Likewise, the Commission notes that the State considers that the petition was filed out of time and that the tutela action filed by the partner of the alleged victim was manifestly inadmissible and therefore cannot be considered a validly exhausted remedy for the purposes of calculating the term established in Article 46.1 (b) of the American Convention. In addition, the State has also denounced that the administrative and constitutional contentious channels were unduly exhausted.

10. In the instant case, the Commission considers that the action for annulment and restoration of the right before the contentious administrative jurisdiction filed by the alleged victim was, prima facie, an appropriate route for the claims raised in the petition to be addressed at the domestic level. As stated by the State and not contested by the petitioner, the alleged victim filed an action for annulment and restoration of

the right before the contentious administrative jurisdiction whose final decision of rejection was notified to him on March 13, 2003. It does not appear from the file that additional actions related to the object of the petition were filed until the permanent partner of the alleged victim filed a tutela action on January 19, 2010.

11. In these circumstances, the Commission recalls that it has already ruled "with regard to those remedies that are adequate and effective, and that therefore it is necessary to exhaust as a general rule, and the procedural continuity of domestic remedies in those cases in which, in addition to exhausting these remedies, the petitioner continues to litigate internally by filing appeals or additional claims. This procedural continuity of the resources exhausted internally is relevant when it comes to elucidating which should be considered the definitive remedy that ends the process"<sup>5</sup>. In the present case, given the 7 years elapsed without filing additional actions from the final decision of the administrative contentious process to the filing of the action before the constitutional justice, as well as the absence of information indicating that the alleged victim was prevented to file the tutela action earlier, the Commission considers that there is no situation of procedural continuity that leads to the tutela action filed by the permanent partner of the alleged victim being considered as a validly exhausted remedy for the purpose of analyzing the admissibility requirements.

12. Regarding the process advanced before the contentious administrative jurisdiction, the Commission observes that the petitioner was prevented from appealing the decision that rejected his action for nullity and restoration of the right based on a normative provision regarding the amount of the claims. In these circumstances, the Commission considers, without prejudging on the merits and as it has previously done in a case of a similar nature<sup>6</sup>, that the exception to the requirement of exhaustion of domestic remedies contemplated in Article 46.2 (a) of the American Convention is applicable to the present petition. Pursuant to article 32.2 of its rules of procedure in cases where the exceptions to the requirement of prior exhaustion of domestic remedies are applicable, the Commission must assess whether the petition was presented within a reasonable period of time, taking into account the date on which the alleged violation of the rights and circumstances of each case. In the present case, the Commission observes that the petition was presented on February 21, 2011, having elapsed almost 10 years since the alleged victim was definitively removed from the Comptroller's Office on April 26, 2001 and more than 8 years since he was definitively notified on March 13, 2013 that the decision that declared his claim for nullity and restoration of law inept was not appealable. The petitioner has not provided information on causes that have prevented or hindered the alleged victim from filing his petition earlier with the Commission. For these reasons, the Commission concludes that the present petition is inadmissible due to it not having been presented within a reasonable time under the terms of Article 32.2 of its rules of procedure.

## VII. ANALYSIS OF COLORABLE CLAIM

13. Given the conclusions set forth in section VI of this report, the Commission will not carry out an analysis regarding whether the facts raised by the petitioner could characterize violations of the American Convention or other treaties that confer jurisdiction.

## VIII. DECISION

1. Declare this petition inadmissible based on article 32.2 of its rules of procedure.
2. Notify the parties of this decision; and 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 2<sup>nd</sup> day of the month of July, 2020.  
(Signed): Joel Hernández, President; Antonia Urrejola, First Vice President; Flávia Piovesan, Second Vice President; Margarette May Macaulay, and Esmeralda E. Arosemena Bernal de Troitiño, Commissioners.

<sup>5</sup> IACHR, Report No. 178/19. Inadmissibility. Jorge Orlando Caicedo Rojas. Colombia. December 5, 2019, para. 122

<sup>6</sup> IACHR, Report No. 82/18. Petition 551-07. Admissibility. Alcides Espinosa Ospino and others. Colombia. July 10, 2018, para