

OEA/Ser.L/V/II.165
Doc. 172
October 26, 2017
Original: Spanish

REPORT No. 146/17
PETITION 296-07
REPORT ON ADMISSIBILITY

OROSMÁN MARCELINO CABRERA BARNÉS
MEXICO

Approved by the Commission at its session No. 2104 held on October 26, 2017
165th Regular Period of Sessions

Cite as: IACHR, Report No. 146/17, Petition 296-07. Admissibility. Orosmán Marcelino Cabrera Barnes. Mexico. October 26, 2017.

REPORT 146/17¹
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I. INFORMATION ABOUT THE PETITION

Petitioner:	Orosmán Marcelino Cabrera Barnés
Alleged victim:	Orosmán Marcelino Cabrera Barnés
State denounced:	Mexico
Rights invoked:	No alleged articles are specified

II. PROCEDURE BEFORE THE IACHR²

Date on which the petition was received:	March 13, 2007
Additional information received at the initial study stage:	March 23, 2008
Date on which the petition was transmitted to the State:	September 19, 2011
Date of the State's first response:	January 23, 2012
Additional observations from the petitioning party:	July 20, 2016 and May 19, 2017
Additional observations from the State:	April 7, 2017

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 on Human Rights ³ (ratification instrument was deposited on March 24, 1981)

IV. ANALYSIS OF 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), 7 (Personal Liberty), 8 (Fair Trial), 22 (Movement and Residence) and 25 (Judicial Protection) of the American Convention, in connection with its Articles 1.1 (Obligation to Respect Rights) and 2 (Domestic Legal Effects)
Exhaustion of domestic remedies or applicability of an exception to the rule:	Yes; under the terms of Section VI
Timeliness of the petition:	Yes; under the terms of Section VI

¹ Pursuant to Article 17.2.a of the IACHR Rules of Procedure, Commissioner José de Jesús Orozco Henríquez, a Mexican national, did not participate in the discussion or the decision on this matter.

² The observations presented by each party were duly transmitted to the opposing party.

³ Hereinafter "Convention" or "American Convention."

V. ALLEGED FACTS

1. Mr. Orosmán Marcelino Cabrera Barnés (hereinafter “the petitioner,” “the alleged victim” or “Mr. Cabrera Barnés”) submits that on February 7, 2006, along with a group of people, he fled Cuba due to political reasons on a vessel that a few days later broke down and was rescued by a cruise ship heading to Mexico. He also asserts that on February 17 of that same year, when he arrived in the territory of Mexico, officers of the National Institute of Migration (hereinafter “INM”) arrested him at the migration station in Chetumal, in Quintana Roo state. He submits that said officers interviewed him, told him that he would not be deported, that he might stay for a period no longer than 90 days pursuant to the law in force at the time of the facts and that they would give him an Exit Permit to leave Mexico in a reasonable amount of time.

2. The petitioner indicates that he was then taken to the “*Siglo XXI*” migration station, in Tapachula (Chiapas), in which he was not assigned a public counsel. He claims that he was subjected to unfavorable detention conditions, as he was 24 hours isolated, deprived of sunlight and unable to make phone calls; that the food was of bad quality and that he could not take a bath on a daily basis. According to the information filed by the alleged victim, on April 21 and May 8, 2006 he filed applications for refugee status to the local office of the Mexican Commission for Refugee Assistance (hereinafter “COMAR”), as it is the competent state body to undertake said procedure, and he was assured that, in the interest of his liberty and his life, he would not be deported while the proceedings were underway. According to the file, the COMAR representative in Chiapas notified the INM of the two applications on May 4 and 8, 2006, respectively. In reply to the allegations filed by the State, he asserts that he never withdrew these applications.

3. The petitioner indicates that on May 16, 2006 one part of the group of people with whom he had applied for refugee status to the COMAR was deported back to Cuba without prior notice. He explains that given the circumstances –after spending 100 days in detention, having lost contact with COMAR representatives and for fear of being deported before his application for refugee status was settled–, three days later, he filed a complaint before the National Human Rights Commission (hereinafter “CNDH”). He submits that the complaint was against the INM and the COMAR, in view of their violation of article 150 of the Federal Law on Population in force when the acts occurred, as under that law immigration authorities had a maximum of 90 days to rule on his situation. Mr. Cabrera Barnés also indicates that on June 2, while still in detention, he lodged a second complaint based on the same arguments, before the Mexican Ministry of Public Administration. Subsequently, he asserts that an INM officer told him “by blackmail” that if he signed a document, he would be granted an Exit Permit to leave Mexico.

4. The petitioner alleges that on June 9, 2006, after 113 days in detention and with his application for refugee status pending resolution, he was deported back to Cuba. He claims that the INM authorities were aware of his application and that he was never notified of the decision to deport him or the destination where he was being taken to by air until he landed in La Habana city. The alleged victim indicates that his deportation caused him several damages because, back in Cuba, he was stripped of his property, his job and his livelihood.

5. Mr. Cabrera Barnés claims that in the months following his deportation he mailed several requests for information to the CNDH, the INM and the COMAR regarding his complaints. He indicates that on November 16, 2007 he was notified of Recommendation No. 35/2007 in which the CNDH concluded that the INM authorities had violated his freedom of movement and his rights to lawfulness and judicial protection by keeping him in detention for a period longer than the lawful term of 90 days and by repatriating him without the prior settlement of his application. The CNDH recommended that the INM order administrative proceedings against public officials involved in the facts described and adopt the measures necessary to ensure that migrants have sufficient information to file applications for refugee status. Mr. Cabrera Barnés submits that the administrative investigations that had been undertaken were not appropriate as it was concluded that there were no sufficient elements to prove liability on the part of the COMAR or the INM authorities.

6. For its part, the State claims that the petition is inadmissible due to its untimely submission, as it was filed more than 6 months following the final resolution on the immigration proceedings. It also indicates that remedies in the domestic legal framework were not exhausted.

7. The State asserts that in the framework of the immigration proceedings the petitioner's rights were ensured pursuant to national and international rules in force at the time of the events. It submits that, both upon Mr. Cabrera Barnes' arrival in Mexico and after he appeared before the migration authority, the INM authorities informed him his rights, such as his rights to apply for refugee status if requirements were met, to be assisted by someone of his own trust, to receive consular assistance and to make telephone calls. The State explains that the petitioner, however, refused to be assisted by someone of his own trust. It asserts that the immigration proceedings were filed on February 17, 2006 and that on April 24 of that same year the Cuban Consulate in Mexico authorized to repatriate Mr. Cabrera Barnés to his country of origin, which took place on June 9. The State claims that the petitioner could have lodged an appeal for review while the immigration proceedings were still underway. It also indicates that, apart from the administrative remedy, the petitioner could have filed constitutional proceedings in order that the court ruled to suspend his removal.

8. Likewise, the State submits observations regarding the alleged applications for refugee status. On the one hand, it mentions a first application for refugee status –which was not mentioned by the petitioner– filed on March 1, 2006 to the COMAR regarding the alleged victim's transfer to Chiapas, which it asserts was dismissed on the following day, in accordance with the attachment included, whose signature appears to belong to Mr. Cabrera Barnés. As to the alleged application for refugee status pending resolution, the State alleges that the petitioner filed it before the COMAR when the immigration proceedings had finished. It moreover submits that the COMAR recommended the INM not to adopt measures to remove Mr. Barnes or send him to the consular or diplomatic authorities of his country of origin while his case was under assessment. The State indicates that the COMAR, however, did not undertake any formal procedure regarding his application for refugee status because the competent body to receive such applications was the INM, pursuant to articles 35 and 42 of section VI of the Federal Law on Population and articles 166 and 167 of the institution's rules in force when the events occurred. Finally, the State claims that the time elapsed between the filing of the petition and its notification to the State affected his right of defense.

VI. EXHAUSTION OF DOMESTIC REMEDIES AND TIMELINESS OF THE PETITION

9. According to the available information, at least two applications for refugee status were lodged before the COMAR during the alleged victim's detention term. Concerning the first of these, the State alleges that it was withdrawn by the petitioner –who controverts this argument–, whereas the second application was reportedly pending resolution when he was removed. The State claims that the petition is inadmissible as it was filed more than 6 months following the final resolution through which the immigration proceedings were closed, and because domestic remedies were not exhausted. According to the State, the petitioner could have filed the appeal for review set forth in article 83 of the Federal Law on Administrative Procedure effective when the facts took place, from the time the repatriation procedure began and in view of the Cuban Consulate's formal acceptance to repatriate him. On the other hand, the State alleges that, apart from administrative proceedings, the petitioner could have filed constitutional proceedings and had his removal order suspended by a judicial resolution.

10. The Commission notes that in situations like this, in general, the remedy that must be exhausted is the one that allows challenging the administrative or judicial resolution leading to removal or deportation. The alleged victim claims that he was unable to file any remedies since he was not notified of the removal order enforced on June 9, 2006 or informed of his destination while being taken by air until he arrived in La Habana. For its part, the State recognizes that there was at least one application for refugee status pending resolution and it does not indicate how or when the removal order was notified. In this regard, the State did not submit any arguments concerning the way in which Mr. Cabrera Barnés could have duly challenged the removal order.

11. The IACHR has previously established that when a removal order is issued and enforced on the same day, there is an unreasonably short time to ensure the basic right of due process⁴ if a petitioner is deprived of liberty, like in this case; therefore, remedies are materially unavailable in terms of access.⁵ Likewise, when the removal order was enforced, any remedy became manifestly useless to prevent the order's effects. Therefore, in view of the characteristics of this case, the Commission believes that the situation denounced by the petitioner meets the criteria of the exception to the requirement of exhaustion of domestic remedies set forth in Article 46.2.b of the ACHR. Since the petition was filed on December 20, 2006 and the deportation took place on June 9 of that same year, the Commission believes it meets the requirement of timeliness.

12. Lastly, as to the State's observation on the delay between the date when the petition was filed and the date of notification to the State, the Commission informs that neither the Convention nor the IACHR Rules of Procedure establish a term for notifying the State of a petition following its reception date.⁶

VII. COLORABLE CLAIM

13. In view of the elements of fact and law presented by the parties and the nature of the matter brought to it, the IACHR considers that, if proved, the purported irregularities committed in the immigration proceedings and in the removal order's summary enforcement, along with the failure to duly settle the alleged victim's application for refugee status, might establish a possible violation of the rights protected by Articles 5 (Humane Treatment), 7 (Personal Liberty), 8 (Fair Trial), 22 (Movement and Residence) and 25 (Judicial Protection) of the American Convention, in connection with its Articles 1.1 (Obligation to Respect Rights) and 2 (Domestic Legal Effects).

VIII. DECISION

1. To declare the instant petition admissible in relation to Articles 5, 7, 8, 22 and 25 of the American Convention, in relation to Articles 1.1 and 2 of the same treaty;

2. To notify the parties of this decision;

3. To continue with the analysis on the merits; and

4. To publish this decision and include it in its Annual Report to the General Assembly of the Organization of American States.

Done and signed in the city of Montevideo, Uruguay, on the 26th day of the month of October, 2017. (Signed): Francisco José Eguiguren, President; Margarette May Macaulay, First Vice President; Esmeralda E. Arosemena Bernal de Troitiño, Second Vice President; Paulo Vannuchi, James L. Cavallaro, and Luis Ernesto Vargas Silva, Commissioners.

⁴ IACHR, Admissibility Report No. 37/01, Case 11.529, José Sánchez Guner Espinales *et al.* (Costa Rica), February 22, 2001, par. 45; Admissibility Report No. 89/00, Case 11.495, Juan Ramón Chamorro Quiroz (Costa Rica), October 5, 2000, par. 36; and Report No. 49/99, Case 11.610, Merits Report, Loren Laroye Riebe Star, Jorge Barón Guttlein and Rodolfo Izal Elorz, Mexico, April 13, 1999, par. 71.

⁵ IACHR, Report No. 95/06, Petition 92-04 Admissibility, Jesús Tranquilino Vélez Looor (Panama), October 23, 2006, par. 46.

⁶ IACHR, Report No. 56/16, Petition 666-03. Admissibility. Luis Alberto Leiva. Argentina. December 6, 2016, par. 29.