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REPORT No. 54/22

PETITION 1430-12

ADMISSIBILITY REPORT

DAVID BERNARDINO TUNY DUEÑAS
PERU

Approved electronically by the Commission on March 10, 2022.

Cite as: IACHR Report No. 54/22. Petition 1430-12. Admissibility. David Bernardino Tuny Dueñas. Peru. March 10, 2022.

I. INFORMATION ABOUT THE PETITION

Petitioner:	David Bernardino Tuny Dueñas
Alleged victim:	David Bernardino Tuny Dueñas
Respondent State:	Peru ¹
Rights invoked:	Articles 8 (fair trial), 24 (equal protection), and 25 (judicial protection) of the American Convention on Human Rights, ² in relation to its articles 1.1 (obligation to respect rights) and 2 (obligation to adopt domestic legal effects); and articles 1 (obligation to adopt measures), 2 (obligation to enact domestic legislation), 3 (nondiscrimination), 6 (work), 7 (just, equitable, and satisfactory working conditions), 12 (food), 13 (education), and 15 (right to the formation and protection of families) of the Additional Protocol to the American Convention in the Area of Economic, Social, and Cultural Rights ("Protocol of San Salvador").

II. PROCEEDINGS BEFORE THE IACHR³

Filing of the petition:	August 1, 2012.
Additional information received at the phase of initial review:	August 27, 2012, and January 4, 2016
Notification of the petition to the State:	August 9, 2017.
State's first response:	November 6, 2017.
Additional observations from the petitioner:	July 18, 2018
Additional observations from the State:	July 6, 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 28, 1978)

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 (fair trial), 24 (equal protection), 25 (judicial protection), and 26 (economic, social, and cultural rights) of the American Convention in conjunction with its articles 1.1 (obligation to respect rights) and 2 (obligation to adopt domestic legal effects)

¹ Commissioner Julissa Mantilla Falcón, of Peruvian nationality, did not participate in the deliberations nor in the decision in this case, in keeping with the provisions of Article 17(2)(a) of the Rules of Procedure of the Commission.

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

³ The observations presented by each party were duly transmitted to the opposing party.

Exhaustion of domestic remedies or applicability of an exception to the rule:	Yes, pursuant to the terms of Section VI
Timeliness of the petition:	Yes, pursuant to the terms of Section VI

V. ALLEGED FACTS

1. Mr. David Bernardino Tuny Dueñas, in his capacity as petitioner and alleged victim, alleges that the National Police of Peru (hereinafter “the PNP”) illegally and arbitrarily dismissed him when he was transferred from active duty to retirement, violating his rights to judicial guarantees, equal protection, and judicial protection.

2. He indicates that after thirteen years and five days of service in the rank of Major Service Officer of the Lima Police, the PNP arbitrarily forced him to retire to renew the ranks, pursuant to supreme resolution 1097-2002-IN/PNP of December 30, 2002. The following day, the resolution was published in the newspaper *El Peruano*, making official the list of colonels, commanders, and majors of the PNP who went into retirement as of January 1, 2003. In this regard, he alleges that the PNP arbitrarily forced him into retirement to prevent his promotion to the rank of commander, even though he had been declared fit for that role; and that according to directorial resolution No. 296-2004 DIRRHUM-PNP of January 10, 2005, the authorities recognized his pension rights as equivalent to those of an active-duty commander.

3. The petitioner indicates that in response to the aforementioned resolution of December 30, 2002, on January 9, 2003, he filed an appeal for reconsideration before the PNP, in which he requested his reinstatement, alleging that the grounds for the renewal of the ranks were arbitrary and unfair, since his time of service was not recognized, nor was the reason for his retirement communicated, nor was it taken into consideration that he was on the merit list for promotion to the rank of commander as of January 1, 2003. However, through supreme resolution No.0454-2003-IN/PNP of July 31, 2003, the PNP declared the appeal inadmissible, arguing that his retirement due to renewal of the ranks was approved in strict application of articles 50(c) and 53 of the repealed Legislative Decree 745,⁴ which established that police personnel would go into retirement status for renewal of ranks pursuant to the needs determined by the PNP; and that the proposal for those to be moved to retirement had to be submitted before and approved by the President of the Republic in his capacity as supreme head of the PNP. The petitioner indicates that with this decision, the administrative procedure was exhausted.

4. Consequently, on August 17, 2005, Mr. Tuny Dueñas filed a lawsuit for annulment against the Ministry of Interior Affairs before the Third Permanent Administrative Disputes Court, in which he requested: (i) the annulment and ineffectiveness of supreme resolutions No. 1097-2002-IN/PNP and No. 0454-2003-IN-PNP of the PNP; ii) his reinstatement as commander; (iii) recognition of service time; (iv) payment of salaries earned by law and other benefits; and (v) recognition of seniority as commander. In his lawsuit, he alleged that the aforementioned resolutions lacked argumentation and grounding, violating his constitutional rights to due process, equal protection, and life project.

5. The case file of his petition indicates that in the framework of the annulment suit, the alleged victim filed a brief on January 5, 2007, before the Third Permanent Court of Administrative Litigation, in which he stated that the Constitutional Court, through Judgment issued in file No. 090-2004-AA/TC of July 5, 2004, adopted a new binding criterion regarding transfers to retirement due to renewal of ranks for officers of the Armed Forces and the PNP. Specifically, this precedent established that although forced retirement due to renewal in the Armed Forces and National Police is a discretionary authority of the President of the Republic, this administrative act cannot be based solely on the individual judgment of the president, but must rather be grounded in the reasons for which such a decision was made.

6. Despite this, on December 31, 2008, the Third Permanent Contentious-Administrative Court declared the suit baseless, noting that while it was true that the aforementioned ruling of the Constitutional

⁴ Currently, Legislative Decree No. 1149 – Career and Status of PNP Personnel Act of December 10, 2012.

Court set a precedent compliance with which was mandatory, the same was true of that ruling's paragraph 47, establishing that "the above criteria must be observed by future resolutions placing officers into retirement to renew the ranks of the Armed Forces and the National Police." In this regard, the court found that because the facts of this case took place prior to the issuance of the aforementioned judgment, it was not applicable.

7. On February 12, 2009, the petitioner filed an appeal; however, on May 18, 2010, the Fourth Specialized Chamber for Administrative Disputes upheld the lower court's decision, finding that forced retirement for renewal of the ranks is not punitive or discriminatory; and that what happened to the plaintiff was in accordance with the provisions established in applicable law. In response, on August 31, 2010, the petitioner filed an appeal, which was declared inadmissible by the Temporary Constitutional and Social Law Chamber of the Supreme Court of Justice via a resolution dated November 22, 2011, in view of its failure to comply with the admissibility requirements of the remedy established in article 388(2) and (3)⁵ of the Code of Civil Procedure. However, in the opinion of the alleged victim, analysis of the merits of the matter did not require meeting these formal requirements. He indicates that he was notified of this decision on February 1, 2012.

8. In sum, the petitioner alleges that his length of service in the PNP was not recognized, and that he was forced to retire just when he was promoted to the rank of commander, violating his right to equal protection. In addition, he alleges that in other cases similar to his, the Supreme Court of Justice ruled in favor of other officers forced to retire during the same time period as he was.⁶ Likewise, he argues that his forced retirement to renew the ranks violated his right to judicial guarantees, since there was no administrative procedure or substantiation of the reason for this decision. He adds that the authorities did not summon him or offer him a hearing where he could exercise his right to defense; and that, in this regard, due process was also violated due to the failure to evaluate the evidence. Lastly, he adds that he was discriminated against by the PNP because he was ill. He indicates that over the years, his health deteriorated, and that on January 2, 2017, the National Institute of Neurological Sciences of the Ministry of Health diagnosed him with Parkinson's.

9. The State, for its part, argues that the facts alleged do not constitute a human rights violation attributable to it; and that, on the contrary, the petitioner intends to employ the IACHR as a fourth judicial instance. It emphasizes that in issuing judgments dismissing the petitioner's claim, the courts acted within the sphere of their competence and applied due process guarantees. It adds that the petitioner had the opportunity to exercise the judicial remedies provided for in the legal system; and that in response to each, he received a duly reasoned response from the domestic courts.

10. In this regard, it maintains that moving him into retirement to renew the ranks was not a disciplinary procedure pursuant to article 58 of Legislative Decree 752, in force at the time of the facts and clarified by the Constitutional Court in ruling 090-2004-AA/TC of July 5, 2004. It argues that the use of this modality was not an obstacle to the alleged victim's right to defense, since it was based on institutional criteria; and that in addition, the aforementioned ruling established that since it was a dismissal to renew the ranks pursuant to supreme resolutions of the PNP prior to the issuance of the aforementioned sentence, it was not possible to apply the precedent set in 2004 by the Constitutional Court.

11. Regarding the alleged victim's health problems, the State said it has not been proven that they are related to his forced retirement to renew the ranks, adding that it was not mentioned in the initial petition and therefore should not be considered by the Commission. The State alleges that although there were supreme resolutions of the PNP finding in favor of other police officers in a situation similar to that of the petitioner, the petitioner has not demonstrated that these cases involved circumstances identical to his own, nor that the

⁵ Article 388 of the Code of Civil Procedure, which stipulates in part 1: that the appellant had not previously agreed to the adverse ruling of the lower court, where confirmed by the decision under appeal; and 2: clearly and precisely describe the infraction of the law or the deviation from the judicial precedent.

⁶ As evidence, the alleged victim attaches the following to the case file: i) Supreme Resolution No. 1410-2001-INP-PNP of December 20, 2001, which ordered employment benefits for a captain when he was forced to retire for renewal of the ranks; and ii) Resolutions No. 0030-20006-IN-PNP of January 10, 2006, No. 0194-2006-IN-PNP of February 14, 2006, and No. 0214-2006-IN-PNP of February 21, 2006, which ordered the reinstatement of colonels to active duty and promotions to commanders.

treatment he was given was due to discrimination in the administration of justice. Peru therefore asks that the petition be declared inadmissible based on Article 47(b) of the Convention on the rationale that the petitioner is seeking for the Commission to act as a court of appeal, contrary to its complementary nature.

12. In addition, it reiterates that the Commission is not competent to rule on the alleged violations of Articles 1, 2, 3, 6, 7, 12, and 15 of the Protocol of San Salvador in view of Article 19(6) of the same instrument. Likewise, regarding the alleged violation of the right to education established in Article 13 of the aforementioned Protocol, it notes that the alleged victim did not present any argument demonstrating the existence of such a violation.

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

13. In the instant case, the alleged victim argues that he exhausted domestic remedies by having filed the appeal for reconsideration before the PNP through administrative channels and filing a cassation appeal before the Supreme Court of Justice, which denied the appeal by decision of November 23, 2011. For its part, the State has not disputed the exhaustion of domestic remedies nor has it made references to the deadline for filing the petition. Based on this and on the information in the case file, the Commission concludes that this petition meets the requirement of exhaustion of domestic remedies, pursuant to Article 46(1)(a) of the American Convention. Additionally, taking into consideration that on February 1, 2012, the authorities issued notification of the cassation judgment of the Temporary Constitutional and Social Law Chamber of the Supreme Court of Justice, and that the petitioner filed the petition on August 1, 2012, the Commission finds that it complies with Article 46(1)(b) of the American Convention.

VII. ANALYSIS OF COLORABLE CLAIM

14. In view of the elements of fact and law presented by the parties, the IACHR finds that if the alleged lack of rationale in the supreme resolutions dismissing the alleged victim to renew the ranks is proven, as is the alleged unequal treatment of him, they could constitute, *prima facie*, violations of the rights contained in articles 8 (fair trial), 24 (equal protection), 25 (judicial protection), and 26 (economic, social, and cultural rights) of the American Convention in conjunction with its articles 1.1 (obligation to respect rights) and 2 (obligation to adopt domestic legal effects), to the detriment of David Bernardino Tuny Dueñas. The analysis carried out by the Commission in the merits stage will be focus on determining whether the State complied with its obligations derived from the American Convention on Human Rights and evaluating whether the judicial decisions adopted by the national authorities were in accordance with domestic law.

15. Regarding the alleged violation of Articles 1, 2, 3, 6, 7, 12, and 15 of the Protocol of San Salvador, the IACHR notes that the competence provided for under Article 19.6 of this treaty to decide on an individual case is limited to articles 8 and 13 of this instrument. Regarding the other articles, in accordance with Article 29 of the American Convention, the Commission may take them into account to interpret and apply the American Convention and other applicable instruments. Additionally, as to the claim regarding the alleged violation of Articles 11 (honor and dignity) of the American Convention and 13 (right to education) of the Protocol of San Salvador, the Commission observes that the petitioner has not offered sufficient arguments to support the *prima facie* conclusion that a violation is possible.

VIII. DECISION

1. To declare this petition admissible with regard to Articles 8, 24, 25, and 26 of the American Convention, in conjunction with Articles 1.1 and 2; and

2. To notify the parties of this decision; continue with analysis of the merits of the matter; 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 10th day of the month of March, 2022. (Signed:) Stuardo Ralón Orellana, First Vice President; Margarete May Macaulay, Second Vice President; Esmeralda E. Arosemena Bernal de Troitiño, Joel Hernández, Roberta Clarke, and Carlos Bernal Pulido, Commissioners.