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REPORT No. 291/22
PETITION 3034-18
REPORT ON INADMISSIBILITY

ISMAIL ELSHIKH & THE MUSLIM ASSOCIATION OF HAWAII
UNITED STATES OF AMERICA

Approved electronically by the Commission November 1, 2022.

Cite as: IACHR, Report No. 291/22, Petition 3034-18. Inadmissibility. Ismail Elshikh & The Muslim Association of Hawaii. United States of America. November 1, 2022.

I. INFORMATION ABOUT THE PETITION

Petitioners:	Ismail Elshikh & The Muslim Association of Hawaii
Alleged victim:	Ismail Elshikh & The Muslim Association of Hawaii
Respondent State:	United States of America ¹
Rights invoked:	Articles II (Right to equality before law.), III (Right to religious freedom and worship), VI (Right to a family and to protection thereof), XVIII (Right to a fair trial), XXVII (Right of asylum) of the American Declaration on the Rights and Duties of Man ²

II. PROCEEDINGS BEFORE THE IACHR³

Filing of the petition:	December 3, 2018
Notification of the petition to the State:	June 2, 2020
State's first response:	November 13, 2020
Additional observations from the petitioner:	March 10, 2021

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 Declaration (ratification of the OAS Charter on June 19, 1951)

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	None
Exhaustion of domestic remedies or applicability of an exception to the rule:	Yes, in terms of Section VII
Timeliness of the petition:	Yes, in terms of Section VII

V. ALLEGED FACTS

1. This petition arises from a series of three executive actions by the President of the United States in 2017 aimed at suspending or barring the entry into the USA of nationals from certain countries with predominantly Muslim populations. The petitioners, Dr. Ismail Elshikh ("Dr. Elshikh") and the Muslim Association of Hawaii ("the MAH") claim that these executive actions violated the American Declaration to the detriment of the petitioners. These rights include the right to equality, and the right to religious freedom.

¹ Hereinafter "United States", "the U.S." or "the State."

² Hereinafter "the American Declaration" or "the Declaration".

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

A. THE POSITION OF THE PETITIONERS

2. According to the petition the executive actions at issue are: (a) Executive Order by President Donald J. Trump (“President Trump”) dated January 27, 2017 (hereafter referred to as “EO-1”); (b) Executive Order by President Trump dated March 6, 2017 (hereafter referred to as “EO-2”); and (c) Presidential Proclamation No. 9645 (hereafter referred to as “the Proclamation”) dated September 24, 2017. The petitioners claim that these executive actions were preceded by a pattern of overt hostility to Muslims by President Trump as manifested during his campaign⁴ for the presidency of the United States (between 2015 and 2017). By way of background, the petitioner Dr. Elshikh is a U.S. citizen of Egyptian descent who has been resident in Hawaii since 2003. Dr. Elshikh’s wife is also U.S. citizen, of Syrian descent. The petition also states that Dr. Elshikh’s brothers-in-law and sisters-in-law are Syrian nationals and residents in Syria who have been barred from entering the United States due to the U.S. government measures complained of in the petition. According to the petition, Dr. Elshikh is also the Imam of the MAH. With respect to the petitioner MAH, this is a nongovernmental entity (based in Manoa, Honolulu) that comprises approximately 4,000 Muslims who are all citizens or permanent residents of the United States. According to the petition, members of the MAH have family members in Syria, Iran, Libya, Somalia, and Yemen, all of which were subject to the executive actions that suspended immigration to the United States.

3. The petitioners state that these executive actions were all challenged before the federal courts, with varying success. However, the legal challenge to these executive actions ultimately ended with a decision of the U.S. Supreme Court on 26 June 2018 that upheld the legality of the Proclamation. For context, the following paragraphs set out a chronology of the executive actions and concomitant litigation (as extracted from the petition).

EO-1

4. EO-1 (issued on January 27, 2017) proclaimed that the entry of immigrants and non-immigrants from Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen “*would be detrimental to the interests of the United States*”. Accordingly, EO-1 suspended the entry into the U.S. of nationals from these countries for a period of 90 days, in order to design and implement new security measures with respect to immigrants and nonimmigrants from those countries. The petition states that the populations of all countries listed in EO-1 are predominantly Muslim; and that the EO-1 did not impose suspensions on entry from citizens of any country not populated predominantly by Muslims.

5. According to the petition, EO-1 did not exempt lawful permanent residents, holders of valid student or work visas, foreign investors supervising their investments, or legitimate refugees or asylum seekers. In this regard, the petition alleges that at the time, there were 52,275 lawful permanent residents from the countries listed in EO-1 living in the United States. Any that had been outside of the United States on vacation, visiting family, for work or school, or for any other reason, were prevented from returning home and detained at the airport or sent to (or kept in) a foreign country without preparation or resources. Refugees and asylum seekers were refused entry as well and either detained or returned to their country of origin⁵.

6. EO-1 was immediately challenged by several private litigants and multiple U.S. states as contrary to U.S. immigration legislation and the U.S. Constitution. Dr. Elshikh and the MAH were among the plaintiffs who filed lawsuits challenging the suspension. These legal challenges resulted in injunctions being issued by various district federal courts to bar the implementation of EO-1. Ultimately, the issue was

⁴ The petitioners offer several examples of statements made by President Trump during this campaign. According to the petitioners, one example occurred on December 7, 2015, when the Trump’s campaign announced that: “*Donald J. Trump is calling for a total and complete shutdown of Muslims entering the United States until our country’s representatives can figure out what is going on.*”

⁵ The petition claims that following implementation of EO-1, asylum seekers from the listed countries who were present in the United States were expelled without an asylum hearing. The petition gives the following example: on January 28, 2018, a Syrian woman traveling to the United States from a third country was denied entry and forced to return to her port of origin.

considered by the U.S. Court of Appeals for the Ninth Circuit, which, on February 9, 2017, upheld the grant of a nationwide injunction (blocking the implementation of EO-1).

EO-2

7. On March 6, 2017, EO-2 was issued by President Trump, which revoked EO-1. EO-2 took effect on March 16, 2017. According to the petition EO-2 maintained the suspension of immigration from all the countries listed in EO-1 except Iraq. Like EO-1, EO-2 was the subject of multiple legal challenges in the district federal courts of various states of the USA (including Hawaii). The petitioners were parties to the challenge initiated before the district federal courts of Hawaii. Injunctions were granted by some of these courts, including districts courts in Hawaii and Maryland. Ultimately, these challenges culminated in appeals, by the State, to the to the U.S. Court of Appeals for the Ninth Circuit and the U.S. Court of Appeals for the Fourth Circuit. Both Courts of Appeals upheld the injunctions granted by the lower district federal courts. The Fourth Circuit made its ruling on May 25, 2017, while the Ninth Circuit made its ruling on June 17, 2017. The U.S. government then filed petitions for review of both decisions with the U.S. Supreme Court. The Supreme Court granted certiorari and consolidated the petitions. In June 2017, it issued an opinion granting the government's applications to temporarily stay the injunctions (and thereby allow the EO-2 to take effect), but only with respect to "*foreign nationals who lack any bona fide relationship with a person or entity in the United States*". It otherwise left the injunctions in place pending final consideration of the EO-2. The Court did not definitively decide the legality or constitutionality of the EO-2; however, because the U.S. government requested that the Court defer consideration until a new policy (which was then being drafted) could replace EO-2.

Proclamation

8. On 24 September 2017, President Trump issued Proclamation No. 9645, which replaced EO-2. According to the petitioners, the Proclamation differed in some respects from the EO-2, but in substance it upheld it. It made no significant changes to the immigration ban and the list of countries targeted, or the basis on which the countries were targeted.

9. The Proclamation was challenged in the district courts by the petitioners, various U.S. states, and others, and it was found unconstitutional or ultra vires under the Immigration and Nationality Act ("INA"). Consequently, the Proclamation was enjoined by the courts from being implemented. Subsequently, the case involving the petitioners (*Hawaii v. Trump*), was considered by the U.S. Court of Appeals for the Ninth Circuit. On 22 December 2017, the Ninth Circuit upheld the injunctive relief granted by the lower courts, holding that the Proclamation exceeded the President's delegated statutory authority (under the INA). However, the Ninth Circuit limited the scope of the injunctive relief "*foreign nationals who have a bona fide relationship with a person or entity in the United States*." The Ninth Circuit declined to rule on the compatibility of the Proclamation with the constitutional prohibition on religious discrimination.

10. In January 2018, the U.S. government challenged the decision of the Ninth Circuit before the U.S. Supreme Court, by way of certiorari. On June 26, 2018, the U.S. Supreme Court by majority substantially reversed the decision of the Ninth Circuit. According to the petition, the U.S. Supreme Court upheld the constitutionality and legality of the Proclamation, ruling that the Proclamation was consistent with the "*comprehensive delegation*" of authority to the President under the INA. The Court rejected the argument that the Proclamation violated the constitutional prohibition on discrimination based on religion. The Court held that the Proclamation is "*facially neutral toward religion*", and invokes "*national security*", and that accordingly, any actual discriminatory motive or effect is irrelevant. Further, the Court held that because the Proclamation dealt with matters of national security, the Court afforded great deference to the executive branch and reviewed the Proclamation based on whether it was "*plausibly related to the Government's stated objective to protect the country*" and its national security.

Some collateral effects of the executive actions and ensuing litigation on the petitioners

11. According to the petition, Dr. Elshikh's family had, in September 2015, filed an application for an immigrant visa for his mother-in-law (who resided in Syria). The application was approved in February 2016. However, following the issuance of EO-1 in January 2017, Dr. Elshikh and his family were informed that the application for the immigrant visa had been placed on hold. After EO-1 was enjoined by the courts in 2017, Dr. Elshikh's family were notified that the application for immigrant visa had progressed to the next stage, and that Dr. Elshikh's mother-in-law would be interviewed at an overseas embassy. According to the petition, Dr. Elshikh's mother-in-law was eventually allowed to enter the United States with a grant of lawful permanent residence while enforcement of the suspension (of EO-1) was enjoined by courts.

12. In March 2017, after EO-1 was enjoined by the courts, Dr. Elshikh's family received notice that his mother-in-law's visa had progressed to the next stage and that she would be interviewed at an overseas embassy. She was eventually allowed to enter the United States with a grant of lawful permanent residence while enforcement of the suspension was enjoined by courts. However, because of the Proclamation, and its enforcement by the U.S. Supreme Court, Dr. Elshikh and his family remain unable to receive visits from other family members in Syria, including four brothers and one sister of Dr. Elshikh's wife. This is because the Proclamation suspends the entry of Syrian national indefinitely. Accordingly, Dr. Elshikh and his family are uncertain of when they will see these family members again. The petition claims that members of the MAH have experienced similar effects, given that their families include nationals of Iran, Libya, Somalia, Syria, and Yemen.

13. The petitioners submit that in considering their claims under the American Declaration, the Commission may consider other sources of international human rights. In this regard, the petitioners refer to international instruments such as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights ("ICCPR") and the International Convention on the Elimination of All Forms of Racial Discrimination ("CERD").

14. The petitioners submit that domestic remedies were effectively exhausted with the decision of the U.S. Supreme Court on June 26, 2018, which upheld the legality of the Proclamation. The petitioners indicate that the case was remanded to the lower courts for further proceedings. However, given the interpretation of U.S. law by the U.S. Supreme Court, the petitioners considered that there was no possibility of prevailing in the lower courts. Accordingly, the petitioners voluntarily withdrew their lawsuit on August 13, 2018. The petitioners state that the petition was filed on December 3, 2018. Accordingly, the petitioners affirm that the petition was filed within six months of the decision of the U.S. Supreme Court and therefore complies with Article 32 (1) of the Commission's Rules of Procedure.

15. The petitioners generally reject the observations of State, affirming that the petition is admissible. Regarding the arguments of the State about the competence of the Commission, the petitioners offer the following rebuttals. Firstly, the petitioners assert that the Commission has competence *ratione personae* to entertain claims from the MAH, primarily on the authority of Article 23 of the Commission's Rules of Procedure. The petitioners emphasize that the petition does not allege violations of the MAH's rights, but violations of the rights of members of MAH. Secondly, the petitioners affirm that the Commission is entitled to consider other sources of law in interpreting the State's obligations under the American Declaration. Accordingly, any consideration of such other sources of law does not deprive the Commission of competence *ratione materiae*. Thirdly, regarding the State's submission on competence *ratione loci*, the petitioners contend, inter alia, that alleged violations principally affected the petitioners and other persons who were within the jurisdiction of the United States at various times during the relevant period. In this regard, the petitioners also contend that over one hundred holders of valid U.S. entry visas, including immigrant visas (lawful permanent residents), were detained in U.S. airports or on U.S.- flagged airplanes after EO-1 was issued and returned to their country of origin.

16. The petitioners affirm that they exhausted domestic remedies. Contrary to the State's submission, the petitioners allege that all relevant claims in the petition were all raised before all relevant U.S. courts, including the U.S. Supreme Court; and that the documentation presented to the courts in respect of these claims also included *amicus curiae* briefs.

17. The petitioners reject the State's contention that the petition's claims are inadmissible under Article 34 (a) and 34 (b) of the Commission's Rules of Procedure. Generally, the petitioners reaffirm that the petition has established *prima facie* violations of the American Declaration (including the right to equality under the law and the right to family). Regarding the State's submission on the right to due process, the petitioners contend that the State has incorrectly claimed that the petitioners invoked Article XXVI of the Declaration. The petitioners indicated that they did not make a claim under this provision, but instead, made a claim under Articles XVIII and XXV⁶ (with respect to due process). Regarding the State's observations on the right to asylum, the petitioners submit that they have a direct and personal interest in ensuring that friends and family members threatened with persecution in the states subject to the "Muslim ban" of EO-1, EO-2, and the Proclamation are not denied their right to seek protection as refugees under the American Declaration and international human rights treaties binding on the United States.

18. The petitioners reject the State's submission that the fourth instance formula applies to the petition. The petitioners argue that they are not inviting the Commission to second-guess the U.S. Supreme Court's decisions on U.S. municipal law. The petitioners further submit that their claims are based on commitments made by the State under the American Declaration; and that the U.S. Supreme Court did not consider the American Declaration or any aspect of international human rights law in arriving at its decision. Accordingly, the petitioners submit that the Commission has competence to evaluate all the petitioners' claims.

19. Finally, the petitioners indicate that on January 20, 2021, the Proclamation was revoked by President Joseph R. Biden, Jr.

B. THE POSITION OF THE UNITED STATES

20. The State contests the admissibility of the petition on several grounds, submitting that: (a) the petitioners have failed to pursue and exhaust domestic remedies (pursuant to Article 31 of the Commission's Rules of Procedure); (b) the petitioners have failed to state facts that tend to establish violations of any rights (pursuant to Article 34 (a) of the Commission's Rules of Procedure); and (c) that the claims are otherwise manifestly groundless (pursuant to Article 34 (b) of the Commission's Rules of Procedure. The State also submits that the petition is, at least in part, beyond the *ratione personae*, *ratione materiae*, and *ratione loci* competence of the Commission. The State also contends that any consideration of the petition would violate the Commission's fourth instance doctrine.

Jurisdictional issues

21. The State contends that the Commission has competence *ratione personae* to review petitions that allege concrete violations of the rights of specific individuals, whether separately or as part of a group, in order that the Commission can determine the nature and extent of the State's responsibility for those violation. In this respect, the State argues that the Commission only has competence to review particularized claims with respect to Dr. Elshikh. To the extent that the petition presents generalized allegations of the violation of the rights of the approximately 4,000 members of the MAH, the State contends that such claims are beyond the competence *ratione personae* of the Commission. The State also argues that only individuals may be beneficiaries of human rights obligations, and not non-governmental organizations. Accordingly, any claim by the MAH is similarly beyond the competence *ratione personae* of the Commission.

⁶ This appears to be a mistake by the petitioners, as there is no mention Article XXV in the petition.

22. The State notes that although the petitioners anchor their claims in specific provisions of the American Declaration that they have attempted to expand the competence of the Commission by invoking an array of other international instruments to substantiate their claims that international legal obligations have been violated. For the State, claims based on such international instruments and purported authorities beyond the American Declaration are beyond the competence *ratione materiae* of the Commission and must be rejected as inadmissible.

23. The State argues that many of the claims in the petition relate to alleged harms suffered not by the petitioners, but by unnamed classes of individuals beyond the territory and jurisdiction of the United States. In this regard, the State mentions as an example, the petition's due process claims that aliens holding valid visas were denied entry into the United States. The State asserts that the human rights commitments of the United States under the American Declaration do not extend extraterritorially to individuals beyond the jurisdiction of the United States. Accordingly, the State concludes that such claims are beyond the competence *ratione loci* of the Commission and must be dismissed as inadmissible.

Exhaustion of domestic remedies

24. The State acknowledges that the petitioners challenged the Proclamation in the courts but contends that this challenge was ultimately confined to the issue of right to equality to law. The State indicates that to the extent that the petitioners present a claim that Dr. Elshikh's right to equality was violated, that claim may have been exhausted. However, the State contends that Dr. Elshikh's pursuit of his right to equality claim with respect to the Proclamation is not sufficient to satisfy the exhaustion requirement for other individuals with respect to alleged violations of other rights or with respect to other executive actions. The State argues that petitioners are obliged to pursue their specific claims under domestic law to address their concerns before invoking the Commission's competence. The State contends that the petitioners have not done so; and accordingly, have not satisfied their duty to demonstrate they have "*invoked and exhausted*" domestic remedies under Article 31 of the Commission's Rules of Procedure.

Rejection of claims (pursuant to Article 34 (a) and (b) of Commission's Rule of Procedure

25. Generally, the State contends that all the claims of the petitioners fail to state any facts to support violations of the American Declaration and are otherwise manifestly groundless. In respect of the petitioners' claim under Article II of the Declaration (right to equality before law), the State asserts that the petitioners have indicated that they are all U.S. citizens and lawful permanent residents of the United States. The State argues that the Proclamation does not apply to citizens and permanent residents, and that accordingly, there is no basis to claim a violation of the right to equality before the law. The State indicates that the petitioners may disagree with the Proclamation, but that such disagreement is insufficient to substantiate their claim of violation of the right to equality before the law.

26. Regarding the alleged violation of Article VI (right to family), the State notes that the petitioners have complained of obstacles in receiving visits from family members who resides in countries covered by the Proclamation. The State contends such an allegation is not sufficient to state facts that tend to establish that violations of Article VI of the Declaration. The State adds that the Proclamation expressly provides that a waiver of its restrictions may be granted where the foreign national seeks to enter the United States to visit or reside with a close family member (e.g., a spouse, child, or parent) who is a United States citizen, lawful permanent resident, or alien lawfully admitted on a valid nonimmigrant visa, and the denial of entry would cause the foreign national undue hardship.

27. The State notes that the petition presents a generalized claim that asylum seekers from certain countries who were present in the United States were expelled without an asylum hearing, in violation of Article XXVII of the American Declaration. However, the State emphasizes that the petitioners are all U.S. citizens and lawful permanent residents of the United States; and accordingly, they are not eligible to seek and receive asylum in the United States and therefore their right of asylum cannot have been violated by the United States. The State further submits that the Proclamation exempts from its restrictions any foreign national who has been granted asylum by the United States; any refugee who has already been admitted to

the United States; or any individual who has been granted withholding of removal, advance parole, or protection under the Convention Against Torture.

28. The State contends that the petitioners have failed to establish that the Proclamation deprived the petitioners of the right to due process of law (pursuant to Article XXVI of the American Declaration). The State underscores that the petitioners are U.S. citizens or permanent residents, and accordingly, are not subject to any entry restrictions under the Proclamation. For the State, any entry restrictions under the Proclamation could not have deprived them of due process.

Fourth instance formula

29. The State contends that to the extent that the petitioners pursued domestic remedies, the petition constitutes an effort by petitioners to use the Commission as a “fourth instance” body to review claims already heard and rejected by U.S. courts. In this regard, the State notes that the Commission has repeatedly stated that it may not serve as an appellate court to examine alleged errors of internal law or fact that may have been committed by the domestic courts acting within their jurisdiction. In the instant case, the State argues that with respect to the Proclamation, the petitioners are relitigating claims that were unsuccessful in domestic litigation; and that this violates the fourth instance formula established by the Commission. Accordingly, the State concludes that the petition should be rejected as inadmissible.

VI. ISSUES OF COMPETENCE

30. The State claims that the petition is, at least in part, beyond the *ratione materiae*, *ratione loci*, and *ratione personae* competence of the Commission. With respect to the issue of competence *ratione materiae*, the State contends that the petitioners’ reliance on international instruments/jurisprudence outside the Inter-American System places the claims of the petition outside of the competence *ratione materiae* of the Commission. However, in accordance with the normative framework of the system, when examining individual cases concerning non-parties to the American Convention, the Commission looks to the American Declaration as the primary source of international obligation and applicable law. This does not mean that the Commission may not refer to other sources of law in effectuating its mandate. The Commission is mandated by its Statute to examine claims alleging the violation of a right protected under the Declaration, the fact that the resolution of such a claim may require reference to other international instruments or jurisprudence treaty is no bar to jurisdiction. The Commission accordingly concludes that it does have competence *ratione materiae* to consider the claims in the petition.

31. The State argues that many of the claims in the petition relate extend not only to the petitioners, but also to unnamed classes of individuals who are beyond the territory and jurisdiction of the United States. With respect to these classes of individuals, the State submits that such claims are beyond the competence *ratione loci* of the Commission. The Commission considers that the reference to these individuals appears, *prima facie*, to be in corroboration of the allegations advanced by the petitioners about the effect of the executive actions on their rights (the petitioners). At all material times, the Commission notes that the petitioners were in the territory of the State, and that their complaint relates to executive action that also occurred in the territory of the State. Accordingly, the Commission considers that it has competence *ratione loci* over the petition.

32. Concerning the *ratione personae* competence, the State contends that claims based on *actio popularis* are inadmissible because they are outside the Commission’s competence *ratione personae*. The State argues that the Commission only has competence to review specific claims with respect to Dr. Ismail Elshikh, as the *ratione personae* competence refers to individual petitions that allege concrete violations of the rights of specific individuals, whether separately or as part of a group, in order that the Commission can determine the nature and extent of the State’s responsibility for those violations. It cites the Commission’s jurisprudence stating that its governing instruments do not allow for an *actio popularis*. Thus, the U.S. asserts that the petition presents generalized allegations of the violation of the rights of the approximately 4000 members of the MAH, which renders this petition into an *action popularis*.

33. In this regard, the Commission has consistently interpreted its Rules of Procedure as to require that for a petition to be admissible that there must be specific victims, who have been individualized and identified, or a group of specific victims which is comprised of identifiable individuals⁷. Therefore, in a case like the present, a general claims concerning 4000 unidentified victims that are members of the MAH fall under the category of *actio popularis* and render this petition inadmissible in this respect. The IACHR concludes that it does not have competence *ratione personae* to decide on the matter of abstract alleged victims. Therefore, the Commission will proceed with the admissibility assessment of this petition only with regard to Dr. Ismail Elshikh and his family.

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

34. In accordance with Article 31(1) of the Rules of Procedure of the Inter-American Commission, for a petition to be admissible, domestic remedies must have been pursued and exhausted pursuant to generally recognized principles of international law. This requirement is aimed at enabling national authorities to take notice of the alleged violation of the protected right and, if appropriate, resolve the matter before it is heard by an international body.

35. The Commission observes that the petitioners invoked or were otherwise involved in various domestic legal actions before the federal courts aimed at challenging the executive actions, including the Proclamation. During this period, the petitioners obtained injunctive relief from some of the federal courts, that blocked the implementation of these executive actions. However, ultimately, the State successfully appealed to the U.S. Supreme Court which, on June 26, 2018, upheld the legality of the Proclamation. The State has argued that the petitioners have not exhausted domestic remedies, because the domestic remedied pursued by the petitioners were confined to only one of their claims, namely, an alleged violation of the right to equality before the law.

36. However, based on the record, the Commission considers that the petitioners pursued all their claims before the domestic courts. Additionally, the Commission has long established that if petitioners have endeavored to resolve the matter by making use of a valid, adequate alternative available in the domestic legal system and the State had an opportunity to remedy the issue within its jurisdiction, the purpose of the international legal precept is fulfilled⁸. The Commission therefore concludes that the domestic remedies were exhausted with the US Supreme Court's decision of June 26, 2018. Moreover, the Commission takes into consideration the general effects of this decision rendered by the Supreme Court. Given that the petition was submitted on December 3, 2018, the Commission deems that the petition was submitted within the six-month deadline prescribed by Article 32 (1) of the Commission's Rules of Procedure

VIII. ANALYSIS OF COLORABLE CLAIM

37. The Commission notes that this petition alleges multiple violations of the American Declaration (including the right to equality and the right to family) arising from a series of executive actions by the U.S. President in 2017 that allegedly barred the entry of persons into the U.S. from predominantly Muslim countries. The Commission observes that even though the Proclamation was upheld by the U.S. Supreme Court's ruling, it was not applied the Dr. Elshikh's family, and it was eventually reversed by the new President in January 2021. Indeed, based on available information, Dr. Elshikh's mother-in-law was granted permanent residency, and his siblings-in-law are now able to enter the country.

38. Therefore, the Commission concludes that the State has remedied the situation that gave rise to this petition and the alleged violations contained therein, rendering it inadmissible under Article 34 (a) of the IACHR's Rules of Procedure.

⁷ IACHR, Report No. 57/08, Petition 283-06. Inadmissibility. Mario Roberto Chang Bravo. Guatemala. July 24, 2008, para. 38; IACHR, Report No. 100/14, Petition 11.082, Inadmissibility, International Abductions, United States, November 7, 2014, para. 27.

⁸ IACHR, Report No. 279/21, Petition 2106-12. Admissibility. Huitosachi, Mogotavo and Bacajipare Communities of the Raramuri indigenous peoples. Mexico. October 29, 2021, para. 36.

39. In spite of the previous conclusion, concerning the instant case, the Commission recalls that Article II of the Declaration prohibits deliberately discriminatory policies and practices, and those that have a discriminatory effect against a certain category of person, even when the discriminatory intent cannot be proved.⁹ Under principle 12 of the Inter-American Principles on the Human Rights of all Migrants, Refugees, Stateless Persons and Victims of Human Trafficking, “*Distinctions in the treatment of migrants are permissible, including in the regulation of admission and exclusion, only where the distinction is made pursuant to a legitimate aim, the distinction has an objective justification, and reasonable proportionality exists between the means employed and the goals pursued.*”¹⁰ In the specific case of the executive actions banning entry to persons of certain countries, even though the State invoked national security as its legitimate aim, the general provisions of the Orders and the proclamation impeded, in practice, the analysis of necessity and proportionality in a case-by-case basis of immigration and asylum requests submitted by all persons that were nationals or residents of the banned countries.

40. Consequently, the measures adopted by the State did not prove to be necessary nor proportional to the aim set in the executive actions. The Commission emphasizes that States are not allowed to implement discriminatory policies, even in the name of national security, or under the color of the law. Particularly, in a brief analysis of the Executive Orders, the Commission stated that:

The measures envisaged in these executive orders reflect a high degree of discrimination of migrant communities and minority groups, particularly Latinos and Muslims or those perceived as such. [...] Human rights norms and standards prohibit discrimination based on national origin or religion. The State has an obligation to identify those among migrants who need special safeguards —such as asylum seekers and refugees, and victims of human trafficking, among others— and to adopt measures to protect them. States should also adopt measures to guarantee the rights to due process and to judicial protection in the context of immigration proceedings and proceedings to determine refugee status, the right to family unity, the right to seek and receive asylum, the principle of *non-refoulement*, the prohibition on rejection at the border, and the prohibition on the collective expulsion of aliens.¹¹

IX. DECISION

1. To find the instant petition inadmissible; and
2. To notify the parties of this decision; 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 1st day of the month of November, 2022. (Signed:) Julissa Mantilla Falcón, President; Margarete May Macaulay, Second Vice President; Joel Hernández, and Roberta Clarke, Commissioners.

⁹ IACHR, Thematic Report on *Human Mobility: Inter-American Standards*, OEA/Ser.L/V/II, Doc. 46/15 31 December 2015, para. 191.

¹⁰ IACHR, Res. 4/19: Inter-American Principles on the Human Rights of all Migrants, Refugees, Stateless Persons and Victims of Human Trafficking, 7 December 2019, Principle No. 12, para 3.

¹¹ IACHR, Press Release no. 6/17, *IACHR Expresses Concern over Executive Orders on Immigration and Refugees in the United States*, 1st February 2017.