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REPORT No. 168/20
PETITION 1183-10
REPORT ON ADMISSIBILITY

GILLES BIKINDOU AND FAMILY
UNITED STATES OF AMERICA

Approved electronically by the Commission on July 2, 2020.

Cite as: IACHR, Report No. 168/20, Petition 1183-10. Admissibility. Gilles Bikindou and family.
United States of America. July 2, 2020.

I. INFORMATION ABOUT THE PETITION

Petitioner:	Gilles Bikindou
Alleged victim:	Gilles Bikindou and Family
Respondent State:	United States of America
Rights invoked:	None specified

II. PROCEEDINGS BEFORE THE IACHR¹

Filing of the petition:	August 23, 2010
Additional information received at the stage of initial review:	October 5, 2010
Notification of the petition to the State:	February 2, 2011
State's first response:	December 6, 2016
Additional observations from the petitioner:	October 9, 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 Declaration of the Rights and Duties of Man (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	Articles XI (Right to the preservation of health and to well-being) XVIII (right to fair trial) and XXVII (Right to seek asylum) of the American Declaration of the Rights and Duties of Man.
Exhaustion of domestic remedies or applicability of an exception to the rule:	Yes, in terms of Section VI
Timeliness of the petition:	Yes, in terms of Section VI

¹ The observations submitted by each party were duly transmitted to the opposing party.

V. ALLEGED FACTS

1. This petition deals with the refusal of asylum to Gilles Bikindou (“the petitioner” or “alleged victim”) and withholding of removal and alleged implications thereof, including risk of persecution and lack of access to adequate medical treatment for HIV.

2. According to the petitioner, he is citizen of the Democratic Republic of the Congo (DRC), who arrived in the United States of America on July 12, 2004 on a J-1 student visa to pursue a Master’s Degree at Columbia University. However, according to the record, the petitioner never actually attended Columbia University, because of financial reasons². At the time of his arrival in the United States of America, the petitioner alleges that he was an employee of the government of the DRC.

3. In March 2005, the petitioner applied to the Department of Homeland Security (“DHS”) for asylum and withholding of removal based primarily on the ground that he would be at risk of persecution were he returned to the DRC³. According to the record, the DHS interviewed the petitioner in March 2005 to assess his eligibility for asylum and withholding of removal, following which the DHS refused the petitioner’s application. Subsequently, the petitioner’s asylum application was referred to an Immigration Judge for the initiation of removal proceedings. Following a preliminary hearing before the Immigration Judge in August 2006, a hearing on the merits was scheduled for April 23, 2007. According to the petitioner, he was diagnosed with HIV in September 2006. During the hearing of April 23, 2007, the petitioner sought to submit evidence regarding his medical condition, but this was refused by the Immigration Judge primarily because it was only “tangentially related” to the petitioner’s application for asylum, and thus was inadmissible. On that day, the petitioner testified in support of his asylum application and the Immigration Judge indicated that a subsequent hearing would be scheduled to allow the petitioner to present the testimony of a supporting witness.

4. According to the petitioner, the Immigration Judge did not schedule a subsequent hearing, and on August 22, 2007, issued a decision on the merits of the petitioner’s application. The Immigration Judge dismissed the petitioner’s application, ruling that the petitioner had failed to (a) provide credible testimony or to adequately corroborate his claims; (b) establish past persecution; (c) demonstrate a sufficient likelihood of future persecution. As a result, the Immigration Judge ordered the removal of the petitioner to the DRC. The petitioner subsequently appealed to the Board of Immigration Appeals (“BIA”), challenging not only the substantive decision of the Immigration Judge, but also on the ground that the Immigration Judge had issued a decision without first allowing the petitioner to present the testimony of a supporting witness. On December 21, 2008, the BIA allowed the appeal and remanded the case to the Immigration Judge to rehear the application and to consider the testimony of the petitioner’s witness. On January 26, 2010, the Immigration Judge issued a new decision which again denied the petitioner’s request for asylum and withholding of removal. The grounds for dismissal largely mirrored the first decision. The petitioner claims that he was not notified of this decision until June 9, 2010. According to the petitioner, this late notification prevented him from initiating a timely appeal (within 90 days). Thus, the petitioner argues that he was ultimately prevented from exhausting domestic remedies. According to the record, the petitioner was represented by counsel during the judicial proceedings relating to his asylum claim, and indicated that this counsel is taking steps to reopen his asylum claim.

5. The petitioner argues that removal to DRC would violate the principle of *non-refoulement*, given (a) the risk of persecution; and (b) his HIV status. With regard to the former issue, the petitioner contends that international human rights law prohibits the deportation of a person where there are substantial grounds for believing that he would be subjected to torture or other cruel, inhuman, or degrading punishment or treatment. With regard to the latter issue, the petitioner states that he receives adequate medical treatment in

² According to the petitioner, the government of the DRC reneged on a promise to provide him funding for his university studies.

³ In his asylum application, the petitioner claimed that (a) he had fled the DRC in April 1999 because of fighting in the DRC; (b) that on his return to the DRC in May 1999, he was subjected to a week-long detention and mistreatment by officials of the DRC; (c) he was a witness to aspects of an event referred to as “the Disappeared of the Beach”, in which up to 350 other returnees were allegedly disappeared; (d) that he fears persecution by the DRC government, because he (as a government employee) has refused to support the DRC’s version of events relating to “the Disappeared of the Beach”.

the United States of America, but that he would be unlikely to have the requisite resources to access the medical treatment necessary in the DRC or relevant support systems. The petitioner adds that while anti-retroviral medication is generally available in the DRC, there are factors, such as discrimination and mismanagement that might reduce access to this medication. The petitioner contends that the risk of discrimination would be heightened given his current relationship with the government of the DRC. The petitioner also claims that in the absence of the treatment that he currently receives in the United States, he would be at risk of illness or premature death⁴. According to the record, the petitioner states that he has not yet been removed from the United States of America.

6. According to the State, the petition is inadmissible for failure to (a) exhaust domestic remedies; and (b) to state facts that tend to establish violations of the American Declaration. With regard to the question of exhaustion of domestic remedies, the State doesn't dispute the chronology of judicial proceedings set out by the petitioner, or the petitioner's allegation that he was unaware of the January 26 2010 decision of the Immigration Judge until five months later. However, the State contends that a "timely appeal" to the Board of Immigration Appeals was not the only domestic remedy available to the petitioner. In this regard, the State submits that the petitioner could have filed, and is still eligible to file a motion to reopen his case with the Immigration Court, requesting the Immigration Judge to reopen proceedings *sua sponte*, for the purpose of reissuing his January 26, 2010 decision, so that the petitioner could then file a timely appeal with the Board of Immigration Appeals. The State further argues that with regard to the exclusion of medical evidence by the Immigration Judge in 2007, that the petitioner did not appeal this ruling to the Board of Immigration Appeals (which ultimately remitted the case for further hearing by the Immigration Judge). The State also indicates that it was open to the petitioner to challenge any decision of the Board of Immigration Appeals (arising from the 2010 judgment) to the Federal Court of Appeals. Ultimately, the State contends that the petitioner has so far failed to take any of these steps (despite having the assistance of counsel) and therefore has failed to exhaust available domestic remedies.

7. With regard to the issue of prima facie violations of the American Declaration, the State cites Article XXVI of the American Declaration, with particular reference to the provision "Every person accused of an offense has the right ... not to receive cruel, infamous or unusual punishment." In this regard, the State contends that this provision (a) only to a criminal context and not a civil immigration context; and (b) does not include an implied *non-refoulement* obligation⁵. The State emphasizes that the petitioner is not accused of any offense and that an order of removal does not constitute punishment. With respect to the petitioner's medical condition, the State contends that the petitioner has not provided any evidence to corroborate his claims regarding accessibility to medical care in the receiving country.

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

8. The petitioner contends that he was effectively prevented from filing a timely appeal to the judgment of January 26, 2010, because he was not informed of the judgment until five months after it had been delivered. This late notification has not been contested by the State. However, the State contends that the petitioner is, and remains eligible to apply to reopen the proceedings that led to this judgment, and if warranted, to further challenge this judgment before the Board of Immigration Appeals and the Federal Court of Appeals. In the Commission's view, the State's position requires the petitioner to rectify the late notification, without providing any basis for the suitability of this remedy or the likelihood of success (in having the proceedings reopened). In the circumstances, the Commission considers that the petitioner was effectively prevented from pursuing domestic remedies (following the judgment of January 26, 2010), is accordingly

⁴ Mr. Bilindou's case was the focus of public attention in the US media: See <https://www.cnn.com/2018/02/22/us/church-fights-deportation-gilles-bikindou/index.html>.

⁵ The State cites its disagreement with the IACHR case of Andrea Mortlock [IACHR Report N° 63/08 CASE 12.534 ADMISSIBILITY and MERITS, UNITED STATES July 25, 2008] in which the IACHR found that Article XXVI includes an implied obligation of non-refoulement. This was a case in which the IACHR found that Ms. Mortlock, an HIV patient was at risk of deportation to Jamaica where she would be prevented from receiving necessary medical care to treat her illness and therefore subject to "cruel, infamous or unusual punishment" within the meaning of Articles XI and XXVI of the American Declaration, given the uncertainties confronting her in Jamaica through shortage of the necessary drugs and medical facilities available there.

exempted from the requirement of exhausting domestic remedies pursuant to Article 31 (2) (b) of the Commission's Rules of Procedure. The Commission notes that the petition was filed on August 23, 2010, which it considers to be a reasonable time (pursuant to Article 32.2 of its Rules of Procedure), having regard for the chronology of circumstances that gave rise to the petition. Accordingly, the IACHR considers that the petition meets the requirement of timeliness and is therefore admissible

VII. ANALYSIS OF COLORABLE CLAIM

9. The Commission notes that this petition contains allegations that relate to (a) the refusal of the petitioner's asylum claim; (b) the lack of judicial consideration of his HIV status; and (c) late notification of a judgment of January 26, 2010 that allegedly prevented a timely appeal.

10. In view of the elements of fact and law presented by the parties and the nature of the matter brought to its attention, the Commission believes that the claims of the petitioner are not manifestly unfounded and require a substantive study on the merits as the alleged facts, particularly with regard to lack of judicial consideration to a change in the status quo to the detriment of the alleged victim subjected to a deportation procedure, as Mr. Bikindou learned that he was HIV positive during his asylum application, and as such, if deported could face cruel and degrading treatment or even death given the poor access to medical care for people living with HIV in DRC and discrimination. In this regard, the Commission considers that the allegations if corroborated could characterize violations of Articles XI (right to the preservation of health and to well-being) XVIII (right to fair trial) and XXVII (Right to seek asylum) of the American Declaration of the Rights and Duties of Man.

VIII. DECISION

1. To find the instant petition admissible in relation to Articles XI, XVIII, and XXVII of the American Declaration of the Rights and Duties of Man; 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 2nd day of the month of July, 2020. Joel Hernández, President; Antonia Urrejola, First Vice President; Flávia Piovesan, Second Vice President; Margarette May Macaulay, and Esmeralda E. Arosemena Bernal de Troitiño, Commissioners.