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REPORT No. 213/24
PETITION 1600-14
REPORT ON INADMISSIBILITY

JAMES COLIN MCNAUGHTON
COLOMBIA

Approved electronically by the Commission on November 27, 2024.

Cite as: IACHR, Report No. 213/24, Petition 1600-14. Inadmissibility. James Colin McNaughton. Colombia. November 27, 2024.

I. INFORMATION ABOUT THE PETITION

Petitioner:	James Colin McNaughton
Alleged victims:	James Colin McNaughton
Respondent State:	Colombia ¹
Rights invoked:	Articles 7 (personal liberty), 8 (judicial guarantees), 11 (protection of honor and dignity), 22 (movement and residence), 24 (equality before the law), and 25 (judicial protection) of the American Convention on Human Rights, ² in relation to its Articles 1(1) and 2; Articles V, IX, XVII, XVIII, XXV, and XXVI of the American Declaration of the Rights and Duties of Man

II. PROCEEDINGS BEFORE THE IACHR³

Filing of the petition:	November 21, 2014
Additional information received during the initial review stage:	May 9, 2017 and March 14, 2018
Notification of the petition to the State:	November 4, 2019
Request for extension:	February 21, 2020
State's first response:	August 28, 2020
Additional observations by the petitioner:	September 21, 2020 and December 16, 2020
Additional observations on the part of the State:	May 6, 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 Convention (deposit of instrument of ratification done July 31, 1973)

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:	No
Timeliness of the petition:	No

¹ In keeping with Article 17(2)(a) of the Commission's Rules of Procedure, Commissioner Carlos Bernal Pulido, of Colombian nationality, did not participate in the decision in the instant matter.

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

³ Each party's observations were duly considered and forwarded to the other party.

V. THE PARTIES' POSITIONS

Petitioner

1. The petitioner and alleged victim, a U.S. citizen who was residing in Colombia, alleged he was arrested without a judicial warrant, kept from communicating with the consulate, and arbitrarily expelled from the country.

2. The petitioner alleged that he lived in Colombia continuously, without having left the country, from February 11, 2003, and was granted a resident visa with no expiration date on June 28, 2006. He was intending to apply for Colombian nationality. Nonetheless, on Monday, April 28, 2014, at approximately 9:00 AM, he was at his home where he had lived for two weeks in the town of Taganga, Santa Marta, with the iron gate door closed, when two officials came from the immigration agency Migración Colombia and four officers from the Taganga police.

3. According to his account, the immigration officer informed him that he had to go with them to the office to read a document on the computer. The petitioner requested that they print the document and give him a copy. The officer said that it wasn't possible, and that he should accompany them. Seconds later, without an arrest warrant, a search warrant, or his consent, the officers entered his house and removed him by force, barefoot, and wearing only pants. The officers searched his home, apparently looking for identification papers. They left the house with his current U.S. passport and three other passports, all expired. They gave him a pair of shoes and a shirt taken from his house. He was transferred in the back of a car of the immigration officers, where he was threatened with an electronic pistol and handcuffed. The immigration and police officers took him to the office of Migración Colombia in Santa Marta.

4. The petitioner alleges that he asked to make a phone call to the consular agent of the United States in Barranquilla, whose number he had in his wallet. Nonetheless, the officer informed him that he had already notified U.S. authorities by email, and did not allow him to make any phone call. He further alleges that he was held incommunicado for 23 hours. They asked him for his ID card and presented him with a seven-page document, asking him to sign the last page. The document, Resolution No. 19160 of April 7, 2014, contained complaints and accusations of which the petitioner had no knowledge, and in relation to which he had no opportunity to defend himself. A public defender was present while the petitioner once again asked to place a call to the consulate, yet the request was denied.

5. At 4:30 PM he was taken to the Santa Marta airport and forced to board Avianca flight #9767 to Bogotá. During the flight he asked to borrow a cell phone and called the U.S. consular agent, who promised to contact the U.S. embassy. In Bogotá, Migración Colombia placed him in solitary confinement at the airport and subsequently put him onto another flight, to Miami. They did not return two of his expired passports. He states that he had applied for asylum, but once again he was held in incommunicado detention and he was forced to board the flight to Miami, where he arrived without money or belongings.

6. As regards the judicial remedies aimed at resolving the facts alleged, the petitioner argues in generic terms that it was not possible to exhaust them because there are no domestic laws that ensure due process of law nor was there a judicial investigation.

7. With respect to the processing of the petition before the IACHR, in his additional observations the petitioner argues that he filed the petition with the IACHR on October 15, 2014, within the time for filing. And he further argues that the State did not comply with the regulatory deadline of three months for filing its first response after the petition was forwarded to it.

The Colombian State

8. The State filed a detailed account of the administrative process that led to the expulsion of U.S. citizen James Colin McNaughton from Colombia. The expulsion was based on his aggressive and erratic behavior

towards the members of the community of Taganga, Santa Marta. According to the State, the petitioner exhibited aggressive conduct, made constant threats to many persons, and habitually consumed hallucinogenic substances. These actions had a serious negative impact on the peaceful coexistence, tranquility, and security of the inhabitants of the region, disturbing public order and putting at risk his life and the lives of the others. In response, Migración Colombia initiated an administrative procedure in keeping with Decree 4000 of 2004 and Decree 834 of 2013. This process culminated in Resolution No. 19160 of April 7, 2014, which ordered the expulsion of Mr. McNaughton from Colombian territory.

9. The State emphasizes that the functions of the Special Administrative Unit Migración Colombia (UAEMC) are based on the principle of protection of the State and in its power to guarantee that both nationals and foreigners comply with constitutional and statutory provisions in the national territory. Migración Colombia states that in all migration-related administrative proceedings due process is respected and guaranteed, along with foreigners' rights to defense and to respond to the arguments of the State, strictly abiding by the laws regulating that power.

10. The State argues that according to Article 100 of the 1991 Constitution, equality of rights between nationals and foreigners is not absolute and may be limited by the Constitution and statute law. The Constitutional Court, in Judgment SU-677 of 2017, affirmed that the recognition of foreigners' rights also gives rise to the requirements to comply with the Constitution and Colombian statute law. In this context, any administrative act that determines the expulsion of a foreigner must meet with the standard of "sufficient reason" ("*razón suficiente*") that is evidenced by breaching a state mandate. These mandates include not only preserving the life, honor, and property of the citizens, but also preserving peace and tranquility. The State argues that the conduct of Mr. McNaughton went against these principles.

11. The facts that motivated the decision to expel him included that in November 2013 approximately 40 residents of Taganga lodged complaints against Mr. McNaughton because of his aggressive and erratic behavior, disturbing the peace (*perturbación de la convivencia*), and his use of hallucinogenic substances. The complainants included neighbors and the owner of the room he had rented. The complaints indicated that Mr. McNaughton had threatened them with a knife on multiple occasions. In response to these complaints, officials of Migración Colombia carried out work orders No. 6766/173 of December 18, 2013 and No. 7289 of January 16, 2014, with the objective of verifying the situation denounced and Mr. McNaughton's immigration status. After these verifications, the Caribbean Regional Office of Migración Colombia suggested beginning an administration action that could lead to a possible sanction of deportation or expulsion.

12. On January 28, 2014 Migration Colombia issued Order No. 30269, in case No. 2013-44724-198193, ordering that an immigration-related administrative action be initiated to establish possible infractions by Mr. McNaughton. On March 7, 2014, the authorities proceeded to notify him of the order initiating an administrative action. Nonetheless, when agents went to the address where he presumably resided, it was apparent that Mr. McNaughton was not living there and was living as an indigent in the streets. Upon being notified of the order, he refused to sign the communication, accordingly five inhabitants of the zone served as witnesses. The administrative act was not appealed by Mr. McNaughton, even though he could have filed a motion for reconsideration.

13. The immigration authorities corroborated the negative impact on public order, public health, and social peace by the petitioner. Therefore, they considered the expulsion measure urgent; accordingly, on April 7, 2014, they handed down Resolution No. 19160, by which it was decided to expel Mr. McNaughton from Colombian territory. This resolution was duly reasoned, in light of the facts narrated, and considered, among other aspects, the constitutional principle of the sovereignty of the State, the discretionary authority of the National Government to authorize the entry and stay of foreigners in the country, and the power of the State to oversee compliance with constitutional and statutory provisions by nationals and foreigners in the national territory, especially in migration-related matters.

14. On April 28, 2014, notice of the above-mentioned Resolution No. 19160 was given to Mr. McNaughton, who was given an explanation of the contents, and it was then read. The consular agent of the United States was also informed of the situation of the U.S. citizen. Nonetheless, once again Mr. McNaughton

refused to sign the notice, accordingly three witnesses signed it. Although no administrative remedies were in order, Mr. McNaughton did not file any regular remedy before the contentious-administrative courts nor a *tutela* action.

15. Pursuant to the expulsion resolution, the national authorities held Mr. McNaughton on a preventive basis. The petitioner was taken to the offices of the Migratory Services Facilitating Center-Caribbean Regional Center, in Santa Marta. He refused to sign the preventive hold document. This situation was reported immediately to the consular agent of the United States. Both Mr. McNaughton and the Embassy of the United States in Colombia were informed of the administrative acts issued by the Colombian authorities on migration matters, which were duly motivated in the legislation in force and in the facts of the case.

16. According to the State, due process and the right to defense of the foreign citizen were respected at all times; and he had an opportunity to respond within 15 days to citizens' complaints against him. Nonetheless, Mr. McNaughton did not collaborate and refused to sign the notice of the order to initiate the administrative action. In addition, he had the opportunity to bring domestic actions as he considered relevant for remedying the infractions alleged internationally, but did not do so. He merely refused to sign any notice and to lash out at the officials.

17. On April 28, 2014, Mr. McNaughton was transferred to Bogotá on a commercial flight for the purpose of embarking him on a flight to Miami, United States. Nonetheless, his violent attitude impeded it, thus the trip was rescheduled and carried out on April 29, 2014, finalizing the process of his expulsion from Colombia. Mr. McNaughton returned to his country; Colombia followed the protocols in terms of paying for the tickets and ensuring he be kept in custody by Migración Colombia, after communicating with the consular agent of the United States.

18. After concluding the expulsion process, there was no request, claim, or complaint by Mr. McNaughton before any Colombian agency. The Ministry of National Defense reported that, having consulted the National Legal System for the National Police, no records were found of contentious-administrative actions against the National Police for these facts. Nor was any action filed against the Ministry of Foreign Relations or Migración Colombia. The Office of the Procurator General of the Nation (Procuraduría General de la Nación) reported that after consulting the databases of the GEDIS and SIME information systems, no record was found on the filing of complaints, petitions, or applications, nor the initiation of *sua sponte* disciplinary actions with the data produced. Similarly, the Office of the Human Rights Ombudsperson (Defensoría del Pueblo) reported that there were no complaints lodged or remedies pursued for the facts narrated.

19. The State asks the Commission, first, to find that it is not competent in respect of the subject matter to take cognizance of alleged violations of Articles V, IX, XVII, XVIII, XXV, and XXVI of the American Declaration, invoked by the petitioner, considering that Colombia is a party to the American Convention, that the facts occurred after its entry into force, and that the alleged violations are related to rights recognized in the Convention.

20. In addition, it asks that the petition be found inadmissible due to the failure to exhaust domestic remedies. It notes that Mr. McNaughton had an opportunity to challenge the expulsion through two domestic mechanisms: an action for nullity and reestablishment of the right, and a *tutela* action. It explains that administrative acts that affect general or particular interests are subject to judicial review through such actions, established in Articles 84 and 85 of the Contentious-Administrative Code, and enshrined once again in Articles 137 and 138 of Law 1437 of 2011 (Code of Administrative and Contentious-Administrative Procedure). It cites case law from the Constitutional Court, such as Judgment C-199/97, which recognizes that a person harmed by an act of the administration may go before the contentious-administrative courts to seek its annulment and the reestablishment of his or her right. It also mentions Judgment T-500/2018, which recognizes that persons sanctioned with expulsion may request precautionary measures before admission of the action to provisionally protect the subject matter of the proceeding, and the effectiveness of the judgment. Even so, Mr. McNaughton did not pursue any legal defense in Colombia.

21. In addition, the State emphasizes that none of the grounds exempting one from exhausting domestic remedies established at Article 46(2) of the American Convention applies, since there are adequate and effective remedies that are handled respecting due process, and no showing has been made of the existence of obstacles that kept Mr. McNaughton from accessing such remedies.

22. The State also argues that if Mr. McNaughton considered that the immigration-related administrative acts involved errors that negatively affected his fundamental rights, he could have filed a *tutela* action, whose aim is the immediate judicial protection of fundamental rights when they are violated or threatened by act or omission of any authority. Mr. McNaughton could have filed a *tutela* action to challenge the administrative acts that defined his immigration status in Colombia, triggering expeditious judicial intervention. Nonetheless, he did not use this mechanism.

23. The State also argues that the petition is inadmissible due to the failure to respect the rule on timeliness of the filing of the petition. It notes that Resolution No. 19160 of 2014 was notified on April 28, 2014, and that from that moment it was enforceable. Nonetheless, the petitioner filed the complaint with the IACHR in November 2014, seven months after the final domestic decision.

24. Finally, with regard to the petitioner's argument on the failure to comply with the three-month term for responding to the petition before the IACHR, the State notes that in the terms of Article 30(6) of the Commission's Rules of Procedure, the considerations and questions raised to challenge admissibility must be submitted "*as from the time that the relevant parts of the petition are forwarded to the State and prior to the Commission's decision on admissibility.*"

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

25. On a preliminary basis, the Inter-American Commission clarifies that in order to analyze the exhaustion of domestic remedies it will take into account the considerations and questions raised prior to the adoption of this decision on admissibility, which includes all the memorials mentioned in Section II of this report.

26. The subject matter of the petition is the alleged arrest without a judicial order, the lack of communication with the consulate, and the expulsion from the country of Mr. James Colin McNaughton.

27. The State alleges that the petitioner had access to two suitable domestic mechanisms to call into question the expulsion resolution: the action for nullity and reestablishment of the right, and the *tutela* action. In addition, it argues that these mechanisms made it possible to request precautionary measures to safeguard the petitioner's rights, but that he did not make use of them. It argues that the failure to pursue regular remedies, such as the failure to have recourse to a *tutela* action, falls short of meeting the prior exhaustion requirement.

28. For his part, the petitioner alleges generally that he did exhaust domestic remedies due to the absence of effective due process guarantees. Nonetheless, he did not produce specific information on the alleged impossibility of access or the inefficacy of the remedies available.

29. The Inter-American Commission reiterates that the requirement of exhaustion of domestic remedies does not imply that the alleged victims have the obligation to exhaust all possible remedies at their disposal. In this regard, the IACHR has maintained that "*if the alleged victim raised the issue by means of one of*

the valid and adequate alternatives as per the domestic legal system and the State had the opportunity to remedy the issue of its jurisdiction, the purpose of the international provision is satisfied.”⁴

30. In the instant case the Inter-American Commission observes that the State identified specific judicial remedies that the petitioner could have used to challenge the expulsion resolution and the actions of the immigration authorities, such as the action for nullity and reestablishment of rights and the *tutela* action. In this respect the Commission recalls that in the analysis of other petitions referring to the State of Colombia, the action for nullity and reestablishment of rights has been considered, in principle, a valid remedy for challenging resolutions that contain administrative sanctions.⁵ In addition, the *tutela* action, though on occasions not a remedy that a petitioner is obligated to exhaust, has also been considered a suitable remedy for challenging acts contrary to fundamental rights.⁶

31. While the State held that the petitioner and alleged victim could use the action for nullity and reestablishment of rights and the *tutela* action, yet the adequacy and suitability of these remedies was not controverted by the petitioner. In addition, the petitioner did not provide any specific information about the filing of domestic remedies nor did he cite any obstacles that may have kept him from doing so. His general allegations on lack of effective guarantees for due process are not sufficient to exempt the petitioner from having to comply with the prior exhaustion requirement, if the contrary finding does not arise clearly from the record of the petition. The petitioner did not make a showing of having pursued those remedies, nor did he justify his failure to do so. Accordingly, the Commission finds that the requirement of prior exhaustion of domestic remedies established at Article 46(1)(a) of the American Convention has not been met.

VII. DECISION

1. To find this petition inadmissible.
2. To notify the parties of this decision, 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 27th day of the month of November, 2024. (Signed:) Roberta Clarke, President; José Luis Caballero Ochoa, Second Vice President; Arif Bulkan, and Gloria Monique de Mees, Commissioners.

⁴ IACHR, Report No. 150/22. Petition 832-13. Admissibility. Jaime Eduardo Dangond Rodríguez. Colombia. June 30, 2022, para. 22; IACHR, Report No. 70/04, Petition 667/01, Admissibility. Jesús Manuel Naranjo Cárdenas et al., Retired Workers and Pensions of the Venezuelan International Aviation Corporation VIASA, Venezuela, October 15, 2004, para. 52.

⁵ See, e.g., IACHR, Report No. 150/22. Petition 832-13. Admissibility. Jaime Eduardo Dangond Rodríguez. Colombia. June 30, 2022, para. 22; IACHR, Report No. 206/20. Petition 963-10. Inadmissibility. Daniel Geovany Neira Ríos. Colombia. August 5, 2020, para. 9 (d).

⁶ See, e.g., IACHR, Report No. 46/23. Petition 297-12. Admissibility. Fabio Arango Torres. Colombia. March 16, 2023, para. 18; IACHR, Report No. 241/23. Petition 596-10. Admissibility. Mauricio Pimiento Barrera. Colombia. October 10, 2023, para. 25; IACHR, Report No. 372/22. Petition 750-14. Admissibility. Martha González Rodríguez, Álvaro González Santana and family. Colombia. December 19, 2022, paras. 6, 20.