Case of Gonzalo Belano and 807 Other Wairan Persons

v. Republic of Arcadia

Memorial for the State

I. TABLE OF CONTENTS

II. INDEX OF AUTHORITIES 5

III. STATEMENT OF FACTS 10

IV. LEGAL ANALYSIS 13

i. Preliminary Objections 13

A. The Court should find Petitioner's claim inadmissible because Gonzalo Belano and the 807 other Wairan persons did not exhaust the effective and adequate domestic remedies available, and exceptions do not apply. 13

i. Domestic Remedies Were Not Exhausted by any of the Wairan Nationals in Relation to the Claim of a Violation of Nonrefoulement 14

a. The 591 Wairans that did not file a writ of amparo have not exhausted domestic remedies and their claims should be found inadmissible. 14

b. The 217 Wairans who submitted a writ of amparo did not exhaust domestic remedies because an adequate and effective administrative remedy exists which was not pursued. 15

ii. Domestic Remedies Were Not Exhausted in Relation to the Other Claims 16

iii. Domestic Remedies Were Not Exhausted Because Exceptions Do Not Apply 17

B. The claims of the 771 unidentified persons must be dismissed because the facts do not merit flexibility, and Arcadia's right to defense has not been satisfied. 18

ii. Merits 19

A. Arcadia's Asylum and Refugee Status Application Procedure has not Violated Article 8, 25, or 22.7 ACHR 19

i. Arcadia Guaranteed Access to Assistance 20

ii. Arcadia Conducted an Objective Examination with a Personal Interview by the Appropriate Authority 20

iii. The Decision to Deny Refugee Status to was Duly and Expressly Founded..... 21

iv. Arcadia Kept the Applicant Information Confidential from Puerto Waira..... 22

B. Arcadia has not violated Article 8, 25, or 22.8 ACHR in the proceedings that may culminate in deportation because minimum guarantees of due process were met and effective and adequate remedies were available...... 23

i. Arcadia has not violated Article 8, 25, or 22.8 rights in its deportation of Wairans to Tlaxcochitlan because minimum guarantees of due process were met. 23

a. Arcadia met its obligations in relation to the first set of Pacheco factors because the 808 Wairans were offered legal assistance, had the right to submit their case for appeal, and were only deported after a reasoned decision. 24

b. Arcadia met its obligations in relation to the second set of Pacheco factors because the 808 Wairans were provided information on appealing, granted a reasonable period to do so, and the deportation was suspended awaiting adjudication. 25

ii. Arcadia has not violated Article 8, 25, or 22.8 rights in its deportation of Wairans to Tlaxcochitlan because effective and adequate remedies were available to appeal the decision to deport. 26

C. Arcadia did not violate Article 24 when it instituted a specific measure to address Puerto Wairan asylum applicants because the national origin distinction was reasonable and objective. 27

D. Arcadia has not violated Article 4 in its deportation of Wairans to Tlaxcochitlan because no indirect refoulement took place, assurances were gained from Tlaxcochitlan, and the 808 Wairans presented no special distinguishing features to enable Arcadia to foresee their treatment. 29

i. Arcadia has not violated Article 4 because no indirect refoulement took place where no evidence suggests that the 808 Wairans judicial guarantees would be violated in Tlaxcochitlan. 29

ii. Arcadia has not violated Article 4 because no indirect refoulement took place since assurances were gained from Tlaxcochitlan regarding the non-deportation of Wairans. 31

iii. In the alternative, even if indirect refoulement took place, Arcadia has not violated Article 4 in its deportation of Wairans to Tlaxcochitlan because the 808 Wairans presented no special distinguishing features to enable Arcadia to foresee their treatment, and the deportation was in the interest of preserving the Wairans right to life..... 34

E. Arcadia did not violate Articles 7 or 8 ACHR in relation to the detention of the 808 Wairans because the detention was legal, non-arbitrary, information on free legal assistance and consular assistance was provided, the Wairans were heard case-by-case, and effective remedies were available. 36

i. Arcadia did not violate Article 7.2 because the detention was legal under Arcadian law . 37

ii. Arcadia did not violate Article 7.3 because the detention was not arbitrary..... 38

a. The detention was not arbitrary because it pursued a legitimate purpose..... 38

b. The Detention was not arbitrary because it was Necessary and Proportionate. 39

ii. Arcadia did not violate Articles 7.4 or 8 because the detained Wairans were offered information on their rights, consular contact and assistance. 40

iii. Arcadia did not violate Article 7.5 ACHR because the 808 Wairans appeared before authorized officials without delay and their claims were heard case-by-case to decide on their release. 41

iv. Arcadia did not violate Articles 7.6 or 8 because the 808 Wairans had access to effective remedies before a court, legal assistance was offered, and there was the possibility of appeal. 42

F. Arcadia Did Not Violate Articles 19 and 17 ACHR in its Determination to Grant Children Refugee Status Because the Best Interest of the Child was Considered in Light of the Context 43

V. REQUEST FOR RELIEF 46

II. INDEX OF AUTHORITIES

A. Books and Articles

Articles

Hubing, Bridget. *International Child Adoptions: Who Should Decide What is in the Best Interest of the Family*, 15 Notre Dame J.L. Ethics & Pub. Pol'y 655 (2001). **(p. 41)**

B. Case-Law

1. Inter-American Court of Human Rights

Advisory Opinions

Exceptions to the exhaustion of domestic remedies (Art. 46(1), 46(2)(a) and 46(2)(b) American Convention on Human Rights), Advisory Opinion OC-11/90, Inter-Am. Ct. H.R., Ser. A, No. 11, (10 August 1990). **(p. 16)**

Juridical Condition and Human Rights of the Child, Advisory Opinion OC-17/2002 Inter-Am. Ct. H.R., Ser. A, No. 17, (28 August 2002). **(p. 42, 43)**

Juridical Condition and Rights of the Undocumented Migrants, Advisory Opinion OC- 18/03 nter-Am. Ct. H.R., Ser. A, No. 18, (17 September 2003). **(p. 26)**

La institución del asilo y su reconocimiento como derecho humano en el sistema interamericano de protección, Advisory Opinion OC-25/18, Inter-Am. Ct. H.R., Ser. A, No. 18, (30 May 2018). **(p. 27)**

*The Right to Information on Consular Assistance in the Framework of the Guarantees of Due Process of Law***,** Advisory Opinion OC-16/99, Inter-Am. Ct. H.R., Ser. A, No. 16, (October 1, 1999). **(p. 23)**

Proposed Amendments of the Naturalization Provisions of the Constitution of Costa Rica, Advisory Opinion OC-4/84, Inter-Am. Ct. H.R., Ser. A, No. 4, (19 January 19 1984). **(p. 26)**

Contentious Cases

Case of Chocrón Chocrón v. Venezuela (Judgment), Inter-Am. Ct. H.R., Ser. C, No. 227. (1 July 2011). **(p. 21)**

Case of Constitutional Court v. Peru (Judgment), Inter-Am. Ct. H.R., Ser. C, No. 71, (31 January 2001). **(p. 40)**

Case of Expelled Dominicans and Haitians v. Dominican Republic (Judgment), Inter-Am. Ct. H.R., Ser. C, No. 282, (28 August 2014). **(p. 39)**

Case of Furlan and Family v Argentina (Judgment), Inter-Am. Ct. H.R., Ser. C, No. 246, (31 August 2012). **(p. 14)**

Case of Juan Humberto Sánchez v. Honduras (Judgment), Inter-Am. Ct. H.R., Ser. C, No. 99, (7 June 2003). **(p. 39)**

Case of López Mendoza v. Venezuela (Judgment), Inter-Am. Ct. H.R., Series C No. 233 (1 September 2011). **(p. 20)**

Case of "Mapiripán Massacre" v. Colombia (Judgment), Inter-Am. Ct. H.R., Ser. C, No. 122, (15 September 2005). **(p. 17)**

Case of Nadege Dorzema et al. v. Dominican Republic (Judgment), Inter-Am. Ct. H.R., Ser. C, No. 251, (24 October 2012). **(p. 22, 39)**

Case of Pacheco Tineo Family v. Plurinational State of Bolivia (Judgment), Inter-Am. Ct. H.R., Ser. C, No. 272, (25 November 2013). **(p. 18 -25, 28, 42)**

Case of the "Juvenile Reeducation Institute" v. Paraguay (Judgment), Inter-Am. Ct. H.R., Ser. C, No. 112, (2 September 2004). **(p. 17)**

Case of the Ituango Massacres v. Colombia (Judgment), Inter-Am. Ct. H.R., Ser. C, No. 148, (1 July 2006). **(p. 17)**

Case of the Moiwana Community v. Suriname (Judgment), Inter-Am. Ct. H.R., Ser. C, No. 124, (15 June 2005). **(p. 17)**

Case of Velásquez-Rodríguez v. Honduras (Judgment), Inter-Am. Ct. H.R., Ser. C, No. 4, (29 July 1988). **(p. 12 -15)**

Case of Wong Ho Wing v Peru (Judgement), Inter-Am. Ct. H.R., Ser. C, No. 297, (June 30, 2015). **(p. 30 -31)**

López Álvarez v. Honduras (Judgment), Inter-Am. Ct. H.R., Ser. C, No. 141 (Feb. 1, 2006). **(p. 40)**

Vélez Loor v. Panama (Judgment), Inter-Am. Ct. H.R. (ser. C) No. 132, (Nov. 23, 2010). **(p. 35)**

Case of Yatama v Nicaragua (Judgment), Inter-Am. Ct. H.R., Ser. C, No. 127, (23 June 2005). **(p. 26)**

2. Inter-American Commission of Human Rights

John Doe et al. v Canada, IACHR, Case 12.586, Report No. 78/11 (21 July 2011). **(p. 28 -29)**

Jorge Rafael Valdivia Ruiz v Peru, IACHR, Petition 1166-04, Report No. 43/09 (27 March 2009). **(p. 16)**

Luis Alberto Rojas Marín v Peru, IACHR, Petition 446-09, Report No. 99/14 (6 November 2014). **(p. 16)**

Mariblanca Staff Wilson and Oscar E. Ceville R. v Panama, IACHR, Case 12.303, Report No. 89/03 (22 October 2003). **(p. 13)**

Tracey Lee Housel v United States, IACHR, Petition 129/02, Report No. 16/04 (27 February 2004). **(p. 12)**

3. European Court on Human Rights

K. and T. v Finland, ECtHR, App. No. 25702/94 (12 July 2001). **(p. 44)**

K.R.S. v United Kingdom, ECtHR, App. No. 32733/08, (2 December 2008). **(p. 29 -30)**

M.S.S. v Greece, ECtHR, App. No. 30696/09, (21 January 2011). **(p. 29)**

Othman v United Kingdom, ECtHR, App. No. 8139/09, (17 January 2012). **(p. 30- 32)**

Saadi v Italy, ECtHR, App. No. 37201/06, (28 February 2008). **(p. 30 -31, 34, 38)**

T.I. v United Kingdom, ECtHR, App. No. 43844/98, (7 March 2000). **(p. 28)**

Vilvarajah and Others v United Kingdom, ECtHR, App. Nos. 13163/87, 13164/87, 13165/87, 13447/87, 13448/87 (30 October 1991). **(p. 33 -34)**

Willis v. United Kingdom, ECtHR, App. No. 36042/97, (11 June 2002). **(p. 26)**

4. Other Human Right Bodies

U.N. Committee on the Elimination of Racial Discrimination (CERD), *CERD General Recommendation XXX on Discrimination Against Non-Citizens,* (1 October 2002). **(p. 26)**

U.N. High Commissioner for Refugees, *Asylum Processes (Fair and efficient asylum procedure),* EC/GC/01/12, (31 May 2001). **(p. 21)**

U.N. High Commissioner for Refugees, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol,* (26 January 2007). **(p. 22)**

U.N. High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees,* HCR/IP/4/Eng/REV.1 Reedited, Geneva, (January 1992). **(p. 20)**

U.N. Human Rights Committee, *Lassâd Aouf v Belgium,* Communication No. 1010/2001, Doc. CCPR/C/86/D/1010/2001, (17 March 2006). **(p. 15 -16)**

U.N. Human Rights Committee, *Refugee and Asylum Seekers Duties,*

https://help.unhcr.org/brazil/en/rights-and-duties/refugees-and-asylum-seekers-duties/ **(p. 19)**

III. STATEMENT OF FACTS

The respondent State of Arcadia ("Arcadia") has been a migratory destination due to it sound democracy, strong public institutions, strong economy, low levels of crime, and integration policies for migrants and refugees.[1]

In August 2014, about 7,000 people arrived at Arcadia's border from Puerto Waira, without any legal status, most of them of African descent.[2] By the end of 2015, there were 18,000 refugees from Puerto Waira in Arcadia.[3] Due to the unprecedented number of Wairans, Arcadia established a procedure specific to Puerto Wairan asylum applicants,[4] and on August 20, 2014[5] announced a policy for prima facie recognition as refugees. Within 24 hours of submitting an application to the National Commission for Refugees (CONARE), every asylum application is reviewed, an individual interview conducted, and the Ministry of Foreign Affairs and the Intelligence Service completes a background check.[6]

Following assessment, 808 Wairans were excluded on the basis of Article 40(2) of Arcadia's Law on Refugees for having records of serious non-political crimes, such as kidnapping, murder, and sexual violence.[7] No child or person of extreme vulnerability was excluded from refugee status,[8] although some children were separated from parents who were excluded.[9] Those children were placed in the care of their closest relatives in Arcadia or in foster care until a close relative was located.[10]

[1] Hypothetical Case (Hypothetical), paras. 8 & 10; Clarification Questions (Questions), para. 7
[2] Hypothetical, para. 15; Questions, no. 5.
[3] Questions, no. 43.
[4] Hypothetical, para. 17.
[5] Hypothetical, para. 18.
[6] Hypothetical, paras. 20 & 21.
[7] Questions, no. 2; Hypothetical, para. 13.
[8] Questions, no. 17; Questions, no. 21.
[9] Questions, no. 21.
[10] Questions, no. 21.

Those adults that were excluded were taken immediately before an administrative authority after their arrest[11] and placed in detention to ensure their appearance at asylum proceedings, and compliance with their deportation order.[12] Each was informed that they were being refused refugee status due to their criminal records, and of their rights, including: legal remedies, access to free legal assistance, and the possibility of contacting their consulate.[13]

Within the 45 days established by Arcadian law, each detainee's case was individually evaluated.[14] 729 Wairans faced a high risk and 79, including Gonzalo Belano, faced a reasonable likelihood of torture if returned to Puerto Waira.[15]

Due in part to these determinations, and in response to public marches where the 808 Wairans were called "cockroaches,"[16] Arcadia created awareness-raising campaigns to ensure that anti-immigrant sentiment does not permeate in society.[17] Arcadia determined it could not take in the 808 Wairans and asked for regional support on November 21, 2015 - a call that went unanswered.[18] On March 2, 2015, authorities from Arcadia and its neighbor Tlaxcochitlán convened a meeting,[19] where Tlaxcochitlan agreed to Arcadia's request to accept the Wairans and not deport them, in exchange for support for migration control and development.[20] Because Tlaxcochitlan ultimately deported the 808 Wairans, Arcadia withheld the second part of the payment.[21]

[11] Questions, no. 50.
[12] Questions, no. 15.
[13] Questions, nos. 50 & 10.
[14] Hypothetical, para. 23.
[15] Hypothetical, para. 23.
[16] Hypothetical, para. 24, 25.
[17] Hypothetical, para. 25.
[18] Hypothetical, para. 26.
[19] Hypothetical, para. 27.
[20] Hypothetical, para. 27.
[21] Questions, no. 66.

The Wairans had access to food, health and other services in detention.[22] On February 10, 2015, 217 Wairans individually filed a writ of amparo to stop the deportation.[23] The deportation was suspended while the merits of the amparo were being adjudicated.[24] Protection was denied after a case-by-case contextual review of the country of origin,[25] and this deportation order was upheld after review.[26] These 217 Wairans were deported to Tlaxcochitlan on May 5, 2015, while the 591 that did not file an amparo were deported on March 16, 2015.[27] Upon their subsequent expulsion from Tlaxcochitlan to Puerto Waira, 29 deportees were killed, including Gonzalo Belano, and 7 were disappeared.[28]

The Legal Clinic brought an action on November 15, 2015 on behalf of the 808 deportees seeking reparation for alleged administrative irregularities.[29] The action was filed with the Arcadian consulate, rather than the court of competent jurisdiction as Arcadian law requires, and so the complaint was dismissed on December 15, 2015. [30]

Arcardia has ratified most of the instruments of the Inter-American Human Rights System, and all the treaties of the universal system.[31]

[22] Questions,, para 18.
[23] Hypothetical, para. 28.
[24] Hypothetical, para. 28.
[25] Questions, no. 69.
[26] Hypothetical, para. 28.
[27] Hypothetical, paras. 27 & 28.
[28] Hypothetical, para. 31.
[29] Hypothetical, para. 32.
[30] Hypothetical, paras. 32 & 33.
[31] Hypothetical, para. 9.

IV. LEGAL ANALYSIS

i. Preliminary Objections

A. The Court should find Petitioner's claim inadmissible because Gonzalo Belano and the 807 other Wairan persons did not exhaust the effective and adequate domestic remedies available, and exceptions do not apply.

Articles 46(1)(a), 46(2) and 47(a) of the American Convention on Human Rights (ACHR) require that domestic remedies be exhausted in order for a claim to be admissible.[32] Domestic remedies must be adequate, i.e. suitable to address an infringement of the legal right alleged to be violated,[33] and effective, i.e. capable of producing the result for which they were designed.[34] Effective remedies include an examination of the merits.[35] The Court has held that once a State shows the existence of domestic remedies that should have been utilized, the burden shifts to the petitioner to prove those remedies were exhausted or that an exception applies.[36]

Here, three domestic legal avenues for remedy were clearly explained to all the Wairan nationals in detention.[37] One remedy was constitutional, including the writ of amparo and review proceedings, a second was administrative, and a third allowed reparation for administrative irregularities.[38] The amparo and administrative remedies were adequate and effective remedies for the claim of non-refoulement. The 591 Wairans who did not file an amparo did not comply with the exhaustion requirement. Similarly, the 217 who did file an amparo still did not comply with the exhaustion requirement since they did not pursue the administrative route. In relation to

[32] Organization of American States (OAS), American Convention on Human Rights, "Pact of San Jose", Costa Rica, 22 November 1969, Art. 46(1)(a), 46(2) and 47(a).
[33] *Case of Velásquez-Rodríguez v. Honduras* (Judgment), Inter-Am. Ct. H.R., Ser. C, No. 4, para 64 (29 July 1988).
[34] *Tracey Lee Housel v United States*, IACHR, Petition 129/02, Report No. 16/04, para. 31 (27 February 2004).
[35] *Tracey*, para. 68.
[36] *Tracey*, para. 60.
[37] Questions, no. 50.
[38] Questions, no. 10.

the other claims, remedies were not exhausted because the adequate and effective remedy for reparation of alleged administrative irregularities was not properly pursued by any of the 808 Wairans.

i. Domestic Remedies Were Not Exhausted by any of the Wairan Nationals in Relation to the Claim of a Violation of Nonrefoulement

a. The 591 Wairans that did not file a writ of amparo have not exhausted domestic remedies and their claims should be found inadmissible.

By not filing a writ of amparo, 591 Wairans failed to exhaust domestic remedies for the alleged violation of nonrefoulement and their claim should be found inadmissible. An amparo seeks to protect the fundamental rights of individuals;[39] thus, in the case of Wairans alleging that deportation would constitute an infringement of a right,[40] an amparo is an adequate legal avenue to remedy the claim of a violation of the right to nonrefoulement. For those that did submit the amparo, Arcadia suspended the deportation orders while the merits were being adjudicated.[41] If successful, the amparo would have reversed the deportation orders.[42] In addition, an examination of the merits was conducted.[43] Therefore, the amparo is also an effective tool for addressing the alleged infringement of a right.[44]

In Mariblanca Staff Wilson and Oscar E. Ceville R. v Panama, the Commission found that the petitioner who unlike the other petitioners did not file an amparo to challenge his alleged unjustified dismissal as magistrate in the Panamanian Supreme Court of Justice had not

[39] Questions, no. 10.
[40] Hypothetical, para. 20.
[41] Hypothetical, para. 28.
[42] Hypothetical, para. 28.
[43] Hypothetical, para. 28.
[44] *Velásquez-Rodríguez*, para. 68.

exhausted domestic remedies and his petition was deemed inadmissible.[45] Similarly, the 591 Wairans who did not submit a writ of amparo have not exhausted all adequate and effective domestic remedies and their claim should be found inadmissible.

b. The 217 Wairans who submitted a writ of amparo did not exhaust domestic remedies because an adequate and effective administrative remedy exists which was not pursued.

In *Mariblanca*, the Commission found that even the petitioners who did present an amparo had not exhausted domestic remedies, because another adequate and effective remedy had not been exhausted, namely an independent action for unconstitutionality.[46]

Arcadian officials clearly explained to detainees the second legal avenue: the administrative route.[47] The administrative proceeding would review an administrative decision, such as a deportation order, alleged to have been made unlawfully,[48] and would thus have been an adequate remedy for an alleged violation of the right to nonrefoulement. Since this mechanism, too, could result in the overturning of an administrative decision to deport,[49] it is an effective remedy.

The administrative remedy is not extraordinary because it is intended to review a decision, and not question a law.[50] Unlike motions for cassation, which are sometimes considered extraordinary,[51] a motion for reconsideration is not extraordinary because it consists of the review of a decision alleged to have been unlawful, within the same institution that issued the

[45] *Mariblanca Staff Wilson and Oscar E. Ceville R. v Panama*, IACHR, Petition 12.303, Report No. 89/03, para. 30-32, (22 October 2003).
[46] *Mariblanca*, para. 48.
[47] Questions, nos. 10, 50.
[48] Questions, no. 10.
[49] Questions, no. 10.
[50] *Case of Furlan and Family v Argentina* (Judgment), Inter-Am. Ct. H.R., Ser. C, No. 246, para. 27, (31 August 2012).
[51] *Velásquez-Rodríguez*, para. 69.

initial decision.[52] Since the 217 Wairains, and in fact none of the 808 Petitioners, pursued this adequate, effective and non-extraordinary remedy, their claim does not comply with the ACHR requirements regarding the exhaustion of domestic remedies, and therefore their claims should be found inadmissible.

ii. Domestic Remedies Were Not Exhausted in Relation to the Other Claims

The 808 Wairans did not pursue any domestic legal remedies for any of the other claims alleged, despite the existence of effective and adequate remedies. The amparo filed by 217 Wairans only addressed deportation and, even if successful, would not have addressed alleged violations subsequent to the deportation: the rights to life, a fair trial, judicial protection, personal liberty, the right to seek and be granted asylum, family unity, the best interests of the child nor equal protection.[53] In *Lassâd Aouf v Belgium*, the Human Rights Committee found that the petitioner had not exhausted domestic remedies for all claims of violations of the ICCPR because he had failed to raise alleged violations to his other rights, and therefore the violations he failed to raise were inadmissible.[54]

Although the legal action submitted by the Clinic alleging administrative irregularities and seeking comprehensive reparation would have been adequate (see *Mariblanca*, holding that even an action that was not retroactive but which provided some reparations was adequate[55]) and effective, because the remedy was not denied for a trivial reason,[56] the action did not constitute an exhaustion of domestic remedies because it did not allow Arcadia to respond to all the

[52] Questions, no. 10.
[53] Hypothetical, para. 28.
[54] U.N. Human Rights Committee, *Lassâd Aouf v Belgium*, Communication No. 1010/2001, Doc. CCPR/C/86/D/1010/2001, para. 8.3 (17 March 2006).
[55] *Mariblanca*, para. 48.
[56] Hypothetical, para. 33; *Velásquez-Rodríguez*, para. 68.

claims[57] since it did not address alleged violations of the right to personal liberty, the right to seek and be granted asylum, family unity, the best interests of the child nor equal protection.[58]

The "objective of [the] requirement [to exhaust domestic remedies] is to enable the national authorities to learn of the alleged violation of a protected right and... to have the opportunity to resolve it before it is heard by an international body[59]." However, since Arcadia never had the opportunity to address these claims domestically, they should be found inadmissible.

Additionally, in regards to the three claims the Clinic made, the action was not filed according to the requirements of Arcadian law.[60] In *Jorge Rafael Valdivia Ruiz v Peru*, the Commission found that where the petitioner had the opportunity but failed to answer nor contest a report from a domestic tribunal detailing the adoption of certain measures, his claim was inadmissible.[61] In this case, the Petitioners were made aware of their error a month after their filing and did not correct it.[62] Consequently, Arcadia could not properly adjudicate the claim since it was not properly presented.[63] Thus, the legal action does not meet the requirements of exhaustion of domestic remedies and the claims should be deemed inadmissible.

iii. Domestic Remedies Were Not Exhausted Because Exceptions Do Not Apply

Petitioners have the burden of showing that exceptions to the requirement of exhausting domestic remedies are met. The three exceptions in Article 46(2) ACHR are not met.

[57] Hypothetical, para. 32.
[58] Hypothetical, para. 32.
[59] *Luis Alberto Rojas Marín v Peru*, IACHR, Petition 446-09, Report No. 99/14 (6 November 2014); *Lassâd Aouf*, para. 8.3.
[60] Hypothetical, para. 33.
[61] *Jorge Rafael Valdivia Ruiz v Peru*, IACHR, Petition 1166-04, Report No. 43/09, para. 36-39, (27 March 2009).
[62] Hypothetical, para. 33.
[63] Hypothetical, para. 33.

Additionally, the exception in cases of indigency resulting in an inability to afford court proceedings or counsel, if counsel is necessary to secure a right, does not apply.[64]

B. The claims of the 771 unidentified persons must be dismissed because the facts do not merit flexibility, and Arcadia's right to defense has not been satisfied.

Article 50 ACHR and Article 35 of the Rules of Procedure of the Inter-American Court of Human Rights taken together establish that the report transmitted to the Court "must... identify the alleged victims." The Court has held that "proper identification, by name, of the person whose right or freedom is alleged to have been breached is essential."[65] Within this governing structure, the Court may consider the particularities of each case in applying the requirement of identifying each victim, so long as the right to defense of the parties is respected.[66]

When exercising its discretion to "consider the particularities" of each case, the Court has allowed individualized lists to be provided after the initial application has been submitted,[67] but only in the specific context of massacres, which present "complexities and difficulties in individualizing" alleged victims.[68] Here, the facts are not comparable to a massacre, the accompanying "complexities and difficulties" do not exist, and thus flexibility should not be exercised.

Of the few non-massacre cases where the Court has exercised flexibility in the individualization requirement is *Juvenile Reeducation Center*. In that case, the Court requested that the

[64] *Exceptions to the exhaustion of domestic remedies (Art. 46(1), 46(2)(a) and 46(2)(b) American Convention on Human Rights),* Advisory Opinion OC-11/90, Inter-Am. Ct. H.R., Ser. A, No. 11, para. 22 and 30, (10 August 1990).
[65] Case of the *"Juvenile Reeducation Institute" v. Paraguay* (Judgment), Inter-Am. Ct. H.R., Ser. C, No. 112, para. 107 (2 September 2004).
[66] Case of the *Ituango Massacres v. Colombia* (Judgment), Inter-Am. Ct. H.R., Ser. C, No. 148, (1 July 2006).
[67] *Ituango*, para 94.
[68] *Ituango*, para. 97; Case of "Mapiripán Massacre" v. Colombia (Judgment), Inter-Am. Ct. H.R., Ser. C, No. 122, para 183 (15 September 2005).

Commission provide an individualized list of alleged victims in order to protect the State's right to defense.[69] The Commission forwarded the list to the State, which did not object to the list and adjudication proceeded on merits.[70] Unlike Paraguay in *Reeducation Centre*, here, only 37 of the 808 victims were individualized.[71] Arcadia was not given a chance to object to the inclusion of the other victims since they were not individualized. Deviation from the ACHR and Rules of Procedure would threaten the right to defense, and thus the *effet utile* of Article 23 of the Rules of Procedure.[72] Consequently, these claims should be dismissed.

ii. Merits

A. Arcadia's Asylum and Refugee Status Application Procedure has not Violated Article 8, 25, or 22.7 ACHR

Article 8 ACHR provides the right to judicial protection, and Article 25 to fair trial, with respect to the right "to seek and be granted asylum in a foreign territory, in accordance with the legislation of the state and international conventions."[73] The Convention and Protocol Relating to the Status of Refugees ("Refugee Convention"), which Arcadia ratified, provides that status cannot be granted "to any person with respect to whom there are serious reasons for considering that: (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee."[74] The determination of refugee status must be "based on

[69] *Reeducation*, 109 and 111.
[70] *Reeducation*, para. 112; *Case of the Moiwana Community v. Suriname* (Judgment), Inter-Am. Ct. H.R., Ser. C, No. 124, para. 74, (15 June 2005).
[71] Hypothetical, para. 32.
[72] *Reeducation*, para. 109.
[73] *Case of Pacheco Tineo Family v. Plurinational State of Bolivia* (Judgment), Inter-Am. Ct. H.R., Ser. C, No. 272, para 154 (25 November 2013).
[74] Refugee Convention Article 1(F)(b)

respective fair and competent proceedings."[75] Further, the determination of refugee status must include an assessment and decision of potential risk to the applicant's basic rights.[76]

In accordance with Articles 8, 25, and 22.7 ACHR and UNHCR guidelines, Arcadia has various obligations in its responsibility to accept and grant asylum.[77] First, they must guarantee the applicant the necessary facilities, which includes access to legal assistance.[78] Second, the asylum request must be examined objectively by a competent authority and must include a personal interview.[79] Third, the decision by the competent state organ in the application must be duly and expressly founded.[80] Lastly, the State must maintain the confidentially of an applicant's personal information.[81] Arcardia has met each of these obligations.

i. Arcadia Guaranteed Access to Assistance

Arcadian authorities provided information leaflets to *all* Wairans informing them that they can access consular assistance.[82] Further, authorities informed Wairans, in both writing and verbally, that they could request legal assistance.[83] Thus, Arcadia met its obligations to provide necessary facilities and guidance concerning the asylum procedure to Wairan applicants.

ii. Arcadia Conducted an Objective Examination with a Personal Interview by the Appropriate Authority

[75] *Pacheco*, para. 147.
[76] *Pacheco*, para. 157.
[77] *Pacheco*, para 159.
[78] *Pacheco*, para 159(a).
[79] *Pacheco*, para 159(b).
[80] *Pacheco*, para 159(c).
[81] *Pacheco*, para 159(d).
[82] Questions, no. 9.
[83] Questions, no. 9.

The National Commission for Refugees (CONARE) is the appropriate authority to determine refugee status. [84] CONARE received and considered the application of every Wairan applicant seeking recognition of refugee status in Arcadia.[85] Each Wairan underwent an objective process, submitting an application for refugee recognition, undergoing an interview at the CONARE office,[86] and a background check by the Ministry of Foreign Affairs and the Intelligence Service for refugee determination.[87] Thus, Arcadia met its obligation to make an objective determination.

iii. The Decision to Deny Refugee Status to was Duly and Expressly Founded

The Refugee Convention denies refugee status to any person for "whom there are serious reasons for considering" "has committed a serious non-political crime."[88] The Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees ("The Handbook")[89] states that "a capital crime or a very grave punishable act" constitute a serious non-political crime.[90]

CONARE sought out intelligence to determine whether Gonzalo Belano and 807 other Wairan applicants were eligible to receive refugee status.[91] The intelligence showed that the aforementioned applicants were *convicted* of kidnapping, extortion, murder, sexual violence, drug trafficking, human trafficking, and forcible recruitment,[92] all of which are considered "serious non-political crimes" under article 40(2) of Law on Refugees, which refers to the

[84] CONARE determines refugee status for various members of OAS states, such as Bolivia. UNHCR, "Refugee and Asylum Seekers Duties," https://help.unhcr.org/brazil/en/rights-and-duties/refugees-and-asylum-seekers-duties/
[85] Hypothetical, para. 20.
[86] Hypothetical, para. 20.
[87] Hypothetical, paras. 20 & 21.
[88] Refugee Convention Article 1(F)(b)
[89] The leading source in interpreting The Convention. *See Pacheco* FN 177.
[90] The Handbook, para. 155.
[91] Hypothetical, para. 21.
[92] Questions, no. 2.

Refugee Convention criteria. [93] Furthermore, those convictions were made by a competent court.[94] While Article 40 only requires "reasonable grounds," in this case there was factual certainty that such crimes had been committed. Thus, Arcadia's determination is well-founded and not arbitrary.

This Court in *López Mendoza v. Venezuela* articulated that the "the argumentation of a ruling and of certain administrative actions should allow one to know what the facts, reasons and regulations are on which it bases the decision-making authority, to therefore rule out any hint of arbitrariness."[95] That decision affirmed and expanded on this Court's guarantee that a decision should not be made arbitrarily so to give "credibility to the legal decisions within the framework of a democratic society."[96] Arcadia communicated the reasons for rejecting the refugee applications,[97] thus fulfilling this obligation.

iv. Arcadia Kept the Applicant Information Confidential from Puerto Waira

The UNHCR's Asylum Process document states, "No information on the asylum application should be shared with the country of origin."[98] Since Arcadia did not expulse any applicant to Puerto Waira, it is unlikely Arcadia shared any information with Puerto Waira and thus, Arcadia met its obligation.

In conclusion, Arcadia's rejection of the refugee applications of Gonzalo Belano and 807 Wairans did not violate Article 8, 25, or 22.7 because each determination was made in

[93] Questions, no. 36& 54.
[94] Questions, no. 33.
[95] *Case of López Mendoza v. Venezuela,* para. 141.
[96] *Case of Chocrón Chocrón v. Venezuela,* para. 118.
[97] Questions, no. 50.
[98] UNHCR. Asylum Processes (Fair and efficient asylum procedure). EC/GC/01/12. 31 May 2001, para. 50(m).

accordance with Arcadian domestic legislation, international conventions, and after satisfying the four obligations listed above.

B. Arcadia has not violated Article 8, 25, or 22.8 ACHR in the proceedings that may culminate in deportation because minimum guarantees of due process were met and effective and adequate remedies were available.

Article 8 ACHR provides the right to judicial protection, and Article 25 to fair trial, with respect to the right to non-refoulement.[99] Additionally, under the Refugee Convention, protections against non-refoulment apply to those asylum seekers awaiting determination of their status.[100]

i. Arcadia has not violated Article 8, 25, or 22.8 rights in its deportation of Wairans to Tlaxcochitlan because minimum guarantees of due process were met.

In cases of proceedings that may result in expulsion, "[t]he analysis that the organs of the inter-American system must make is to determine whether the actions of the domestic authorities called on to make that analysis or determination were compatible with the American Convention."[101] Two sets of factors relating to this compatibility are relevant in this regard. Firstly, regarding expulsion, proceedings must be individualized, and asylum seekers must (1) be informed of the reasons for expulsion, including information on the possibility of presenting reasons why she shouldn't be deported, and of receiving legal assistance (including free public services) and consular assistance; (2) have the right to submit the case for appeal; and (3) only be deported after a "reasoned decision in keeping with the law."[102] In a second set of factors, the

[99] ACHR, Art. 22.8. right not to "be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status, or political opinions."; *Pacheco*, para 155.
[100] UN General Assembly, Convention Relating to the Status of Refugees, Art. 33 (28 July 1951); UN High Commissioner for Refugees, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, para. 6 (26 January 2007).
[101] *Pacheco*, para. 159.
[102] *Pacheco*, para. 133; *Nadege Dorzema*, para. 161, 175.

court also sets forth State obligations regarding seeking asylum based on Inter-American and UNHCR guidelines.[103] The latter two of these factors are relevant for asylum seekers who have been denied refugee status: (1) the denied applicant must be provided with information on how to file an appeal and granted a reasonable period to do so; and, (2) the appeal must have suspensive effects while being adjudicated.[104]

In *Pacheco*, the State "took a summary decision on the request, without hearing the applicants by an interview, hearing or other mechanism, without receiving evidence, without assessing the circumstances of the applicants... without granting them the possibility of contesting" the determination, and without even notifying the asylum seekers of their decision to deport them; it was found in violation of its obligations.[105] By contrast, Arcadia fully met the requirements outlined above.

a. Arcadia met its obligations in relation to the first set of Pacheco factors because the 808 Wairans were offered legal assistance, had the right to submit their case for appeal, and were only deported after a reasoned decision.

The Arcadian procedure for determining refugee status involved an individual interview,[106] and those found to have criminal records had their asylum claims examined individually a second time,[107] meeting the requirement of individualized proceedings. The 808 Wairans were informed that they were being refused refugee status due to their criminal records, and were informed of their rights and the legal remedies available.[108] They were also informed of their access to free

[103] *Pacheco*, para. 159.
[104] *Pacheco*, para. 159.
[105] *Pacheco*, para. 174.
[106] Hypothetical, para. 20.
[107] Hypothetical, para. 23; Questions, no. 22.
[108] Questions, no. 50.

legal assistance and contacting their consulate.[109] Thus, Arcadia fulfilled its obligations in relation to factor (1).

Regarding the right to submit their case for review, the fact that 217 Wairans took advantage of a legal remedy shows that all Wairans had this right, whether they took advantage of the possibility or not.[110] In all 217 cases the amparo was properly adjudicated. [111] The eventual deportation of 808 Wairans was carried out only after the claims of each asylum seeker was individually examined and her application excluded based on domestic and international law.[112] Thus, Arcadia has met its obligations under (2) and (3) regarding the expulsion proceedings.

b. Arcadia met its obligations in relation to the second set of Pacheco factors because the 808 Wairans were provided information on appealing, granted a reasonable period to do so, and the deportation was suspended awaiting adjudication.

As discussed above, the Wairans received information on how to file an appeal.[113] Although the timing is unclear from the facts, at the very latest, the 808 Wairans were placed in detention before November 21, the date on which Arcadia asked for regional support to help accommodate the migrants.[114] Those who did not file an amparo were not deported until March 16, 2015,[115] meaning that at minimum they had 115 days to file an appeal. Since 217 Wairans were able to file an appeal within 81 days, 115 days was sufficient time to file an appeal.[116] Therefore,

[109] Questions, no. 50; *The Right to Information on Consular Assistance in the Framework of the Guarantees of Due Process of Law*. Advisory Opinion OC-16/99, Inter-Am. Ct. H.R., Ser. A, No. 16, (October 1, 1999).
[110] Hypothetical, para. 28.
[111] Hypothetical, para. 28.
[112] Hypothetical, para. 23.
[113] Questions, no. 50.
[114] Hypothetical, para. 26.
[115] Hypothetical, para. 27.
[116] Hypothetical, para. 28.

Arcadia met its obligations in relation to seeking asylum under factor (1). Finally, Arcadia also met its obligations under factor (2) because deportation was suspended awaiting adjudication.[117]

ii. Arcadia has not violated Article 8, 25, or 22.8 rights in its deportation of Wairans to Tlaxcochitlan because effective and adequate remedies were available to appeal the decision to deport.

In addition to evaluating the proceedings related to expulsion and seeking asylum, the Court has maintained that it will evaluate whether "rapid, adequate and effective" judicial or administrative remedies, such as an amparo, exist to question a possible violation of 22.7 and 22.8 rights.[118] The Court examines first, whether these remedies existed and if it was possible to exercise them, and second, the appropriateness and effectiveness of the remedies.[119] In *Pacheco*, since the victims were not notified of the denial of their asylum request, the State violated Article 8 of the ACHR and the possibility of appealing was impracticable.[120] Thus, the Court did not go on to evaluate the scope of the remedies.[121]

Here, the 808 Wairans were notified of the reasons for the denial of status.[122] They were told of their possible legal remedies:[123] a constitutional route (amparo), administrative route, and a claim of administrative irregularities,[124] all of which were effective and adequate. [125] Free legal

[117] Hypothetical, para. 28.
[118] *Pacheco*, para. 160.
[119] *Pacheco*, para. 191.
[120] *Pacheco*, para. 194.
[121] *Pacheco*, para. 195.
[122] Questions, no. 50.
[123] Questions, no. 50.
[124] Questions, no. 10.
[125] *See*, supra, Part IV(ii)(A) & Part IV(ii)(B).

assistance was available[126] and 217 Wairans did exercise the remedy of amparo.[127] Thus, unlike the egregious omission by the State in Pacheco, Arcadia did in fact offer multiple remedies and the possibility of exercising them and did not violate Articles 8, 25 and 22.8.

C. Arcadia did not violate Article 24 when it instituted a specific measure to address Puerto Wairan asylum applicants because the national origin distinction was reasonable and objective.

Equality and non-discrimination is a fundamental element of international law.[128] A distinction between groups of people does not violate Article 24 if it is objective and reasonable, and in furtherance of an aim that does not violate international law norms.[129] To be reasonable, the classification must be due to a factual differentiation between that group and others and the aims of the state must be proportional to the use of the factual difference.[130]

Between 2013-2015 there was an 800% increase in asylum seekers from Puerto Waira entering Arcadia. During the same period, Arcadia increased the overall number of people recognized as refugees by 20%,[131] but the number of Puerto Wairans recognized as refugees increased over 300% between 2012-2015.[132] The Puerto Wairan nationality is a unique characteristic of those seeking asylum in Arcadia, and is distinct enough to warrant a classification by Arcadia.

[126] Questions, no. 9.
[127] Hypothetical, para. 28.
[128] Case of *Yatama v Nicaragua* (Judgment), Inter-Am. Ct. H.R., Ser. C, No. 127, para. 185 (23 June 2005).
[129] *Yatama*, para. 185; *Juridical Condition and Rights of the Undocumented Migrants*. Advisory Opinion OC-18/03 of September 17, 2003. Series A No. 18, para. 89; OHCHR CERD General Recommendation XXX on Discrimination Against Non Citizens. Adopted October 1, 2002. Part I, para. 4; and *Proposed Amendments of the Naturalization Provisions of the Constitution of Costa Rica*, Advisory Opinion OC-4/84 of January 19, 1984. Series A No. 4, para. 56; *Eur. Court H.R.,Case of Willis v. The United Kingdom*, Judgment of 11 June 2002, para. 39.
[130] *Yatama*, para. 185; *Proposed Amendments*, para. 57.
[131] Hypothetical, para. 10
[132] Questions, no. 43.

Consequently, Arcadia established a procedure specific to Puerto Wairan asylum applications, after a meeting with the UNHCR and IOM,[133] to "provid[e] all necessary conditions and assistance to the Wairan people[,]" "in accordance with international, constitutional, and legal obligations."[134] and Arcadia's refugee recognition procedure was established in accordance with international law.[135]

The victims may argue the established procedure discriminated against Puerto Wairans because most of the asylum seekers are of African descent[136] and because of their undocumented migrant status.[137] However, the distinction by the procedure was based on national origin, not because of race or immigration status.

Further, Arcadia affirmatively created norms of equality and non-discrimination through awareness-raising campaigns to ensure that anti-immigrant sentiment does not permeate in society.[138] The awareness campaigns not only targeted public servants, but also targeted the general public through employment programs and cooperation with civil society organizations.[139] Consequently, Arcadia met its obligation of equality and non-discrimination under international law.

[133] Hypothetical, para. 17.
[134] Hypothetical, para. 17.
[135] *See* supra Part IV(ii)(A) & Part IV(ii)(B).
[136] Hypothetical, para. 15; International Convention on the Elimination of All Forms of Racial Discrimination. January 4, 1969. Article 1.1; *Juridical Condition and Rights of the Undocumented Migrants*. Advisory Opinion, para 103.
[137] Questions, no. 5 &15; International Convention on the Elimination of All Forms of Racial Discrimination. January 4, 1969. Article 1.3.
[138] Hypothetical, para. 25.
[139] Questions, no. 40.

D. Arcadia has not violated Article 4 in its deportation of Wairans to Tlaxcochitlan because no indirect refoulement took place, assurances were gained from Tlaxcochitlan, and the 808 Wairans presented no special distinguishing features to enable Arcadia to foresee their treatment.

In the jurisprudence of the European Court of Human Rights (ECHR), although the two rights are distinct, the right to life as it relates to refoulement, either direct or indirect, can be analyzed in the same manner as the application of the right to be free from torture, inhuman or degrading treatment or punishment applied in relation to refoulement.[140] In Consultative Opinion OC-25/18, the Inter-American Court stated that in the context of extradition, the right to life and judicial guarantees are also implicated, in addition to the right to be free from torture.[141] Thus, the following section uses jurisprudence regarding the right to be free from torture as well as the right to life to analyze the present claim of a violation of Article 4 of the ACHR.

i. Arcadia has not violated Article 4 because no indirect refoulement took place where no evidence suggests that the 808 Wairans judicial guarantees would be violated in Tlaxcochitlan.

ACHR 22.8 contemplates the possibility of an asylum seeker being refouled indirectly via a third country, that is, being sent to a third country when the sending country knows that from there, there is a high likelihood that the asylum seeker may be sent back to their country of origin.[142] In *John Doe et al. v Canada*, the Inter-American Commission states "the individualized assessment with respect to the risk of indirect refoulement does not necessarily involve the same level of due process required for a hearing on the merits of asylum claim or other claim for protection."[143]

[140] *T.I. v United Kingdom*, ECtHR, App. No. 43844/98, p. 19 (7 March 2000); *M.S.S. v United Kingdom*, ECtHR, App. No. 30696/09, para. 361, (21 January 2011).
[141] *La institución del asilo y su reconocimiento como derecho human en el sistema interamericano de protección*, Advisory Opinion OC-25/18, Inter-Am. Ct. H.R., Ser. A, No. 18, para. 182 (30 May 2018).
[142] *Pacheco*, para. 153; *Institución del asilo*, para. 196.
[143] *John Doe et al. v Canada*, IACHR, Case 12.586, Report No. 78/11, para. 111 (21 July 2011).

The Commission states that before removing an asylum seeker, the State must perform an individualized assessment of the risk that the claimant's rights to due process in expulsion proceedings could be violated, and could therefore be refouled to the original country.[144]

The lower bar for this "individualized assessment" is clarified in its citation to *KRS v the United Kingdom*, in which the ECHR considered that in the absence of proof to the contrary, it must be presumed that Greece would comply with its non-refoulement obligations.[145] Additionally, the UK had satisfied the requirement of an individualized assessment, since UK border patrol was given assurances from Greek authorities that they did not refoule asylum seekers to Iran.[146] Thus, the UK was not in violation of the right to be free from torture in returning the asylum seeker to Greece.[147] In contrast, the purpose of the policy in John Doe was to eliminate the need for an individualized assessment by sending claimants back to the US until a future appointment.[148]

Here, firstly, no evidence was available that indicated that the judicial guarantees of the 808 Wairans would be violated in Tlaxcochitlan.[149] Unlike the case of *M.S.S.*, where the ECHR found that the availability of "numerous reports and materials"[150] meant that "general situation was known to the Belgian authorities,"[151] no such information was available to Arcadian officials.[152] Secondly, Arcadia specifically asked Tlaxcochitlan that the 808 Wairans not be

[144] *John Doe*, para. 107.
[145] *K.R.S. v United Kingdom*, ECtHR, App. No. 32733/08, p. 18 (2 December 2008).
[146] *K.R.S.*, p. 18; See also, *M.S.S.*, para. 347; *John Doe*, para. 110.
[147] *K.R.S.*, p. 18.
[148] *John Doe*, para. 112.
[149] Hypothetical, para. 27.
[150] *M.S.S.*, para. 347.
[151] *M.S.S* , para. 352.
[152] Hypothetical, para. 27.

deported.[153] This was an even more individualized assessment than that which the UK undertook, because the meeting was specifically about the Wairans that had been excluded from refugee status, not Wairans in the abstract.[154] Thus, Arcadia is not in violation of Article 4 because it had no reason to believe the judicial guarantees of the Wairans would be violated in Tlaxchochitlan and conducted an individualized assessment of this risk.

In addition, in return for accepting and not deporting the Wairans, Arcadia agreed to increase migration control support to Tlaxcochitlan. When Tlaxcochitlan breached the agreement by returning the Wairans to Puerto Waira, Arcadia suspended the second support payment.[155]

ii. Arcadia has not violated Article 4 because no indirect refoulement took place since assurances were gained from Tlaxcochitlan regarding the non-deportation of Wairans.

The fact that a State extracts assurances from the third country regarding the non-violation of guarantees of returned asylum seekers may also weigh in favour of finding the State has not violated the right to life in relation to refoulement.[156] Assurances are viewed in the context in which they have been given.[157] In *Othman*, the ECHR found a diplomatic assurance protected the UK from claims of alleged violations of the right to be free from torture based on two factors: (1) the general situation of the country giving assurance – although only "in rare cases that the general situation in a country will mean that no weight at all can be given to assurances";[158] and (2) the quality of the assurances given and whether they can be relied upon.[159]

[153] Questions, no. 66.
[154] Questions, no. 66.
[155] Questions, no. 66.; Hypothetical, para. 27.
[156] *K.R.S.*, p. 17; *John Doe*, para. 110; *Saadi*, para. 148; *Othman*, para. 187.
[157] *Othman*, para. 195; *Saadi*, para. 148; *Wong Ho Wing*, para. 182.
[158] *Othman*, para. 188.
[159] *Othman*, para. 189.

In *Othman*, the ECHR found that the general human rights situation in Jordan, despite many reports of ill-treatment and torture in prisons, did not exclude accepting assurance, because the two States made transparent efforts to prevent ill-treatment.[160] Here, there are no such reports. The claims of violations against migrants in Tlaxcochitlan in the past is a far cry from the documented systematic abuse in Jordan.[161] Thus, the general situation of Tlaxcochitlan weighs in favour of finding the agreement it reached with Tlaxcochitlan sufficient.

The Court in *Othman* used a variety of factors to determine the quality of the assurance and whether it can be relied upon, including (1) whether it is specific or general; (2) whether the person who gave it can bind the state; (3) the bilateral relationship between the sending and receiving states; and, (4) whether the applicant has previously been ill-treated in the receiving state.[162] In *Wong Ho Wing v Peru*, though dealing with direct extradition, the IACHR offered similar factors for evaluating assurances, including, as in *Othman*, (1) the importance of specific assurances, and (2) the identity of the person who gave the assurance.[163]

In *Othman*, an assurance was specific when it concerned the asylum seeker in question.[164] In *Saadi*, by contrast, assurances were general when they were a mere recitation of domestic laws regarding prisoner's rights.[165] Here, the assurance in the form of the agreement was specific:

[160] *Othman*, para. 194.
[161] Hypothetical, para. 14; *Othman*, para. 191.
[162] *Othman*, para. 189.
[163] *Wong Ho Wing*, para. 184.
[164] *Othman*, para. 23.
[165] *Saadi*, para. 147.

Arcadia asked that the Wairans specifically not be deported, rather than asking Tlaxcochitlan to respect non-refoulment in general, and received assurance in the form of the agreement.[166]

In *Othman*, the agreement was a negotiation between the heads of state and Secretary of State/Foreign Minister of the two countries[167] and the two countries had historically a strong bilateral relationship.[168] Here, two ministries, the Ministry of Foreign Affairs and of the Interior, from both Arcadia and Tlaxcochitlan participated in the negotiations.[169]

The Refugee Convention recommends that States display a true spirit of international cooperation in the resettlement of refugees.[170] It was in this context that Arcadia offered to *increase* its support for migration control and development, which indicates that Arcadia already had been making contributions.[171] Therefore, Arcadia and Tlaxcochitlan have a strong bilateral relationship and the agreement was reliable.

Finally, in *Othman*, even though the applicant had suffered detention and torture in Jordan prior to seeking asylum in the UK, the court ultimately found the assurance was sufficient.[172] Here, there is no evidence that the 808 Wairans were ill-treated in Tlaxcochitlan prior to seeking asylum in Arcadia, and thus more weight can be afforded the assurance than even in *Othman*.

[166] Questions, no. 66.
[167] *Othman*, para. 22.
[168] *Othman*, para 195.
[169] Hypothetical, para. 27.
[170] Refugee Convention, Recommendations IV(D); *Institución del asilo*, para. 199.
[171] Questions, no. 66.
[172] *Othman*, para. 7, 192.

iii. In the alternative, even if indirect refoulement took place, Arcadia has not violated Article 4 in its deportation of Wairans to Tlaxcochitlan because the 808 Wairans presented no special distinguishing features to enable Arcadia to foresee their treatment, and the deportation was in the interest of preserving the Wairans right to life.

In *Vilvarajah*, the ECHR attached importance to the extensive experience of UK authorities with Sri Lankan claimants and the fact that it had examined the personal circumstances of all the claimants, when deciding that the UK had not violated the rights of Tamil asylum seekers to be free from ill-treatment by deporting them back to Sri Lanka.[173] The ECHR found that even though some of the claimants had previously been ill-treated in Sri Lanka, and were subsequently ill-treated following their deportation, "there existed no special distinguishing features in their cases that could or ought to have enabled the Secretary of State to foresee that they would be treated in this way" when returned.[174] The court held that despite belonging to an ethnic group susceptible to ill-treatment, their personal positions were no worse than any other member of the group.[175]

Similarly, here, Arcadia had experience with Wairan asylum seekers in the past: at the end of 2015, there were 18,000 refugees from Puerto Waira, and had processed thousands of Wairans under its prima facie recognition policy.[176] Thus, Arcadia has extensive experience adjudicating Wairan asylum claims. Also, as in the State in *Vilvarajah*, Arcadia examined the personal circumstances of each of the asylum seekers[177] and conducted a second review of the

[173] *Vilvarajah and Others v United Kingdom*, ECtHR, App. Nos. 13163/87, 13164/87, 13165/87, 13447/87, 13448/87, para. 114 (30 October 1991).
[174] *Vilvarajah*, para. 112.
[175] *Vilvarajah*, para. 111.
[176] Questions, no. 43.; Hypothetical, para. 22.
[177] Hypothetical, para. 20.

circumstances of the 808 Wairans with criminal records.[178] In *Vilvarajah*, the court attached importance to the fact that this review was carried out in light of both personal circumstances and the current situation in the country of origin.[179] Likewise here, for example in Gonzalo Belano's case, Arcadia made the determination that he faced a "reasonable likelihood," rather than a "high risk," based on his former gang membership and the contextual analysis of his country of origin.[180] Thus, Arcadia has experience with Wairan claimants and conducted an examination of each claimant's personal circumstances.

In regards to the second review, although the 729 Wairans faced a high risk and 79 faced a reasonable likelihood of torture, there was no information regarding the other Wairans and so this level of risk could have been the same for all Wairans, including those granted status. Consequently, it was reasonable for Arcadia to conclude that "there existed no special distinguishing features in their cases that could or ought to have enabled [Arcadia] to foresee that they would be treated in this way." [181] The cases of the 37 present petitioners did not signal special distinguishing features in their cases.[182]

Although the 808 Wairans were excluded from refugee protection based on their criminal records,[183] this on its own was not the reason for the deportation.[184] As the ECHR makes clear in *Saadi*, the fact that a person may pose a serious threat to the community if not returned does not mitigate the risk of ill treatment one may be subject to on return.[185] Here, Arcadia based its decision on a combination of events, including a march of Arcadians demanding the return of the

[178] Hypothetical, para. 23.
[179] *Vilvarajah*, para. 144.
[180] Questions, no. 22.
[181] Hypothetical, para. 23; *Vilvarajah*, para. 112.
[182] Hypothetical, para. 31, 32.
[183] Questions, no. 50.
[184] Hypothetical, para. 26.
[185] *Saadi*, para. 139.

808 Wairans, and Wairans being called "cockroaches" or "scum."[186] Although Arcadia implemented integration policies for those recognized as refugees,[187] this public atmosphere made it unsafe for the 808 Wairans to remain in Arcadia. To protect their right to life, the decision was made to deport them to Tlaxcochitlan.[188] Thus, Arcadia followed domestic and international law in regards to determining refugee status, and made the decision to deport the 808 Wairans due to a concern for their right to life.

E. Arcadia did not violate Articles 7 or 8 ACHR in relation to the detention of the 808 Wairans because the detention was legal, non-arbitrary, information on free legal assistance and consular assistance was provided, the Wairans were heard case-by-case, and effective remedies were available.

The ACHR provides in Article 7.1 that "every person has the right to personal liberty and security." In interpreting this right, the Court has nevertheless maintained that "in the exercise of their authority to set immigration policies, States may establish mechanisms to control the entry into and departure from their territory of individuals who are not nationals, provided that these are compatible with the standards of human rights protection established in the American Convention."[189] The Court has held that the violation of any subsection of Article 7 results in a violation of Article 7.1.[190] In *Velez Loor*, the Court considered each subsection of Article 7, in addition to certain judicial guarantees contained in Article 8, to determine that the complete lack

[186] Hypothetical, para. 24, 25.
[187] Questions, no. 40; Hypothetical, para. 25.
[188] Hypothetical, para. 27.
[189] *Vélez Loor v. Panama* (Judgment), Inter-Am. Ct. H.R. (ser. C) No. 132, para. 97 (Nov. 23, 2010); *Institución del asilo*, para. 119.
[190] *Velez*, para. 189.

of due process in the punitive detention of the plaintiff for disobeying deportation orders constituted a violation of the ACHR.[191] In contrast, Arcadia respected the requirements of Article 7 and 8.

i. Arcadia did not violate Article 7.2 because the detention was legal under Arcadian law

Article 7.2 of the ACHR prohibits deprivations of liberty that are not in line with domestic law in relation to detention. Here, the detention of the 808 Wairans is based on section 111 of the General Immigration Act, which allows for custodial measures for irregular migrants to ensure their appearance at proceedings, to guarantee the enforcement of an expulsion order, and, exceptionally, for public safety.[192] Detention must only occur after the administrative authority has examined its appropriateness and proportionality.[193] This provision applies to those covered by Article 30 of the Law on Refugees and Complementary Protection.[194]

The facts show that purpose of the detention of Wairans was to (1) ensure the appearance of the migrants; and, (2) ensure compliance with a deportation order.[195] Thus, section 111.1 was complied with. This assessment was conducted on a case-by-case basis[196] immediately after their arrest.[197] This individual assessment by the administrative authority ensures that the detention was appropriate and proportional, complying with section 111.2. Finally, all Wairans were processed under a policy announced pursuant to Article 30 of the Law on Refugees, and thus are

[191] *Velez*, para. 101.
[192] Questions, no. 11.
[193] Questions, no. 11.
[194] Questions, no. 11.
[195] Questions, no. 15.
[196] Questions, no. 15.
[197] Questions, no. 50.

subject to section 111.[198] Arcadia has not violated 7.2 because the detention was conducted in pursuant to Arcadia law.

ii. Arcadia did not violate Article 7.3 because the detention was not arbitrary.

Article 7.3 of the ACHR requires that no one be subject to arbitrary arrest or imprisonment, even if the detention is legal under domestic law.[199] Legal detention is not arbitrary if it has legitimate purpose, if it is appropriate, necessary, and proportionate.[200]

a. *The detention was not arbitrary because it pursued a legitimate purpose.*

In *Velez*, the court maintained that "preventive custody may be suitable to regulate and control irregular immigration to ensure that the individual attends the immigration proceeding or to guarantee the application of a deportation order," though it ultimately found that the criminalization of the irregular entry of the plaintiff went beyond this legitimate purpose.[201] Here, the detention had precisely the legitimate purpose stated: to ensure the appearance of the migrants at asylum proceedings, and to ensure compliance with a deportation order.[202] The Court also states that public safety could motivate a detention when there is a reasoned and objective legal basis.[203] Here, only those Wairans with criminal records indicating serious political crimes were detained.[204] Thus, there was a reasoned and objective legal basis to this rationale, particularly in comparison to the authorities in *Velez* who did not list any specific reasons the plaintiff was a security risk.[205]

[198] Hypothetical, para. 18.
[199] *Velez*, para. 165.
[200] *Velez*, para. 166.
[201] *Velez*, para. 169.
[202] Questions, no. 15.
[203] *Velez*, para. 116.
[204] Hypothetical, para. 22; Questions, no. 2.
[205] *Velez*, para. 112.

b. The Detention was not arbitrary because it was Necessary and Proportionate.

The Court defines necessary as, "indispensable for achieving the intended purpose," and proportionate as measures wherein the "sacrifice inherent in the restriction of the right to liberty is not... unreasonable compared to the advantages obtained from this restriction."[206] Here, the reasons given for the detention show that it was indispensable. Since many migrants along the southern Arcadian border had to sleep on streets, begged for money and lacked health services,[207] providing housing, food, health and other services in detention[208] meant that a lack of housing, transport, health, etc. would not prevent Wairans from attending their hearing. This likely also increased the efficiency of the proceedings.[209] The Court also values a determination of alternatives.[210] Here, Arcadian authorities determined each person's place of detention based on sex, with women being given priority to remain at the immigration detention center,[211] thus considering alternatives Therefore, the detention was necessary, and no alternatives were available to achieving the legitimate purpose of having the migrants appear for their hearings.

The detention was proportionate because, despite the restriction on liberty, the Wairans enjoyed greater ease of access to their hearings. Therefore, the slight restriction on liberty was proportionate to the benefit the migrants received as far as safety, and that Arcadia received as far as efficiency.

[206] *Velez*, para. 166.
[207] Hypothetical, para. 16.
[208] Hypothetical, para 18.
[209] *Saadi*, para. 77.
[210] *Velez*, para. 171.
[211] Questions, no. 3.

ii. Arcadia did not violate Articles 7.4 or 8 because the detained Wairans were offered information on their rights, consular contact and assistance.

Article 7.4 protects the rights of detainees to be informed of the reasons for their detention. The Court has maintained that a detainee's right to establish contact with their consulate is read in conjunction with the obligations under Article 7.4[212] as well as Article 8.2(d) of the ACHR.[213] The rights to consular assistance are: (1) the right to be informed of rights under the Vienna Convention; (2) the right to have effective access to communicate with the consular official, which involves being permitted to freely communicate and be visited by consular officials; and, (3) the right to the assistance itself.[214]

In accordance with Article 7.4 ACHR, the Wairans were informed that they were detained because they had criminal records and so not eligible for prima facie refugee status. Regarding consular assistance, the Wairans were informed of their rights during the detention and asylum process, particularly regarding contacting their consulate,[215] in accordance with 36(b)(1) of the Vienna Convention. Although the facts don't indicate that any Wairan requested consular assistance or a visit, they did have effective access to communicate with consular officials, especially since there was a telephone available in the facilities and they were able to receive visits.[216] Although no visit was made, the option to receive consular assistance was available, and was communicated from the moment of detainment.[217] Consequently, the requirements under Article 7.4 and 8.2(d) ACHR were met.

[212] *Velez*, para. 154; *Information on Consular Assistance*, para. 124; United Nations, *Vienna Convention on Consular Relations*, Article 36(1)(b) (24 April 1963).
[213] *Velez*, para. 157.
[214] *Velez*, para. 153.
[215] *Velez*, para. 153.
[216] Questions, no. 18.
[217] Questions, no. 50.

iii. Arcadia did not violate Article 7.5 ACHR because the 808 Wairans appeared before authorized officials without delay and their claims were heard case-by-case to decide on their release.

The court has established that to meet the guarantees in Article 7.5 ACHR, detainees must be taken without delay to appear in person before an officer authorized by law to carry out judicial functions.[218] "Delay" is often defined in terms of the requirements of the domestic Constitution and can be anywhere between 24 and 48 hours.[219] The officer must hear each person individually and evaluate all their explanations in order to decide whether to release the detainee.[220]

The 808 Wairans had multiple opportunities to appear before an authorized official. First, at the time of their arrest, they were immediately brought before the administrative authority before being transferred to custody,[221] and so there was no delay in this initial appearance. Second, within 45 days, each detainee's individual claims were evaluated,[222] which included a determination based on personal circumstances and a contextual analysis of the country of origin.[223] Additionally, each person was heard individually, and the determination was made that the Wairans would be released because they were to be deported.[224] Therefore, Arcadia met all the requirements of Article 7.5 ACHR.

[218] *Velez*, para. 109.
[219] *Case of Juan Humberto Sánchez v. Honduras* (Judgment), Inter-Am. Ct. H.R., Ser. C, No. 99, para 83 (7 June 2003); *Case of Expelled Dominicans and Haitians v. Dominican Republic* (Judgment), Inter-Am. Ct. H.R., Ser. C, No. 282, para 374 (28 August 2014); *Nadege Dorzema*, para. 139.
[220] *Velez*, para. 109; López Álvarez v. Honduras (Judgment), Inter-Am. Ct. H.R., Ser. C, No. 141, para. 87 (Feb. 1, 2006).
[221] Questions, no. 50.
[222] Hypothetical, para. 23.
[223] Questions, no. 22, 69.
[224] Hypothetical, para. 23.

iv. Arcadia did not violate Articles 7.6 or 8 because the 808 Wairans had access to effective remedies before a court, legal assistance was offered, and there was the possibility of appeal.

Article 7.6 of the ACHR provides for recourse to a court to determine the lawfulness of the arrest. Remedies must be before a judge or court, rather than an administrative body.[225] This right can be read together with Article 8.2(d), (e), and (h) which require the right to defend oneself, the right to free counsel, and the right to appeal a judgement, respectively.[226] Notification of the reasons for detention are also required under Article 8.[227] Although the text of Article 8.2 refers exclusively to criminal proceedings, the Court has held that the procedural guarantees therein contained apply in non-criminal proceedings as well.[228]

Here, various remedies existed both formally and effectively.[229] In particular, the amparo route and the proceedings for reparation of direct harm involved appearing before a judge, rather than an administrative authority and thus meet the requirement of remedies being before a judge.[230] The fact that 217 Wairans filed a writ of amparo that was adjudicated demonstrates that this was an effective remedy.[231] Since there was judicial recourse to determine the lawfulness of the detention, Arcadia met its obligations under Article 7.6.

The effectiveness of the remedies are further determined by considering whether requirements of Article 8.2 were met. In *Velez*, the plaintiff "was unable to communicate with any other person and that at no time did he have legal counsel to defend himself or to appeal the sentence imposed

[225] *Velez*, para. 126.
[226] *Velez*, para. 145, 177.
[227] *Velez*, para. 180.
[228] *Velez*, para. 142; *Case of Constitutional Court v. Peru* (Judgment), Inter-Am. Ct. H.R., Ser. C, No. 71, para. 70 (31 January 2001).
[229] *Velez*, para. 129.
[230] Questions, no. 10.
[231] Hypothetical, para. 28.

on him.[232] In the present case, the Wairans had access to legal assistance and representation.[233] The Court maintains that the assistance of non-governmental organizations does not replace the State's obligation to offer free counsel.[234] However, in *Velez*, the NGOs were generally present at detention centers with no indication of government support of their activities.[235] Here, Arcadian officials specifically provided information about the availability of legal services to the detainees, rather than simply tolerating the presence of NGOs, which was the approach of the State in *Velez*.[236] Arcadia, like the Court, respects the importance of free legal aid in proceedings concerning expulsion or deprivation of freedom[237] and therefore met its obligations in relation to Article 8.2(d) and (e). Finally, the Wairans were clearly notified of the reasons for their detention[238] and had the possibility of appealing the decision.[239] The fact that 217 Wairans did appeal the amparo decision indicates that the right to appeal was not illusory.[240] Therefore, the requirement under 8.2(h) was met.

F. Arcadia Did Not Violate Articles 19 and 17 ACHR in its Determination to Grant Children Refugee Status Because the Best Interest of the Child was Considered in Light of the Context

Children possess the rights established in the American Convention, in addition to the special measure "of protection required by [her] condition as a minor on the part of [her] family, society, and the state."[241] In any decision taken by the State, society or family that may curtail the right of

[232] *Velez*, para. 130.
[233] Questions, no. 47.
[234] *Velez*, para. 137.
[235] *Velez*, para. 137.
[236] Questions, no. 47.
[237] *Velez*, para. 146.
[238] Questions, no. 50.
[239] Questions, no. 50; Hypothetical, para. 28.
[240] *Velez*, para. 179.
[241] American Convention, Art. 19; *Pacheco*, para. 217; Hubing, Bridget. *International Child Adoptions: Who Should Decide What is in the Best Interest of the Family*, 15 Notre Dame J.L. Ethics & Pub. Pol'y 655 (2001).

the child, the principle of the best interest of the child must be incorporated.[242] The best interest of the child is based on the dignity of the human being, the inherent characteristics of children, and the need to foster development to expand their "potential to the full."[243]

The child has the right to be heard in any administrative proceeding affecting the child, including refugee status determination.[244] Further, the determination of refugee status for a minor invokes the right to judicial protection and due process.[245] In proceedings where a family is involved, the right of the family must be considered.[246]

The Court in *Pacheco*, found the State had violated its responsibility in Articles, 8, 25, 19, and 22.7 and as part of its reasoning emphasized the right of the child to be heard in a refugee application.[247] In *Pacheco*, the State argued that although the children of the Pacheco family did not have an individualized refugee application process, they had to be expelled with their parents so a family separation did not occur.[248] The court did not accept this "special measure of protection based on the principle of family unification"[249] argument because every child deserves a separate from their family, individualized refugee application process.[250] Thus, this Court foresaw a scenario, like the one at bar, where a child of a family's refugee application may lead to a different result than that of a family member. Unlike the State in *Pacheco* who only

[242] Convention on the Rights of the Child, Art. 3(1); *Juridical Condition and Human Rights of the Child*, Advisory Opinion OC-17/2002, August 28, 2002, para. 65; *Pacheco*, para. 218.
[243] *Pacheco*, para. 218.
[244] Convention on the Rights of the Child, Art. 12(1); *Pacheco*, para. 219.
[245] *Pacheco*, para. 220.
[246] *Juridical Condition and Human Rights of the Child*, Advisory Opinion, para. 66.
[247] *Pacheco*, para. 226.
[248] *Pacheco*, para. 215.
[249] *Pacheco*, para. 215.
[250] *Pacheco*, para. 223-225.

reviewed the application of the adult family members, the application of each Wairan child and adolescent was reviewed independently of their adult family members.[251]

Arcadia established a procedure where each individual filed an application and was then interviewed.[252] Through the interview, each child was heard and could express their interests. Through the procedure, no child or adolescent was excluded from international protection, detained, or expelled from Arcadia.[253] Therefore Arcadia met its international obligations.

The State has broad discretion in determining the best interest of the child.[254] Because Arcadia has been a migratory destination due to it sound democracy, strong public institutions, stable, a strong economy with a GDP of US$325 billion and a low, stable level of unemployment, low levels of crime and violence, and integration policies for migrants and refugees,[255] Arcadia can provide the resources to allow a child to expand their "potential to the full," therefore Arcadia did not violate Articles 17 and 19 because the decision to grant every Wairan child refugee status is justified in the best interest of the child.[256]

Although some children were separated from a parent when they were granted refugee status and their parent was ineligible for refugee status, those children were placed in the care of their closest relatives in Arcadia or in foster care until a close relative was located.[257] Thus, Arcadia promoted the family unit in compliance with Article 17 ACHR.

[251] Questions, no. 21
[252] Hypothetical, para. 20.
[253] Questions, no. 21.
[254] *Juridical Condition and Human Rights of the Child,* Advisory Opinion, para. 74; Eur. Court H.R., Case of *K and T v. Finland*, Judgment, 12 July 2001, para. 154.
[255] Hypothetical, paras. 8 & 10; Questions, no. 7
[256] The only justification of the separation of a family is the best interest of the child. *Juridical Condition and Human Rights of the Child*, Advisory Opinion, para. 73.
[257] Questions, no. 21.

V. REQUEST FOR RELIEF

Based on the foregoing submissions, the respondent State of Arcadia respectfully requests this Honourable Court to:

1. Declare the Applicants' petition is inadmissible based on the conclusions in IV.A and IV.B;

2.In the alternative, to hold that Arcadia protected all the rights as established in Art. 4, 7, 8, 22.7, 22.8, 17, 19, 24, and 25 of the ACHR in conjunction with Art. 1(1) thereof with respect to Gonzalo Belano and the 807 other Wairans.

Respectfully,

The respondent State of Arcadia