



REPORT N° 56/06

ADMISSIBILITY

PETITION 8-03

WAYNE SMITH

UNITED STATES (^{*})

JULY 20, 2006

I. SUMMARY

1. On December 27, 2002, the Inter-American Commission on Human Rights (the "Commission") received a petition from the Center for Justice and International Law, the law firm of Gibbs Houston Pauw, and the Center for Human Rights and Justice (the "Petitioners") against the Government of the United States (the "State" or "United States"). The petition was presented on behalf of Wayne Smith in relation to his deportation from the United States.

2. In their initial petition and subsequent observations, the Petitioners claim that Mr. Smith has exhausted domestic remedies, or alternatively that he is excused from the exhaustion of domestic remedies requirement, and therefore that his claims are admissible. With regard to the merits of Mr. Smith's complaint, the Petitioners contend that the United States is responsible for violations of the right to life, liberty and security of the person, the right to protection against abusive attacks on family life, the right to establish family, the right to protection for mothers and children, the right to inviolability of the home, the right to resort to courts, and the prohibition against cruel, infamous or unusual punishment and Articles I, V, VI, VIII, XVII, IX and XXVI of the American Declaration of the Rights and Duties of Man (the "American Declaration") because of the manner in which Mr. Smith's removal from the United States was authorized under the U.S. Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA).^[1]

3. In its response to the petition, the State argues that the Petitioners' claims are inadmissible on three main grounds, namely that the American Declaration is no more than a recommendation to the American States that does not create legally binding obligations, the alleged victims have failed to exhaust domestic remedies, and the petition does not state facts that would constitute a violation of the Declaration if it could be the subject of violations.

4. As set forth in this Report, having examined the information and arguments provided by the parties on the question of admissibility, the Commission decided to declare the Petitioners' claims to be admissible in respect of Articles V, VI, VIII, XVII, and XXVI of the American Declaration, to join and process together the present petition with petition P526-03 (Hugo Armendariz v. United States), to continue with the analysis of the merits of the case, to

transmit the report to the parties, and to publish the report and include it in its Annual Report to the General Assembly of the Organization of American States.

II. PROCEEDINGS BEFORE THE COMMISSION

5. Following the lodging of the Petitioners' petition, on July 21, 2003 the Commission transmitted the pertinent parts of the petition to the State and requested information within two months as established by the Commission's Rules of Procedure.

6. In a communication dated December 23, 2003 and received by the Commission on the same date, the State delivered its observations on the Petitioners' petition. By note dated January 5, 2004, the Commission transmitted the State's response to the Petitioners and requested any additional information on the State's response within one month.

7. Subsequently, in a letter dated March 19, 2004 and received by the Commission on March 22, 2004, the Petitioners delivered their reply to the State's December 23, 2003 response. The Commission transmitted the pertinent parts of the Petitioners' reply to the State on March 26, 2004 with any observations requested within one month.

8. In a note dated April 15, 2004, the State requested an extension of time to June 25, 2004 within which to deliver its observations, which the Commission granted by note dated April 20, 2004 and which the Commission extended further to July 25, 2004 again at the request of the State. Subsequently, by communication received by the Commission on February 24, 2005, the State delivered its additional observations on the Petitioners' reply, which the Commission transmitted to the Petitioners by letter date February 25, 2005.

III. POSITIONS OF THE PARTIES

A. Position of the Petitioners

9. According to the Petitioners, Mr. Smith has been the subject of proceedings under the IIRIRA, which amended the provisions of the Immigration and Naturalization Act ("INA")^[2] governing the admission of individuals to and their deportation from the United States. In particular, Mr. Smith was ordered removed from the United States under the IIRIRA amendments based upon his conviction for certain criminal offenses designated under the legislation as "aggravated felonies".^[3] The Petitioners challenge the proceedings against Mr. Smith under this legislation as inconsistent with Articles I, V, VI, VII, XVIII, IX and XXVI of the American Declaration.

10. Concerning the background to the complaint, the petition states that Mr. Smith was born in the Republic of Trinidad and Tobago and came to the United States in 1967, when he was 10 years old, as a dependent of a diplomatic visa holder. The petition also indicates that Mr. Smith subsequently married a U.S. national, Ann Hoyte, in 1996, that they had one U.S. citizen child together, Karina Ann, and that Mrs. Smith also has one child from a previous relationship. The Petitioners claim that while living in the United States, Mr. Smith became addicted to drugs and in February 1990 was convicted of possession of cocaine and attempted distribution of cocaine and served three years in prison. The petition also states that while incarcerated, Mr. Smith began a recovery from his drug addiction and upon his release continued his education at the University of the District of Columbia through a scholarship from Action to Rehabilitate Community Housing, remained involved that the prison ministry and also became involved in drug counseling and other community outreach programs, among other activities and projects.

11. According to the Petitioners, Mr. Smith was placed in deportation proceedings in

March 1996. The Petitioners also state that at that time he was eligible for a humanitarian waiver of deportation (known as a "212(c) waiver"), which permits a legal resident subject to deportation to continue to live with his or her family in the United States based upon such considerations as the seriousness and recency of the offense, the danger the applicant poses to the community, family ties, length of residence in the United States, evidence of rehabilitation and other equitable factors.^[4] The Petitioners claim, however, that by the time Mr. Smith's case was heard the Antiterrorism and Effective Death Penalty Act (AEDPA) had been enacted, which eliminated 212(c) relief for persons convicted of an aggravated felony. As a consequence, on March 11, 1997 the Immigration Judge in Mr. Smith's case omitted his waiver application. Mr. Smith pursued unsuccessful appeals before the Board of Immigration Appeals and the U.S. District Court for the Southern District of Maryland and was deported to Trinidad shortly after the U.S. Court of Appeals for the Fourth Circuit denied him a stay of removal on November 25, 1998.

12. The petition also indicates that Mr. Smith reentered the United States in January 1999 and returned to his home in Maryland where he continued to reside until he was stopped for a traffic violation in March 2001 and was turned over to the INS, which held him in jail without bond. On March 16, 2001 the Immigration Service reinstated the prior order of removal against Mr. Smith without a hearing and, following further proceedings pursued by Mr. Smith in the U.S. federal courts, Mr. Smith was again deported to Trinidad on December 13, 2001.

13. Concerning the admissibility of the complaint, the Petitioners argue that Mr. Smith has exhausted domestic remedies as required under Article 37 of the Commission's Rules, as he has appealed to the administrative and judicial tribunals provided for under U.S. immigration law, which have all been rejected. In particular, the Petitioners claim that on March 11, 1997, Mr. Smith filed an appeal to the Board of Immigration Appeals from the Immigration Judge's decision to omit his 212(c) waiver application, which was dismissed on August 24, 1998. He then filed a petition for a writ of habeas corpus with the U.S. District Court for the Southern District of Maryland on November 9, 1998 alleging, *inter alia*, that his deportation would violate the U.S. Constitution because he would be separated from his family without being given an opportunity to apply for a waiver of deportation. According to the Petitioners, the District Court transferred the case to the U.S. Court of Appeals for the Fourth Circuit. Mr. Smith applied for a stay of deportation but the Fourth Circuit denied the stay on the ground that the court did not have jurisdiction, following which Mr. Smith was deported.

14. The Petitioners also state that following Mr. Smith's detention in March 2001 and the reinstatement of his prior order of removal, he filed a habeas corpus petition in the District Court challenging the removal order, which the District Court dismissed without elaboration but granted a 60-day stay of deportation. Mr. Smith then appealed to the U.S. Court of Appeals for the Fourth Circuit which held that Mr. Smith had no constitutionally cognizable interest at stake and on July 1, 2002 affirmed the order of removal and Mr. Smith was deported to Trinidad on December 13, 2001.

15. Further, the Petitioners claim that in spite of the decision of the U.S. Supreme Court in the case of *INS v. St. Cyr*,^[5] in which that Court held that 212(c) waivers of deportation remained available to non-citizens who, prior to 1996, plead guilty to a criminal offense if they would have been eligible for 212(c) relief at the time of their guilty plea, the courts dismissed Mr. Smith's efforts to seek this relief and, consequently, he has been deported from the United States and separated from his family without a consideration of whether deportation is proportional to the offense he was convicted of in 1990.

16. In addition, the Petitioners claim that the petition has been filed in a timely manner, as it was filed within six month of the July 1, 2002 decision of the U.S. Court of

Appeals for the Fourth Circuit.

17. With respect to the merits of the petition, the Petitioners claim that the IIRIRA and its application to Mr. Smith's circumstance have resulted in violations of his rights under Articles I, V, VI, VII, XVIII, IX and XXVI of the American Declaration. More particularly, the Petitioners claim that the IIRIRA has radically expanded the definition of "aggravated felony" beyond such offenses as murder, drug trafficking and trafficking in firearms to cover an extremely long list of offenses including minor non-violent criminal infractions such as gambling offenses and re-entering the US after deportation.^[6] The Petitioners also claim that the broadened definition of "aggravated felony" is applied retroactively, by specifically providing that the new definition applies "regardless of whether the conviction was entered before, on, or after September 30, 1996."^[7] Moreover, the Petitioners contend that 212(c) humanitarian waivers of deportation are no longer allowed for persons who have been convicted of an "aggravated felony."^[8] Finally, the Petitioners claim that the IIRIRA eliminated the right to judicial review as any further review by courts beyond the Board of Immigration Appeals is specifically precluded for deportations based upon aggravated felonies and other criminal offenses.^[9] As a consequence, such persons have no recourse to a court of law to challenge the deportation decision or to submit the social or humane considerations that would weigh in favor of not deporting an individual.

18. Within this legislative framework, the Petitioners argue that the State is responsible for violations of Mr. Smith's rights under Article I (right to life, liberty and security of the person), V (right to protection against abusive attacks on family life), VI (the right to establish family), VII (the right to protection for mothers and children), IX (right to inviolability of the home), XVII (right to resort to courts), and XXVI (prohibition against cruel, infamous or unusual punishment). First, they argue that the application of IIRIRA provisions to Mr. Smith violated his right to family as embodied under Articles V, VI and VII of the Declaration on the basis that he was the subject of mandatory deportation without any consideration of mitigating factors such as family unity. The Petitioners argue in this respect that the removal of a non-citizen from a state may raise serious questions about the violation of family rights in determining whether a deportation is justified and that necessitate consideration of such factors as the length of stay in the country, the extent to which family ties will be broken, whether the person has continuing ties to his or her home country, and the gravity of the offense. In support of this claim, the Petitioners cite jurisprudence from the European Court of Human Rights addressing family rights in the context of the deportation of non-citizens.^[10]

19. The Petitioners also argue that the State is responsible for violations of Mr. Smith's right under Article XXV of the American Declaration not to be deprived of liberty except according to procedures established by pre-existing law because the provisions of the IIRIRA were applied to him retroactively to disqualify an "aggravated felon" for relief from deportation when he was eligible for such relief when he was initially placed in deportation proceedings in March 1996.^[11]

20. Finally, the Petitioners contend that the State is responsible for violations of the right to a fair trial and to due process under Articles XVIII and XXV of the American Declaration by denying Mr. Smith an opportunity to seek a waiver of deportation and by failing to provide adequate judicial review of the denial of such waiver. In particular, the Petitioners argue that the IIRIRA amendments specifically bar an individual from appealing a deportation order to a court of law, with the result that the sole remedy for a final order of deportation is an appeal to the Board of Immigration Appeals, a tribunal within the U.S. Department of

Justice. ^[12]

21. In response to the arguments of the State, the Petitioners reiterate that Mr. Smith did file a timely petition for habeas corpus in the District Court after the August 28, 1998 decision of the Board of Immigration Appeals that he was not eligible for a 212(c) waiver of deportation, which was ultimately dismissed by the U.S. Court of Appeals for the Fourth Circuit on the ground that there was no jurisdiction to hear his constitutional claims.^[13] The Petitioners also argue that Mr. Smith was not required to appeal the decision of the Fourth Circuit to the U.S. Supreme Court because the decision as to whether to accept such appeals for consideration is entirely within the discretion of the Court is therefore constitutes an extraordinary remedy. Further, the Petitioners reiterate their contention that Mr. Smith has exhausted domestic remedies in respect of the issue raised in his petition, namely the finding by the Board of Immigration Appeals, upheld by the Fourth Circuit, that he was not eligible for a 212(c) waiver, and was not, as the State suggests, required to challenge the Attorney General's reinstatement procedures. In addition, the Petitioners dispute the State's arguments that the petition does not characterize any violations of the American Declaration, essentially on the basis that allowing a fair and meaningful opportunity for a non-citizen to present information as to why his or her deportation may be disproportionate in light of his or her individual circumstances is not precluded by the authority of a state to control the presence of non-nationals in its territory. Finally, while Petitioners admit that at the time of Mr. Smith's conviction he was deportable under the Anti-Drug Abuse Act of 1988, they also assert that he may have been eligible for a waiver of deportation that would allow him to remain in the United States with his family, but that this possibility was denied through the erroneous procedures as described in their petition.

B. Position of the State

22. In its observations in the present complaint, the State's depiction of the factual and procedural history of Mr. Smith's case does not differ in any significant respects from that of the Petitioners as articulated in Part III(A) above. Based upon this background, the State asserted and elaborated three give main grounds upon which it claims Mr. Smith's petition should be considered inadmissible. First, the State contends that the American Declaration does not create legally binding obligations on OAS member states and cannot be said to create rights or impose duties on the United States, and therefore any assertion that the United States has violated any of the Declaration's provisions has no validity, and that in any event the case is moot in view of the fact that Mr. Smith has been deported and is no longer in the United States.

23. Second, the State argues that Mr. Smith has failed to exhaust his domestic remedies in three main respects. The State argues that after the issuance by the Board of Immigration Appeals of the first order of deportation on August 24, 1998, Mr. Smith failed to seek judicial review directly in the Fourth Circuit Court of Appeals by a filing a petition for review within 30 days of the date of the Board's order, but that instead, Mr. Smith filed a petition for a writ of habeas corpus in the District Court on November 9, 1998, which was then transferred to the Fourth Circuit Court of Appeals and ultimately dismissed on November 25, 1998. The State also notes that Mr. Smith did not seek certiorari review of this decision in the U.S. Supreme Court.

24. In addition, the State asserts that after the INS reinstated Mr. Smith's deportation order following his reentry into the United States, he failed in his habeas corpus petition before the U.S. District Court for the Southern District of Maryland to raise a constitutional challenge to the Attorney General's reinstatement procedure, but rather only challenged the August 1998 deportation. Further, the State argues that when Mr. Smith challenged in July 2001 his prior deportation order of August 1998, the issue of the proper

forum for review of deportation orders against non-nationals who had committed crimes was an open question in the Fourth Circuit and that the U.S. Supreme Court ultimately found that criminal non-nationals who challenge the denial of discretionary immigration relief on purely statutory grounds may do so through habeas corpus proceedings in the district courts. The State contends that in contrast, Mr. Smith failed to diligently pursue his claim in federal courts as he did not timely file a petition for review in the Fourth Circuit and failed to seek further review in the U.S. Supreme Court. Accordingly, the State argues that Mr. Smith has failed to properly exhaust domestic remedies.

25. Third, the State contends that the petition fails to state facts that disclose any violations of the American Declaration. In particular the State contends that Mr. Smith was properly deported based not only upon his February 1990 conviction for possession of cocaine and attempted distribution of cocaine but also based upon his January 1999 illegal reentry into the U.S. and rejects the Petitioners' challenges to the propriety of Mr. Smith's removals. In particular, the State argues generally that the Petitioners' complaint is a disguised attack on the legitimacy of the current immigration legislation in the United States, which it claims the Petitioners have no standing to assert and is beyond the mandate and jurisdiction of the Commission. The State also emphasizes that a sovereign state has the right to exclude from its territory non-nationals whose presence is not in the public interest or is potentially harmful to public safety or threatens the economic, social or political well being of its citizens and that restricting the release into the country by detention and deportation of non-nationals convicted of certain crimes is a legitimate means of exercising that right and violates no principle of international law or binding legal obligation.

26. In this regard, the State asserts that one of the primary aims of the IIRIRA when it was signed by the U.S. President on September 30, 1996 was to address the widespread problem of illegal immigration in the United States, on the premise that non-nationals who violate U.S. immigration law should be removed from the U.S. as soon as possible. According to the State, the legislation attempted to achieve this objective in part by expediting the removal of non-nationals convicted of serious crimes, and denying non-nationals who have been convicted of aggravated felonies discretionary relief known as "cancellation of removal" and expanding the definition of "aggravated felonies."^[14] In support of its argument in this connection, the State noted by comparison that asylum seekers and those seeking refugee status who have committed "serious non-political crimes" or particularly serious crimes are excluded from the benefits of the 1951 Refugee Convention and the 1967 Refugee Protocol even if they have a well-founded fear of persecution in their country of origin. Accordingly, the State argues that Mr. Smith, who did not have asylum or refugee status, is "hardly entitled to better treatment under U.S. immigration law than that received by asylum seekers and refugee seekers who were also engaged in criminal conduct."^[15]

27. In respect of the substantive violations of the American Declaration raised by the Petitioners, the State presents several arguments, as alternatives to its initial contention that the American Declaration cannot be the subject of violations by states. With regard to the alleged violations of the right to family and related rights under the Declaration, the State contends that such violations cannot be said to provide a non-national with a liberty interest that outweighs a state's legitimate responsibility to provide for the welfare and security of its citizens. Rather, the State argues that the serious drug offenses committed by Mr. Smith justified his removal on these grounds notwithstanding his family situations. Indeed, the State contends that the alleged victims claim to enjoy legal protection for familial consideration "would be tantamount to a 'blank check' in terms of a purported substantive right to be at liberty in a country not their own without regard to that State's immigration or other legislation."^[16] The State also objects to the Petitioners' reliance on case law under Article 8 of the European Convention for the Protection of Human Rights and Fundamental

Freedoms, on the ground that the US is not a party to that instrument and that interpreting the terms of the American Declaration in an expansive manner by analogy to the European Convention would require the Commission to go far beyond its actual power and would create rights and duties of familial association that do not exist in the Declaration.

28. With regard to the retroactive application of the legislative amendments under consideration, the State argues that there is no evidence that Article 25 of the American Declaration, which provides that "no person may be deprived of his liberty except in the cases and according to the procedures established by pre-existing law," was intended to apply to immigration detention and deportation, which are not of a criminal nature and which ordinarily do not turn on a non-national's failure to perform a civil obligation. Accordingly, in the civil context, the State argues that it is open to the U.S. to apply immigration legislation to conduct that occurred prior to that legislation's enactment as long as its intent and purpose is clear in the plain language of the law.^[17] The State asserts in this regard that according to the U.S. Supreme Court, deportation in an immigration context is not a punishment for past crimes but rather is a civil consequence of a non-national's lack of right to be in the U.S. and his or her failure to abide by the domestic laws therein.^[18] In part for this reason, the U.S. Supreme Court has repeatedly upheld the constitutionality of deportation proceedings that apply new law to past criminal conduct. The State also asserts that in enacting the IIRIRA, the U.S. Congress was clear in its intent to apply the new definition of aggravated felony to conduct prior to the statute's enactment regardless of whether the conviction was entered before, on, or after September 30, 1996, and therefore that Congress acted within the intended scope of Article XXV of the Declaration and in no way deprived Mr. Smith of liberty not in accordance with pre-existing procedures. Indeed, the State contends that any other rule would compromise the ability of a state to amend its laws or immigration policy to respond to changing world economic and social conditions. Finally, the State argues that at the time of his conviction, Mr. Smith was deportable under the Anti-Drug Abuse Act of 1988, since under that Act he was convicted of an eligible drug trafficking crime as defined under 21 U.S.C. § 801 (2000).^[19]

29. With regard to the Petitioners' submission concerning access to court, the State argues that the administrative review procedures before the immigration judges, the Board of Immigration Appeals and the judicial review procedures before federal courts to challenge deportation and detention are sufficient to satisfy the requirements of Articles XVIII and XXV of the American Declaration in respect of deportation proceedings. The State alleges, for example, that at the administrative level, an immigration judge presides in immigration court over a removal hearing. In these proceedings, a non-national is afforded substantial rights, such as the privilege of being represented by counsel at no expense to the government, the opportunity to examine the evidence against him or her and to cross-examine the witnesses presented by the government, and the right to have a complete record of the proceedings for appellate review, including all testimony and evidence presented at the hearing. During these proceedings, aliens may present applications for relief and protection from removal.

30. In addition, the State indicates that an alien may appeal an adverse decision by the immigration judge to the Board of Immigration Appeals which has de novo review authority^[20] and that while an appeal is pending an alien may not be removed from the United States, and indeed Mr. Smith availed himself of this remedy. In addition, after the Board has decided a case, an alien may file a motion to reopen or a motion to reconsider the Board's decision if new evidence arises or if the alien believes that the Board has made an error of law warranting reconsideration.^[21] Finally, the State contends that aliens who have committed serious crimes continue to have access to U. S. judicial courts to review their immigration orders. In particular, the State argues that these aliens may seek judicial review

to challenge the charge of deportability as well as to seek review of other substantive statutory and constitutional questions.^[22]

31. Based upon the foregoing arguments, the State argues that the Commission should declare the Petitioners' petition inadmissible.

IV. ANALYSIS

A. Competence of the Commission

32. In its observations on the Petitioners' petition, the United States contests the authority of the Commission to determine as against the State violations of the American Declaration. In the State's view, the Declaration does not create legally binding obligations and therefore cannot be "violated" as that term is used in the petition.

33. According to the long-standing practice and jurisprudence of the Inter-American human rights system, however, the American Declaration of the Rights and Duties of Man constitutes a source of international obligation for the United States and other OAS Member States that are not parties to the American Convention on Human Rights.^[23] These obligations are considered to flow both from the human rights commitments of Member States under the OAS Charter,^[24] which Member States have agreed are contained in and defined by the American Declaration,^[25] as well as from the customary legal status of the rights protected under many of the Declaration's core provisions,^[26] and the Commission is empowered under Articles 18 and 20 of its Statute^[27] to receive and evaluate allegations that states have failed to respect these commitments. It is therefore appropriate to characterize a Member State's failure to guarantee the rights under the American Declaration as a violation of its obligations under international human rights law and the Commission rejects the State's contention that the American Declaration does not create legally binding obligations for Member States of the OAS.

34. In the petition presently under consideration, the Petitioners have alleged that the United States is responsible for violations of Mr. Smith's rights under the American Declaration. The United States is a Member State of the OAS, having deposited its instrument of ratification of the OAS Charter on June 19, 1951, and the events described in the petition occurred subsequent to the State's ratification of the OAS Charter and the creation of the IACHR in 1959. The alleged victims are natural persons, and the petition was lodged by the Center for Justice and International Law, Gibbs, Houston, Pauw, and the Center for Human Rights and Justice, who are authorized to lodge petitions with the Commission under Article 23 of the Commission's Rules of Procedure.

35. Inasmuch as the Petitioners have filed complaints alleging violations of Articles I, V, VI, VII, XVIII, IX and XXV of the American Declaration, the Commission is competent *ratione materiae* to examine the petition.

36. The Commission is competent *ratione temporis* to examine the complaints because the petition alleges facts that occurred on or after the date on which the United States' obligations under the American Declaration took effect.

37. Finally, the Commission is competent *ratione loci*, given that the petition indicates that Mr. Smith was under the jurisdiction of the United States at the time of his arrest, detention and subsequent criminal proceedings.

B. Admissibility of Petition

38. In their petition, the Petitioners raise three main claims of violations of Mr. Smith's rights under the American Declaration:

- (a) Violations of Mr. Smith's right to life, liberty, personal security and family life embodied under Articles I, V, VI, VII and IX of the American Declaration, because he was the subject of deportation from the United States without a fair and meaningful opportunity to establish that his family and other circumstances outweighed the state's interest in deporting him;
- (b) Violations of Mr. Smith's right under Article XXV of the American Declaration not to be arbitrarily detained because of the retroactive application of the expanded definition of "aggravated felony" to his circumstances;
- (c) Violations of Mr. Smith's rights under Articles XVIII and XXV of the American Declaration to a fair trial and to due process because he has been denied access to a court of law to challenge his deportation.

1. Exhaustion of Domestic Remedies

39. Article 31 of the Commission's Rules of Procedure provides that the admissibility of a petition submitted to the Inter-American Commission is subject to the requirement that remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law. The purpose of this requirement is to enable national authorities to have the opportunity to address the alleged violation of a protected right, and where appropriate resolve it, prior to any submission before an international mechanism.

40. The requirement of prior exhaustion applies when domestic remedies are available in practice within the national system, and would be adequate and effective in providing a remedy for the alleged violation. In this sense, Article 31(2) of the Commission's Rules of Procedure specifies that the requirement is not applicable when the domestic legislation does not afford due process for the protection of the right in question; or if the alleged victim did not have access to domestic remedies; or if there was unwarranted delay in reaching a final judgment in response to the invocation of those remedies. As indicated by Article 31(3) of the Commission's Rules, when a petitioner alleges one of these exceptions, it then falls to the State to demonstrate that domestic remedies have not been exhausted, unless that is clearly evident from the record.

41. In the present complaint, the Petitioners allege that Mr. Smith has exhausted all available administrative and judicial remedies available to him in respect of the claims raised before the Commission. The State, on the other hand, has objected to the admissibility of the Petitioners complaints on the ground that Mr. Smith has failed to exhaust domestic remedies in three respects. First, the State argues that after the issuance by the Board of Immigration Appeals of the first order of deportation on August 24, 1998, Mr. Smith should have sought judicial review directly in the Fourth Circuit Court of Appeals by a filing a petition for review within 30 days of the date of the Board's order. Second, the State argues that Mr. Smith should have sought certiorari review of the November 25, 1998 decision of the Fourth Circuit dismissed Mr. Smith's habeas corpus challenge to his deportation. Finally, the State contends that after the INS reinstated Mr. Smith's deportation order following his reentry into the United States, he should have raised a constitutional challenge to Attorney General's reinstatement procedure in his habeas corpus petition before the U.S. District Court for the Southern District of Maryland.

42. In considering the positions of the parties on the question of exhaustion, the Commission notes that Mr. Smith's claims before the Commission focus upon his inability to

present his family and other circumstances as equitable considerations in determining whether he should have been deported from the United States, which, in the context of the U.S. immigration system, was traditionally provided through consideration of "212(c)" humanitarian waivers under former section 212 of the Immigration and Naturalization Act, 8 U.S.C. § 1182(c). The record before the Commission indicates that Mr. Smith attempted to obtain the benefit of consideration of humanitarian factors before the immigration tribunals and the national courts on two occasions, first through an appeal to the Board of Immigration Appeals and a petition for a writ of habeas corpus in the federal courts following the immigration judge's March 11, 1997 denial of his waiver application, and again through a second petition for a writ of habeas corpus and corresponding appeal to the Fourth Circuit Court of Appeal after his prior deportation order was reinstated on March 16, 2001. The record also indicates that in his first habeas petition Mr. Smith alleged, *inter alia*, that his deportation would violate the U.S. Constitution because he would be separated from his family without being given an opportunity to apply for a waiver, and that in his second habeas corpus petition, Mr. Smith specifically challenged the denial of his application for a discretionary waiver of deportation before his first deportation in December 1998 on the basis that he was denied his right to procedural due process in violation of the Fifth Amendment to the U.S. Constitution.^[28] The Fourth Circuit held that it had jurisdiction to consider Mr. Smith's habeas challenge pursuant to the U.S. Supreme Court's decision in the case of *INS v. St. Cyr*^[29] but denied his constitutional challenge on the ground that Mr. Smith failed to establish that he had a "personal or liberty interest" at stake in the right to discretionary section 212(c) relief, which constitutes a prerequisite under U.S. law for claiming procedural due process protection under the U.S. Constitution.^[30]

43. For its part, the State contends that Mr. Smith should have filed an appeal directly to the Fourth Circuit Court of Appeal following the dismissal of his first 212(c) application in 1997 and that, following the reinstatement of his deportation order in 2001, he should have challenged the constitutionality of the Attorney General's reinstatement procedures. The State has not, however, indicated how these additional procedures may have provided Mr. Smith with a remedy for the claims that he has raised before the Commission. In particular, the State has not specified how a direct appeal to the Fourth Circuit Court Appeals, as opposed to a habeas corpus petition before the same court, might have provided Mr. Smith with a different result, namely that Mr. Smith was precluded from section 212(c) relief by reason of the provisions of the Anti-Terrorism and Effective Death Penalty Act. It has been held in the inter-American system that the determination of whether a remedy is available refers to only to the formal existence of such remedies but also to their adequacy and effectiveness.^[31] In any event, the Fourth Circuit did subsequently consider Mr. Smith's constitutional challenge to his denial of 212(c) relief and rejected those claims for failure to satisfy the requirements for application of the due process protections under the U.S. Constitution. Similarly, the State has failed to show how a constitutional challenge to the Attorney General's reinstatement procedures may have provided him with a remedy for the claims raised before this Commission that were not otherwise available in his habeas corpus petition proceedings before the Federal Court in 2001.

44. Finally, the State contends that Mr. Smith should have filed petitions for writs of certiorari in the United States Supreme Court in respect of both decisions of the Fourth Circuit Court of Appeals in his case in November 1998 and July 2002. The Petitioners, on the other hand, argue that the decision as to whether to accept such appeals for consideration is entirely within the discretion of the U.S. Supreme Court and therefore does not constitute a remedy that Mr. Smith is required to exhaust. The Commission notes that in its response, the State has not provided any observations on the Petitioners' contention in this respect, and in particular has not provided information indicating that review by the Supreme Court may have

been available and effective in the circumstances of Mr. Smith's case. Moreover, the Commission observes that in petition P526-03 (Hugo Armendariz v. United States), which raises issues parallel to those in the present complaint and to which the Commission has decided to join the processing of Mr. Smith's complaint (see para. 49 *infra*), the alleged victim petitioned the U.S. Supreme Court for a writ of certiorari to review equivalent issues and on June 2, 2003 the Court dismissed the petition. There is no information on the record in the present case to suggest that a different result might have occurred had Mr. Smith also petitioned the Supreme Court.

45. Based upon the above factors, the Commission concludes that the Petitioners claims before the Commission are not barred from consideration by the requirement of exhaustion of domestic remedies under Article 31(1) of its Rules of Procedure.

2. Duplication

46. In their petition, the Petitioners have stated that Mr. Smith's claims are not pending before any other international forum. The State has not contested the issue of duplication of procedures. The Commission therefore finds no bar to the admissibility of the Petitioners' claims under Article 33 of the Commission's Rules of Procedure.

3. Timeliness of the Petition

47. The record in the present complaint indicates that the Petitioners lodged their petition with the Commission on December 27, 2002 and therefore within 6 months of the July 1, 2002 decision of the U.S. Court of Appeals for the Fourth Circuit affirming Mr. Smith's order of removal. The State has not contested the issue of timeliness. As such, the Commission finds that the petition was not lodged beyond the time period prescribed under Article 32 of the Commission's Rules of Procedure.

4. Colorable Claim

48. For the purposes of admissibility, Article 34(a) of the Commission's Rules of Procedure provides that petitions lodged with the Commission must state facts that tend to establish a violation of the rights referred to in Article 27 of the Rules of Procedure, or whether the petition must be dismissed as "manifestly groundless" or "obviously out of order" under Article 34(b) of the Commission's Rules of Procedure. In so doing, the Commission undertakes only a *prima facie* evaluation of the alleged facts with respect to admissibility and does not consider or judge the merits of any claim.

49. In the present case, the Petitioners have alleged violations of Mr. Smith's rights under Articles I (right to life, liberty and security of person), V (protection against abusive attacks on family life), VI (right to a family and protection thereof), VII (right to protection for mothers and children), XVIII (right to resort to courts), IX (right to inviolability of home), and XXVI (prohibition against cruel, infamous or unusual punishment) of the American Declaration.

50. The Commission has outlined in Part III of this Report the substantive allegations of the Petitioners and information submitted by the Petitioners in support of those allegations as well as the State's arguments to the effect that the facts in the petition fail to present colorable violations of the American Declaration. After carefully reviewing the information and arguments provided by the Petitioners and the State, and without prejudging the merits of the matter, the Commission considers that the petition states facts that, if proven, tend to establish violations of rights guaranteed under the Declaration. The Commission notes in this regard that, according to the authorities referred to by the Petitioners, other international human rights bodies, most notably the European Court of

Human Rights, have held that there can be situations in which the right to family association outweighs a state's interest in deporting a non-citizen even when the non-citizen was considered to pose a threat to society and public order.^[32] While the Commission accepts the State's point that the United States is not a party to the European Convention on Human Rights and is therefore not bound by its provisions or judgments of the European Court of Human Rights, the Commission has also previously held that the jurisprudence of other international supervisory bodies like the European Court can provide constructive insights into the interpretation and application of rights that are common to regional and international human rights systems.^[33] Moreover, the Commission itself has recognized that rights governing the protection of the family are potentially pertinent considerations in the context of the principles and standards of the inter-American Human Rights system in evaluating the expulsion of non-citizens from OAS member states.^[34]

51. The Commission also considers that the present petition raises colorable claims in respect of the retroactive application of the IIRIRA to Mr. Smith's circumstances as well as the availability of judicial review. In particular, the jurisprudence of the inter-American system has recognized that the standards of due process under the system's instruments may apply not only to proceedings of a criminal nature, but also to non-criminal proceedings for the determination of a person's rights and obligations of a civil, labor or any other nature, including non-criminal proceedings against non-nationals.^[35] The Commission has also noted that the full complement of due process protections available in a criminal proceeding may not necessarily apply in all other processes but rather will depend upon the potential outcome and effects of the proceedings.^[36]

52. Accordingly, based upon the above considerations, the Commission considers that the claims raised by the Petitioners should not be declared inadmissible under Article 34 of the Commission's Rules of Procedure.

C. Joinder of Petitions

53. The Commission has observed that in petition P526-03 (Hugo Armendariz v. United States), the admissibility of which has been considered at the same time as the present petition, Mr. Armendariz is represented by two of the same petitioners as Mr. Smith, namely the law firm of Gibbs Houston Pauw and the Center for Human Rights and Justice, and the petitions address similar facts and reveal the same pattern of conduct concerning the relationship between rights governing the protection of the family and the expulsion of non-citizens from OAS member states. Based upon these considerations, the Commission has decided to join the present petition with petition 526-03 pursuant to Article 29(d) of the Commission's Rules and process them together for the purpose of determining the merits of the claims admitted by the Commission.

V. CONCLUSIONS

54. The Commission concludes that it has the competence to examine the Petitioners' allegations, and that the petition is admissible for the alleged violations of Articles V, VI, VII, XVIII, and XXVI of the American Declaration and in accordance with the Commission's Rules of Procedure.

55. On the basis of the findings of fact and law set forth above, and without prejudging the merits of the matter,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS DECIDES TO:

1. Declare the claims in the petition to be admissible in respect of Articles V, VI, VII, XVIII, and XXVI of the American Declaration.
2. Join and process together the present petition with petition P526-03 (Hugo Armendariz v. United States).
3. Continue with the analysis of the merits of the case.
4. Transmit this report to the parties.
5. Publish this report and include it in its Annual Report to the General Assembly of the Organization of American States.

Done and signed in the city of Guatemala, Guatemala, on the 20th day of the month of July 2006. (Signed): Evelio fernández Arévalos, President; Florentín Meléndez, Second Vice-president; Clare Kamau Roberts, Freddy Gutiérrez Trejo, and Victor E. Abramovich, Commissioners.

* Commission Member Professor Paolo Carozza did not take part in the discussion and voting on this case, pursuant to Article 17(2) of the Commission's Rules of Procedure.

[1] Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, 110 Stat. 3009 (1996).

[2] Immigration and Naturalization Act, 8 U.S.C. §1101 et seq.

[3] 8 U.S.C. §1227(a)(2)(A)(iii).

[4] Petitioners' petition dated December 20, 2002, p. 3, citing Matter of Marin, 16 I&N Dec. 581 (BIA 1978); Matter of Arrequin de Rodriguez, Interim Dec. No. 3247 (BIA, 1995).

[5] Petitioners' petition dated December 20, 2002, pp. 4-5, citing *INS v. St. Cyr*, 121 S. Ct. 2271 (2002). According to the Petitioners, the Court also held that federal courts do have jurisdiction in habeas proceedings to decide "pure questions of law" raised by non-citizens who are subject to a final order of removal if judicial review is precluded under the IIRIRA, and therefore that there is no judicial review of the discretionary denial of a request for a waiver of deportation.

[6] 8 U.S.C. § 1101(a)(43).

[7] 8 U.S.C. § 1101(a)(43).

[8] 8 U.S.C. § 1229b(a)(3).

[9] 8 U.S.C. §1252(a)(2)(C) (providing "[n]otwithstanding any other provision of law, no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense ... [including those classified as aggravated felonies]").

[10] Petitioners' petition dated December 20, 2002, pp. 11-12, citing, *inter alia*, *Mehemi v. France*, 6 E.H.R.R. (1997), *Beljoudi v. France*, 14 E.H.R.R. 801 (1992) and *Bouchelkia v. France*, 25 E.H.R.R. 686 (1998).

[11] Petitioners' petition dated December 20, 2002, p. 12, citing IACHR, *Narciso Palacios v. Argentina*, Report N° 105/99, Case 10.194 (29 September 1999).

[12] Petitioners' petition dated December 20, 2002, p. 13 citing Canada Report 2000, para. 150.

[13] The Petitioners also claim that this decision was ultimately erroneous in light of the US Supreme Court decision in *INS v. St. Cyr* but was not corrected because, as the Fourth Circuit itself recognized, Mr. Smith's habeas petition "simply fell between the judicial cracks." Petitioners' observations of March 19, 2004, p. 4, citing *Smith v. Ashcroft*, 295 F.3d 425, 429 (4th Cir. 2002).

[14] State's Observations dated December 22, 2003, p. 2.

[15] State's Observations dated December 22, 2003, p. 3.

[16] State's Observations dated December 22, 2003, p. 3.

[17] In this regard, the State asserts that under US constitutional law, four types of laws may not be the subject of ex post facto laws: 1. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal, and punishes such action; 2. Every law that aggravates a crime, or makes it greater than it was, when committed; 3. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed; and 4. Every law that alters the legal rules of evidence, and received less, or different testimony, than the law required at the time of the commission of the offense, in order to convict the offender. State's observations dated December 22, 2003, p. 8, relying upon *Calder v. Bull*, 3 Dallas 386, 390 (1798), cited in *Rogers v., Tennessee*, 121 S. Ct. 1693, 1697 (2001).

[18] State's observations dated December 22, 2003, p. 8, citing, *inter alia*, *Reno v. American Arab Anti-Discrimination Comm.*, 525 U.S. 471, 491 (1999); *Lehmann v. US*, 353 U.S. 685, 690 (1957); *Marcello v. Bonds*, 349 U.S. 302, 314 (1955).

[19] State's observations dated December 22, 2003, p. 8, citing Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181, 4409-71.

[20] State's observations dated December 22, 2003, p. 10, citing 8 C.F.R. § 3.1(b)(3)(2001).

[21] State's observations dated December 22, 2003, p. 10, citing 8 U.S.C. § 1229a(c)(5),(6) (Supp. V 1995).

[22] State's observations dated December 22, 2003, p. 10, citing *INS v. St. Cyr*, 121 S. Ct. 2275, 2289 (2001).

[23] See I/A Court H.R., Advisory Opinion OC-10/89 "Interpretation of the Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights, July 14, 1989, Ser. A No. 10 (1989), paras. 35-45; *James Terry Roach and Jay Pinkerton v. United States*, Case 9647, Res. 3/87, 22 September 1987, Annual Report of the IACHR 1986-87, paras. 46-49. For examples of decisions in which the Commission has found violations of the American Declaration in respect of OAS member states that are not parties to the American Convention on Human Rights, see Case N° 1742 (Cuba), May 1975, Annual Report of the IACHR 1975; *Maclean v. Suriname*, Case N° 10.116, Resolution N° 18/89, Annual Report of the IACHR 1988-1989; *Michael Edwards et al. v. The Bahamas*, Case N° 12.067, Report N° 48/01, Annual Report of the IACHR 2000; *Garza v. United States*, Case N° 12.243, Report N° 52/01, Annual Report of the IACHR 2000.

[24] See Charter of the Organization of American States, signed in Bogotá 9n 1948 and amended by the Protocol of Buenos Aires in 1967, by the Protocol of Cartagena de Indias in 1985, by the Protocol of Washington in 1992, and by the Protocol of Managua in 1993, Arts. 3(l), 45, 106, 145.

[25] See Advisory Opinion OC-10/89, paras. 42, 43 (citing numerous resolutions in which the General Assembly of the OAS has recognized the American Declaration as a source of international obligation for the member states of the OAS, and concluding that "it may be said that by means of an authoritative interpretation, the members states of the Organization have signaled their agreement that the Declaration contains and defines the fundamental rights referred to in the Charter.").

[26] As the Commission has previously held, it is beyond question that the core rights protected under the American Declaration, including the right to life, the right to liberty and the right due process and to a fair trial, have attained the status of customary, and indeed peremptory, norms of international law. See Case 12.379, Report 19/02, *Mario Alfredo Lares-Reyes et al. v. United States*, Annual Report of the IACHR 2002, para. 46, n. 23.

[27] The Commission's current Statute was approved by Resolution N° 447 taken by the General Assembly of the OAS at its Ninth Regular Session, held in La Paz, Bolivia in October 1979. Basic Documents Pertaining to Human Rights in the Inter-American System, Doc. OEA/Ser.L/V/I.4 rev. 8 (22 May 2001), pp. 119-126.

[28] *Smith v. Ashcroft*, 295 F.3d 425 (4th Cir. July 1, 2001) (Petitioners' petition dated December 20, 2002, Exhibit 10).

[29] In the *INS v. St. Cyr* case, the Supreme Court concluded that the IIRIRA's elimination of any possibility of 212(c) relief should not be interpreted so as to apply retroactively to criminal convictions entered prior to the September 30, 1996 effective date of the statute, with the effect that 212(c) relief remains available for aliens whose convictions were obtained through plea agreements and who, notwithstanding those convictions, would have been eligible for 212(c) relief at the time of their plea under the law then in effect. *INS v. St. Cyr*, 121 S. Ct. 2271, 2289 (2001).

[30] *Smith v. Ashcroft*, 295 F.3d 425 (4th Cir. July 1, 2001) (Petitioners' petition dated December 20, 2002, Exhibit 10).

[31] See, e.g., Case 11.233, Report 39/97, *Martin Javier Roca Casas (Peru)*, Annual Report of the IACHR 1998, para. 98, citing I/A Court H.R., *Velasquez Rodriguez Case*, Preliminary Objections, Judgment of June 26, 1987, Ser. C No. 1.

[32] See Petitioners' petition dated December 20, 2002, pp. 11-12, citing, *inter alia*, *Mehemi v. France*, 6 E.H.R.R. (1997) (finding that the fact that the 29-year-old applicant had lived his entire life in France and his entire family also lived there outweighed his two offenses of possession and importation of hashish and six year sentence), *Bouchelikia v. France*, 25 E.H.R.R. 686 (1998) (finding that the applicant's offense of

rape with violence as a juvenile and his five year sentence properly led to his deportation for public safety and that his current French wife and child did not change this finding because, at the time of his deportation order, the applicant was single and childless with real links to his country of origin).

[33] See, e.g., Case 11.006, Report 1/95 (Peru), Annual Report of the IACHR 1994; Case 11.427, Report 63/99, Victor Rosario Congo v. Ecuador, Annual Report of the IACHR 1998; Case 11.204, Report 98/03, Statehood Solidarity Committee v. United States, Annual Report of the IACHR 2003, paras. 91-93.

[34] See, e.g., Progress Report of the Office of the Rapporteur on migrant workers and their families in the Hemisphere, Ch., VI, paras. 18-21, Annual Report of the IACHR 1999, Ch. VI "Special Studies".

[35] See I/A Court H.R., Constitutional Court Case, Judgment of January 31, 2001, Ser. C N° 7, paras. 69, 70; Case 11.610, Report N° 49/99, Loren Laroye Riebe Star and others (Mexico), Annual Report of the IACHR 1998, paras. 46, 65-70; Case 10.675, Report 51/96, Haitian Interdiction Case (United States), Annual Report of the IACHR (1996), para. 180. See *similarly* UNHRC, General Comment N° 13, Article 14 (21st sess., 1984), Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/1/Rev.1 at 14 (1994), para. 2.

[36] See IACHR, Report on Terrorism and Human Rights 2002, para. 401.