

**REPORT N° 57/06**

PETITION 526-03
ADMISSIBILITY
HUGO ARMENDARIZ

UNITED STATES (^{*})
July 20, 2006

I. SUMMARY

1. On July 17, 2003, the Inter-American Commission on Human Rights (the "Commission") received a petition from 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 Hugo Armendariz in relation to his deportation from the United States.

2. In their initial petition and subsequent observations, the Petitioners claim that Mr. Armendariz 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. Armendariz'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, VII, XVIII, IX and XXVI of the American Declaration of the Rights and Duties of Man (the "American Declaration") because of the manner in which Mr. Armendariz'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, VII, XVIII, and XXVI of the American Declaration, to join and process together the present petition with petition P8-03 (Wayne Smith 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 August 18, 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. In their petition, the Petitioners also requested precautionary measures from the Commission pursuant to Article 25 of the Commission's Rules of Procedure in order for the United States to refrain from taking steps to deport Mr. Armendariz from the United States to Mexico. After asking the Petitioners for addition information and deliberating upon the request, in a note dated August 18, 2003 the Commission informed the Petitioners that based upon the information available, the Commission had declined to authorize precautionary measures at that time.

6. In a note dated October 21, 2003, the State requested an extension of time to November 18, 2006 within which to deliver its observations, which the Commission granted by communication dated November 5, 2003. Subsequently, in a note dated December 22, 2003 and received by the Commission on December 23, 2003, the State delivered its observations on the Petitioners' petition, which the Commission transmitted to the Petitioners on January 5, 2004 with a request for a reply within 30 days.

7. In a letter dated February 2, 2004, the Petitioners requested an extension of time to March 19, 2004 within which to deliver their observations, which the Commission granted by note dated February 4, 2004. Subsequently, by communication dated March 19, 2004, the Petitioners provide the Commission with a reply to the State's December 22, 2003 response, the pertinent parts of which were transmitted to the State on March 26, 2004 with a request for any additional observations within 30 days.

8. By notes dated April 15, 2004 and June 25, 2004, the State requested extensions of time to, respectively, June 25, 2004 and July 25, 2004 within which to deliver its observations on the Petitioners' reply, both of which the Commission granted in communications dated April 20, 2005 and June 28, 2004. Subsequently, on February 24, 2005, the State delivered its additional observations, which the Commission transmitted to the Petitioners by note dated February 25, 2005.

III. POSITIONS OF THE PARTIES

A. Position of the Petitioners

9. According to the Petitioners, Mr. Armendariz 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. Armendariz 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. Armendariz under this legislation as inconsistent with Articles I, V, VI, VII, XVII, IX and XXVI of the American Declaration.

10. Concerning the background to the complaint, the petition states that Mr. Armendariz is thirty years old and a native and citizen of Mexico. They claim that he first came to the United States in June 1972 when he was 2 years old and has been in the United States since, having become a lawful permanent resident on May 23, 1978 when he was 8

years old. According to the petition, Mr. Armendariz's mother is a U.S. citizen and his father is a lawful permanent resident. Mr. Armendariz has a U.S. citizen daughter who is 14 years old and has no close relatives living in Mexico and no meaningful ties to that country.

11. The Petitioners also state that on September 15, 1995, Mr. Armendariz was convicted after a jury trial of possession of cocaine for sale, possession of drug paraphernalia, and hindering prosecution, a violation of Arizona Revised Statutes § 13-3408(A)(2), (B)(2), (D) and (F). Subsequently, on or about April 5, 1996, the Immigration Service issued an Order to Show Cause alleging that Mr. Armendariz was deportable from the United States as a person convicted of an aggravated felony. According to the Petitioners, at that time the Order to Show Cause was issued, 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] and that at the deportation hearing Mr. Armendariz filed an application for a 212(c) waiver. The Petitioners also indicate that by the time the Immigration Judge ruled on his application, 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 April 16, 1997 the Immigration Judge issued an order that Mr. Armendariz be deported to Mexico and refused to consider the 212(c) waiver application. Mr. Armendariz then pursued an appeal to the Board of Immigration Appeals and petitions for review before the federal courts, which were ultimately unsuccessful when the U.S. Supreme Court dismissed his petition of writ of certiorari on June 2, 2003.

12. Concerning the admissibility of the complaint, the Petitioners argue that Mr. Armendariz 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 ultimately been unsuccessful. In particular, the Petitioners claim that Mr. Armendariz filed an appeal to the Board of Immigration Appeals from the Immigration Judge's April 16, 1997 order that he be deported to Mexico and refusing to consider his 212(c) waiver application, which was dismissed on October 23, 1997. He then filed a petition for review with the U.S. Court of Appeals for the Ninth Circuit arguing, *inter alia*, that his deportation from the United States without an opportunity to apply for a 212(c) waiver constituted a violation of the due process clause of the U.S. Constitution, and the petition was dismissed on February 29, 2000.

13. The Petitioners also indicate that Mr. Armendariz filed a petition for habeas corpus with the U.S. District Court, again arguing that his deportation without an opportunity to apply for a 212(c) waiver would violate the due process clause of the U.S. Constitution. According to the Petitioners, the District Court held that because the deportation proceeding against Mr. Armendariz began before the IIRIRA was enacted, those amendments did not apply to him and he was eligible for a 212(c) waiver. On appeal by the government, however, the U.S. Court of Appeals for the Ninth Circuit reversed the decision of the District Court, holding that the amendments made by the AEDPA and the IIRIRA applied retroactively to Mr. Armendariz and therefore that he was subject to mandatory deportation. [5]

14. The Petitioners also indicate that in the case of *INS v. St. Cyr*, [6] the Supreme Court held that persons who were convicted by a guilty plea prior to the amendments made in 1996 and who at the time of their conviction were eligible for a 212(c) waiver continue to be eligible for a 212(c) waiver in spite of the amendments made by the IIRIRA. They also state that this holding would apply to Mr. Armendariz but for the fact that he did not plead guilty but was convicted after a trial by jury. According to the Petitioners, the Ninth Circuit held that because he decided to exercise his right to a jury trial, Mr. Armendariz was not eligible for the

212(c) waiver and the Court of Appeals also rejected his constitutional arguments and held that he was not eligible for the 212(c) waiver even though he was eligible for the waiver at the time of his conviction. The Petitioners state that on November 26, 2002 the Ninth Circuit rejected a request for reconsideration filed by Mr. Armendariz and the decision became final. Finally, Mr. Armendariz filed a petition for certiorari to the U.S. Supreme Court in the respect of the Ninth Circuit's decision, which was dismissed on June 2, 2003.

15. In addition, the Petitioners claim that the petition has been filed in a timely manner, as it was filed within six months of the June 2, 2003 decision of the U.S. Supreme Court, and that the claims in the petition are not pending in any other international forum so as to preclude the Commission's jurisdiction.

16. With respect to the merits of the petition, the Petitioners claim that the IIRIRA and its application to Mr. Armendariz circumstance have resulted in violations of his rights under Articles I, V, VI, VII, XVII, 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.^[7] 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."^[8] 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."^[9] Finally, the Petitioners claim that the IIRIRA eliminated the right to judicial review as any review by courts beyond the Board of Immigration Appeals is specifically precluded for deportations based upon aggravated felonies and other criminal offenses.^[10] 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.

17. Within this legislative framework, the Petitioners argue that the State is responsible for violations of Mr. Armendariz'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. Armendariz 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.^[11]

18. The Petitioners also argue that the State is responsible for violations of Mr. Armendariz'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.^[12]

19. 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. Armendariz 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 US Department of Justice.^[13]

20. In response to the arguments of the State, the Petitioners reiterate that Mr. Armendariz has pursued available administrative and judicial remedies by presenting statutory and constitutional arguments that his request for a 212(c) waiver should have been considered and that these arguments were rejected by the courts.^[14] 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 their individual circumstances is not precluded by the authority of a state to control the presence of non-nationals in its territory.^[15] Finally, while the Petitioners admit that at the time of Mr. Armendariz's conviction he was deportable under the Anti-Drug Abuse Act of 1988, they also assert that he was still 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 retroactively through the enactment of the IIRIRA in 1996.^[16]

B. Position of the State

21. In its observations in the present complaint, the State's depiction of the factual and procedural history of Mr. Armendariz'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 two main grounds upon which it claims Mr. Armendariz'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. Armendariz has been deported and is no longer in the United States.

22. Second, 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. Armendariz was properly deported based upon his September 1995 convictions for unlawful possession of a narcotic for sale, of unlawful possession of drug paraphernalia, and of hindering a prosecution. The State also argues 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.

23. In this regard, the State asserts that one of the primary aims of the IIRIRA when it was signed by the US 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 US immigration law should be removed from the U.S. as quickly 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."^[17] 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. Armendariz, who did not have asylum or refugee status, is "hardly entitled to better treatment under U.S. immigration laws than that received by asylum seekers and refugee seekers who were also engaged in criminal conduct."^[18]

24. 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 offenses committed by Mr. Armendariz 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."^[19] 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.

25. 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.^[20] 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.^[21] 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. Armendariz 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. Armendariz 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).^[22]

26. 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, non-nationals may present applications for relief and protection from removal.

27. In addition, the State indicates that a non-national may appeal an adverse decision by the immigration judge to the Board of Immigration Appeals which has de novo review authority^[23] and that while an appeal is pending an individual may not be removed from the United States, and indeed Mr. Armendariz availed himself of this remedy. In addition, after the Board has decided a case, a non-national may file a motion to reopen or a motion to reconsider the Board's decision if new evidence arises or if the non-national believes that the Board has made an error of law warranting reconsideration.^[24] Finally, the State contends that non-nationals 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 non-nationals may seek judicial review to challenge the charge of deportability as well as to seek review of other substantive statutory and constitutional questions.^[25]

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

IV. ANALYSIS

A. Competence of the Commission

29. 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.

30. 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.^[26] These obligations are considered to flow from the human rights commitments of Member States under the OAS Charter,^[27] which Member States have agreed are contained in and defined by the American Declaration,^[28] as well as from the customary legal status of the rights

protected under many of the Declaration's core provisions,^[29] and the Commission is empowered under Articles 18 and 20 of its Statute^[30] 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.

31. In the petition presently under consideration, the Petitioners have alleged that the United States is responsible for violations of Mr. Armendariz's rights under Articles I, V, VI, VII, XVIII, IX and XXV of 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 victim is a natural person and the petition was lodged by the law firm 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. The Commission is therefore competent to examine this petition.

32. 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.

33. 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.

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

B. Admissibility of Petition

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

- (a) Violations of Mr. Armendariz'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. Armendariz'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. Armendariz'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 based upon his family and other circumstances.

1. Exhaustion of Domestic Remedies

36. 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.

37. In the present complaint, the Petitioners allege that Mr. Armendariz has exhausted all available administrative and judicial remedies available to him in respect of the claims raised before the Commission. In particular, they claim that Mr. Armendariz has challenged his deportation before the Board of Immigration Appeals and the federal courts on the basis that the denial of his request for a 212(c) humanitarian waiver violated his rights under the U.S. Constitution and that these claims were ultimately unsuccessful when the U.S. Supreme Court dismissed his petition for a writ of certiorari on June 2, 2003.^[31] The State has not objected to the admissibility of the Petitioners' petition on the ground that Mr. Armendariz has failed to exhaust domestic remedies.

38. 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

39. In their petition, the Petitioners have stated that Mr. Armendariz'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

40. The record in the present complaint indicates that the Petitioner lodged their petition with the Commission on July 17, 2003 and therefore within 6 months of the July 2, 2003 decision of the U.S. Supreme Court denying his petition for a writ of certiorari. 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

41. 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.

42. In the present case, the Petitioners have alleged violations of Mr. Armendariz'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.

43. 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]

44. 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]

45. 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

46. The Commission has observed that in petition P8-03 (Wayne Smith v. United States), the admissibility of which has been considered at the same time as the present petition, Mr. Smith is represented by two of the same petitioners as Mr. Armendariz, 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 P8-03 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

47. 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.

48. 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 P8-03 (Wayne Smith 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 K. Roberts, Freddy Gutiérrez Trejo, and Víctor 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 July 14, 2003, 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 July 14, 2003, p. 8, citing Armendariz-Montoya v. Sonchik, 291 F.3d 1116 (9th Cir. 2002).

[6] Petitioners' petition dated July 14, 2003, pp. 5, 8, citing INS v. St. Cyr, 121 S. Ct. 2271 (2002).

[7] Petitioners' petition dated July 14, 2003, p. 2, citing 8 U.S.C. § 1101(a)(43).

[8] Petitioners' petition dated July 14, 2003, p. 3, citing 8 U.S.C. § 1101(a)(43).

[9] Petitioners' petition dated July 14, 2003, pp. 3-4, citing 8 U.S.C. § 1229b(a)(3).

[10] Petitioners' petition dated July 14, 2003, p. 4, citing 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]").

[11] Petitioners' petition dated July 14, 2003, pp. 10-11, 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).

[12] Petitioners' petition dated July 14, 2003, pp. 12-13, citing IACHR, *Narciso Palacios v. Argentina*, Report No. 105/99, Case 10.194 (29 September 1999).

[13] Petitioners' petition dated July 14, 2003, pp. 13-14, citing Canada Report 2000, para. 150.

[14] Petitioners' observations dated March 19, 2004, p. 7.

[15] Petitioners' observations dated March 19, 2004, pp. 2-5.

[16] Petitioners' observations dated March 19, 2004, p. 5.

[17] State's observations dated December 22, 2003, p. 4.

[18] State's observations dated December 22, 2003, p. 3.

[19] State's observations dated December 22, 2003, p. 5.

[20] 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. 6, relying upon *Calder v. Bull*, 3 Dallas 386, 390 (1798), cited in *Rogers v., Tennessee*, 121 S. Ct. 1693, 1697 (2001).

[21] State's observations dated December 22, 2003, p. 7, 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).

[22] 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.

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

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

[25] State's observations dated December 22, 2003, p. 8, citing *INS v. St. Cyr*, 121 S. Ct. 2275, 2289 (2001).

[26] 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 No. 1742 (Cuba), May 1975, Annual Report of the IACHR 1975; *Maclean v. Suriname*, Case No. 10.116, Resolution No. 18/89, Annual Report of the IACHR 1988-1989; *Michael Edwards et al. v. The Bahamas*, Case No. 12.067, Report No. 48/01, Annual Report of the IACHR 2000; *Garza v. United States*, Case No. 12.243, Report No. 52/01, Annual Report of the IACHR 2000.

[27] 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.

[28] See Advisory Opinion OC-10/89, *supra*, 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.").

[29] 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.

[30] 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/II.4 rev. 8 (22 May 2001), pp. 119-126.

[31] Petitioners' petition dated July 14, 2003, p. 8, Exhibit 12.

[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.