
INTER-AMERICAN COMMISSION ON HUMAN RIGHTS
RESOLUTION 21/2016
PRECAUTIONARY MEASURE No. 152-16

Matter of D.S.¹ regarding the United States of America²
April 9, 2016

I. INTRODUCTION

1. On March 14, 2016, the Inter-American Commission on Human Rights (hereinafter, 'the IACHR,' 'the Commission,' or 'the Inter-American Commission') received a request for precautionary measures from Ms. Claudia Valenzuela and Mr. Mark Fleming (hereinafter, 'the applicants') in order to safeguard the right to life and personal integrity of Ms. D.S., a citizen of El Salvador. According to the request, D.S., who fled her country and sought asylum in the United States of America (hereinafter, 'the U.S.', 'the United States' or 'the State'), faces an imminent threat of deportation which places her life and personal integrity at risk. In addition, the applicants filed a petition P-439-16 alleging a series of due process violations in the asylum procedure.

2. After analyzing the legal arguments and facts presented by the applicants, the Commission considers that the information submitted suggests *prima facie* that D.S. is facing a situation of seriousness and urgency, since her life and personal integrity would be at risk if she is deported. Consequently, in light of Article 25 of the Rules of the IACHR, the Commission requests the United States to refrain from deporting Ms. D.S. until the IACHR has ruled on the petition pending before the IACHR (P-439-16), in which the applicants allege violations of the American Declaration on the Rights and Duties of Man.

II. SUMMARY OF LEGAL ARGUMENTS AND FACTS SUBMITTED BY THE APPLICANTS

3. According to the request for precautionary measures, D.S. is a Salvadorian woman who fled her country in August 2015 and entered U.S. territory in November 2015 seeking asylum. The relevant authorities processed her application for asylum through 'expedited removal proceedings' under which an asylum officer screens applications by assessing their likelihood of success before an immigration judge. In the meantime, the proposed beneficiary was kept in custody at the Pulaski Detention Center in rural Illinois. The request for precautionary measures is based on the following legal arguments and alleged facts:

A. As background information, the applicants indicate that the Northern Triangle Countries (composed by El Salvador, Honduras and Guatemala) have been subject to some of the most extreme violence in the world, registering a death toll of 17,500, which is higher than four West African countries struggling with the Boko Haram insurgency and even higher than the death tolls in Somalia, Libya and South Sudan. In particular, the violence seems to be disproportionately serious against women and children, who face sexual aggression and forced recruitment. This situation of violence is due mainly to the presence of powerful and highly organized armed criminal gangs who exercise an overall control over entire neighborhoods in El Salvador, and even exert a considerable amount of influence on the judiciary and law enforcement institutions. These gangs (mainly, the Mara Salvatrucha or MS-13 and the Barrio 18) often enter into territorial disputes among themselves, which increases the degree of already serious violence. As of late, these criminal groups have expanded their presence in neighboring countries, such as Honduras and Guatemala.

B. Concerning the situation of D.S., the applicants inform that she lived in the Cantón Los Ángeles, Canchagua, La Unión, El Salvador, with her former partner, Mr. R., and her three children, A., B., and C, all of

¹ In this matter, the applicants requested that the proposed beneficiary's identity be kept confidential in any document accessible to the public. In this regard, her identity is fully specified in the request and other documents transferred to the State.

² According to the Rules of Procedure of the IACHR, President James Cavallaro, an U.S. citizen, did not participate in the debate and decision of this matter.

whom were minors.³ Around two years ago, the *mareros* (gang members) tried to forcefully recruit her son A., when, on one occasion, approximately eight of them, covered in tattoos, surrounded him. D.S., however, confronted them and one of them told her, 'you need to stop being a bitch. You have no right to be involved in the life of your children,' while pointing a gun at her. Since then, the *mareros* began threatening D.S. through death threats, in person and over the phone, as well as through extortions and home invasions during which she was forced to feed them. Additionally, the *mareros* demanded that her daughter B. be handed over to them. According to the request, D.S. initially decided not to call the police for fear that the *mareros* would kill her for doing so, as she had observed that some gang members in her neighborhood were released just a few days after their detention. Additionally, the police had allegedly behaved in an aggressive manner towards her which caused her to disbelieve in the effectiveness of the institution.

C. In light of the numerous threats, attempts of forced recruitment and violent attacks, the son of the proposed beneficiary, A., fled the country to the U.S. However, a few months later, on an evening in August 2014, gangsters killed her other son C. while he was getting some food. According to the request, the neighbors heard gunshots and called D.S. to inform her that her son was lying dead on the street. The proposed beneficiary believes that C's death was carried out as a reprisal for protecting her other son, A. Supposedly, the police did not investigate the alleged crime.

D. Eventually, D.S. went to the prosecutor to express her fears on account of the death threats and extortions carried out against her family. The prosecutor allegedly told her that they could offer no protection since the institution was also under threat ('well, it's hard in the entire country'), and even suggested that her daughter B. stop going to school in order to minimize her risk of being attacked by the *mareros*. Soon after, her daughter B. also fled from El Salvador to the United States.

E. Parallel to these events, the applicants indicate that D.S. was also suffering from domestic violence at the hands of her former partner, Mr. R., who, within the last three years, repeatedly threatened, beat, and raped her, as well as demanded money from her. In particular, the information indicates that Mr. R. used to lock the door and keep her in the house almost all of the time forcing her to stay with him ('you can't leave me because you'll pay for it'). In August 2015, Mr. R. almost killed D.S. when he became angry that D.S. did not have any money. According to the request: '[...] he locked [her] in one of the rooms and beat [her] all day. [Mr. R.] even threw the microwave at [her] [...]. He then grabbed a knife and used it as if he were stabbing [her]. Afterwards, he grabbed [her] hair and dragged [her] around to different rooms, throwing furniture at [her]. He forcibly took off [her] clothes, spit on [her] face and raped [her]. [Mr. R.] then grabbed a machete and put it on [her] neck and said 'I wish I had a gun to kill you. All I need is one bullet.' In that moment, [her] sister knocked on the door of the house. She came in and saw everything. [Her] sister was afraid of him but told [him] to stop beating [her]. [Mr. R.] responded ['take this bitch because if not, I will kill her!']. [Mr. R.] then threw [her] out of the house and threw [her] stuff out on the street [...]. That night, [she] went to [her] sister's house and at night, [she] fled the country [...]. [She has] learned that [Mr.R.] still looks for [her] and has promised to kill [her] if [she returns] to El Salvador [...].' Due to the control exercised by her former partner, D.S. was prevented from leaving El Salvador earlier.

F. As for the asylum procedure in the U.S., the applicants inform that on the December 8 2015, an asylum officer conducted a telephone interview with the proposed beneficiary in order to consider her asylum application. On December 21, 2015, the proposed beneficiary was notified that her application was dismissed. According to the documents provided in the request, the immigration officer stated that: 'there is not a significant possibility that the harm the applicant fears is on account of one of the five protected grounds [that is to say: race, religion, nationality, political opinions and membership in a particular social group]. The applicant was threatened in the past by unknown individuals because they wanted money. The individuals told the applicant that if she did not pay them she would wind up dead like her son. It does not appear that the applicant was threatened on the account of one of the protected grounds, but because the unknown individuals were

³ The identity of these persons has been kept confidential in the present matter, in accordance with the applicants' request of protecting the identity of the proposed beneficiary.

motivated for nothing more than by financial gain [...]; there is no evidence that the gangs the applicant fears could harm the applicant with the instigation of or with the consent or acquiescence of the government of El Salvador [...].’ On January 4th 2016, a review hearing was held before an immigration judge, who eventually upheld the dismissal.

G. In this regard, the applicants sustain that the U.S. authorities: i) failed to understand the real situation, by asking meaningless or distorted questions; ii) did not provide her legal counsel; iii) did not understand the meaning of the concept of ‘membership in a particular social group’ in this case (either in relation to the violence caused by the *mareros* or by her former partner) and thus erroneously categorized her case as falling beyond the scope of the law; iv) failed to apply relevant national case-law which apparently addresses the same situation; v) failed to duly justify the reasons for upholding the dismissal; vi) did not take into consideration the general information on the Salvadorian context; vii) applied an inadequate standard of proof; viii) denied judicial review or access to the federal courts because of limitations contained within the applicable regulation; among other complaints. Lastly, the applicants indicate that a final order of removal has been issued against D.S., which means that she would be deported as soon as the logistical matters are settled.

4. On March 23, 2016, the IACHR requested information from the State with a five-day deadline. To date, the State has not provided any answer.

5. On April 1, 2016, the applicants submitted additional information, indicating that after filing the present request for precautionary measures, they sought a stay of deportation from the U.S. Immigration and Customs Enforcement (ICE) in order to provide the Inter-American Commission more time to consider D.S.’s request. Nonetheless, on March 22, 2016, the ICE rejected that request. Moreover, the applicants indicated that the ICE, without previously consulting with her attorneys, had D.S. sign documents claiming that she is supposedly refusing to cooperate with her deportation. According to the applicants, this is the first step towards bringing criminal charges against D.S.

III. ANALYSIS ON THE ELEMENTS OF SERIOUSNESS, URGENCY AND IRREPARABLE HARM

6. The mechanism of precautionary measures is part of the Commission’s function of overseeing Member State compliance with the human rights obligations set forth in Article 106 of the Charter of the Organization of American States. These general oversight functions are set forth in Article 41 (b) of the American Convention on Human Rights and Article 18 of the Commission’s Statute. The mechanism of precautionary measures is set out in Article 25 of the Commission’s Rules of Procedure. According to this Article, the Commission issues precautionary measures in situations that are serious and urgent, and where such measures are necessary to prevent irreparable harm to persons.

7. The Inter-American Commission and the Inter-American Court of Human Rights have repeatedly established that precautionary and provisional measures have a dual nature, precautionary and protective. Regarding their protective nature, the measures seek to avoid irreparable harm and preserve the exercise of human rights. Regarding their precautionary nature, the measures have the purpose of preserving a legal situation being considered by the IACHR. Their precautionary nature aims at preserving those rights at risk until the petition in the Inter-American system is resolved. Its object and purpose are to ensure the integrity and effectiveness of the decision on the merits and, thus, avoid infringement of the rights at issue, a situation that may adversely affect the useful purpose (*effet utile*) of the final decision. In this regard, precautionary measures or provisional measures thus enable the State concerned to fulfill the final decision and, if necessary, to comply with the ordered reparations. As such, for the purposes of making a decision, and in accordance with Article 25.2 of its Rules of Procedure, the Commission considers that:

- a. “serious situation” refers to a grave impact that an action or omission can have on a protected right or on the eventual effect of a pending decision in a case or petition before the organs of the Inter-American system;
- b. “urgent situation” refers to risk or threat that is imminent and can materialize, thus requiring immediate preventive or protective action; and

- c. “irreparable harm” refers to injury to rights which, due to their nature, would not be susceptible to reparation, restoration or adequate compensation.

8. The Inter-American Commission observes that the State has not replied to the request for information made on March 13, 2016, in which the State was asked to provide its observations on the request for precautionary measures and to indicate whether any protective measures could be implemented in response to the allegations. In this context, although the lack of the response is not enough to grant precautionary measures, it is a factor to consider when making a decision. In this sense, the lack of information from the State makes it impossible for the Commission to know about the possible measures being implemented and the State’s view on the alleged facts, in general.

9. The present request for precautionary measures aims to protect the right to life and personal integrity of Ms. D.S., a Salvadorian woman who fled her country in August 2015 and entered U.S. territory in November 2015, seeking asylum. The request for precautionary measures is related to individual petition P-439-16 in which the applicants allege violations of Articles I (right to life and personal security), XVIII (right to a fair trial), XXIV (right of petition), XXVI (right to due process of law) and XXVII (right to seek asylum) of the American Declaration.

10. In the present matter, the IACHR considers that the requirement of seriousness is met, in both its precautionary and protective aspects, since the rights implicated relate primarily to the right to life under Article I of the American Declaration in connection with the alleged risks involved in the deportation to El Salvador. In this regard, it has been alleged that D.S.’s family was targeted by criminal gangs for many years, and that the alleged persecution included repeated extortions, death threats and acts of aggression. In this sense, it must be stressed that in August 2014, the youngest son of D.S. was killed in alleged retaliation for the proposed beneficiary’s confrontation with the gang members who tried to forcefully recruit one of her children. In this context of violence, her two surviving children also had to flee from their country to seek asylum. Additionally, D.S. was subjected to domestic violence for a long period of time, which consisted of violent threats, physical assaults and sexual abuse, including rape, at the hands of her former partner, who threatened to kill her in the event of her return to El Salvador.

11. As for the asylum procedure in the United States, the applicants denounce a series of alleged flaws in the response to DS’s application for asylum. The applicants claim that the US authorities: i) failed to understand the real situation, by asking meaningless or distorted questions; ii) did not provide her legal counsel; iii) did not understand the meaning of the concept of ‘membership in a particular social group’ in this case (either in relation to the violence caused by the *mareros* or by her former partner) and thus erroneously categorized her case as falling beyond the scope of the law; iv) failed to apply relevant national case-law, which apparently addresses the same situation; v) failed to duly justify the reasons for upholding the dismissal; vi) did not take into consideration the general information on the Salvadorian context; vii) applied an inadequate standard of proof; viii) denied judicial review or access to the federal courts, because of limitations contained within the applicable regulation; among other complaints.

12. Within the framework of this requirement, the IACHR notes that the alleged elements are consistent with general information collected through its other mechanisms, as well as statements issued by other international human rights bodies. In this regard, the United Nations High Commissioner on Refugees (UNHCR) stated that ‘gangs in El Salvador reportedly perceive a wide range of acts by residents of the area under the gang’s control as demonstrating ‘resistance’ to their authority. Acts commonly construed as challenging a gang’s authority reportedly include but are not limited to: criticizing the gang; refusing a request or ‘favor’ by a gang member; arguing with or looking mistrustfully at a gang member; refusing to participate in gang activities or to join the gang; rejecting the sexual attention of a gang member [...]; refusing to pay extortion demands [...]; and passing on information about the gang to rivals, authorities or outsiders [...].The nature of retaliation for perceived acts of ‘resistance’ or ‘disloyalty’ by inhabitants is reported to vary to some degree depending on the ‘character’ of the local gang and the form of ‘resistance’ involved. However, most perceived contraventions of these gang-imposed rules are dealt with severely: individuals whom the gang members suspect of resisting their authority are reported often to be killed without prior warning, although sometimes the killing is reportedly preceded by threats and/or

other attacks against the person concerned.⁴ Moreover, concerning the asylum procedure, the IACHR declared that '[...] in order to comply with Article XXVII [of the American Declaration on Rights and Duties of Man], domestic procedures by which a refugee seeks asylum must be adequate and effective. At a minimum, the Commission has held that Article XXVII ensures an asylum seeker a hearing that complies with basic due process standards to determine refugee status. The Commission has previously expressed that the 'act of hearing the person,' who claims to be at risk of persecution, is 'the most fundamental element of the right to seek asylum [...]. The Inter-American Commission reaffirms that, under international law, States must have effective substantive and procedural safeguards in place to identify and protect the rights of individuals eligible for asylum. To this end, the Commission has outlined the contours of the obligation of non-refoulement to require that States do not return persons at risk of persecution to the country of persecution, as well as to ensure that State policies and practices provide sufficient mechanisms to identify such claims and make the relevant administrative and judicial determinations with the corresponding due process guarantees.'⁵

13. Regarding the requirement of urgency, the IACHR sustains that it is satisfied, given that Ms. D.S. currently faces imminent deportation. According to the applicants, D.S.'s asylum application was denied on the 21st of December 2015. Said denial was upheld by the immigration judge on the 4th of January 2016, without any possibility of challenging the decision. The applicants also mentioned that a stay of deportation was filed before the relevant authorities, but was eventually denied. Ms. D.S. may, therefore, be removed at any time. Additionally, it must be stressed that 12 days have passed since the IACHR requested information from the State, with no answer to date, despite the high urgency of the matter. Furthermore, apart from the risk faced by Ms. D.S. in the event she is returned to El Salvador, the execution of the deportation order will eventually prevent the Inter-American Commission from properly assessing the merits of the petition.

14. Regarding the requirement of irreparable harm, the Commission considers that it is fulfilled, to the extent that the possible effect on the right to life and physical integrity represents the highest irreparable situation. Regarding the precautionary nature, the Commission considers that if Ms. D.S. is deported before the Commission has an opportunity to fully examine this matter, any eventual decision would be rendered moot in respect of the efficacy of potential remedies, resulting in irreparable harm.

V. BENEFICIARIES

15. The request has been presented in favor of D.S., who is fully identified within the documents submitted to the IACHR.

VI. DECISION

16. In view of the above-mentioned information, the Commission considers that this matter *prima facie* meets the requirements of seriousness, urgency and irreparable harm contained in Article 25 of its Rules of Procedure. Consequently, the Commission requests that the United States of America refrain from deporting Ms. D.S. until the IACHR has ruled on the petition pending before the IACHR (P-439-16), in which the applicants allege violations of the American Declaration on the Rights and Duties of Man.

17. The Commission also requests that the Government provide information within a period of 15 days from the date that the present resolution is issued on the adoption of precautionary measures and provide updated information periodically.

18. The Commission wishes to point out that in accordance with Article 25(8) of its Regulations, the granting of precautionary measures and their adoption by the State shall not constitute a prejudging of any violation of the rights protected in the American Declaration on the Rights and Duties of Man or any other applicable instrument.

⁴ See: UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from El Salvador, p. 29-30, available at: <http://www.refworld.org/docid/56e706e94.html>

⁵ See: IACHR. Human Rights Situation of Refugee and Migrant Families and Unaccompanied Children in the United States of America, p. 46-48, available at: <http://www.oas.org/en/iachr/reports/pdfs/Refugees-Migrants-US.pdf>

19. The Commission requests that the Executive Secretariat of the IACHR notify the present resolution to the United States of America and to the petitioners.

20. Approved on April 9, 2016, 2016 by: Francisco José Eguiguren Praeli, First Vice President; Margarete May Macaulay, Second Vice President; José de Jesús Orozco Henríquez, Paulo Vannuchi, Esmeralda Arosemena de Troitiño, Enrique Gil Botero, members of the IACHR.



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