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File Number(s): Report No. 90/98; Case 11.843
Title/Style of Cause: Kevin Mykoo v. Jamaica
Doc. Type: Decision
Decided by: Chairman: Carlos Ayala Corao;
First Vice Chairman: Robert K. Goldman;
Second Vice Chairman: Jean Joseph Exume.
Commissioners: Alvaro Tirado Mejia, Claudio Grossman, Helio Bicudo,
Henry Forde.
Dated: 3 November 1998
Citation: Mykoo v. Jamaica, Case 11.843, Inter-Am. C.H.R., Report No. 90/98,
OEA/Ser.L/V/II.102, doc. 6 rev. (1998)
Represented by: APPLICANT: Barlow Lyde & Gilbert
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I. ALLEGED FACTS:

1. By letter dated December 1, 1997, Messrs. Barlow Lyde & Gilbert, Solicitors (hereinafter referred to as “the Petitioners”), in London, the United Kingdom, presented a petition to the Inter-American Commission on Human Rights (hereinafter referred to as “the Commission”) against the State of Jamaica (hereinafter referred to as “the State”) on behalf of Mr. Kevin Mykoo, a Jamaica National. The Petitioners stated that Mr. Mykoo was convicted of murder and sentenced to death on February 16, 1996, in the Home Circuit Court, in Kingston, Jamaica, and is incarcerated on death row, at St. Catherine District Prison, Jamaica. Mr. Mykoo appealed to the Court of Appeal of Jamaica, and the Court of Appeal dismissed his appeal on April 14, 1997. The Petitioners stated that Notice of Intention to Petition the Judicial Committee of the Privy Council (“Privy Council”) was given, and advice was sought from Junior and Leading Counsel, concerning an appeal to the Privy Council. The Petitioners claim that advice of Junior Counsel was given on September 6, 1997, and advice of Leading Counsel was given on October 22, 1997, and both said that there were no grounds upon which Mr. Mykoo could petition the Judicial Committee of the Privy Council, based on the trial, and Court of Appeal’s decisions.

2. The Petitioners allege that the State of Jamaica has violated Mr. Mykoo’s right to humane treatment pursuant to Article 5(1) and 5(2), of the American Convention, because Mr. Mykoo was kept in custody for three months and was denied access to a lawyer for two months. The Petitioners allege that after Mr. Mykoo was arrested and during questioning by the police, Mr. Mykoo was subjected to a catalogue of ill treatment, including his attempted strangulation by the police by putting his head into a car window and raising the window against his neck; that the police took out a knife and threatened to cut off his penis if he did not answer their questions; that Mr. Mykoo was beaten with guns and subjected to electric shocks until he signed the

statement in which he incriminated himself; and that Mr. Mykoo is being confined in conditions which violate his right to humane treatment. The Petitioners also allege that Mr. Mykoo's right to personal liberty and his right to a fair trial, as established by Articles 7(5) and 8(1) of the American Convention, were violated by the State, because he was not brought promptly before a judicial officer, and was brought before one after he had been in custody for four months; and that Mr. Mykoo did not have a speedy trial, and was brought to trial almost two years after his arrest, he was arrested on July 5, 1994, and his trial commenced on February 5, 1996.

3. The Petitioners stated that Mr. Mykoo is subject to the death penalty, is at risk of execution, and requested that the Commission provide interim relief pursuant to Article 29.2 of its Regulations against the State, and that the Commission should request that the State take no steps to implement the death sentence pending determination of the petition.

4. On February 4, 1998, the Petitioner filed a Supplementary Communication which claims that the Governor General's Instructions violate Articles of the American Convention and that if Mr. Mykoo is executed while his petition is pending before the Commission, his right to life, right to humane treatment, right to apply for pardon, clemency and commutation of sentence, right to judicial protection as established by Articles 4(1), 4(6), 5(1) and 25(1) of the American Convention will be violated because of the mandatory nature of the death penalty.

II. PROCEEDINGS BEFORE THE COMMISSION

5. The Commission received Mr. Mykoo's petition on December 1, 1997, and an accompanying letter which stated inter alia that: "You may be aware that on the August 1997, the Jamaican Government published a Notification (Vol. CXX, No. 84) in which it announced that: where after a period of one month from the date on which proof of filing an application has been furnished no request by the [Inter-American Commission on Human Rights] for a response and for a Stay of Execution has been received by the Government of Jamaica, the Execution will not be further postponed. You will understand from this that the communication attached is in need of the Commission's most urgent attention." [FN1]

[FN1] The Governor General's Instructions were issued on August 6, 1997, and published in Vol. CXX, on Thursday, August 7, 1997, in "The Jamaica Gazette Extraordinary." The Governor General Instructions were later amended and published in "The Jamaica Gazette Extraordinary," on Thursday, April 23, 1998. The Governor General's Instructions states, inter alia that when a petitioner submits a petition to the Commission for consideration, that petitioner must furnish proof to the Governor-General in Privy Council within 3 weeks that an application has been filed; the Commission must then request a response to the petition from the State, and also request a stay of execution of the victim, within one month of receipt of the petition; the Commission must make a decision on the petition within six months after the State responds to the petition; if the Commission make its decision within six months, such decision will be considered by the Jamaican Privy Council as to whether or not the Prerogative of Mercy should be exercised in the victim's favor. If the Commission does not issue its decision within six months of receipt of the State's response to the petition, the execution of the victim will not be further postponed.

6. The Commission acknowledged receipt of the communication, and forwarded the pertinent parts of the petition to the State on December 3, 1997 pursuant to Article 34 of its Regulations. The Commission requested that the State supply it with the information concerning the claims raised in the petition, and any additional information which would enable it to study and process the petition in accordance with Article 37 of the Regulations, and to determine whether the internal legal remedies and procedures have been exhausted in this case. The Commission also requested that the State stay the execution of Mr. Mykoo pending an investigation by it of the alleged facts.

7. The State forwarded its Reply to the Commission on December 29, 1997, and stated that “it acknowledges receipt of the Commission’s request for comments on the admissibility of the communication. In order to expedite the examination of the communication, the merits will also be addressed at this stage.” The State denied the allegations made by the Petitioner and submitted its views on the admissibility of the petition referred to below.

8. The Commission received additional information from the Petitioners on September 21, 1998, concerning the admissibility of the petition, and the pertinent parts were forwarded to the State on the same day. The Commission requested that the State provide the information it deemed relevant within 7 days from receipt of its letter, in order for the Commission to consider the case at its next period of Sessions.

9. On September 30, 1998, the Commission received the State’s Reply to the Petitioners’ argument on admissibility.

10. The parties’ arguments on the merits of the petition will be included in the Commission’s decision on the merits.

III. PARTIES’ POSITIONS ON ADMISSIBILITY

A. Petitioner’s position

11. The Petitioners argue that the petition is admissible because all effective domestic remedies have been exhausted by Mr. Mykoo, and that Mr. Mykoo has not pursued a Constitutional Motion, because in the circumstances of this case, it does not constitute an available remedy within the meaning of Article 46(1)(a) of the American Convention. The Petitioners claim that the remedy which must be exhausted before recourse to this Commission, must be effective in the sense of being reasonably available rather than theoretically possible, and that the Constitutional redress provided by Section 25 of the Constitution of Jamaica is effectively denied to Mr. Mykoo because of the high cost and procedural complexity. The Petitioners claim that Mr. Mykoo does not have the private means to obtain legal representation and that no legal aid is available to pursue such a motion, therefore, Mr. Mykoo has exhausted all domestic remedies for the purposes of Article 46(1) of the American Convention, and thus, the petition is admissible.

12. The Petitioners claim that subsequent to the Court of Appeal's dismissal of Mr. Mykoo's appeal on April 14, 1997, Notice of Intention to petition the Privy Council was given. The Petitioners argue that advice of Junior Counsel was given on September 6, 1997, and advice of Leading Counsel was given on October 22, 1997, and both said that there were no grounds upon which Mr. Mykoo could petition the Privy Council based on the trial and Court of Appeal's decisions.

13. The Petitioners argue that the earliest point at which it was known with any certainty that the Jamaican Court of Appeal's ruling in Mr. Mykoo's case represented a "final ruling" was the point at which Leading Counsel advised that there were no grounds upon which an appeal to the Privy Council could proceed. The Petitioners also argue that the six month time limit should therefore run from October 22, 1997, when the advice was given. The Petitioners argue that the time limit was not intended to encourage the pursuit of wholly unmeritorious appeals to the Privy Council purely for the purpose of preserving the time available for applications to be made to the Commission. In addition, the Petitioners argue that plainly this is what would result if the Commission was to conclude in circumstances such as these that the earlier Jamaican Court of Appeal ruling was the "final ruling" for the purposes of Article 38(1) of the Commission's Regulations.

14. The Petitioners argue that Article 38(2) of the Regulations provides that the time limit within which a petition must be lodged where the circumstances of Article 37(2) apply is "a reasonable time," and that Mr. Mykoo's case falls within Article 37(2) (b) of the Regulations because there is no Legal Aid funding available to him to enable him to pursue a Constitutional Motion in relation to the violation of his human rights in Jamaica and thereby to fully exhaust his domestic remedies. The Petitioners also argue that Mr. Mykoo's petition was sent to the Commission on his behalf on December 1, 1997, and was therefore made within "a reasonable period of time" and should be admissible for consideration by the Commission on this basis in the event that the Commission is unwilling to consider the application as admissible in accordance with Article 38(1) of the Regulations.

15. In response to the State's Reply on the admissibility of the right to humane treatment pursuant to Article 5 of the American Convention, the Petitioners argue that under Article 46(1) of the American Convention, Mr. Mykoo is under an obligation to exhaust remedies in accordance with internationally recognized principles of international law. The Petitioners also argue that one of these recognized principles is that the remedy be "effective" in other words it should provide adequate relief, and that at Mr. Mykoo's trial the prosecution did not seek to rely upon admissions obtained through the use of torture, had they done so, it is true that Mr. Mykoo could have sought to have them excluded from the evidence. In addition, the Petitioners argue that because the prosecution did not rely upon admissions as part of its case the issue of Mr. Mykoo's ill-treatment could not have affected the course of the trial, and that such a complaint could only have been raised by way of motion under the Constitution of Jamaica, however, as noted in Mr. Mykoo's complaint, he cannot pursue a Constitutional Motion.

16. The Petitioners argue that Mr. Mykoo was not under a duty to bring the fact of his incommunicado detention to the attention of the magistrate because this would not have afforded him any grounds for relief in the domestic courts and such a claim could only have been brought

by way of a Constitutional Motion. The Petitioners also argue that Mr. Mykoo is unable to pursue such a motion because of the high cost of legal representation in Jamaica and the absence of legal aid. In addition, the Petitioners argue that the State's argument with regard to the new Legal Aid Act is false, and that the State must be taken to know the status of legislation before Parliament, whether or not it has been passed, and whether or not it is in force, and that the State has not supplied copies of the legislation in order to show that Mr. Mykoo will be able to take advantage of it when it becomes law.

17. The Petitioners argue that in light of the State's position, the Commission is invited to hold the determination of Mr. Mykoo's application in abeyance until the Legal Aid Act is in force and Mr. Mykoo has had an opportunity to pursue a Constitutional Motion in the Jamaican Courts. The Petitioners argue that if this process was completed, the Commission could seek further submissions on the findings of fact made by the Jamaican Courts and could then proceed to determine the application.

B. State of Jamaica's position

18. The State argues that the petition is inadmissible, and refutes the Petitioners' argument that the date of the "final ruling" in Mr. Mykoo's case, was the date when Lead Counsel advised Mr. Mykoo that there were no grounds upon which an appeal to the Privy Council could proceed." The State argues that in its view, exhaustion of domestic remedies means seeking a remedy from a court and obtaining a determination, and denies that "an opinion from leading Counsel, no matter how distinguished constitutes an exhaustion of remedy." The State argues that Counsel may advise but cannot always predict the outcome of a case, and that Mr. Mykoo opted not to pursue a legal remedy available to him. Having done so, he failed to meet the obligation under the Convention to exhaust domestic remedies.

19. The State denies the allegations raised in the petition. The State argues that Mr. Mykoo's claims concerning his lack of access to an attorney for three months after his arrest, and a "catalogue of ill-treatment" to which he was subjected to on arrest by the arresting authorities, in violation of his right to humane treatment, and as established by Articles 5 of the American Convention, are inadmissible. The State argues that Mr. Mykoo could have raised the claim at his preliminary hearing, his trial, and his appeal, therefore, it is not acceptable to raise these allegations for the first time before the Commission, and having failed to do so, Mr. Mykoo should not be allowed to raise the issue for the first time.

20. The State argues in its prior submissions, that Mr. Mykoo may avail himself of pursuing a Constitutional remedy, because there is a new Legal Aid Act which makes such provisions, and that the Legal Aid Act is number 36 of 1997, and has been passed by both houses of Parliament, and assented to by the Governor General, and will come into force on a day appointed by the Minister. The State also argues that it did not at any time intend to mislead the Commission and regrets that Mr. Mykoo's counsel found it necessary to make allegations of bad faith on the part of the State. The State later acknowledged that the Legal Aid Act is not yet in force and that a specific date has not been set for its entry into force, and argues that any attempt by Mr. Mykoo to suspend proceedings before the Commission in order to await the entry into force of a law, will be regarded as a stalling tactic, should Mr. Mykoo choose to proceed in this way.

IV. GENERAL CONSIDERATIONS

A. The Commission's Competence

21. The Commission is competent to examine this petition. It derives its authority from the Charter of the Organization of American States, its Statute, the American Convention on Human Rights and its Regulations.

B. Admissibility of petition

1. Exhaustion of domestic remedies

22. The State argues that exhaustion of domestic remedies means seeking a remedy from a court and obtaining a determination, and denies that opinion of Lead Counsel constitutes exhaustion of a remedy, and that Mr. Mykoo opted not to pursue a legal remedy available to him and therefore has not exhausted domestic remedies. The State argues that with regard to Mr. Mykoo's claims concerning his lack of access to an attorney for three months after his arrest, and a "catalogue of ill-treatment" to which he was subjected to on arrest by the arresting authorities, in violation of his right to humane treatment and as established by Articles 5 of the American Convention, are inadmissible. The State argues that Mr. Mykoo could have raised the claim at his preliminary hearing, his trial, and his appeal, therefore, it is not acceptable to raise these allegations for the first time before the Commission, and having failed to do so, Mr. Mykoo should not be allowed to raise the issue for the first time.

23. The State argues in its prior submissions that Mr. Mykoo may avail himself of pursuing a Constitutional remedy, because there is a new Legal Aid Act which makes such provisions, and that the Legal Aid Act is number 36 of 1997, and has been passed by both houses of Parliament, and assented to by the Governor General, and will come into force on a day appointed by the Minister. The State also argues that it did not at any time intend to mislead the Commission and regrets that Mr. Mykoo's Counsel found it necessary to make allegations of bad faith on the part of the State. The State later acknowledged that the Legal Aid Act is not in force and a specific date has not been set for its entry into force, and argues any attempt by Mr. Mykoo to suspend proceedings before the Commission in order to await the entry into force of a law, will be regarded as a stalling tactic, should Mr. Mykoo choose to proceed in this way.

24. The Petitioners argue that under Article 46(1) of the American Convention, Mr. Mykoo is under an obligation to exhaust remedies in accordance with internationally recognized principles of international law. The Petitioners also argue that one of these recognized principles is that the remedy be "effective" in other words provide adequate relief, and that at Mr. Mykoo's trial the prosecution did not seek to rely upon admissions obtained through the use of torture, had they done so, it is true that Mr. Mykoo could have sought to have them excluded from the evidence. In addition, the Petitioners argue that because the prosecution did not rely upon admissions as part of its case the issue of Mr. Mykoo's ill-treatment could not have affected the course of the trial, and that such a complaint could only have been raised by way of motion under the

Constitution of Jamaica, however, as noted in Mr. Mykoo's complaint, he cannot pursue a Constitutional Motion.

25. The Petitioners argue that Mr. Mykoo was not under a duty to bring the fact of his incommunicado detention to the attention of the magistrate because this would not have afforded him any grounds for relief in the domestic courts and such a claim could only have been brought by way of a Constitutional Motion. The Petitioners also argue that Mr. Mykoo is unable to pursue such a motion because of the high cost of legal representation in Jamaica and the absence of legal aid. In addition, the Petitioners argue that the State of Jamaica's argument with regard to the new Legal Aid Act is false, and that the State must be taken to know the status of legislation before Parliament, whether or not it has been passed, and whether or not it is in force, and that the State has not supplied copies of the legislation in order to show that Mr. Mykoo will be able to take advantage of it when it becomes law.

26. The Petitioners argue that in light of the State of Jamaica's position, the Commission is invited to hold the determination of Mr. Mykoo's application in abeyance until the Legal aid Act is in force and Mr. Mykoo has had an opportunity to pursue a Constitutional Motion in the Jamaican Courts. If this process was completed, the Commission could seek further submissions on the findings of fact made by the Jamaican Courts and could then proceed to determine the application.

27. Article 46 (1) of the American Convention provides:

Admission by the Commission of a petition or communication lodged in accordance with Articles 44 or 45 shall be subject to the following requirements:

(a) That the remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law.

28. Article 46(2) of the American Convention provides:

The provisions of paragraphs 1.a and 1.b of this Article shall not be applicable when:

(a) The domestic legislation of the state concerned does not afford due process of law for the protection of the right or rights that have allegedly been violated;

(b) The party alleging violation of his rights has been denied access to the remedies under domestic law or has been prevented from exhausting them.

29. The Petitioners are in effect arguing that their allegations of violations of the right to humane treatment, and the right to personal liberty, because of the delay in bringing Mr. Mykoo promptly before a judicial officer, and the alleged abuse by the police, are claims which could not have been raised at trial or on appeal, and could only be raised in a Constitutional Motion, however, Mr. Mykoo was not provided with an attorney, nor is there legal aid available to pursue such claims because he is indigent. The State in response argues that these claims are inadmissible, because they could have been raised at the preliminary hearing, at trial, and on appeal, and that a Legal Aid Act has been passed but is not yet in force.

30. The Commission refers to the Inter-American Court's Advisory Opinion OC-11/90 of August 10, 1990.[FN2] In that Advisory Opinion, the Court was requested by the Commission to construe Article 46(1)(a) and 46(2) of the American Convention in light of one of the following questions: "Does the requirement of the exhaustion of internal legal remedies apply to an indigent, who because of economic circumstances is unable to avail himself of the legal remedies within a country?" The Court concluded by stating that:

If it can be shown that an indigent needs legal counsel to effectively protect a right which the Convention guarantees and his indigency prevents him from obtaining such counsel, he does not have to exhaust the relevant domestic remedies.

[FN2] At 20, para. 31.

31. In addition, in construing Article 46 of the American Convention concerning the exhaustion of domestic remedies, the Inter-American Court stated in the Velasquez Rodriguez' Case, Judgment of July 29, 1988, that "it is the legal duty of the States to provide such remedies, " and then stated further that:

The rule of prior exhaustion of domestic remedies under the international law of human rights has certain implications that are present in the Convention. Under the Convention, States Parties have an obligation to provide effective judicial remedies to victims of human rights violations (Art.25), remedies that must be substantiated in accordance with the rules of due process of law (Art.8(1)), all in keeping with the general obligation of such States to guarantee the free and full exercise of the rights recognized by the Convention to all persons subject to their jurisdiction (Art.1). (Velasquez Rodriguez Case, Preliminary Objections, supra 23, para. 91.)[FN3]

[FN3] OAS/ser.L/V/III.19, August 31, 1988, at 48-49, para. 62.

32. The Inter-American Court also stated in the Velasquez Rodriguez case that remedies must be adequate and effective. The Court stated that:

Adequate domestic remedies are those which are suitable to address an infringement of a legal right. A number of remedies exist in the legal system of every country, but not all are applicable in every circumstance. If a remedy is not adequate in a specific case, it obviously need not be exhausted. A norm is meant to have an effect and should not be interpreted in such a way as to negate its effect or lead to a result that is manifestly absurd or unreasonable. For example, a civil proceeding specifically cited by the Government, such as a presumptive finding of death based on disappearance, the purpose of which is to allow heirs to dispose of the estate of the person presumed deceased or to allow the spouse to remarry, is not an adequate remedy for finding a person or for obtaining his liberty.[FN4]

[FN4] Id. At 49, para. 64.

33. The Inter-American Court also stated that:

A remedy must be effective that is, capable of producing the result for which it was designed. Procedural requirements can make the remedy of habeas corpus ineffective: if it is powerless to compel the authorities; if it presents a danger to those who invoke it; or if it is not impartially applied.

34. The United Nations Human Rights Committee has held when deciding communications from Jamaica that “in the absence of legal aid, a Constitutional Motion could not be deemed to constitute an available remedy to an indigent convict and need not be exhausted for purposes of the Optional Protocol.”[FN5] The United Nations Human Rights Committee has also held that a failure to petition the Judicial Committee of the Privy Council, is not attributable to the indigent person because “to petition the Judicial Committee as a poor person, the petition must be accompanied by an affidavit in its support as well as the certificate of counsel that the petitioner has reasonable grounds of appeal...and that an application to the Privy Council could not be considered an effective remedy and does not constitute a remedy which must be exhausted for the purposes of the Optional Protocol.”[FN6]

[FN5] Lloydell Richards, Communication No. 535/1993, Adoption of Views, 31, March 1997, CCPR/C/59/D/535/1993, 5 May 1997, at 6-7 para. 6.1; Michael Steadman, Communication No. 528/1993, Adoption of Views, 2 April, 1997, CCPR/C/59/D/528/1993, 29 April, 1997, at 6, para. 6.3; Desmond Williams, Communication No. 561/1993, Adoption of Views, 8 April 1997, CCPR/C/59/D/561/1993, 24 April 1997, at 6, para. 6.1.

[FN6] Fray Deidrick, Communication No. 619/1995, Views adopted 9 April, 1998, CCPR/C/62/D/619/1995, 4 June, 1998, at 6, para. 6.1.

35. The Commission finds that based on the above jurisprudence of international human rights law, that a Constitutional Motion is per se available to Mr. Mykoo to pursue, however, is not effective nor adequate to pursue his claims of fundamental violations of his human rights because the State’s Legal Aid Act which was enacted in 1997, to pursue Constitutional Motions has not yet entered into force. Therefore, the Commission finds that Mr. Mykoo is excused from pursuing and exhausting domestic remedies, namely, to the Privy Council and by way of a Constitutional Motion in the Courts of Jamaica.

2. This petition is timely filed

36. Mr. Mykoo was convicted of murder and sentenced to death on February 16, 1996, he appealed to the Court of Appeal and his appeal was dismissed by the Court of Appeal on December 1, 1997. The Petitioners argue that Notice of Intention to Petition the Judicial Committee of the Privy Council, was given but on the advice of both Junior and Leading

Counsel, on September 6, 1997, and October 22, 1997, respectively, that there were no grounds upon which to appeal, Mr. Mykoo did not appeal to the Privy Council. The Petitioners also argue that Mr. Mykoo's petition to the Commission was filed within a "reasonable time" pursuant to Articles 37(2) and 38(2) of the Commission's Regulations, because Mr. Mykoo is indigent and that the State of Jamaica does not provide legal aid to pursue a Constitutional Motion.

37. The Petitioners argue that the date of the "final ruling" as stated by Article 38(1) is the date when Leading Counsel's advice was given on October 22, 1997. The Petitioners also argue that the time limit was not intended to encourage the pursuit of wholly unmeritorious appeals to the Judicial Committee of the Privy Council purely for the purpose of preserving the time available for applications to be made to the Commission, and that this is what would result if the Commission was to conclude in circumstances such as these that the earlier Jamaican Court of Appeal ruling was the "final ruling" for the purposes of Article 38(1).

38. Article 38(1) of the Commission's Regulations provides that:

The commission shall refrain from taking up petitions which are lodged after the six-month period following the date on which the party whose rights have allegedly been violated has been notified of the final ruling in cases where the remedies under domestic law have been exhausted.

39. Article 38(2) of the Commission's Regulations provides:

In the circumstances set forth in Article 37 (2) of these Regulations, the deadline for presentation of a petition to the Commission shall be within a reasonable period of time, in the Commission's judgment, as from the date on which the alleged violation of rights has occurred, considering the circumstances of each specific case.

40. Article 37(1) of the Commission's Regulations provides:

For a petition to be admitted by the Commission, the remedies under domestic jurisdiction must have been invoked and exhausted in accordance with the general principles of international law.

41. Article 37(2) provides that the provisions of the preceding paragraph shall not be applicable when:

- (a) The domestic legislation of the State concerned does not afford due process of law for protection of the right or rights that have allegedly been violated;
- (b) The party alleging violation of his rights has been denied access to the remedies under domestic law or has been prevented from exhausting them;
- (c) There has been unwarranted delay in rendering a final judgment under the aforementioned remedies.

42. The Commission notes that Article 46(1) of the American Convention provides that admission by the Commission of a petition or communication lodged in accordance with Articles 44 or 45 shall be subject to the following requirements:

That the petition or communication is lodged within a period of six months from the date on which the party alleging violation of his rights was notified of the final judgment.

43. Article 46(1) refers to when the party allegation violation of his rights was notified of the “final judgment” and Article 38(1) refers to the “final ruling” in cases where the remedies under domestic law have been exhausted. The Commission finds that pursuant to Article 46(1) the “final judgment” would be the date of the Court of Appeals decision, April 14, 1997, when Mr. Mykoo was notified that his appeal was dismissed. However, the Commission finds that pursuant to Article 38(1) the “final ruling,” is the date when Mr. Mykoo has exhausted his domestic remedies, and Article 38(2) provides that the deadline for presenting petitions shall be “in the circumstances set forth in Article 37(2) of these Regulations...“within a reasonable period of time, in the Commission’s judgment... .” Article 37(2)(b) provides “the party alleging violation of his rights has been denied access to the remedies under domestic law or has been prevented from exhausting them.”

44. The Petitioners argue that Mr. Mykoo could not exhaust his domestic remedies by filing a Constitutional Motion because the State of Jamaica does not provide legal aid to persons who wish to pursue a Constitutional Motion, and he could not pursue his claims as to violation of his right to humane treatment because such a claim can only be brought on a Constitutional Motion. The United Nations Human Rights Committee has held that a failure to petition the Judicial Committee of the Privy Council, is not attributable to the indigent person because “to petition the Judicial Committee as a poor person, the petition must be accompanied by an affidavit in its support as well as the certificate of counsel that the petitioner has reasonable grounds of appeal...and that an application to the Privy Council could not be considered an effective remedy and does not constitute a remedy which must be exhausted for the purposes of the Optional Protocol.”[FN7]

[FN7] Fray Deidrick, Communication No. 619/1995, Views adopted 9 April, 1998, CCPR/C/62/D/619/1995, 4 June, 1998, at 6, para. 6.1.

45. The Commission finds that the Court of Appeal of Jamaica issued a final judgment in Mr. Mykoo’s case on April 14, 1997. Mr. Mykoo submitted his petition dated November, 28, 1997, to the Commission and it was received on December 1, 1997, within “a reasonable time” from the date of the Court of Appeal’s decision and final advice of Leading Counsel on October 22, 1997, pursuant to Article 46(1)(a) of the American Convention, and Article 38(2) of the Commission’s Regulations. The Commission finds this petition was filed seven months after the “final ruling,” and “final judgment” of the Court of Appeal’s decision, and was filed within a reasonable time, and therefore it is timely filed.

3. No duplication of procedures

46. The Commission finds that this petition satisfies the requirement of Article 46(1)(c) of the American Convention and Article 39(1) of the Commission’s Regulations. It is not pending settlement in another procedure under an international organization of which the State concerned

is a member and does not duplicate a petition already examined and settled by the Commission or by another international governmental organization of which the state concerned is a member. Nor is the petition substantially the same as one previously studied by the Commission or by another international organization as established by Article 47(d) of the American Convention.

V. CONCLUSION:

47. The Commission finds that the petition is admissible having satisfied the requirements of Article 46 of the American Convention and Articles 37, 38, and 39 of its Regulations. The Commission wishes to state that Article 4 of the American Convention places great emphasis on the protection of the right to life rather than the deprivation of the right to life. "Article 4(1) of the American Convention provides that "every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No person shall be arbitrarily deprived of his life." However, Article 4(2) of the American Convention provides: "In countries that have not abolished the death penalty, it may be imposed only for the most serious crimes in accordance with a law establishing such punishment, enacted prior to the commission of the crime. The application of such punishment shall not be extended to crimes to which it does not presently apply." The Petitioners claim that the State has violated Mr. Mykoo's human rights as established by Articles 4(1), 4(6), 7(5), 8(1), 5(1), 5(2), and 25(1) of the American Convention.

48. The Commission finds that this petition raises a prima facie claim of a violation of a human right recognized in the American Convention. Without prejudging the merits of this petition and the allegations of human rights violations made by the Petitioners on behalf of Mr. Mykoo, the Commission will assess the validity of these claims in the merits phase of its decision.

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,

DECIDES:

1. To declare the petition admissible.
2. To transmit this Report to the State of Jamaica and to the Petitioner.
3. To place itself at the disposal of the parties concerned with a view to reaching a friendly settlement of the matter.
4. To maintain in effect the precautionary measures issued on December 3, 1997, in this case, until it issues a decision on the merits.
5. To make public this report and to publish it in its Annual Report to the OAS General Assembly.

Done and approved at the headquarters of the Inter-American Commission on Human Rights, in the city of Washington, D.C., on the 3rd day of the month of November, 1998. (Signed): Carlos Ayala Corao, Chairman; Robert K. Goldman ; First Vice Chairman; Jean Joseph Exumé, Second Vice Chairman; Commissioners Alvaro Tirado Mejía; Claudio Grossman; Hélio Bicudo and Henry Forde.