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Institution: Inter-American Commission on Human Rights
File Number(s): Report No. 15/04; Petition 518/01
Session: Hundred and Nineteenth Regular Session (23 February – 12 March 2004)
Title/Style of Cause: Derrick Tracey v. Jamaica
Doc. Type: Decision
Decided by: President: Jose Zalaquett;
First Vice-President: Clare K. Roberts;
Second Vice-President: Susana Villaran;
Commissioners: Evelio Fernandez Arevalos, Florentin Melendez, Paulo Sergio Pinheiro, Freddy Gutierrez Trejo.
Dated: 27 February 2004
Citation: Tracey v. Jamaica, Petition 518/01, Inter-Am. C.H.R., Report No. 15/04, OEA/Ser.L/V/II.122, doc. 5 rev. 1 (2004)

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I. SUMMARY

1. On August 3, 2001, the Inter-American commission on Human Rights (the “Commission”) received a petition from Mr. Derrick Tracey (the “petitioner”) against the Government of Jamaica (the “State” or “Jamaica”). The petition stated that on April 14, 2000, Mr. Tracey was convicted in the St. Ann Circuit Court in Jamaica of robbery with aggravation and illegal possession of a firearm and was subsequently sentenced to two 15-year sentences.

2. In his petition, Mr. Tracey has alleged that the State is responsible for violating his right to due process under Articles 8(1), 8(2), and 8(3) of the American Convention on Human Rights (the “Convention”) in connection with the criminal proceedings against him. In particular, the petitioner claims that he was denied effective assistance of counsel at trial and was denied the assistance of counsel altogether during his appeal, that he was not provided adequate time and means to prepare his defense prior to his trial, and that a coerced confession of guilt was used against him during his trial. The State contends that the petition is inadmissible because the petitioner has failed to exhaust domestic remedies in accordance with Article 46(1)(a) of the Convention by way of petition for Special Leave to Appeal to the Judicial Committee of the Privy Council.

3. As set forth in this Report, having examined the contentions of the parties on the question of admissibility, and without prejudging the merits of the matter, the Commission decided to declare the petition admissible with respect to Articles 1(1), 8 and 25 of the American Convention, subject to its decision to join the question of exhaustion of domestic remedies to the merits, to transmit this Report to the parties, to continue with the analysis of the merits of the

case, and to publish this Report and include it in its Annual Report to the General Assembly of the Organization of American States.

II. PROCEEDINGS BEFORE THE COMMISSION

4. Following receipt of the petitioner's complaint, which was designated as petition P0518/2001, the Commission decided to transmit the pertinent parts of the petition to the Government of Jamaica by means of a note dated September 24, 2001, with a request for the State's observations within a period of two months in accordance with Article 30(3) of the Commission's Rules of Procedure.

5. In a communication dated November 20, 2001 and received by the Commission on November 20, 2001, Jamaica delivered its response to the petitioner's petition, which the Commission transmitted to the petitioner by note dated December 5, 2001. Also by note dated December 5, 2001, the Commission informed Jamaica that the pertinent parts of the Government's response had been transmitted to the petitioner.

6. By letter received by the Commission on June 28, 2002, the petitioner delivered additional information in response to the State's November 20, 2001 observations on his petition. The Commission transmitted the pertinent parts of the petitioner's reply to the State by note dated July 17, 2002, with a request for a response within 30 days.

7. In a note to the Commission dated September 12, 2002 and received by the Commission on September 13, 2002, the State requested an extension of time within which to deliver its response to the petitioner's reply. By letter dated September 16, 2002, the Commission granted the State an extension of time of 30 days within which to deliver its observations.

8. In a communication dated October 16, 2002 and received by the Commission on October 17, 2002, the State delivered a response to the petitioner's reply, which the Commission transmitted to the petitioner for his information by note dated October 21, 2002.

9. By note dated October 23, 2002, and received by the Commission on October 28, 2002, the State delivered an amended response to the petitioner's reply, with a request that the amended observations replace the State's communication dated October 16, 2002. In a communication dated October 30, 2002, the Commission transmitted to the petitioner the amended observations of the State.

10. By letter dated October 2, 2003 and received by the Commission on December 2, 2003, the petitioner provided the Commission with additional observations concerning his complaint. The Commission transmitted the pertinent parts of the petitioner's additional observations to the State in a note dated December 9, 2003 with a request for a response within one month. In a communication dated January 14, 2004, the State requested a 30-day extension of time within which to respond to the Commission's December 9, 2003 note, which the Commission granted by letter dated January 20, 2004.

11. In a note dated January 27, 2004 and received by the Commission on the same date, the State delivered its response to the petitioner's October 2, 2003 observations, which the Commission transmitted to the petitioner by letter dated January 29, 2004.

III. POSITIONS OF THE PARTIES

A. POSITION OF THE PETITIONER

12. The petitioner claims that he was arrested on a charge of robbery with aggravation and illegal possession of a firearm on July 10, 1998. He was subsequently tried in the St. Ann Circuit Court and, on April 14, 2000, was convicted of the charges against him and sentenced to two 15-year sentences, which he is presently serving at the St. Catherine Adult Correctional Centre in Jamaica.

13. With respect to the admissibility of his claim, the petitioner argues that he is excused from exhausting domestic remedies because the State has effectively denied his right to a fair trial in connection with his efforts to exhaust remedies.

14. According to the petitioner, following his April 14, 2000 conviction he lodged an application for legal representation and for leave to appeal from the trial court to the Court of Appeal of Jamaica. On March 8, 2001, a single judge of the Court of Appeal of Jamaica dismissed the petitioner's application. In its "Notification to Appellant of Result of Application", a copy of which the petitioner provided to the Commission, the Court stated as follows:

Application for leave refused. All the legal issues have been properly dealt with by the Learned Trial Judge. Legal aid refused. Sentence to commence on 28/5/2000.

15. The petitioner subsequently applied to a three-judge panel of the Court of Appeal of Jamaica for legal representation and for leave to appeal, and on June 11, 2001 the panel dismissed his application and request for leave.

16. The petitioner also claims that he made other attempts to obtain legal representation to pursue an appeal before the Court of Appeal and the Judicial Committee of the Privy Council. In particular, Mr. Tracey indicates that in November 2002, he wrote to the President of the Court of Appeal of Jamaica concerning his circumstances and did not receive a reply. Mr. Tracey also claims that he requested assistance from the Independent Jamaican Council for Human Rights and from the Public Defender of Jamaica, without success. In this connection, Mr. Tracey indicated that the Public Defender sent a representative to visit him, who only said that they "could not overrule the court," and that the petitioner had to start his sentence and apply for parole after 5 years. The petitioner also provided the Commission with a copy of a letter dated May 21, 2002 that he received from the Public Defender advising him that "unfortunately we are unable to assist you any further in this matter as was communicated to you by our Investigator, Mr. A.S. Sharpe, in July of last year."

17. Based upon these circumstances, the petitioner contends that by denying his request for legal representation to pursue his appeal, the State effectively denied his right to pursue judicial remedies in respect of the criminal proceedings against him

18. With respect to the substance of his complaints, the petitioner argues that the State is responsible for violating his right to a fair trial under Article 8 of the American Convention because he was not provided with due guarantees during the criminal proceedings against him. According to the petitioner, following his arrest he represented himself during court proceedings for a period of over 21 months and was subsequently appointed a legal aid lawyer on the first day of his trial. Mr. Tracey also alleges that the legal aid lawyer did not take a statement from him and did not have sufficient time to study the petitioner's case. Further, the petitioner alleges that he was coerced by the police into making a confession of guilt in the absence of a Justice of the Peace or a lawyer and that the trial court nevertheless admitted the confession into evidence. Finally, the petitioner claims that the State failed to provide him with legal representation to pursue his appeal before the Court of Appeal of Jamaica or to petition the Judicial Committee of the Privy Council for special leave to appeal.

B. POSITION OF THE STATE

19. With respect to the admissibility of the petitioner's petition, the State claims that the petition is inadmissible because remedies provided for under the domestic law have not been exhausted. In particular, the State argues that pursuant to Section 110 of the Jamaican Constitution, the petitioner may apply to the Judicial Committee of the Privy Council for Special Leave to Appeal to that body. According to the State, Section 110 states in pertinent part, that:

(1) An appeal shall lie from decisions of the Court of Appeal to Her Majesty in Council as of right in the following cases:

(c) final decisions in any civil, criminal or other proceedings on questions as to the interpretation of this Constitution,... [emphasis added][FN1]

[FN1] State's observations dated October 23, 2002, p. 2.

20. The State asserts in this regard that, based upon its investigation of Mr. Tracey's submissions, there is no evidence that he attempted to obtain legal representation to pursue a petition to the Judicial Committee of the Privy Council or that he in fact pursued such a petition, and therefore that he has failed to exhaust an available remedy.

21. With respect to Mr. Tracey's allegation that he was not represented on appeal, the State argues that the petitioner is not exempt from exhausting domestic remedies because it cannot be proved that the lack of legal counsel affected his right to a fair hearing. In particular, the State asserts that the application for leave to appeal to the Court of Appeal of Jamaica is a simple process, which requires only the completion of a single form. The State points out that the petitioner instituted this process and that his leave applications were considered and dismissed by

a single judge of the Court of Appeal as well as a three-judge panel of the Court of Appeal. Also in support of its position, the State cites the decision of the Inter-American Court of Human Rights in Advisory Opinion OC-11/90 of August 10, 1990, which addressed the effect of a petitioner's indigence on the requirement of the exhaustion of domestic remedies as follows:

26. Article 8 must, then, be read to require legal counsel only when that is necessary for a fair hearing...

27. Even in those cases in which the accused is forced to defend himself because he cannot afford legal counsel, a violation of Article 8 of the Convention could be said to exist if it can be proved that the lack of legal counsel affected the right to a fair hearing to which he is entitled under that Article. [. . .]

31. ...the question is whether an indigent may appeal directly to the Commission to protect a right guaranteed in the Convention without first exhausting applicable domestic remedies...The answer...is that if it can be shown 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. [emphasis added][FN2]

[FN2] State's observations dated October 23, 2002, pp. 5, 7.

22. The State argues that in the present complaint, the petitioner was not denied legal representation based on his indigent status and therefore that he is not exempt from the requirement of exhausting domestic remedies. More particularly, according to Section 20 of Jamaica's Legal Aid Act 1997, an indigent who would otherwise qualify for legal aid may be denied such aid if the applicant's prospects of success are insufficient to justify this assistance.[FN3] The State asserts that the petitioner was denied legal aid based on the judges' determination of an insufficient prospect of success, which was independent of the petitioner's indigent status. Accordingly, the State argues that because the apparent lack of merit in the petitioner's case, and not his indigency, prevented him from obtaining legal counsel, the petitioner is not excused from exhausting relevant domestic remedies in accordance with the jurisprudence of the Inter-American Court.

[FN3] State's observations dated October 23, 2002, pp. 6-7 (citing Articles 19 and 20 of the Legal Aid Act as follows: "19.(1) [...] for the purposes of assessing the means of the applicant, the certifying authority shall make such inquiries as it considers necessary into the means of an applicant [...] and [...] shall have regard to all of the financial resources of the applicant, in particular – a) The income of the applicant after deductions made from income pursuant to law; b) Any cash that is readily available or can be made available to the applicant; c) The financial obligations of the applicant; and d) Such other matters as from time to time may be prescribed. 20. In deciding whether to grant a legal aid certificate, a certifying authority shall take into account – a) The extent to which full disclosure regarding the means of the applicant has been made; b) Whether the applicant's prospects of success are insufficient to justify the grant of legal

aid; [...] e) Where the matter is on appeal, whether in the opinion of the certifying authority, the grant of legal aid or further legal aid, as the case may be is justified in all the circumstances of the case”).

23. The State did not provide the Commission with any observations on the merits of the allegations raised in the petitioner’s complaint.

IV. ANALYSIS

A. Competence of the Commission *ratione personae*, *ratione materiae*, *ratione temporis* and *ratione loci*

24. The Commission is competent to examine the petition in question. Under Article 23 of the Rules of Procedure of the Commission, the petitioner is authorized to file complaints alleging violations of rights protected under the American Convention. The petitioner is a person whose rights were protected under the Convention, the provisions of which the State had undertaken to respect. Jamaica has been subject to the jurisdiction of the Commission under the terms of the Convention since August 7, 1978, the date on which it deposited its instrument of ratification.

25. Inasmuch as the petitioner has alleged violations of his right to due process as protected under the American Convention, the Commission is competent *ratione materiae* to examine the complaint.

26. The Commission is competent *ratione temporis* to examine the complaints because the petition alleges facts that occurred on and after August 7, 1978, the date on which Jamaica ratified the American Convention.

27. Finally, the Commission is competent *ratione loci*, given that the petition indicates that the petitioner was under the jurisdiction of the State of Jamaica at the time the alleged events occurred, which reportedly took place within the territory of that State.

B. Admissibility

1. Duplication of Procedures

28. There is no information indicating that the matters complained of in the petitioner’s petition have previously been submitted for examination by this Commission or by any other international organization. The State has not contested the issue of duplication of procedures. The Commission therefore finds no bar to the admissibility of the petition under Article 46(1)(c) or 47(d) of the Convention.

2. Exhaustion of Domestic Remedies

29. Article 46(1)(a) of the Convention specifies that, in order for a case to be admitted, “remedies under domestic law [must] have been pursued and exhausted in accordance with

generally accepted principles of international law.” When domestic remedies are unavailable as a matter of fact or law, however, the requirement that they be exhausted may be excused. Article 46(2) of the Convention specifies that this exception applies if the legislation of the State concerned fails to afford due process for the protection of the right allegedly violated, if the party alleging the violation has been hindered in his or her access to domestic remedies, or if there has been an unwarranted delay in the issuance of a final judgment.

30. Further, when a petitioner alleges that he or she is unable to prove exhaustion, Article 31(3) of the Commission’s Rules of Procedure provides that the burden then shifts to the State to demonstrate that the remedies under domestic law have not previously been exhausted, unless it is clearly evident from the record.[FN4]

[FN4] See also I/A Court H.R., Velasquez Rodriguez Case, Merits, Judgment of July 29, 1988, Ser. C N° 4, para. 59.

31. In determining whether a petitioner’s claims should be considered inadmissible for failure to exhaust domestic remedies, the Commission refers to the fundamental principles governing the nature of the remedies that must be exhausted in the Inter-American system, namely those remedies that are both adequate, in that they are suitable to address an infringement of legal rights, as well as effective, in that they are capable of producing the result for which they are designed.[FN5]

[FN5] Id., paras. 63-66. See also I/A Court H.R., Exceptions to the Exhaustion of Domestic Remedies (Arts. 46(1), 46(2)(a) and 46(2)(b) of the American Convention on Human Rights), Advisory Opinion OC-11/90, August 10, 1990, Ser. A N° 11 (1990), paras. 34, 36.

32. The petitioner in the present complaint argues that the domestic legislation of Jamaica does not afford him due process of law for the protection of the rights that have allegedly been violated. In particular, the petitioner argues that that the right to petition for leave to appeal to the Court of Appeal of Jamaica or to the Judicial Committee of the Privy Council does not constitute an effective domestic remedy because an indigent defendant is not provided with legal aid in exercising those rights.

33. The State argues that domestic remedies remain for the petitioner to exhaust. In particular, the State argues that the right to petition to the Judicial Committee of the Privy Council for special leave to appeal to that body is a domestic remedy that has not been pursued or exhausted. With respect to the petitioner’s claim that he was not represented during his appeal to the Court of Appeal of Jamaica, the State argues that a petition to the Court of Appeal that does not require legal representation to pursue, and indeed that the petitioner engaged that process. The State also argues that Mr. Tracey’s applications for leave were dismissed not because of his status as an indigent, but because his prospects of success were insufficient to justify legal aid assistance.

34. With respect to the observations of the parties concerning the petitioner's appeal to the Court of Appeal of Jamaica, it is apparent from the information available that the petitioner in fact pursued an appeal before a single judge of the Court of Appeal of Jamaica as well as a three-member panel of that Court and was unsuccessful in obtaining legal assistance and leave on both occasions. The Commission therefore considers that Mr. Tracey has exhausted this procedure, insofar as domestic remedies may be considered to encompass an appeal of this nature. In any event, the Commission considers that the State should be stopped from arguing that the petitioner failed to exhaust remedies before the Court of Appeal of Jamaica when, at the same time, it contends that an appeal of this nature would present no reasonable prospect of success.

35. With regard to the State's objection to the admissibility of the case based upon the right to petition to the Judicial Committee of the Privy Council for special leave to appeal, the Commission observes that one of the central issues raised by the petitioner on the merits of the present case is whether, in the context of his case, the right to a fair trial as provided for under Article 8 of the Convention required the State to provide the petitioner with legal representation to pursue the appeals from his conviction and sentence. According to the jurisprudence of the inter-American system, the right to a fair trial under Article 8 of the Convention applies to all stages of a proceeding, including any appeals from a final judgment.[FN6] Further, both the Inter-American Court and this Commission have found that Articles 8 and 25 of the Convention may require a state to provide an individual with legal assistance to pursue remedies in respect of criminal proceedings against him or her, where the individual lacks the means to do so and the interests of justice require such assistance in order for that remedy to be effectively pursued, for example where the issues raised are procedurally and substantively complex and cannot be effectively raised or presented in the absence of legal representation.[FN7] The Commission therefore considers that the facts alleged by the petitioner pertaining to his failure to pursue a petition for special leave to appeal to the Judicial Committee of the Privy Council raise a colorable claim on the merits of his complaint as well as the possible application of an exception to the rule of exhaustion of domestic remedies.

[FN6] See I/A Court H.R., Castillo Petruzzi et al. Case, Judgment of May 30, 1999, Series C N° 52, paras. 161.

[FN7] See, e.g., I/A Court H.R., Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago, Judgment of June 22, 2002, Ser. C. N° 94 (2002), paras. 148-151, 152(b); I/A Court H.R., Advisory Opinion OC-11/90 of August 10, 1990, Exceptions to the Exhaustion of Domestic Remedies (Articles 46(1), 46(2)(a) and 46(2)(b) of the American Convention on Human Rights, Ser. A, N° 11, paras. 26, 27; Case 12.347, Report 76/02, Dave Sewell v. Jamaica, Annual Report of the IACHR 2002, paras. 132-135.

36. Given the interplay between the effectiveness of the petitioner's appellate procedures for the purposes of exhaustion of domestic remedies and the very violations of human rights at issue in the case, the Commission considers that the question of the prior exhaustion of these remedies must be taken up with the merits of the complaint. Accordingly, the Commission will join this aspect of the exhaustion of domestic remedies question to the merits of the case.

3. Timeliness of the Petition

37. In accordance with Article 46(1)(b) of the Convention, a petition must be presented in a timely manner, namely within six months from the date on which the complaining party was notified of the final judgment at the domestic level.

38. In the present case, the petitioner lodged his petition with the Commission on August 3, 2001 and therefore within 6 months from the June 11, 2001 decision of the Court of Appeal of Jamaica dismissing his application for leave and for legal assistance. The State has not contested the admissibility of the petition on the ground of timeliness. The Commission therefore finds that the petition was filed in accordance with the requirements of Article 46(1)(b) of the Convention.

4. Colorable Claim

39. Articles 47(b) and 47(c) of the Convention require the Commission to consider a petition to be inadmissible if the petition does not state facts that tend to establish a violation of the rights guaranteed by the Convention, or if the statements of the petitioner or of the state indicate that the petition is manifestly groundless or obviously out of order.

40. The petitioner alleges that the State is responsible for violations of due process in connection with the criminal trial and appeal proceedings against him. In particular, Mr. Tracey claims that his legal aid lawyer was not appointed until the first day of his trial and did not have sufficient time to prepare his case, and that a coerced confession was admitted into evidence during his trial. Mr. Tracey also contends that the state failed to provide him with legal assistance to pursue his appeals before the Court of Appeal of Jamaica and the Judicial Committee of the Privy Council, also in violation of right to a fair trial. The State has not provided any observations or other information concerning the petitioners' allegations on the merits of their petition. After carefully considering the information before it, and without prejudging the merits of the matter, the Commission finds that the petitioners' petition contains factual allegations that, if proved, tend to establish violations of the rights guaranteed by Articles 8 and 25 of the Convention, in conjunction with the State's obligations under Article 1(1) of the Convention. In the Commission's view, this includes an issue as to whether the petitioner was afforded his right to appeal under Article 8(2)(h) of the Convention, in light of information suggesting that his appeal to the Court of Appeal of Jamaica was dismissed on the basis that it revealed an "insufficient prospect of success" and without the assistance of legal counsel.

41. Consequently, the Commission finds that the petition is admissible under Articles 47(b) or 47(c) of the Convention.

V. CONCLUSIONS

42. The Commission concludes that it has the competence to examine this case, and that the petition is admissible in accordance with Articles 46 and 47 of the Convention, with the exception of the question of the prior exhaustion of these remedies, which will be joined to the merits of the case.

43. 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:

1. To declare the present case admissible with respect to Articles 1, 8 and 25 of the Convention, subject to its decision to join the question of exhaustion of domestic remedies to the merits of the case.
2. To transmit this Report to the Parties.
3. To continue with the analysis of the merits of the case.
4. To 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 Washington, D.C. on the 27th day of the month of February, 2004. (Signed): José Zalaquett, President; Clare K. Roberts, First Vice-President; Susana Villarán, Second Vice-President; Evelio Fernández Arévalos, Florentín Meléndez, Paulo Sergio Pinheiro and Freddy Gutiérrez Trejo, Commissioners.