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Title/Style of Cause: Fabian Moses v. Jamaica
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Decided by: President: Jose Zalaquett;
First Vice-President: Clare K. Roberts;
Second Vice-President: Susana Villaran;
Commissioners: Evelio Fernandez Arevalos, Paulo Sergio Pinheiro, Freddy Gutierrez Trejo, Florentin Melendez.
Dated: 14 October 2004
Citation: Moses v. Jamaica, Petition 753/02, Inter-Am. C.H.R., Report No. 66/04, OEA/Ser.L/V/II.122, doc. 5 rev. 1 (2004)
Represented by: APPLICANT: a firm of Solicitors "Denton, Wilde, Sapte"
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I. SUMMARY

1. On January 15, 2002, the Inter-American Commission on Human Rights (the “Commission”) received a petition from Denton, Wilde, Sapte, a firm of Solicitors in London, United Kingdom (the “Petitioners”) against the Government of Jamaica (the “State” or “Jamaica”). The petition was presented on behalf of Mr. Fabian Moses, who is incarcerated in St. Catherine’s District Prison, Jamaica. According to the petition, Mr. Moses has been in custody since August 28, 1987, and spent more than 5 years on death row in St. Catherine’s District Prison until his crime was re-classified on January 28, 1993.

2. In their petition, the Petitioners have alleged that the State violated Mr. Moses’ rights under Articles 1, 5(1), 5(2), 5(6) and 7 of the American Convention on Human Rights (the “Convention”) because of the conditions of his detention during his time on death row and in the General Penitentiary following the re-classification of his crime. The State contends that the petition is inadmissible because Mr. Moses has failed to exhaust domestic remedies in accordance with Article 46(1)(a) of the Convention by way of a Constitutional Motion before the domestic courts in Jamaica.

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, 2, 5, and 25 of the American Convention, to declare the petition inadmissible with respect to Article 7 of the American Convention, 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

4. Following receipt of the Petitioners' complaint, which was designated as petition 0753/2001, the Commission decided to request additional information from the Petitioners by note dated December 18, 2001. On January 15, 2002, the Commission received a response from the Petitioners to its request for information, following which the Commission decided to transmit the pertinent parts of the petition to the Government of Jamaica by means of a note dated January 28, 2002 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. Also by note dated January 28, 2002, the Commission informed the Petitioners that the pertinent parts of their petition had been transmitted to the State.

5. By note dated March 18, 2002 and received by the Commission on March 19, 2002, Jamaica delivered its response to the Petitioners' petition, which the Commission transmitted to the Petitioners by note dated March 27, 2002 and requested a response within 30 days.

6. By letter dated April 30, 2002, the Petitioners acknowledged receipt of the Commission's March 27, 2002 note and informed the Commission that they were examining the State's response and would deliver their comments shortly. In a note dated November 26, 2003, the Commission reiterated its request to the Petitioners for a response to the State's observations. By letter dated December 3, 2003, the Petitioners informed the Commission that they understood that admissibility issues similar to those in Mr. Moses' complaint had been raised in another complaint before the Commission involving another prisoner in Jamaica, Whitley Myrie, and requested a copy of the Commission's admissibility decision in that case. In a note dated December 9, 2003, the Commission forwarded to the Petitioners a copy of its admissibility report N° 7/03 in the Case of Whitley Myrie v. Jamaica.

7. Subsequently, in a communication dated January 21, 2004 and received by the Commission on the same date, the Petitioners delivered their reply to the State's March 18, 2002 observations on the petition. The Commission transmitted the pertinent parts of the Petitioners' response to the State by note dated January 28, 2004 with a response requested within 30 days. In a communication to the Commission dated February 17, 2004 and received by the Commission on the same date, the State delivered a reply to the Petitioners' January 21, 2004 response, which the Commission transmitted to the Petitioners for their information by note dated March 16, 2004.

III. POSITIONS OF THE PARTIES

A. Position of the Petitioners

8. The Petitioners claim that Mr. Moses has been in the custody of the State of Jamaica since August 28, 1987 and that the Circuit Division of the Gun Court of Jamaica convicted Mr. Moses of the murder of Carl Brown in 1989. They also claim that Mr. Moses was initially

sentenced to death and spent 5 years on death row until his crime was reclassified on January 28, 1993. According to the petition, the Court of Appeal of Jamaica refused his application for leave on June 16, 1989, and the Judicial Committee of the Privy Council dismissed Mr. Moses' application for Special Leave to Appeal on April 24, 2001.

9. The Petitioners further argue that although Mr. Moses has not pursued a Constitutional Motion before the courts in Jamaica pursuant to Section 25 of the Constitution of Jamaica, he has been denied access to this remedy. In particular, they claim that pursuing a Constitutional Motion requires the services of an attorney, that the legal costs of pursuing such a process are beyond Mr. Moses' means, and that legal aid in Jamaica is unavailable for Constitutional Motions.

10. Also in connection with the exhaustion of domestic remedies requirement, the Petitioners provided submissions concerning the State's reliance on the Public Defender (Interim) Act 1999 of Jamaica (the "Act"), and argued in particular that Section 15(5) of the Act does not render remedies effectively available to individuals such as Mr. Moses. In support of their argument, the Petitioners rely upon the Commission's February 20, 2003 decision on admissibility in the case of Whitley Myrie v. Jamaica,[FN1] in which the Commission found that the information presented by the State in that case failed to establish that the Public Defender (Interim) Act 1999 rendered domestic remedies effectively available to indigent claimants. The Petitioners in the present complaint have cited the Commission's reasoning in the Myrie admissibility decision and suggest that these findings would be equally applicable in Mr. Moses' circumstances.

[FN1] Petition 729/01, Report 7/03, Whitley Myrie v. Jamaica, Annual Report of the IACHR 2003.

11. With regard to the timeliness of the petition, the Petitioners argue that pursuant to Article 46(2) of the American Convention, the 6-month requirement under Article 46(1) of the Convention is not applicable when, inter alia, the domestic legislation of the state concerned does not afford due process of law for the protection of the rights that have allegedly been violated, or where the party alleging violation of his rights has been denied access to remedies under domestic law or has been prevented from exhausting them. In light of Mr. Moses' alleged inability to pursue a Constitutional Motion, therefore, the Petitioners submit that the 6-month time requirement does not apply to Mr. Moses' complaint.

12. Further, the Petitioners assert that Mr. Moses' complaint has not been submitted to the UN Human Rights Committee or another international organization with similar characteristics.

13. With respect to the substance of their complaint, the Petitioners claim that the State has detained Mr. Moses under conditions that fail to comply with international standards of humane treatment. In particular, they allege that the State is responsible for violations of Mr. Moses' right to humane treatment contrary to Articles 5(1), 5(2) and 5(6) of the American Convention and his right to liberty under Article 7 of the Convention, together with the State's obligations under Article 1(1) of the Convention, because Mr. Moses has been held in conditions on death row and in the St. Catherine's District Prison that are unhygienic, unsanitary and have caused serious

detriment to his health. The Petitioners also allege that Mr. Moses has been the victim of abusive treatment at the hands of other prisoner and warders. In support of their allegations, the Petitioners have provided copies of letters from Mr. Moses describing his situation in detention, together with reports from the local media concerning the conditions and treatment of inmates in the St. Catherine's District Prison.

B. Position of the State

14. With respect to the admissibility of the Petitioners' petition, the State claims that Mr. Moses has failed to exhaust domestic remedies in accordance with Article 46(1)(a) of the Convention and Article 31 of the Commission's Rules of Procedure. In particular, the State of Jamaica asserts that Mr. Moses has alleged violations of rights guaranteed by sections 13, 15 and 17 of the Constitution of Jamaica, which the State claims are similar to Articles 1, 5 and 7 of the American Convention. The State also asserts that Mr. Moses may, pursuant to section 25 of the Jamaican Constitution, apply to the Supreme Court for redress for these alleged contraventions of his constitutional rights, but that this has not been done in the present case.

15. With respect to Mr. Moses' argument that the costs of pursuing a Constitutional Motion are beyond his means and that he is unable to access legal aid for these proceedings, the State argues that Mr. Moses may, under section 14(1)(b) of the Public Defender (Interim) Act 1999, apply to the Public Defender of Jamaica to investigate the alleged violations of his constitutional rights. According to the State, pursuant to section 15 of the Public Defender (Interim) Act 1999, if the Public Defender determines that an investigation should be undertaken and the complainant can institute proceedings, the Public Defender is under an obligation to ensure that the complainant has access to professional advice and legal representation, including the payment by the office of the Public Defender for legal aid where necessary.

16. In support of its arguments, the State provided the Commission with an affidavit sworn by the Public Defender of Jamaica on March 11, 2002, which read in part as follows:

3. By virtue of Section 13(1)(a)(ii) of the Public Defender (Interim) Act, I may investigate any action taken where any person has suffered, is suffering or is likely to suffer an infringement of his constitutional rights as a result of any action taken by an authority or any officer or member of that authority.

4. By virtue of Section 13(4) of the Public Defender (Interim) Act, I shall not be precluded from conducting an investigation in respect of any matter by reason only that it is open to the complainant to apply to a court for redress under Section 25 of the Constitution of Jamaica.

5. By virtue of Section 14(1) of the Public Defender (Interim) Act, any person who claims to have suffered, to be suffering or to be likely to suffer an infringement referred to in Section 13(1)(a)(ii) may make a complaint to me.

6. I am required by virtue of Section 15(5) of the Public Defender (Interim) Act, to ensure that any person who alleges that his constitutional rights have been or are likely to be infringed is provided with ready access to professional advice and where necessary legal representation.

7. I am required by virtue of Section 15(6) of the Public Defender (Interim) Act, for the purpose of Section 15(5) to:

- (a) determine whether the complainant is in need of legal aid;
- (b) authorize payment of such legal aid out of funds provided by Parliament to the Office of the Public Defender for that purpose;
- (c) compile a list of attorneys-at-law who, in my opinion, are experienced in constitutional matters; and
- (d) invite the complainant to select an attorney-at-law from the list or if no such selection is made, I may recommend an attorney-at-law whose name is on that list.

8. I have not received, either a complaint or allegations, from the alleged victim, Mr. Fabian Moses, pursuant to Section 14 or 15 of the Public Defender (Interim) Act.

9. It is categorically denied that Mr. Fabian Moses has been denied access through the Office of the Public Defender to remedies under domestic law or has been prevented from exhausting them.

10. I first became aware of the alleged victim's allegations via a telephone conversation between a legal office of the Attorney General's Chambers and myself on the 5th March 2002.

11. That appropriate and effective domestic remedies are available under Section 25 of the Constitution of Jamaica, to redress the alleged breaches to Mr. Fabian Moses' constitutional rights and may be accessed through the Office of the Public Defender as provided under the Public Defender (Interim) Act.

12. That pursuant to Section 13 of the Public Defender (Interim) Act, I am able to begin a separate investigation into the allegations of Mr. Fabian Moses without delay upon a complaint being received by my Office regarding same.

13. The costs and procedural requirements involved in seeking constitutional redress will not be borne by the indigent but by the State pursuant to Section 15(6) of the Public Defender (Interim) Act.

14. I verily believe that the alleged victim, Mr. Fabian Moses, should seek redress under Section 25 of the Constitution of Jamaica and is entitled to do so as provided under the Public Defender (Interim) Act.[FN2]

[FN2] State's Response dated March 18, 2002, Attachment, Affidavit of the Public Defender of Jamaica, Mr. Howard Hamilton, Q.C., sworn on March 11, 2002.

17. The State did not provide observations on any other aspects of the admissibility of the Petitioners' petition, nor did it provide any submissions concerning the merits of the claims raised by Mr. Moses in his complaint.

IV. ANALYSIS

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

18. The Commission is competent to examine the petition in question. Under Article 44 of the Convention and Article 23 of the Rules of Procedure of the Commission, the Petitioners are authorized to file complaints alleging violations of rights protected under the American

Convention. The alleged victim, Fabian Moses, 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.

19. Inasmuch as the Petitioners have filed complaints alleging violations of Articles 5, 7 and 1(1) of the American Convention, the Commission is competent *ratione materiae* to examine the complaint.

20. The Commission is competent *ratione temporis* to examine the complaints because the petition alleges facts that occurred on and after the date when Jamaica ratified the American Convention.

21. Finally, the Commission is competent *ratione loci*, given that the petition indicates that the alleged victim 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 OF PETITION

1. Duplication of Procedures

22. According to the Petitioners, the matters complained of in this petition have not previously been submitted for examination by any other pertinent intergovernmental organization. The State has not contested the admissibility of the petition on the basis of duplication. 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

23. 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.

24. Further, when the 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 otherwise evident from the record.[FN3]

[FN3] See also I/A Court H.R., Velasquez Rodriguez Case, Merits, Judgment of July 29, 1988, Ser. C N° 4, para. 59.

25. In the present case, the Petitioners have alleged that Mr. Moses has exhausted the rights of appeal available to him under Jamaican law. They have also acknowledged that he has not pursued a Constitutional Motion pursuant to Article 25 of the Constitution of Jamaica, but argue that he has been precluded from doing so because he requires the assistance of an attorney but cannot afford to retain one, and legal aid is not effectively available from the Jamaican state to pursue such remedies.

26. On this issue, the Commission notes that the State has not contested the Petitioners' allegation that a Constitutional Motion relating to the issues raised before the Commission would require legal representation in order to be effectively pursued, nor has the State disputed that Mr. Moses is indigent and is therefore not able to retain legal assistance with his own resources. The information and evidence before the Commission does not suggest a different conclusion.

27. The State has nevertheless argued that Mr. Moses' claims are inadmissible because he has failed to lodge a complaint with the Office of the Public Defender in Jamaica. In this regard, the State claims that the Public Defender provides an effective remedy respecting complaints such as those raised by Mr. Moses by facilitating access to Constitutional Motions before the Supreme Court of Jamaica under Section 25 of the Constitution of Jamaica. According to the State, any person whose rights have been, are being or are likely to be violated may file a complaint with the Public Defender. Also according to the State, the Public Defender is obliged to investigate any such complaint and, in relation to complaints which allege violations of constitutional rights, is required to provide such complainants with legal aid to pursue a Constitutional Motion in accordance with Section 15(5) of the Act and the circumstances in Section 15(6) of the Act. The State therefore contends that a complaint to the Public Defender provides an avenue to an effective remedy that Mr. Moses is obliged to pursue before coming to the Commission.

28. In light of the parties' positions, the central issue before the Commission is whether a petition to the Public Defender provides a domestic remedy that Mr. Moses is required to pursue and exhaust in accordance with generally recognized principles of international law, or whether it can be said that Mr. Moses has been denied access to the remedies under domestic law or has been prevented from exhausting them. In this respect, in the Case of Whitley Myrie v. Jamaica,[FN4] the Commission undertook a detailed analysis of the Public Defender (Interim) Act and its application in Jamaica. In the Myrie Case, as in the present case, the State contended that the complainant was required to lodge a complaint with the Office of the Public Defender as a condition to admissibility before filing a petition with the Commission.

[FN4] Whitley Myrie Case, *supra*.

29. In evaluating the parties' arguments in the Myrie Case, the Commission made several findings that are relevant to the present complaint. The Commission noted that in order for a petitioner to be required to exhaust a particular remedy in accordance with Article 46 of the

Convention and generally recognized principles of international law, that remedy must be both available and effective as a matter of law and as a matter of fact. If, for example, legal services are required either as a matter of law or fact in order for a right guaranteed by the Convention to be recognized and a person is unable to obtain such services because of his indigency, then that person would be exempted from the requirement to exhaust domestic remedies.[FN5]

[FN5] *Id.*, para. 53, citing I/A Court H.R., Advisory Opinion OC-11/90, Ser. A N° 11 (1990), para. 30.

30. Further, based upon the observations and information provided by the parties in the Myrie Case, the Commission was not satisfied that the Public Defender (Interim) Act 1999 has been shown to render domestic remedies effectively available to indigent individuals such as Mr. Myrie. This conclusion was based upon two characteristics of the Public Defender regime. First, the Commission found that the Public Defender had a considerable degree of discretion in determining whether to grant a complainant legal aid to pursue a Constitutional Motion, both in determining whether the complaint should be investigated and, if so, whether the complainant has made out a prima facie case to warrant the institution of proceedings.

31. Second, statistics provided by the State itself concerning the manner in which the Public Defender (Interim) Act had been implemented in practice indicated that legal aid was in fact authorized in a very small number of the constitutional complaints brought to the Public Defender.[FN6] This in turn indicated that the Public Defender's discretion was not being exercised in a manner that rendered Constitutional Motions effectively available in fact to those who claim to be the victims of violations of their constitutional rights and freedoms. As the Commission noted in the Myrie Case, while this does not mean that a reasonable discretion might not properly be exercised in granting or denying legal aid assistance based, for example, on the financial situation of the applicant or the frivolous nature of a given complaint, it cannot be exercised in such a manner as to render access to Constitutional Motions illusory.

[FN6] *Whitley Marie v. Jamaica*, supra, para. 57 (citing information provided by the State indicating, inter alia, that of 1,776 complaints filed by the general public and prisoners between April 2000 and December 2002, 46 concerned constitutional rights, and that legal aid was authorized in only 3 of those 46 cases).

32. Based upon these findings, the Commission concluded that where legal assistance was required to pursue a Constitutional Motion before the courts in Jamaica, this remedy had not been shown to be effectively available to indigent complainants through the Office of the Legal Defender or otherwise.

33. In the present complaint, the Commission has taken into account the affidavit provided by Jamaica's Public Defender and acknowledges the importance of the duties for which his Office is responsible. As in the Myrie Case, the Commission wishes to commend the State for

creating the Office of the Public Defender in order to provide victims of human rights violations with a new mechanism of investigation. However, the Commission's conclusions in the Myrie Case indicate that the Office of the Public Defender is not, as a matter of practice, operating as an effective means of access by indigent human rights complainants to judicial protection through Constitutional Motions. In its observations of February 17, 2004 in the present complaint, the State did not provide any evidence or information indicating that this situation had changed or that the Commissions' findings in the Myrie Case were otherwise flawed, notwithstanding the fact that the Commission's report in the Whitley Myrie Case was adopted on February 20, 2003 and transmitted to the State on March 14, 2003.

34. Based upon the information available and consistent with its previous decisions on this issue, the Commission finds that a Constitutional Motion does not constitute an available remedy in the circumstances of Mr. Moses complaint, through the Office of the Public Defender or otherwise, and consequently that the requirement of exhaustion of domestic remedies does not apply to his complaints pursuant to Article 46(2) of the Convention.

3. Timeliness of the Petition

35. 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.

36. As in the case of exhaustion of domestic remedies, however, Article 46(2)(a) of the Convention provides that the six month period under Article 46(1)(b) of the Convention shall not be applicable when "the party alleging violation of his rights has been denied access to the remedies or has been prevented from exhausting them."

37. Given the Commission's finding that that Mr. Moses is exempt from pursuing a Constitutional Motion in respect of the rights alleged to have been violated in the Petitioners' petition, the six month period does not apply to the Petitioners' petition. The State has not contested the timeliness of the complaint, and the Commission is satisfied in the circumstances of the matter that the petition was filed within a reasonable time. The Commission therefore finds no bar to the admissibility of the petition under Article 46(1)(b) of the Convention.

4. Colorable Claim

38. 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.

39. The Petitioners allege that the State has violated Mr. Moses' rights under Articles 5 and 7 of the American Convention, together with the State's obligations under Article 1(1) of the Convention. The Petitioners have also provided specific factual contentions concerning Mr. Moses' conditions and treatment in detention that, if true, tend in the Commission's view to

establish violations of Article 5 of the Convention, together with the State's obligation to respect and ensure rights under Article 1(1) of the Convention.

40. In addition, the Commission considers that the facts alleged by the Petitioners, if true, may also disclose violations of Article 2 of the Convention together with Article 25 of the Convention, to the extent that the alleged absence in Jamaica of an effective remedy for violations of the human rights protected under Jamaican domestic law and the American Convention may establish a violation of the State's obligation to give domestic legal effect to the rights and freedoms under the Convention as well as the right to judicial protection. Although the Petitioners have not alleged violations of Articles 2 or 25 in their petition, the Commission may on its own motion identify a potential infringement of this provision for the purposes of the proceeding before it, based upon the well-established principle *iura novit curia*.^[FN7]

[FN7] See similarly I/A Court, Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago, Judgment of June 21, 2002, Ser. C N° 94, para. 152.

41. At the same time, the Commission is not satisfied that the Petitioners have presented any allegations or information that tend to establish violations of Mr. Moses' right to liberty under Article 7 of the Convention.

42. Based upon the information on the record, 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 2, 5 and 25 of the Convention, together with the State's obligation under Article 1(1) of the Convention. Consequently, the petition is not barred as inadmissible under Articles 47(b) or 47(c) of the Convention, with the exception of the claim under Article 7 of the Convention.

V. CONCLUSIONS

43. 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.

44. 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, 2, 5, and 25 of the Convention.
2. To declare the present inadmissible with respect to Article 7 of the American Convention.
3. To transmit this Report to the Parties.
4. To continue with the analysis of the merits of the case.

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

Done and signed at the headquarters of the Inter-American Commission on Human Rights in the city of Washington, D.C., on the 14th day of the month of October, 2004. (Signed): José Zalaquett, President; Clare Roberts, First Vice-president; Susana Villarán, Second Vice-president; Evelio Fernández Arévalos, Paulo Sérgio Pinheiro, Freddy Gutiérrez Trejo y Florentín Meléndez Comisionados, Commissioners.