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Institution: Inter-American Commission on Human Rights
File Number(s): Report No. 26/07; Petition 12.399
Session: Hundred Twenty-Seventh Session (26 February – 9 March 2007)
Title/Style of Cause: David Austin Smith v. Bahamas
Doc. Type: Decision
Decided by: President: Florentin Melendez;
First Vice-President: Paolo Carozza;
Second Vice-President: Victor Abramovich;
Commissioners: Evelio Fernandez Arevalos, Sir Clare K. Roberts, Paulo Sergio Pinheiro, Freddy Gutierrez.
Dated: 9 March 2007
Citation: Smith v. Bahamas, Petition 12.399, Inter-Am. C.H.R., Report No. 26/07, OEA/Ser.L/V/II.130, doc. 22 rev. 1 (2007)
Represented by: APPLICANT: Burton Copeland
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I. SUMMARY

1. On June 14, 2001, the Inter-American Commission on Human Rights (hereinafter "the Commission") received a petition from Burton Copeland, solicitors in London, The United Kingdom (hereinafter "the Petitioners") against The Commonwealth of The Bahamas (hereinafter "The Bahamas" or "the State"). The petition was filed on behalf of David Austin Smith a Bahamian citizen who is under sentence of death at the Fox Hill Prison in The Bahamas, following conviction for the murder of Marnie Calloway. Mr. Smith was convicted primarily on the strength of confession evidence.

2. In their petition, the Petitioners have alleged that the State violated Mr. Smith's rights under Articles I, II, XVIII, and XXVI of the American Declaration on the Rights and Duties of Man ("the American Declaration" or "the Declaration"). More particularly, the Petitioners alleged that these rights were violated by: the imposition of a mandatory death penalty; and the failure to accord Mr. Smith certain due process guarantees during the domestic criminal proceedings against him.

3. To date the State has not presented any arguments on the admissibility or merits of the petition.

II. CONCLUSIONS ON ADMISSIBILITY AND MERITS

4. The Commission, on the basis of the information presented and the due analysis under the American Declaration, declares that the petition is inadmissible pursuant to Article 32, of its

Rules of Procedure and that accordingly, the Commission declines to make any findings on the merits of the petition.

III. PROCEEDINGS BEFORE THE COMMISSION

5. Mr. Smith's petition was presented to the Commission on June 14, 2001, which was acknowledged by the Commission by letter of June 27, 2001. By note of the same date, the Commission forwarded the pertinent parts of the petition to the State, with a request for a response within two months.

6. In letters dated April 6 and September 14, 2002, the Commission reiterated its request to the State for information on the petition. The Commission also requested that the State take whatever measures it deemed necessary to provide the Commission with the relevant information pertaining to the case within 30 days of receipt.

7. On May 28, 2002, the Commission wrote to both parties informing them that pursuant to Article 37(3) of the Commission's Rules of Procedure, it had decided to defer the treatment of admissibility until the decision on the merits and requested that the Petitioners submit their additional observations on the merits of the case within a period of two months from the date of the letter.

8. By letter of July 11, 2002, the Petitioners requested an extension of two months to submit additional information, which was granted by the Commission by communication of July 19, 2002. By letter of August 21, 2002, the Petitioners requested a further extension of time to submit additional information. By letter of August 22, 2002, the Commission granted an extension of a month to the Petitioners.

9. By letter of October 6, 2003, the Petitioners provided additional observations, which was acknowledged by the Commission by letter of October 8, 2003. By note of the same date, the Commission transmitted the pertinent parts of these additional observations to the State and requested a response within a month.

10. By letter of May 24, 2004, the Commission asked the Petitioners to indicate whether Mr. Smith was still under sentence of death or whether the sentence had been commuted to a term of life imprisonment. By letter of May 27, 2004, the Petitioners replied, indicating that they would make further inquiries of lawyers who acted for the State in the appellate proceedings before the Judicial Committee of the Privy Council. By letter of July 2, 2004, the Petitioners forwarded a copy of a letter from the said lawyers dated June 23, 2004.

IV. POSITIONS OF THE PARTIES ON ADMISSIBILITY OF PETITION

A. Petitioners' Position

1. Background

11. The Petitioners claim that Mr. Smith, a national of The Bahamas, was tried on two occasions in the Supreme Court of The Bahamas for the murder of Marnie Calloway, (“the deceased”). Ms Calloway was killed on or about August 23, 1994.

12. The Petitioners state that Mr. Smith was first convicted of the murder of the deceased on July 15, 1996, and sentenced to death. An ensuing appeal against conviction was allowed by the Court of Appeal of the Bahamas on January 31, 1997. Mr. Smith was re-tried and subsequently again of murder, and sentenced to a mandatory death sentence on October 28, 1997, pursuant to section 312 of the Penal Code of The Bahamas. Mr. Smith again appealed to the Court of Appeal of the Bahamas, but his appeal was dismissed on October 23, 1998. Mr. Smith’s petition seeking special leave to appeal to the Judicial Committee of the Privy Council was dismissed on May 25, 2000.

2. Petitioners' Position on Admissibility

13. The Petitioners argue that Mr. Smith's petition is admissible because he has exhausted the domestic remedies of The Bahamas. The Petitioners indicate that Mr. Smith appealed his conviction and mandatory death sentence to The Bahamas' Court of Appeal, which dismissed his appeal on October 23, 1998, and that Mr. Smith's application for special leave to appeal to the Privy Council was dismissed by the Court on May 25, 2000. In addition, the Petitioners argue if it is contended by the State that the remedy of a constitutional motion was available to Mr. Smith, he should be excused from exhausting this remedy, because legal aid is not provided by the State to pursue such a motion. Further, the Petitioners contend that it is difficult if not impossible to find a Bahamian lawyer who is willing to prepare and argue a constitutional motion pro bono.

B. State's Position on Admissibility

14. The State has not addressed or presented arguments on the admissibility of the petition.

V. ANALYSIS ON ADMISSIBILITY

A. Competence of the Commission

15. The Petitioners have alleged violations of Articles I, II, XI, XVIII, XXV, and XXVI of the Declaration. Article 23 of the Commission's Rules of Procedure provides that:

[a]ny person or group of persons, or non-governmental entity legally recognized in one or more Member States of the OAS, may submit petitions to the Commission, on their own behalf or on behalf of third persons, concerning alleged violations of a human right recognized in, as the case may be, the American Declaration of the Rights and Duties of Man, the American Convention on Human Rights, the Additional Protocol in the Area of Economic, Social and Cultural Rights, the Protocol to Abolish the Death Penalty, the Inter-American Convention to Prevent and Punish Torture, the Inter-American Convention on the forced Disappearance of Persons, and/or the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, in accordance with their respective provisions, the Statute of the Commission, and these

Rules of Procedure. The petitioner may designate an attorney or other person to represent him or her before the Commission, either in the petition itself or in another writing.

16. The petition in this case was lodged by the Petitioners on behalf of Mr. Smith who is a national of the State of The Bahamas.

17. The Declaration became the source of legal norms for application by the Commission[FN1] upon The Bahamas becoming a Member State of the Organization of American States in 1982. In addition, the Commission has authority under the Charter of the Organization of American States, Article 20 of the Commission's Statute,[FN2] and the Commission's Rules of Procedure to entertain the alleged violations of the Declaration raised by the Petitioners against the State, which relate to acts or omissions that transpired after the State joined the Organization of American States. Consequently, the Commission has jurisdiction *ratione temporis*, *ratione materiae*, and *ratione personae* to consider the violations of the Declaration alleged in this case. Therefore, the Commission declares that it is competent to address the Petitioners' claims relating to the alleged violations of the American Declaration.

[FN1] I/A Court H.R., Advisory Opinion OC-10/89 (Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights), 14 July 1989.

[FN2] Article 20 of the Commission's Statute provides as follows:

In relation to those member states of the Organization that are not parties to the American Convention on Human Rights, the Commission shall have the following powers, in addition to those designated in Article 18:

- (a) To pay particular attention to the observance of the human rights referred to in Articles I, II, III, IV, XVIII, XXV, and XXVI of the American Declaration of the rights and Duties of Man;
- (b) To examine communications submitted to it and any other available information, to address the government of any member state not a Party to the Convention for information deemed pertinent by this Commission, and to make recommendations to it, when it finds this appropriate, in order to bring about more effective observance of fundamental human rights; and,
- (c) To verify, as a prior condition to the exercise of the powers granted under subparagraph b. above, whether the domestic legal procedures and remedies of each member state not a Party to the Convention have been duly applied and exhausted.

B. Other Grounds of Admissibility

1. Exhaustion of Domestic Remedies

18. Article 31 of the Commission's Rules of Procedure provides that the admissibility of a petition submitted to the Inter-American Commission pursuant to Article 23 of the Commission's Rules of Procedure is subject to the requirement that remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law. The purpose of this requirement is to enable national authorities to have the opportunity to address the alleged violation of a protected right and where appropriate resolve it prior to any submission before an international mechanism.

19. The requirement of prior exhaustion applies when domestic remedies are available in practice within the national system, and would be adequate and effective in providing a remedy for the alleged violation. In this sense, Article 31(2) specifies that the requirement is not applicable when the domestic legislation does not afford due process for the protection of the right in question; or if the alleged victim did not have access to domestic remedies; or if there was unwarranted delay in reaching a final judgment in response to the invocation of those remedies. As indicated by Article 31 of the Commission's Rules of Procedure, when a petitioner alleges one of these exceptions, it then falls to the State to demonstrate that domestic remedies have not been exhausted unless that is clearly evident from the record.

20. According to the principles of international law as reflected in the precedents established by the Inter-American Commission and Court, it may first be noted that the State in question may expressly or tacitly waive the invocation of this rule.[FN3] Secondly, in order to be considered timely, the objection that domestic remedies have not been exhausted must be raised during the first stages of the proceeding. Otherwise, it will be presumed that the interested State has tacitly waived its use.[FN4] Finally, the State that alleges non-exhaustion of domestic remedies must indicate which remedies should have been exhausted, as well as provide evidence of their effectiveness.[FN5] Consequently, if the State in question does not provide timely arguments with respect to this requirement it will be understood to have waived its right to argue the non-exhaustion of domestic remedies and thereby discharge the burden of proof that would correspond to it.

[FN3] See, e.g., IACHR, Report N° 69/05, petition 960/03, Admissibility, Iván Eladio Torres, Argentina, 13 October 2005, para. 42; I/A Court H.R., Ximenes Lopes Case. Preliminary Objections. Judgment of November 30, 2005. Ser. C No. 139, para. 5; I/A Court H.R., Case of Moiwana Village. Judgment of June 15, 2005. Ser. C No. 124, para. 49; I/A Court H.R., Case of the Serrano-Cruz sisters. Preliminary Objections. Judgment of November 23, 2004. Ser. C No. 118, para. 135.

[FN4] See, e.g., I/A Court H.R., The Mayagna (Sumo) Awas Tingni Community Case. Preliminary Objections. Judgment of February 1, 2000. Series C No. 66, para. 53, I/A Court H.R., Castillo Petruzzi Case. Preliminary Objections. Judgment of September 4, 1998. Series C No. 41, para. 56; and I/A Court H.R., Loayza Tamayo Case. Preliminary Objections. Judgment of January 31, 1996. Series C No. 25, para. 40. The Commission and Court have established that "the first stages of the process" must be understood as the admissibility stage of the proceedings before the Commission, that is, "before any consideration of the merits." See, for example, IACHR, Report N° 71/05, petition 543/04, Admissibility, Ever de Jesús Montero Mindiola, Colombia, 13 October 2005, which cites, I/A Court H.R., Herrera Ulloa Case. Judgment of July 2, 2004. Series C No. 107, para. 81.

[FN5] See, e.g., IACHR, Report N° 32/05, petition 642/03, Admissibility, Luis Rolando Cuscul Pivaral and other persons affected by HIV/AIDS, Guatemala, 7 March 2005, paras. 33-35; I/A Court H.R., The Mayagna (Sumo) Awas Tingni Community Case. Preliminary Objections, supra, para. 53; I/A Court H.R., Durand and Ugarte Case. Preliminary Objections. Judgment of May 28, 1999. Series C No. 50, para. 33; and I/A Court H.R., Cantoral Benavides Case. Preliminary Objections. Judgment of September 3, 1998. Series C No. 40, para. 31.

21. In the present case, the Petitioners have alleged that they exhausted domestic remedies which culminated with the dismissal of Mr. Smith's application for special leave to appeal to the Privy Council on May 25, 2000. Alternatively, the Petitioners argue that Mr. Smith should be excused from exhausting domestic remedies in relation to a Constitutional Motion pursuant to Article 31 of the Commission's Rules of Procedure, because no legal aid is provided by the State to pursue such a motion.

22. The State has not disputed these arguments given that it has not submitted any observations on the admissibility or merits of the petition. Accordingly, on the basis of Article 31 of the Rules of Procedure, review of the file (especially taking account of the Privy Council's dismissals of Mr. Smith's applications for leave to appeal) and, in the absence of specific and concrete information indicating that domestic remedies were not duly exhausted, the Commission concludes that the requirement of prior exhaustion has been satisfied. In light of this finding, the Commission does not consider it necessary to consider the alternative contention of the Petitioners that Mr. Smith is entitled to an exemption from exhausting the remedy of a Constitutional Motion before the Bahamian courts.

2. Timeliness of the Petition

23. With respect to the present petition, the Commission considers that domestic remedies were effectively exhausted pursuant to the dismissal of Mr. Smith's petition for leave to appeal to the Judicial Committee of the Privy Council on May 25, 2000.

24. However, the record of the Commission clearly shows that the Commission received the Petitioner's petition on June 14, 2001 more than a year after the dismissal of Mr. Smith's petition for leave to appeal to the Judicial Committee of the Privy Council.

25. The date of submission is not in compliance with the six-month period prescribed by Article 32 of the Commission's Rules of Procedure; accordingly, the Commission finds that this requirement has not been satisfied.

VI. CONCLUSIONS

26. Having regard for the foregoing, the Commission determines that while the Petitioners' exhausted domestic remedies, the petition was lodged after the deadline stipulated by Article 32 of the Commission's Rules of Procedure. Given this finding, the Commission concludes that it need not make any findings on the other allegations.

27. The Inter-American Commission finds that the petition is inadmissible under the terms of Article 32 of the Commission's Rules of Procedure. Based on the arguments of fact and of law set forth herein,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

DECIDES:

1. To declare the present petition inadmissible.
2. To notify the State and the petitioners of this decision.
3. To publish the present report and include it in its Annual Report to the OAS General Assembly.

Done and signed in the city of Washington, D.C., on the 9th day of the month of March, 2007.
(Signed): Florentín Meléndez, President; Paolo G. Carozza, First Vice-President; Víctor E. Abramovich, Second Vice-President; Evelio Fernández Arévalos, Sir Clare K. Roberts, Paulo Sérgio Pinheiro and Freddy Gutiérrez, Commissioners.