REPORT No. 81/10
CASE 12.562
PUBLICATION
WAYNE SMITH, HUGO ARMENDARIZ, ET AL.
UNITED STATES ([*])
July 12, 2010

I. SUMMARY

1. On December 27, 2002 and July 17, 2003, the Inter-American Commission on Human Rights (the "Inter-American Commission" or the "IACHR") received petitions from the Center for Justice and International Law (CEJIL), the law firm of Gibbs Houston Pauw, and the Center for Human Rights and Justice ("the petitioners") against the Government of the United States ("the State" or "United States") on behalf of Wayne Smith and his children and Hugo Armendariz and his children, respectively, (hereinafter collectively the "alleged victims") in relation to Mr. Smith and Mr. Armendariz's deportation from the United States. According to the petitions, the State violated the alleged victims' rights protected under Articles I (right to life, liberty and personal security), V (right to private and family life), VI (right to family), VII (right to protection for mothers and children), IX (right to inviolability of the home), XVIII (right to fair trial) and XXVI (right to due process of law) of the American Declaration on the Rights and Duties of Man (the "American Declaration").

2. On July 20, 2006, the IACHR adopted Reports 56/06 and 57/06 by which it admitted the petitions. In both cases, the IACHR found the alleged victims' petitions admissible with regard to potential violations of Articles V, VI, VII, XVIII, and XXVI of the American Declaration. The Inter-American Commission, likewise, decided to join the two petitions into one case because of the nexus of legal issues and the commonality of parties.

3. Regarding the merits of the case, the petitioners allege that Messrs. Smith and Armendariz, both of whom were legal permanent residents in the United States, were subjected to deportation without permitting them to present a meaningful defense in administrative and judicial courts,[1] including the following alleged internationally-required consideration of humanitarian equities to deportation: the alleged victims' length of legal residency in the United States; the alleged victims' family ties in the United States; the potential hardship on the family members left behind in the United States; the alleged victims' links with their countries of origin; the extent of the alleged victims' rehabilitation and social contribution to the United States; any medical or psychological considerations; and the gravity of the alleged victims' offense and the age when it was committed.

4. In its response on the merits, the State asserts that under international law each sovereign nation has the right to establish reasonable, objective immigration laws that govern the circumstances under which non-citizens may reside in its country. From this principle, the State argues that the statutory scheme established by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (hereinafter "IIRIRA") and the Antiterrorism and Effective Death Penalty Act of 1996 (hereinafter "AEDPA") is a reasonable exercise of sovereign authority to protect U.S. citizens and other non-citizens alike who reside in the United States. Under IIRIRA and AEDPA, a legal permanent resident who has been convicted of an "aggravated felony," is deportable without the opportunity of receiving a waiver of deportation from an immigration or federal judge. In addition, the State asserts that the petitioners interpret the relevant articles under the American Declaration too expansively and that they fail to recognize the proviso in Article XXVIII of the American Declaration, which permits Member States under

[*] IACHR Member Dinah Shelton did not take part in the discussion and voting on this case, pursuant to Article 17.2 of the Inter-American Commission's Rules of Procedure.

[1] Under the U.S. Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), legal permanent residents, who have been convicted of an "aggravated felony," as defined in the statute, are to be subjected to mandatory deportation. *See* Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, 110 Stat. 3009 (1996).

certain circumstances to curtail a person's individual rights in order to preserve the rights and security of others. The State asserts that the mandatory deportation of a non-citizen convicted of an "aggravated felony" is such a circumstance.

5. After having reviewed the positions of the parties and their accompanying evidence, the IACHR concludes that the United States is responsible for violations of Wayne Smith and Hugo Armendariz's rights protected under Articles V, VI, VII, XVIII, and XXVI of the American Declaration. The Inter-American Commission further concludes that it is well-recognized under international law that a Member State must provide non-citizen residents an opportunity to present a defense against deportation based on humanitarian and other considerations, such as the rights protected under Articles V, VI, and VII of the American Declaration. Each Member State's administrative or judicial bodies, charged with reviewing deportation orders, must be permitted to give meaningful consideration to a non-citizen resident's defense, balance it against the State's sovereign right to enforce reasonable, objective immigration policy, and provided effective relief from deportation if merited. The United States did not follow these international norms in the present case. The IACHR presents its recommendations to the State regarding these violations of the American Declaration.

II. PROCESSING SUBSEQUENT TO REPORTS 56/06 AND 57/06

6. On July 20, 2006, the Inter-American Commission adopted Reports 56/06 and 57/06 in which it found, respectively, that the petitions of Wayne Smith and Hugo Armendariz were admissible under its Rules of Procedure and decided to join the cases.

7. On August 23, 2006, the Commission offered the parties the opportunity to reach a friendly settlement in accordance with Article 41 of the Commission's Rules of Procedure. On December 5, 2006, the State declined the Commission's proposal for a friendly settlement.

8. The petitioners submitted their briefing on the merits to the Inter-American Commission on December 7, 2006. The IACHR transmitted the pertinent parts of the petitioners' observations to the State on January 3, 2007 with a request for its response within two months.

9. The Inter-American Commission held a hearing on the merits of the case on July 20, 2007, during its 128th ordinary period of sessions. By letter dated July 19, 2007, the State requested a one-month extension to submit its response on the merits. By facsimile dated August 28, 2008, the State submitted to the IACHR its response to the petitioners' observations on the merits. The Inter-American Commission transmitted the pertinent parts of the State's response to the petitioners on September 11, 2008, requesting any reply be submitted within one month.

10. On December 18, 2008, the petitioners submitted their reply to the State's response on the merits. The IACHR transmitted the pertinent parts of the petitioners' reply to the State on January 14, 2009 and requested any additional observations to be submitted to the Inter-American Commission within one month.

11. By letter dated February 12, 2009, the State reaffirmed the positions articulated in its response dated August 28, 2008. By letter dated April 15, 2009, the petitioners stated that they had no further observations with respect to the merits.

III. POSITIONS OF THE PARTIES

A. Position of the petitioners

1. Wayne Smith

12. According to the petitioners, Mr. Smith, a legal permanent resident of the United States, was ordered removed from the United States under provisions of IIRIRA and AEDPA, which amended the U.S. Immigration and Naturalization Act ("INA"), by eliminating all forms of discretionary relief for legal

permanent residents convicted of an "aggravated felony." The petitioners allege that IIRIRA and AEDPA expanded the statutory definition of "aggravated felony" to include some relatively minor crimes and—more importantly for the purposes of the alleged victim—eliminated the courts' discretion to waive deportation for humanitarian or other considerations.[2] The petitioners allege that IIRIRA and AEDPA's elimination of judicial discretion to consider humanitarian or other legitimate defenses to deportation for legal permanent residents violates recognized international law and Mr. Smith's rights protected under the American Declaration.[3]

13. The petitioners state that Wayne Smith was born in Trinidad and Tobago and came to the United States in 1967, when he was 10 years old, as a dependent of a diplomatic visa holder. They also indicate that a few years after moving to the United States, Mr. Smith's parents separated, and he stayed with his mother in this country. According to the petition, in 1974 Mr. Smith became a legal permanent resident of the United States; in February 1990 he was charged with possession of cocaine and attempted distribution. The petitioners state that he pled guilty to the charges and served three years in state prison. After his release, he allegedly continued to volunteer for prison ministry, volunteered as a drug counselor and in other community outreach programs, and finished his college degree. The petitioners mention that his bi-monthly drug screenings always came back negative.

14. According to the petitioners, in 1996 Mr. Smith married Ann Hoyte, a U.S. citizen, with whom he has one U.S. citizen daughter, Karina Ann. The petitioners also note that Mr. Smith has two older daughters, who also live in the United States, from a prior relationship.[4] The petitioners report that Mr. and Mrs. Smith started a small construction cleaning business together, and that he hired over fifteen persons, most of whom were recovering drug addicts. The Smiths reportedly purchased a house for the family and paid all their taxes.

15. The Immigration and Naturalization Service ("INS") initiated proceedings against Mr. Smith in March 1996.[5] The petitioners state that at that time the IIRIRA and AEDPA had yet to be enacted, and therefore Mr. Smith was eligible for a humanitarian waiver of deportation (known as a "212(c) waiver"), which provided immigration judges the discretion to cancel a legal permanent resident's order of deportation on humanitarian grounds.[6] The petitioners claim, however, that by the time Mr. Smith's case was heard in immigration court, AEDPA and IIRIRA had been enacted, which the judge ruled eliminated 212(c) relief for persons convicted of an aggravated felony. As a consequence, on March 11, 1997 the immigration judge rejected Mr. Smith's application for a 212(c) waiver and ordered him deported to Trinidad. The petitioners report that Mr. Smith appealed the immigration judge's decision to the Board of Immigration Appeals (hereinafter "BIA") and filed a habeas corpus petition in U.S. federal court. Both on appeal and on his habeas petition, the courts denied Mr. Smith the opportunity to apply for a 212(c) humanitarian waiver, and he was deported to Trinidad on December 7, 1998.

16. According to the petitioners, Mr. Smith reentered the United States in January 1999 and returned to his family in Maryland where he continued to reside until he was stopped for a traffic violation in March 2001. He was turned over to the INS and was held in jail without bond; on March 16, 2001 the INS reinstated the prior order of removal against Mr. Smith, which under U.S. law does not permit him another hearing before an immigration judge. The petitioners note that Mr. Smith did file a new habeas

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[2] Petitioners' submission dated December 20, 2002, page 2, citing 8 U.S.C. §§ 1101(a)(43), 1182(c); Petitioners' submission dated December 7, 2006, p. 5.

[3] Petitioners' submission dated December 7, 2006, pages 44-56.

[4] Petitioners' submission dated December 7, 2006, page 24.

[5] The duties of the INS were incorporated into the Department of Homeland Security ("DHS") in 2002.

[6] Petitioners' petition dated December 20, 2002, page 3, citing *Matter of Marin*, 16 I&N Dec. 581 (BIA 1978); *Matter of Arrequin de Rodriguez*, Interim Dec. No. 3247 (BIA 1995). Some of the factors the Board of Immigration Appeals (BIA) considered on 212(c) waivers were: family ties in the United States, length of residency in the United States (especially if the inception of residence occurred at a young age), hardship on family left in the United States, service to the country and community, and any other evidence of criminal rehabilitation and good character.

corpus petition in U.S. federal court, asserting his eligibility for a 212(c) waiver and the right to raise a defense to deportation on humanitarian grounds. On June 25, 2001 the U.S. Supreme Court in the case of *INS v. St. Cyr*[7] held that 212(c) waivers of deportation remained available to non-citizens who pled guilty to a criminal offense prior to the enactment of IIRIRA and AEDPA, if they would have been eligible for 212(c) relief at the time of their guilty plea. Despite the *St. Cyr* decision, Mr. Smith's habeas petition was ultimately denied on July 1, 2002. The petitioners state that Mr. Smith was deported again to Trinidad on December 13, 2001.[8]

17. The petitioners underscore that Mr. Smith's deportation has had deleterious effects on his family. Principally, they report that Mrs. Smith, a breast cancer survivor in need of radiation treatment and continued monitoring, lost her health insurance. In addition, the petitioners report that without Mr. Smith's material support, his wife struggles to support the couple's child and pay basic living expenses. Finally, the petitioners emphasize the children's loss of the moral and emotional support of their father.

2. Hugo Armendariz

18. According to the petitioners, Mr. Armendariz, a legal permanent resident of the United States, was ordered removed from the United States under provisions of IIRIRA and AEDPA, which amended the U.S. Immigration and Naturalization Act ("INA"), by eliminating all forms of discretionary relief for legal permanent residents convicted of an "aggravated felony." The petitioners allege that IIRIRA and AEDPA expanded the statutory definition of "aggravated felony" to include some relatively minor crimes and—more importantly for the purposes of the alleged victim—eliminated the courts' discretion to waive deportation for humanitarian or other considerations.[9] The petitioners allege that IIRIRA and AEDPA's elimination of judicial discretion to consider humanitarian or other legitimate defenses to deportation for legal permanent residents violates recognized international law and Mr. Armendariz's rights protected under the American Declaration.[10]

19. The petitioners state that Mr. Armendariz was born in Mexico but came to the United States in June 1972 at the age of two and became a legal permanent resident six years later. Besides those first two years, they allege, Mr. Armendariz resided in the United States his entire life. The petitioners explain that Mr. Armendariz is married to a U.S. citizen, has a teenage U.S. citizen daughter, a young U.S. citizen step-daughter, and many members of his immediate family are U.S. citizens. The petitioners assert that Mr. Armendariz has no close relatives living in Mexico, no meaningful ties to that country, and does not read or write Spanish.

20. On September 15, 1995, Mr. Armendariz was convicted by jury trial of possession of cocaine for sale, possession of drug paraphernalia, and hindering prosecution. According to the petitioners, on or about April 5, 1996, as Mr. Armendariz was serving his sentence at a minimum security work camp, INS issued an Order to Show Cause alleging that Mr. Armendariz was deportable from the United States as a person convicted of an aggravated felony. They further state that at the time the Order to Show Cause was issued, he was eligible for a 212(c) humanitarian waiver of deportation. They mention that Mr. Armendariz applied for a 212(c) waiver, but by the time the immigration judge ruled on his application in April 1997, the AEDPA and IIRIRA had been enacted and eliminated 212(c) relief for persons convicted of an aggravated felony. As a consequence, on April 16, 1997, the immigration judge issued a deportation order for Mr. Armendariz and refused to consider his 212(c) waiver application. Mr.

[7] Petitioners' petition dated December 20, 2002, pages 4-5, citing *INS v. St. Cyr*, 533 U.S. 289 (2001). According to the Petitioners, the Court also held that federal courts do have jurisdiction in habeas proceedings to decide "pure questions of law" raised by non-citizens who are subject to a final order of removal if judicial review is precluded under the IIRIRA, and therefore that there could be no judicial review of the discretionary denial of Mr. Smith's request for a waiver of deportation.

[8] It appears from the record that Mr. Smith was deported prior to final resolution of his habeas petition.

[9] Petitioners' submission dated July 14, 2003, pages 1-4; Petitioners' submission dated December 7, 2006, pages 5-6, citing 8 U.S.C. §§ 1101(a)(43), 1182(c).

[10] Petitioners' submission dated December 7, 2006, pages 44-56.

Armendariz appealed the immigration judge's decision to the BIA and the appropriate federal circuit court of appeals, but both denied his eligibility for 212(c) relief. In addition, Mr. Armendariz filed a habeas corpus petition with the appropriate federal district court, which ruled that because Mr. Armendariz's immigration proceedings commenced prior to the enactment of AEDPA and IIRIRA, that he was eligible for a 212(c) waiver of deportation. The petitioners note, however, that the district court's decision was reversed on appeal. Finally, the U.S. Supreme Court dismissed his petition of writ of certiorari on June 2, 2003.

21. The petitioners underscore the significant impact Mr. Armendariz's deportation has had on his family. In 1994, Mr. Armendariz married Natalie Porter with whom he purchased a home in which to live with her and his U.S. citizen step-daughter. According to the petitioners, Mr. Armendariz ran a successful business, paid child support for his biological U.S. citizen daughter, and paid all his taxes.

3. The petitioners' legal arguments

22. According to the petitioners, the application of IIRIRA and AEDPA to the alleged victims has resulted in violations of their rights under Articles V, VI, VII, XVIII and XXVI of the American Declaration. The petitioners claim that the broadened definition of "aggravated felony" enacted by the IIRIRA and AEDPA is applied retroactively, by specifically providing that the new definition applies "regardless of whether the conviction was entered before, on, or after September 30, 1996."[11] They contend that 212(c) humanitarian waivers of deportation are no longer allowed for persons who have been convicted of an "aggravated felony."[12] Finally, they claim that the IIRIRA eliminated the right to judicial review in federal court for an administrative decision of the Board of Immigration Appeals on deportations based upon aggravated felonies and other criminal offenses.[13] Consequently, as alleged by the petitioners, persons such as the alleged victims in this case have no recourse to a judicial court to challenge the deportation decision or to submit the social or humane considerations that would weigh in favor of not deporting them.

23. Within this legislative framework, the petitioners argue that the application of IIRIRA and AEDPA provisions to the alleged victims violated their right to family set forth in Articles V, VI, and VII of the American Declaration. Specifically, they argue that mandatory deportation without consideration of humanitarian factors such as family unity, the rights of the alleged victims' children under international law, and the material and emotional hardship deportation places on their family left in the United States is a violation under the mentioned articles. The petitioners recognize that the rights related to family, guaranteed by Articles V, VI and VII of the American Declaration, are not absolute; however, in accordance with well-recognized international law, the petitioners contend that a non-citizen resident's right to family must be properly balanced against the State's right to implement reasonable migration policy.

24. Further, the petitioners argue that the Inter-American Commission should look to the principles it articulated in its "Report on the Human Rights of Asylum Seekers within the Canadian Refugee Determination System" (hereinafter "Canada Report"); the precedents of the European Court on Human Rights in its interpretation of Article 8 of the European Convention of Human Rights; and the decisions of the United Nations Human Rights Committee ("U.N. Human Rights Committee") interpreting

[11] Petitioners' submission dated July 14, 2003, pages 2-3; Petitioners' submission dated December 7, 2006, page 12, citing 8 U.S.C. § 1101(a)(43).

[12] Petitioners' submission dated July 14, 2003, pages 3-4; Petitioners' submission dated December 7, 2006, page 7-8, citing 8 U.S.C. § 1229b(a)(3); 8 U.S.C. § 1182(c).

[13] Petitioners' submission dated July 14, 2003, page 4; Petitioners' submission dated December 7, 2006, page 13, citing 8 U.S.C. §1252(a)(2)(C) (providing "[n]otwithstanding any other provision of law, no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense … [including those classified as aggravated felonies]").

Articles 17 and 23 of the International Covenant on Civil and Political Rights.[14] The petitioners emphasize that the IACHR found that Articles V and VI of the American Declaration "'prohibit arbitrary or illegal interference with family life'" and a State's interference "'may only be justified where necessary to meet pressing need to protect public order, and where the means are proportional to that end.'"[15] In the context of the expulsion of non-citizen residents, the petitioners state that the Inter-American Commission articulated a balancing test, weighing "'the state's right and duty in maintaining public order…against the harm that may result to the rights of the individuals concerned in [a] particular case.'"[16]

25. Like the IACHR's balancing test, the petitioners contend that the European Court of Human Rights ("European Court") in its application of Article 8 (right to family life) of the European Convention on Human Rights ("European Convention") also require that "'[s]tates must show that the impact of the challenged policy or procedure on private or family life is proportionate to the legitimate aim pursued.'"[17] The petitioners argue that the European Court has consistently held that the stronger an individual's family ties and the longer the duration of residency in the host country, the greater the burden on the State to demonstrate that the deportation is proportionate to the legitimate aim pursued.[18] In addition to an individual's family ties and length of residency, the petitioners argue that the European Court has considered in specific cases "the extent to which private and family life was or will be ruptured, the existence and nature of the petitioner's links with his or her origin country, the retention of the nationality of his or her country of origin"[19] as well as "the gravity of the petitioner's offense, persistence of his or her offending behavior, his or her age at time of offense, and his or her medical and psychological status."[20]

26. As pointed out by the petitioners, the U.N. Human Rights Committee employs a similar balancing test between the State's interests and an individual's right to family life in deportation cases. The petitioners assert that the Human Rights Committee first determines whether a deportation order "was made under law and in furtherance of a legitimate state interest" and then whether "due consideration was given in the deportation proceedings to the deportee's family connections."[21] The petitioners state that the Human Rights Committee has found that a State must provide "ample opportunity [for the petitioner] to present evidence of his family connections."[22]

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[14] Petitioners' submission dated December 7, 2006, pages 44-50, citing, *inter alia*, IACHR, *Report on the Situation of Human Rights of Asylum seekers within the Canadian Refugee Determination System*, (2000); Eur. Ct. H.R., *Berrehab v. Netherlands*, Judgment of June 21, 1988, No. 10730/84, paragraph 23; Eur. Ct. H.R., *Moustaquim v. Belgium*, Judgment of February 19, 1991, No. 12313/86; Eur. Ct. H.R., *Beldjoudi v. France*, Judgment of March 26, 1992, No. 12083/86; Eur. Ct. H.R. *Nasri v. France*, Judgment of July 13, 1995, No. 19465/92; Eur. Ct. H.R., *Boughanemi v. France*, Judgment of April 24, 1996, No. 22070/93, Rep. 1996-II, Fasc. 8, paragraph 32; Eur. Ct. H.R. *C. v. Belgium*, June 24, 1996, No. 35/1995/541/627; Eur. Ct. H.R., *Bouchelkia v. France*, Judgment of January 1, 1997, No. 230078/93, Rep. 1997-I, fasc. 28; Eur. Ct. H.R., *Boudjaidi v. France*, Judgment of September 26, 1997, 123/1996/742/941, Rep. 1997-VI, fasc. 51; Eur. Ct. H.R., *Boujlifa v. France*, Judgment of October 21, 1997, 122/1996/741/940, Rep. 1997-VI, fasc. 54; *Mehemi v. France (no. 2)*, Judgment of April 10, 2003, No. 53470/99 (sect. 3)(bil.), ECHR 2003-IV; U.N. C.C.P.R. Human Rights Committee, *Stewart v. Canada*, Judgment of December 1996, No. 538/1993, paragraph 12.10; U.N.C.C.P.R. Human Rights Committee, *Winata v. Australia*, August 16, 2001, No. 930/2000.

[15] Petitioners' submission dated December 7, 2006, page 45, citing IACHR, *Report on the Situation of Human Rights of Asylum seekers within the Canadian Refugee Determination System*, paragraph 162 (2000).

[16] Petitioners cite Canada report at paragraph 166.

[17] Petitioners' submission dated December 7, 2006, page 48, citing *Berrehab v. Netherlands*, Judgment of June 21, 1988, No. 10730/84, para. 29.

[18] Petitioners' submission dated December 7, 2006, page 48, citing Eur. Ct. H.R. decisions *Beldjoudi*, *Berrehab*, and *Moustaquim*.

[19] Petitioners' submission dated December 7, 2006, page 49, citing Eur. Ct. H.R. decisions *Beldjoudi*, *Berrehab, Mehemi*, *Boughanemi*, *Boujlifa*.

[20] *Id.*, citing *Moustaquim*, *Bouchelkia*, *Nasri*.

[21] Petitioners' submission dated December 7, 2006, pages 49-50, citing U.N.C.C.P.R. Human Rights Committee, *Stewart v. Canada*, Judgment of December 1996, No. 538/1993, paragraph 12.10.

[22] *Id.*

27. The petitioners also argue that the State is responsible for alleged violations of the rights of the victims' children under Article VII of the American Declaration. They note that the Inter-American Commission has concluded that Article VII:

> [E]stablishes special measures of protection for children corresponding to their vulnerability as minors, and the implementation of this obligation must be accorded special importance. Respect for this duty of special protection necessarily requires that the interests of the child be taken into account in State decision-making which affects him or her, and that such decisions look to the protection of the best interests of the child.[23]

28. As observed by the petitioners, the IACHR has found that in the immigration context "the absence of any procedural opportunity for the best interests of the child to be considered in proceedings involving the removal of a parent or parents raises serious concerns."[24] They contend that the Inter-American Commission concluded in its Canada Report "that a State's full compliance with its obligations under the American Declaration entails a humanitarian or compassionate review process in deportation proceedings that weighs not only the interests of the deportee, but also the interests of his or her children."[25]

29. Finally, the petitioners argue that the State has violated the petitioners' rights under Article XVIII (right to a fair trial) and Article XXVI (right to due process of law). The petitioners note that the Inter-American Court has found that "due process of law must be respected in any act or omission on the part of the State bodies in a proceeding, whether of an administrative, punitive or jurisdictional nature."[26] The petitioners state that the IACHR in its Canada report found that Article XVIII "requires available and effective recourse for the violation of a right protected under the Declaration or the Constitution of the country concerned."[27] The petitioners assert that the Inter-American Court has held that in order to be truly effective, a recourse must both "establish whether there has been a violation of human rights and [] provide everything necessary to remedy it."[28] The petitioners contend that in order for the alleged victims' immigration proceedings to have been effective, the State had to provide them the opportunity to present their humanitarian defense and permit the tribunal to consider that defense in its final decision. By denying the alleged victims' an opportunity to apply for a waiver of deportation, the petitioners argue that the State denied the alleged victims an adequate and effective remedy in violation of Articles XVIII and XXVI of the American Declaration.

B. Position of the State

30. In its observations in the present cases, the State's depiction of the factual and procedural history of the alleged victims' U.S. criminal and immigration proceedings does not differ in any significant respect from that presented by the petitioners. The State, however, emphasizes that both alleged victims had more than ten years to apply for U.S. citizenship, but chose not to.

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[23] Petitioners' submission dated December 7, 2006, page 56, citing IACHR, *Report on the Situation of Human Rights of Asylum seekers within the Canadian Refugee Determination System*, paragraph 163 (2000).

[24] *Id.* at paragraphs 160.

[25] Petitioners' submission dated December 7, 2006, page 56, citing IACHR, *Report on the Situation of Human Rights of Asylum seekers within the Canadian Refugee Determination System*, paragraphs 159-60 (2000).

[26] Petitioners' submission dated December 7, 2006, page 37, citing IACHR, *Juridical Condition and Rights of the Undocumented Migrants*, paragraph 123.

[27] *See* Petitioners' submission dated December 7, 2006, citing IACHR, *Report on the Situation of Human Rights of Asylum seekers within the Canadian Refugee Determination System*, paragraph 95 (2000).

[28] *See* Petitioners' submission dated December 7, 2006, pages 36-37; *Case of the "Five Pensioners" v. Peru*, Judgment of February 28, 2003, Series C No. 98, paragraph 136; Inter-Am. Ct. H.R., *Juridical Condition and Rights of the Undocumented Migrants*, Advisory Opinion OC-18/03, paragraph 108 (September 17, 2003).

31. The State does contend that its actions, however, did not violate the alleged victims' rights protected under Articles V, VI, VII, XVIII, and XXVI of the American Declaration. The State asserts the following:

- That it has the sovereign right under international law to expel criminal aliens from its territory;

- That the statutory scheme established by IIRIRA and ADEPA is reasonable and comports with the U.S.'s international obligations; and

- That the petitioners' interpretation of the American Declaration is impermissibly expansive and fails to take due account of a State's right to take lawful actions that provide for the general welfare and protect the security of other people residing in its territory, as provided by Article XXVIII of the American Declaration.

32. The first argument is that under international law a sovereign state, such as the United States, has broad authority to establish immigration laws to control the admission and removal of aliens from its territory. The State notes that under Article 6 of the Convention on the Status of Aliens "for reasons of public order or safety, states may expel foreigners domiciled, resident, or merely in transit through their territory."[29] The State does recognize that any legal mechanism for removing non-citizen residents must comport with its international human rights and refugee obligations. It contends, however, that the removal of the alleged victims does not violate any of the United States' obligations under international law, particularly considering that both committed serious criminal offenses in the United States.

33. The State asserts the 1951 Refugee Convention and the 1967 Refugee Protocol recognize that asylum seekers who have committed "serious non-political crime[s] outside the country of refuge" are not eligible for asylum protection and those convicted of a "particularly serious crime" are *per se* "dangers to the community" and excluded from *non-refoulement* protection. Analogously, the State urges that resident non-citizens who have committed serious crimes, like the alleged victims, present a danger to the community, and affirms that in the interest of public order and safety the United States has the sovereign right and duty to remove the potential danger from its territory.

34. It is the position of the State that if the Inter-American Commission were to find violations of the American Declaration, it would be impermissibly interfering in its fundamental right to self-government and in effect would render it impossible to remove any criminal alien so long as the alien has family ties in the country. It emphasizes that such a recommendation would inhibit a State's ability to protect its citizens and lawful residents from threats to their security.

35. The second argument of the United States is that the statutory scheme established by IIRIRA and ADEPA is reasonable and comports with its international obligations. It argues that the legislative debate on these pieces of legislation focused on balancing the humanitarian interest of granting waivers from deportation and the growing threat to public safety from criminal aliens. The State urges that by making deportation mandatory only in the context of aliens who have committed "aggravated felonies" the legislation struck the proper balance between protecting legal permanent residents' family life and protecting the general welfare. Moreover, the State notes that criminal aliens, who fear persecution in their country of origin, are eligible for withholding of removal, in accordance with the Convention Against Torture and Article 33 of the Refugee Convention.

36. Finally, the State argues that the petitioners rely on an erroneously expansive interpretation of the American Declaration's articles. The State contends that the American Declaration does not "confer upon aliens a liberty interest in familial or private relations that may out weigh a country's

[29] State's response dated August 28, 2008, page 5, citing Convention on the Status of Aliens ("Havana Convention"), art. 1, adopted February 20, 1928, 132 L.N.T.S. 301, T.S. 815, 46 Stat. 2753, 2 Bevans, 4 Malloy 4722.

legitimate interest in regulating the residence of criminal aliens on its territory."[30] Accordingly, the State asserts that under the American Declaration it did not need to provide the alleged victims due process for rights they did not possess. In addition, the State underscores that under the American Declaration the alleged victims had the duty to obey the United States' laws[31] Because the alleged victims did not fulfill their duty and were convicted of serious crimes with full due process rights, the State urges that under Article XXVIII of the Declaration it had the right to limit the alleged victims' rights in the interest of protecting the "security of all" and to meet "the demands of the general welfare."[32]

37. With regard to Articles V and VI of the American Declaration, the State contends that these norms only protect against direct state action aimed at harming family life. It asserts that the articles do not protect against the secondary consequences of lawful, reasonable state actions. The State argues that the petitioners' reference to the European Court cases is inappropriate as the United States is not a party to the European Convention. The State further argues that the European Court's interpretations of Article 8 (right to family) of the European Convention are inapposite to the present case, because it contends that this norm is much broader in scope than Articles V and VI of the American Declaration. The State notes that Article 8 of the European Convention provides:

> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

38. The United States argues that the rights to family and private life under the American Declaration are inherently limited by the legitimate exercise of state authority, whereas under Article 8 of the European Convention these individual rights must be given full effect unless the state can prove that it has acted within one of the enumerated exceptions. The State contends that even though Article 8 of the European Convention creates more restrictions on state action to remove criminal non-citizens, there are a number of analogous European Court precedents that demonstrate that it is permissible for a State to deport criminal non-citizens with family ties in the deporting country.[33]

39. With respect to the alleged violation of Article VII (rights of the child), the State underscores that the petitioners' argument relies almost exclusively on the IACHR's Canada Report. The State, however, points out that the Inter-American Commission's analysis in that report was predicated on Canada's obligation under the Convention on the Rights of the Child ("CRC"). Since the United States is not a party to the CRC, it State argues that the IACHR's analysis in the Canada Report is not relevant to its obligations under Article VII of the American Declaration.

40. As to the allegations of violation of Article XVIII, the State contends that the rights under Article XVIII (right to a fair trial) are only relevant if the State deprives the petitioners of other protected rights under the American Declaration. The State argues that because the petitioners do not have protected rights under Articles V, VI, and VII in this case, there cannot be a violation of Article XVIII of the American Declaration.

41. The State asserts, with regard to an alleged violation of Article XXVI, that due process rights protected under this provision only pertain to criminal prosecutions, and that removal proceedings

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[30] State's response dated August 28, 2008, page 14.

[31] State's response dated August 28, 2008, page 14, citing Art. XXXIII of the American Declaration.

[32] State's response dated August 28, 2008, page 14, citing Art. XXVIII of the American Declaration.

[33] State's response dated August 28, 2008, page 16, citing ., *Bouchelkia v. France*, Judgment of January 1, 1997, No. 230078/93, Rep. 1997-I, fasc. 28; Eur. Ct. H.R., *Boudjaidi v. France*, Judgment of September 26, 1997, 123/1996/742/941, Rep. 1997-VI, fasc. 51.

do not have such a nature. It also submits that the petitioners received full due process rights in their underlying criminal proceedings and that, accordingly, there cannot be a violation of Article XXVI of the American Declaration. To the extent that the Inter-American Commission may find that Article XXVI applies to immigration proceedings, the State argues that the case record demonstrates that the alleged victims received ample due process to satisfy Article XXVI of the American Declaration.

42. The State emphasizes that alleged victims made choices that had consequences. It submits that the alleged victims could have avoided removal by either choosing not to commit a serious crime or by availing themselves of the rights and responsibilities of citizenship. The State quotes the U.N. Human Rights Committee report in *Stewart v. Canada*:

> Countries like Canada, which enable immigrants to become nationals after a reasonable period of residence, have a right to expect such immigrants will in due course acquire all the rights and assume all the obligations that nationality entails. Individuals who do not take advantage of this opportunity and thus escape the obligations nationality imposes can be deemed to have opted to remain aliens in Canada. They have every right to do so, but must also bear the consequences.[34]

43. The State emphasizes that both alleged victims had more than ten years to apply for U.S. citizenship but chose not to. Accordingly, the State argues that as a consequence the alleged victims were subjected to a reasonable state policy to deport serious criminal non-citizens in the interest of security and the general welfare.

IV. ANALYSIS ON THE MERITS

A. Established facts

44. As there is no significant dispute of fact between the parties, the IACHR will refer in the following analysis to the circumstances of fact presented in section III above.

B. Consideration of alleged violations of rights

45. Based on the facts as presented by the parties, the Inter-American Commission will analyze the present case to determine whether the United States has violated the alleged victims' rights under Articles V (right to private and family life), VI (right to family), VII (right to protection for mothers and children), XVIII (right to fair trial) and XXVI (right to due process of law) of the American Declaration.

46. The organs of the Inter-American System are not bound to follow the judgments of the European Court or the decisions of other international supervisory mechanisms. However, the Inter-American Commission has previously held that the jurisprudence of other international supervisory bodies can provide constructive insights into the interpretation and application of rights that are common to regional and international human rights systems.[35] Therefore, it is wholly appropriate and established practice for the IACHR to consider authorities originating from the European Court, the U.N. Human Rights Committee, or similar other international instances, to the extent the decisions are relevant to the obligations owed by the State to the alleged victims. Accordingly, in determining the present case, the Inter-American Commission will, to the extent appropriate, interpret and apply the pertinent provisions of the American Declaration in light of current developments in the field of international human rights law, as evidenced by treaties, custom and other relevant sources of international law.

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[34] State's response dated August 28, 2008, page 19, citing U.N. C.C.P.R. Human Rights Committee, *Stewart v. Canada*, Judgment of December 1996, No. 538/1993, paragraph 12.8.

[35] *See, e.g., Case of Andrea Mortlock*, Report No. 63/08, (admissibility & merits report), Case No. 12.534, July 25, 2008 (United States), citing IACHR Report 1/95 (Peru), *Annual Report of the IACHR 1994*; Report 63/99 (Victor Rosario Congo), Ecuador, *Annual Report of the IACHR 1998*; Report 98/03 (Statehood Solidarity Committee), United States, *Annual Report of the IACHR 2003*, paragraphs 91-93.

1. Right to family life and rights of the child (Articles V, VI, and VII of the American Declaration)

47. Articles V and VI of the American Declaration provide:

> Article V. Every person has the right to the protection of the law against abusive attacks upon his honor, his reputation, and his private and family life.
>
> Article VI. Every person has the right to establish a family, the basic element of society, and to receive protection thereof.

48. The State argues that the rights protected under Articles V and VI only pertain to "state action directly aimed at harming family life and not to the secondary consequences" of what the State considers to be "lawful and reasonable state action."[36] However, in the Andrea Mortlock Case, which also addressed aspects of U.S. immigration policies, the Inter-American Commission found the victim had a substantive right to be free from cruel, infamous, or unusual punishment under the American Declaration that concerned direct state action, as well as, foreseeable consequences that flow from state action.[37] Similarly, the IACHR finds in this case that state action directly affecting a person, and that also has consequences for that person's family life, may present a colorable claim under the American Declaration.

49. The Inter-American Commission has consistently recognized that under international law Member States have the rights to control the entry, residence, and expulsion of non-citizens.[38] Indeed, in its Canada Report the IACHR expressed: "[T]he state undoubtedly has the right and duty to maintain public order through the control of entry, residence and expulsion of removable aliens."[39] The State is correct to note that, under certain circumstances, the individual right protected under the American Declaration may be limited in the interest of "the security of all, and by the just demands of the general welfare and the advancement of democracy."[40]

50. On the other hand, the Inter-American Commission has cautioned that "in exercising this right to expel such aliens, the member States must have regard to certain protections which enshrine fundamental values of democratic societies."[41] To this end the IACHR has noted that "immigration policy must guarantee to all an individual decision with the guarantees of due process; it must respect the right to life, physical and mental integrity, family, and the right of children to obtain special means of protection."[42]

51. In accordance with international law, the Inter-American Commission has found that in this area neither the scope of action of the State nor the rights of a non-citizen are absolute. Instead, the

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[36] State's response dated August 28, 2008, page 15. (emphasis in original).

[37] *See* IACHR, Report No. 63/08, Andrea Mortlock, (admissibility & merits), Case No. 12.534, United States, July 25, 2008, paragraphs 76-79.

[38] *See* IACHR, *Report on the Situation of Human Rights of Asylum seekers within the Canadian Refugee Determination System* (2000); Inter-Am. Ct. H.R., *Juridical Condition and Rights of the Undocumented Migrants*, Advisory Opinion OC-18/03, paragraph 119 (September 17, 2003).

[39] IACHR, *Report on the Situation of Human Rights of Asylum seekers within the Canadian Refugee Determination System*, paragraph 166 (2000).

[40] American Declaration on the Rights and Duties of Man, art. XXVIII (1948).

[41] *Case of Andrea Mortlock*, Report No. 63/08, (admissibility & merits report), Case No. 12.534, paragraph 78, July 25, 2008 (United States).

[42] *Id.*, citing IACHR, *Report on the Situation of Human Rights of Asylum seekers within the Canadian Refugee Determination System* (2000).

IACHR has concurred with the finding of many international bodies that there must be a balancing test, which weighs a State's legitimate interest to protect and promote the general welfare against a non-citizen resident's fundamental rights such as to family life. In this regard, the Inter-American Commission has articulated:

> Given the nature of Articles V, VI and VII of the American Declaration…where decision-making involves the potential separation of a family, the resulting interference with family life may only be justified where necessary to meet a pressing need to protect public order, and where the means are proportional to that end. The application of these criteria by various human rights supervisory bodies indicate that this balancing must be made on a case by case basis, and that the reasons justifying interference with family life must be very serious indeed.[43]

52. The European Court of Human Rights has struck a similar balance:

> The Court reiterates that it is for the Contracting States to maintain public order, in particular by exercising their right, as a matter of well-established international law and subject to their treaty obligations, to control the entry and residence of aliens and notably to order the expulsion of aliens convicted of criminal offences.
>
> However, their decisions in this field must, in so far as they may interfere with a right protected under paragraph 1 of Article 8 (art. 8-1) [right to private and family life], be necessary in a democratic society, that is to say, justified by a pressing social need and proportionate to the legitimate aim pursued.[44]

53. Similarly, in *Stewart v. Canada*, which was cited by both parties, the U.N. Human Right Committee noted that, under international law, a State's right to expel a non-citizen resident for a legitimate state interest must be balanced against due consideration in deportation proceedings for a deportee's family connections and the hardship the deportation may have on the family.[45]

54. The European Court and the U.N. Human Rights Committee have considered a variety of elements in balancing a deportee's rights to remain in a host country and a state's interest to protect its citizenry and other individuals under its jurisdiction. Some of the considerations duly analyzed have been: the age at which the non-citizen immigrated to the host state; the non-citizen's length of residence in the host state; the non-citizen's family ties in the host state; the extent of hardship the non-citizen's deportation poses for the family in the host state; the extent of the non-citizen's links to the country of origin; the non-citizen's ability to speak the principal language(s) of the country of origin; the nature and severity of the non-citizen's criminal offense(s); the non-citizen's age at the time of the criminal offense(s) was/were committed; the time span of the non-citizen's criminal activity; evidence of the non-citizen's rehabilitation from criminal activity; and the non-citizen's efforts to gain citizenship in the host state.[46]

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[43] IACHR, *Report on the Situation of Human Rights of Asylum seekers within the Canadian Refugee Determination System*, paragraph 166 (2000).

[44] Eur. Ct. H.R. *C. v. Belgium*, June 24, 1996, No. 35/1995/541/627, paragraph 31; s*ee, Beldjoudi v. France*, Judgment of March 26, 1992, No. 12083/86, paragraph 74; Eur. Ct. H.R. *Nasri v. France*, Judgment of July 13, 1995, No. 19465/92, paragraph 41; Eur. Ct. H.R., *Boughanemi v. France*, Judgment of April 24, 1996, No. 22070/93, Rep. 1996-II, Fasc. 8, paragraph 41;; Eur. Ct. H.R., *Bouchelkia v. France*, Judgment of January 1, 1997, No. 230078/93, Rep. 1997-I, fasc. 28, paragraph 48; Eur. Ct. H.R., *Boudjaidii v. France*, Judgment of September 26, 1997, Rep. 1997-VI, fasc. 51, paragraph 39; Eur. Ct. H.R., *Boujlifa v. France*, Judgment of October 21, 1997, 122/1996/741/940, Rep. 1997-VI, fasc. 54, paragraph 42.

[45] U.N. C.C.P.R. Human Rights Committee, *Stewart v. Canada*, Judgment of December 1996, No. 538/1993, paragraph 12.10.

[46] The Commission notes that all of these factors, which may be relevant to the present case, have been considered by the European Court of Human Rights (in the context of its Article 8 right to family life considerations) and the U.N. Human Rights Committee in their deliberations on similarly-situated individuals. *See generally,* Eur. Ct. H.R., *Berrehab v. Netherlands*, Judgment of June 21, 1988, No. 10730/84, paragraph 23; Eur. Ct. H.R., *Moustaquim v. Belgium*, Judgment of February 19, 1991, No. 12313/86; Eur. Ct. H.R., *Beldjoudi v. France*, Judgment of March 26, 1992, No. 12083/86; Eur. Ct. H.R. *Nasri v. France*, Judgment of July 13, 1995, No. 19465/92; Eur. Ct. H.R., *Boughanemi v. France*, Judgment of April 24, 1996, No. 22070/93, Rep. 1996-II, Fasc. 8, paragraph 32; Eur. Ct. H.R *C. v. Belgium*, June 24, 1996, No. 35/1995/541/627; Eur. Ct. H.R., *Bouchelkia v. France*, Judgment of January 1, 1997, No. 230078/93, Rep. 1997-I, fasc. 28; Eur. Ct. H.R., *Boudjaidii v. France*, Judgment of September 26, 1997, Rep. 1997-VI, fasc. 51; Eur. Ct. H.R., *Boujlifa v. France*, Judgment of October 21, 1997, 122/1996/741/940, Rep. 1997-VI,

continued…

55. The Commission notes that these elements are not an exhaustive list or a rigid set of considerations to be addressed in every case. The balancing test must be flexible to the specific facts of each individual case.

56. In addition, the IACHR particularly emphasizes that the best interest of minor child must be taken into consideration in a parent's removal proceeding. Article VII of the American Declaration states, "all children have the right to special protection, care and aid." As a component of this special protection afforded children, in the context of legal proceedings that may impact a child's right to family life, "special protection" requires that the proceedings duly consider the best interests of the child.[47]

57. Both the Inter-American Commission and the European Court have recognized that under international law the best interest of a deportee's citizen children must be duly considered in any removal proceeding. The European Court has repeatedly held that the "best interest and well-being of the children" of a non-citizen must be taken into consideration in a removal proceeding.[48] Likewise, in its Canada Report the IACHR asserted that "given [the State's] obligations under the American Declaration…the absence of any procedural opportunity for the best interests of the child to be considered in proceedings involving the removal of a parent or parents raises serious concern." Now presented with a specific case on this issue, the Inter-American Commission finds that removal proceedings for non-citizens must take due consideration of the best interest of the non-citizens' children and a deportee's rights to family, in accordance with international law.

58. Although the State contends that the establishment of a balancing test will impermissibly infringe on a State's sovereign rights or will permit criminal aliens "to remain in the country with impunity simply by establishing family or private ties,"[49] the Commission finds both of these arguments without merit. As the State has noted, the European Court and the U.N. Human Right Committee's decisions in this area demonstrate that a deportee's establishment of a family or private ties to a host country does not establish an immutable right of a non-citizen to remain in the host country.[50] Indeed, the United States performed such a balancing test in consideration of 212(c) waivers prior to the passage of IIRIRA and AEDPA.[51] The Commission finds that a balancing test is the only mechanism to reach a fair decision between the competing individual human rights and the needs asserted by the State.

59. In the present case, Mr. Smith and Mr. Armendariz had no opportunity to present a humanitarian defense to deportation or to have their rights to family duly considered before deportation. Nor were the best interests of their respective U.S. citizen children taken into account by any decision maker.

60. Accordingly, the IACHR finds the State in violation of Mr. Smith and Mr. Armendariz's rights under Articles V, VI, and VII of the American Declaration by failing to hear their humanitarian defense and duly consider their right to family and the best interest of their children on an individualized basis in their removal proceedings.

...continuation
fasc. 54; *Mehemi v. France (no. 2)*, Judgment of April 10, 2003, No. 53470/99 (sect. 3)(bil.), ECHR 2003-IV; U.N. C.C.P.R. Human Rights Committee, *Stewart v. Canada*, Judgment of December 1996, No. 538/1993, paragraph 12.10; U.N.C.C.P.R. Human Rights Committee, *Winata v. Australia*, August 16, 2001, No. 930/2000.

[47] Inter-Am. Ct. H.R., Juridical Condition and Human Rights of the Child, Advisory Opinion OC-17/02, Series A No. 17, paras. 62-77, 92-103 (August 28, 2002).

[48] *See, e.g.,* Eur. Ct. H.R. *Maslov v. Austria*, Judgment of June 23, 2008, No. 1638/03, paragraph 82, citing Eur. Ct. H.R., *Üner v. Netherlands*, Judgment of October 18, 2006, No. 46410/99, paragraph 58.

[49] State's response dated August 28, 2008, page 8.

[50] State's response dated August 28, 2008, pages 16, 18.

[51] *See, e.g., Matter of Marin*, 16 I & N Dec. 581 (BIA 1978).

2. Right to due process and fair trial (Articles XVIII and XXVI of the American Declaration)

61. Articles XVIII and XXVI of the American Declaration provide:

> Article XVIII. Every person may resort to the courts to ensure respect for his legal rights. There should likewise be available to him a simple, brief procedure whereby the courts will protect him from acts of authority that, to his prejudice, violate any fundamental constitutional rights.
>
> Article XXVI. Every person accused of an offense has the right to be given an impartial and public hearing, and to be tried by courts previously established in accordance with pre-existing laws, and not to receive cruel, infamous or unusual punishment.

62. The Commission has held that "[a]rticle XVIII [] prescribes a fundamental role for the courts of a state in ensuring and protecting these basic rights, which role must be effective."[52] In the *Rafael Ferrer-Mazorra* case, the Commission concluded that when a state fails to provide an adequate and effective remedy to a violation of a fundamental right under the American Declaration, that deficiency creates an independent violation of the right to judicial protection under Article XVIII of the American Declaration.[53]

63. With regard to Article XXVI of the American Declaration, the Commission has applied the article to certain civil proceedings which involve a possible sanction and flow from a prior criminal conviction.[54] In the case of *Andrea Mortlock*, which involved a similarly-situated victim in deportation proceedings, the Commission stated "to deny an alleged victim the protection afforded by Article XXVI simply by virtue of the nature of immigration proceedings would contradict the very object of this provision and its purpose to scrutinize the proceedings under which the rights, freedoms and well-being of the individuals under the State's jurisdiction are established."[55] As in the *Andrea Mortlock* case, "the initiation of immigration proceedings and the resulting deportation order are the direct consequence of a criminal conviction against [the victims]. Therefore the protections afforded by Article XXVI of the American Declaration are particularly relevant to the examination of [this] case."[56] In short, in the context of immigration proceedings that include the sanction of deportation, the Commission finds that heightened due process protections apply.

64. In the present case, IACHR has found the State violated Mr. Smith and Mr. Armendariz's fundamental rights under Articles V, VI, and VII of the American Declaration by failing to duly consider on an individualized basis their rights to family and the best interest of their children in their respective removal proceedings. The State's failure to provide Mr. Smith and Mr. Armendariz a judicial mechanism to present their humanitarian defenses and offer an effective remedy, if merited, to preserve their fundamental rights, establish independent violations of Articles XXVI and XVIII of the American Declaration.

65. Accordingly, the Inter-American Commission finds the State in violation of Mr. Smith and Mr. Armendariz's rights under Articles XXVI and XVIII of the American Declaration.

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[52] IACHR, *Rafael Ferrer-Mazorra, et al. v. United States*, Report No. 51/01 (merits report), Case No. 9903, para. 243 (April 4, 2001).

[53] *See Id.* at para. 244; *see also Mayan Indigenous Community of the Toledo District v. Belize*, Report No. 40/04 (merits report), Case No. 12.053, para. 175 (October 12, 2004) (stating "The Commission has similarly found that the lack of an effective judicial remedy implies, not just an exception to the exhaustion of domestic remedies, but also a violation of the substantive right to judicial protection [Article XVIII] which is upheld by the inter-American human rights system.").

[54] IACHR, *Andrea Mortlock v. United States*, Report No. 63/08 (merits report), Case No. 12.054, paras. 82-86 (July 25, 2008).

[55] *Id.* at para. 83.

[56] *Id.* at para. 84.

V. CONCLUSIONS

66. In light of the facts presented and evidence analyzed in the present case, the IACHR concludes that the United States violated Wayne Smith and Hugo Armendariz's rights under Articles V, VI, VII, XVIII, and XXVI of the American Declaration, by failing to provide an individualized balancing test in their removal proceedings.[57]

VI. RECOMMENDATIONS

67. Based on the analysis and conclusions in the present report, the IACHR recommends that the United States:

1. Permit Wayne Smith and Hugo Armendariz to return to the United States at the expense of the State.

2. Reopen Wayne Smith and Hugo Armendariz's respective immigration proceedings and permit them to present their humanitarian defenses to removal from the United States.

3. Allow a competent, independent immigration judge to apply a balancing test to Wayne Smith and Hugo Armendariz's individual cases that duly considers their humanitarian defenses and can provide meaningful relief.

4. Implement laws to ensure that non-citizen residents' right to family life, as protected under Articles V, VI, and VII of the American Declaration, are duly protected and given due process on a case-by-case basis in U.S. immigration removal proceedings.

VII. ACTIONS SUBSEQUENT TO REPORT 108/09

68. On November 9, 2009, the IACHR adopted Report No. 108/09 on the merits of this case. The report was sent to the State on December 4, 2009, with a time period of two months to inform the Inter-American Commission on the measures taken to comply with its recommendations. On that same date, the petitioners were notified of the adoption of the report.

69. The petitioners submitted a communication on June 15, 2010 in which they express that the State has not complied with the recommendations of the decision on the merits, and request that the IACHR publish its report. The Inter-American Commission transmitted that communication to the State for information on June 24, 2010.

70. In the above mentioned communication, the petitioners point out that more than six months passed since the United States was notified of the merits report, but that it had not responded. It is the petitioners' opinion that "meanwhile, Mr. Smith, Mr. Armendariz and their families continue to suffer the consequences of the unjust mandatory deportation policy of which they were victims" and that "the United States has forfeited its opportunity to report on the measures adopted."

71. The petitioners also mention that they made "numerous efforts to discuss with the United States Government the IACHR's conclusions and recommendations, but to no avail" and that to the date of their communication "the State has not made any pronunciation, nor contacted the victims in order to adopt measures in accordance with the recommendations." They add that on May 7, 2010 they made a direct appeal to the U.S. Immigration Office to request a humanitarian parole on the basis of the recommendations of the IACHR in this case, but that the request was denied by the State on June 4, 2010 with no explanation. Further, the petitioners express their deep concern that the lack of compliance

[57] In so deciding, the Commission brings its jurisprudence in line with that established by the European Court of Human Rights, the U.N. Human Rights Committee, U.S. immigration proceedings prior to IIRIRA and AEDPA, and that articulated in the Inter-American Commission's Canada Report.

will "exacerbate the human rights violations in this case" and that this will affect not only the rights of the victims but also those of their families and particularly their children.

72. Since the report on the merits was transmitted to the State, no further information on compliance with the recommendations was received from it. Accordingly, based upon the information available, the Inter-American Commission decided to ratify its conclusions and reiterate its recommendation in this case, as set forth below.

VIII. FINAL CONCLUSIONS AND RECOMMENDATIONS

73. On the basis of the facts and information provided, the IACHR finds that the State has not taken measures toward compliance with the recommendations in the merits report in this case. Accordingly,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS REITERATES ITS RECOMMENDATIONS THAT THE UNITED STATES:

1. Permit Wayne Smith and Hugo Armendariz to return to the United States at the expense of the State.

2. Reopen Wayne Smith and Hugo Armendariz's respective immigration proceedings and permit them to present their humanitarian defenses to removal from the United States.

3. Allow a competent, independent immigration judge to apply a balancing test to Wayne Smith and Hugo Armendariz's individual cases that duly considers their humanitarian defenses and can provide meaningful relief.

4. Implement laws to ensure that non-citizen residents' right to family life, as protected under Articles V, VI, and VII of the American Declaration, are duly protected and given due process on a case-by-case basis in U.S. immigration removal proceedings.

IX. PUBLICATION

74. In light of the above and in accordance with Article 45(3) of its Rules of Procedure, the IACHR decides to make this report public, and to include it in its Annual Report to the General Assembly of the Organization of American States. The Inter-American Commission, according to the norms contained in the instruments which govern its mandate, will continue evaluating the measures adopted by the United States with respect to the above recommendations until they have been complied with.

Done and signed in the city of Washington, D.C., on the 12th day of the month of July, 2010. (Signed): Felipe González, President; Paulo Sérgio Pinheiro, First Vice-President; Luz Patricia Mejía Guerrero, María Silvia Guillén; José de Jesús Orozco Henríquez and Rodrigo Escobar Gil, Commissioners.