

REPORT No. 134/11¹
PETITION 1190-06
ADMISSIBILITY
UNDOCUMENTED WORKERS
UNITED STATES
October 20, 2011

I. SUMMARY

1. On November 1, 2006, the Inter-American Commission on Human Rights (the “Inter-American Commission” or the “IACHR”) received a petition from the University of Pennsylvania School of Law, the American Civil Liberties Union Foundation, and the National Employment Law Project (the “petitioners”) against the United States of America (the “State” or “United States”), on behalf of, among others, Leopoldo Zumaya and Francisco Berumen Lizalde, undocumented workers having resided in the United States.²

2. The petitioners claim that the presumed victims were excluded from employment rights and remedies available to their documented counterparts. The presumed victims have allegedly been directly affected by the United States’ denial of equal rights based on immigration status in their efforts to enforce their employment and labor rights either under federal or state law. The petitioners contend that a decision of the United States Supreme Court denying the freedom of association to undocumented workers has made the issue of immigration status relevant to workplace rights and therefore encouraged employers to claim that undocumented immigrant workers lack legal rights in other contexts, such as access to compensation for workplace injuries, freedom from workplace discrimination and entitlement to hold an employer responsible for workplace injury. The petitioners conclude that the United States’ failure to ensure equal protection under the law to undocumented immigrant workers violates Articles II (Right to equality before law), XVII (Right to recognition of juridical personality and civil rights) and XXII (Right of association) of the American Declaration of the Rights and Duties of Man (the “American Declaration”). The State has not submitted its response to the petition.

3. As set forth in this report, having examined the information and arguments provided by petitioners on the question of admissibility, and without prejudging the merits of the matter, the Inter-American Commission decided to declare the petition admissible with respect to Articles II, XVI (Right to social security), XVII and XVIII (Right to a fair trial) of the American Declaration with regard to Leopoldo Zumaya and Francisco Berumen Lizalde. Consequently, the Inter-American Commission will notify the parties of the report, continue with the analysis of the merits of the case, and publish this report and include it in its Annual Report to the General Assembly of the Organization of American States.

II. PROCEEDINGS BEFORE THE IACHR

4. Following receipt of the petition on November 1, 2006, the Inter-American Commission received additional information from petitioners on April 5, 2007, and March 8, 2010. The IACHR transmitted the pertinent parts of the complaint and subsequent communications to the State on October 27, 2010, with a request for observations within two months in accordance with Article 30(3) of the Commission’s Rules of Procedure. This request to the State was reiterated on July 20, 2011. The State has not submitted its response to the petition.

¹ Commissioner Dinah Shelton, a national of the United States, did not take part in the discussion and voting on this case, pursuant to Article 17(2) of the Commission’s Rules of Procedure.

² The petition was also presented on behalf of three other presumed victims. As indicated in paragraph 5 of this report, the IACHR has decided to divide the petition and process separately the situation of these presumed victims.

5. On October 20, 2011, the IACHR, pursuant to Article 29.1(c) of its Rules of Procedure, decided to divide this petition and process separately the claims presented on behalf of three presumed victims whose complete names had not been provided to the IACHR.

III. POSITION OF THE PARTIES

A. Position of the petitioners

6. The petitioners indicate that the present complaint challenges government-sanctioned discrimination against undocumented immigrant workers in the United States. They claim that the highest court and various state courts have excluded undocumented workers from employment rights and remedies available to their documented counterparts.

7. According to the petitioners, discrimination against undocumented workers is rooted in a decision by the United States Supreme Court, *Hoffman Plastic Compounds, Inc. v. National Labor Relations Board*³, in which the country's highest court limited undocumented workers' right to an effective remedy for violation of their freedom of association. As a result, undocumented workers illegally fired in retaliation for having exercised their right to freedom of association are no longer entitled to the remedy of back pay under the National Labor Relations Act due to their undocumented immigration status. Five of the nine justices reasoned that back pay would compensate undocumented workers for work they could not lawfully perform because they lacked authorization to work in the United States.

8. The petitioners argue that this decision has had an enormous impact on undocumented workers' ability to organize to improve their working conditions. In addition, they contend that the impact of *Hoffman* has extended far beyond the denial of the freedom of association as the decision has encouraged employers to claim that undocumented immigrant workers lack legal rights in other contexts. Accordingly, some state courts have either eliminated or severely limited state-law based workplace protections for undocumented workers. The petitioners indicate that these rights and remedies often provided exclusively by state law, such as access to compensation for workplace injuries, freedom from workplace discrimination and entitlement to hold an employer responsible for a workplace injury, are among the most basic protections afforded to workers under United States law.

9. With regard to the impact on the application of discrimination protections, the petitioners claim that *Hoffman* has had important implications for remedies and rights available to undocumented workers under federal and state anti-discrimination laws. They state that under federal law, Title VII of the federal Civil Rights Act of 1964 protects workers' right to be free from discrimination based on sex, color, race, religion and national origin. They contend, however, that shortly after *Hoffman* was decided, the Equal Employment Opportunity Commission (EEOC) rescinded its previous guidance that established that back pay was available to undocumented victims of discrimination.

10. Concerning the provision of workers compensation benefits and other relief following workplace injuries, the petitioners argue that, since *Hoffman*, a number of state courts have held that undocumented immigrants' rights to certain workers' compensation benefits are limited by their immigration status, and in some states where an individual may sue in tort for injury or wrongful death, those benefits have also been limited. As an example of this practice, the petitioners list some decisions rendered by state courts from Pennsylvania, Michigan, Kansas and New York.

11. Finally, the petitioners state that, in addition to limiting or eliminating the workplace rights of undocumented workers, a further consequence of *Hoffman* has been the intimidation of undocumented workers asserting their rights throughout the courts. They contend that, because *Hoffman* had the effect of making immigration status relevant to workplace rights, employer-defendants often seek discovery of immigrant-plaintiffs' immigration status, an action that serves to chill immigrants' willingness to pursue

³ Petitioners cite 535 U.S. 137 (2002).

their workplace rights. The result would be a tacit condoning of the exploitation of immigrant workers even in areas where these workers have retained enforceable workplace rights.

12. The petition was originally presented on behalf of five individuals who have allegedly been directly affected by the United States' denial of equal rights based on immigration status in their efforts to enforce their employment and labor rights either under federal or state law. In their original filing before the IACHR the petitioners indicate that they "also include national and local organizations that join individual [presumed victims] on behalf of their undocumented immigrant membership who are denied equal protection under the labor and employment laws of the United States solely because of their immigration status"⁴. These organizations are the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), the United Mine Workers of America, and Inter-Faith Worker Justice. However, based on the information in the file, it does not appear that the petitioners intended to present these organizations as presumed victims. In particular, following a request for information in which the IACHR asked the petitioners to provide the complete names of the alleged victims, on March 8, 2011, the petitioners responded referring exclusively to the five individual presumed victims, two of whom are named below.⁵

Leopoldo Zumaya

13. Leopoldo Zumaya is a Mexican national who reportedly fractured his leg when he fell out of a tree while picking apples in Pennsylvania. The petitioners indicate that he had to endure three separate surgeries to insert a metal plate and six screws in his ankle and leg, and to try to repair torn ligaments. At the moment of filing the original petition before the IACHR Mr. Zumaya was allegedly still suffering from nerve damage and chronic regional pain disorder. The petitioners further state that Mr. Zumaya's employer initially paid his medical benefits, but when it became clear he would not be able to promptly return to work, his employer indicated his benefits would be suspended. As there was no work available for him with his physical limitations, he sought compensation for his workplace injury.

14. The petitioners assert that, because of his immigration status, Mr. Zumaya was not entitled to wage loss benefits from the time he was released for sedentary work and, in August 2006, was forced to settle his claim for US\$ 35,0000, less than one-half of its worth because of his immigration status. The petitioners indicate that the settlement agreement is confidential and, instead, they provide a sworn declaration of the attorney who represented Mr. Zumaya. In the expert opinion of the attorney, based on his eighteen years of practice in the area of workers compensation, had Mr. Zumaya been a U.S. citizen, he would have been eligible to receive a settlement value of between US\$ 85,000 and US\$ 100,000 in workers compensation benefits. After this settlement Mr. Zumaya returned to Mexico.

Francisco Berumen Lizalde

15. The petitioners submit that Francisco Berumen Lizalde is a worker from Mexico who was employed as a painter in Wichita, Kansas. They state that in November of 2005 he fell from scaffolding and fractured his hand. After filing for workers' compensation benefits, he was allegedly arrested and charged with "document fraud" for having used false documents to get a job. Mr. Berumen believes that he was turned in to immigration authorities because he filed a claim for workers' compensation.

16. The petitioners indicate that Mr. Berumen was jailed for more than a month, was convicted of a felony and deported in February 2006. The presumed victim allegedly returned to his home country without completing his medical treatment. They state that Mr. Berumen subsequently retained a workers' compensation attorney to preserve his right to workers' compensation benefits. The petitioners claim that, however, it would be almost impossible to do so as his presence in Kansas is

⁴ Petition received on November 1, 2006, p. 23.

⁵ As indicated in paragraph 5 of this report, the IACHR has decided to process separately the claims presented on behalf of three of the presumed victims.

allegedly required to pursue his claim. They conclude that Mr. Berumen could not exhaust domestic remedies and has therefore been effectively denied his right to the benefits to which he is legally entitled.

17. With regard to the admissibility of the petition, the petitioners argue that the presumed victims attempted to assert their workplace rights and were limited in their ability to assert them, that they were denied various remedies or denied their rights altogether because of their undocumented status.

18. According to the petitioners, Leopoldo Zumaya sought appropriate domestic remedies and was forced to accept a settlement for far less than he would have received had he been authorized to work. The petitioners contend that Mr. Zumaya exhausted domestic remedies with the settling of his dispute and that he submitted the petition before the IACHR within six months of the settlement date. Regarding Francisco Berumen Lizalde, the petitioners assert that he diligently and timely sought appropriate domestic remedies; that it would have been futile to have sought further benefits; and that Mr. Berumen submitted his petition before the IACHR within a reasonable time.

19. Finally, the petitioners assert that U.S. courts, including the Supreme Court and courts in the states in which the presumed victims reside, have consistently rejected claims brought by undocumented immigrant workers in situations identical to those in which the presumed victims find themselves. They conclude that the presumed victims were precluded from securing adequate and effective remedies for violation of rights protected by the American Declaration at the domestic level and that, therefore, all attempts to fully exhaust their domestic remedies would be futile, rendering the exhaustion requirement inapplicable.

20. On the merits, the petitioners allege that states are not only obligated to provide equal employment and labor rights to undocumented workers, but also have an affirmative obligation to protect undocumented workers from discrimination by non-state actors. They therefore request that the IACHR declare that the United States violated Articles II, XVII and XXII of the American Declaration, and recommend such remedies as it considers adequate and effective for the violation of presumed victims' fundamental rights. The remedies should include, among others, the amendment of law and policies and the enactment of comprehensive legislation that complies with international standards.

B. Position of the State

21. The State has not submitted its response to the petition.

IV. ANALYSIS ON COMPETENCE AND ADMISSIBILITY

A. Competence

22. The petitioners are entitled, in principle, under Article 23 of the IACHR's Rules of Procedure, to lodge complaints with the IACHR. The petition identifies as the alleged victims two individuals with respect to whom the United States committed to respect and ensure the rights enshrined in the American Declaration. As to the State, it is subject to the obligations imposed by the American Declaration pursuant to the OAS Charter, Article 20 of the Statute of the Commission and Article 51 of its Rules of Procedure. The United States has been a member of the Organization of American States since June 19, 1951, when it deposited the instrument of ratification of the OAS Charter.⁶ Consequently, the Commission is competent *ratione personae* to examine the petition.

23. The Inter-American Commission has competence *ratione loci* to deal with the petition since it alleges violations of rights protected by the American Declaration occurring within the territory of the United States, which is a state party to that Declaration. The Commission has competence *ratione temporis* since the obligation of respecting and ensuring the rights protected by the American Declaration was already in force for the State on the date on which the incidents described in the petition allegedly

⁶ Also see, IA Court of HR, Interpretation of the American Declaration on the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights, OC-10.89, par. 45 (July 14, 1989).

occurred. Finally, the Commission has competence *ratione materiae*, since the petition describes possible violations of human rights protected by the American Declaration.

B. Admissibility requirements

1. Exhaustion of domestic remedies

24. The Inter-American Commission must verify whether the remedies of the domestic system have been pursued and exhausted in accordance with generally recognized principles of international law, pursuant to Article 31(1) of its Rules of Procedure. Article 31(2) of the Rules of Procedure, however, specifies that this requirement does not apply if the domestic legislation of the state concerned does not afford due process of law for protection of the right allegedly violated; if the party alleging the violation has been denied access to domestic remedies; if the party is prevented from exhausting them; or if there has been an unwarranted delay in reaching a final judgment under the domestic remedies.

25. The petitioners have argued that Leopoldo Zumaya exhausted domestic remedies with the settlement of his dispute. They argue in this regard that the presumed victim had to accept a settlement for far less than he would have received had he been authorized to work. With regard to Francisco Berumen Lizalde, the petitioners state that he is exempt from the requisite of exhaustion. The petitioners allege that the presumed victim sought appropriate domestic remedies; and that it would have been futile to seek further benefits because of his undocumented status and the fact that U.S. courts have consistently rejected claims brought by undocumented immigrant workers in identical situations. In this sense, they conclude that all attempts to fully exhaust domestic remedies would be futile, rendering the exhaustion requirement inapplicable.

26. In *Hoffman Plastic Compounds, Inc. v. National Labor Relations Board*, the United States Supreme Court held that Federal immigration policy, as expressed by Congress and the Immigration Reform and Control Act of 1986 (IRCA), foreclosed the National Labor Relations Board from awarding backpay to an undocumented alien who has never been legally authorized to work in the United States⁷.

27. According to the information available, the legal principles of the *Hoffman Plastics* decision have been applied in multiple state cases. By applying those principles, the courts have purportedly limited or excluded undocumented workers from obtaining employment rights and remedies available to their documented counterparts. The Inter-American Commission has previously observed that the principles of international law referred to in Article 31(1) of the IACHR's Rules of Procedure do not merely refer to the formal existence of such remedies but also to the requirement that they be adequate and effective.⁸ The remedies must be adequate, in the sense that they must be suitable to address an infringement of a legal right, and effective, in that they must be capable of producing the result for which they were designed.⁹

28. With regard to the settlement between Leopoldo Zumaya and his employer, the IACHR finds that it does not *prima facie* illustrate the existence of an effective remedy against the purported exclusion from employment rights, specially when, according to the petitioners, the settlement was not reasonable or balanced; and it was allegedly signed in an unfavorable context.¹⁰

⁷ 535 U.S. 137 (2002).

⁸ IACHR, Report No. 105/09, Petition P-592-07, Admissibility, Hul'Qumi'Num Treaty Group, Canada, October 30, 2009, para. 31.

⁹ IACHR, Report No. 16/04, Petition P-129-02, Admissibility, Tracy Lee Housel, United States, February 27, 2004, para. 31.

¹⁰ See, *mutatis mutandis*, IACHR, Report No. 43/10, Petition P-242-05, Admissibility, Mossville Environmental Action Now, United States, March 17, 2010, para.31.

29. Based on the available information, the Inter-American Commission finds that any further proceedings brought by the presumed victims before domestic courts would appear to have no reasonable prospect of success, and therefore would not be effective in accordance with general principles of international law.

30. The Inter-American Commission concludes that the application of the legal principles of the *Hoffman Plastics* decision has prevented the presumed victims from exhausting the existing domestic remedies. Therefore, the present situation complies with the necessary criteria justifying an exception to the exhaustion of domestic remedies in application of Article 31(2)(b) of the Rules of Procedure. It should be clarified that the causes and effects which have prevented the exhaustion of domestic remedies in the instant case will be examined, where relevant, by the IACHR during the merits stage, in order to verify whether they in fact constitute violations of the American Declaration.

2. Timeliness of the petition

31. Article 32(1) of the Rules of Procedure requires that for a petition or communication to be admitted, it must be lodged within a period of six months from the date on which the party alleging the violation of his rights was notified of the final judgment. That same article states that in those cases in which the exception to the requirement of prior exhaustion of domestic remedies is applicable, the petition must be lodged within a reasonable period, as determined by the Inter-American Commission, which “shall consider the date on which the alleged violation of rights occurred and the circumstances of each case.”

32. The Inter-American Commission has ruled above that an exception to the rule requiring the exhaustion of domestic remedies is applicable; it must now determine whether the petition was lodged within a reasonable time. The petition was filed on November 1, 2006, and the alleged acts violating the presumed victims’ rights took place primarily between 2005 and 2006. Given the circumstances of the instant matter, the IACHR concludes that the petition was lodged within a reasonable period of time, so the requirement set by Article 32(2) of the Rules of Procedure has been met.

3. Duplication of proceedings and international *res judicata*

33. Article 33(1) of the IACHR’s Rules of Procedure provides that the admissibility of a petition before the Inter-American Commission requires that the subject of the petition is not pending in another international proceeding for settlement. Based on the information provided to the IACHR in the petition, the Commission finds no bar to the admissibility of the petition under Article 33(1) of the IACHR’s Rules of Procedure.

4. Colorable claim

34. For admissibility purposes, the Inter-American Commission must decide whether the alleged facts, if proven, could tend to establish a violation of the American Declaration, as required by Article 34(a) of the IACHR’s Rules of Procedure, or whether the petition is “manifestly groundless” or is “obviously out of order,” in accordance with section (b) of that same article. The level of conviction regarding those standards is different from that required in deciding on the merits of a complaint; the IACHR must perform a *prima facie* evaluation, not to establish the existence of a violation, but to examine if the petition establishes grounds for a possible or potential violation of a right guaranteed by the Declaration. That determination is a preliminary analysis and does not represent a prejudgment on the merits of the matter.

35. According to the petitioners, the highest court and various state courts in the United States have excluded undocumented workers from employment rights and remedies available to their documented counterparts. They allege that discrimination against undocumented workers is rooted in a decision by the United States Supreme Court that ruled that undocumented workers illegally fired in retaliation for having exercised their right to freedom of association are no longer entitled to the remedy of back pay. The petitioners further allege that the impact of this decision has extended far beyond the

denial of the freedom of association, as it has presumably encouraged employers to claim that undocumented immigrant workers lack legal rights in other contexts, such as access to compensation for workplace injuries, freedom from workplace discrimination and entitlement to hold an employer responsible for workplace injury. The petitioners conclude that the United States' failure to ensure equal protection under the law to undocumented immigrant workers violates Articles II, XVII and XXII of the American Declaration.

36. In conclusion, the IACHR decides that this petition is not "manifestly groundless" or "obviously out of order", and as a result, declares that the petitioners have met *prima facie* the requirements set by Article 34(a) of the IACHR's Rules of Procedure as regards potential violations of Articles II and XVII of the American Declaration to the detriment of Leopoldo Zumaya and Francisco Berumen Lizalde, as detailed above.

37. Neither the American Convention nor the IACHR Rules of Procedure require a petitioner to identify the specific rights allegedly violated by the State in the matter brought before the Commission, although petitioners may do so. Instead, it is for the Commission, based on the system's jurisprudence, to determine in its admissibility report which provisions of the relevant Inter-American instruments are applicable and could be found to have been violated if the alleged facts are proven by satisfactory evidence and legal argument. In this case the IACHR observes that the lack of access to compensation for workplace injuries was allegedly motivated by the application of the legal principles of the *Hoffman Plastics* decision. In this regard, the Inter-American Commission considers that, if proven, these facts could tend to establish a violation of the right to social security as provided for in Article XVI of the American Declaration, to the detriment of the two presumed victims. Also, the IACHR considers that the petition contains allegations that, if proved, may tend to establish a potential violation of Article XVIII of the American Declaration.

38. As of the presumed violation of Article XXII of the American Declaration, the IACHR observes that the petitioners alleged this violation with respect to the members of the organizations referred to *ut supra* in paragraph 11. Therefore, as the petition offers no arguments concerning the violation of this provision to the detriment of the presumed victims identified as such by the petitioners, the IACHR concludes, with respect to this provision, that the petition is inadmissible in conformity with Articles 34(a) and (b) of the Inter-American Commission's Rules of Procedure.

V. CONCLUSIONS

39. The Inter-American Commission concludes that it is competent to hear this case and that the petition is admissible according to Article 34 of its Rules of Procedure. Based on the arguments in fact and in law set forth above, and with no pre-judgment on the merits of the matters,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS DECIDES TO:

1. Declare the claims in the petition admissible with respect to Articles II, XVI, XVII and XVIII of the American Declaration;
2. Declare the claims in the petition inadmissible with respect to Article XXII of the American Declaration;
3. Give notice of this decision to the State and to the petitioners;
4. Continue with the analysis of the merits of the case; and
5. Publish this report and include it in the Annual Report to the OAS General Assembly.

Done and signed in the city of Washington, D.C., on the 20th day of October 2011. (Signed): José de Jesús Orozco Henríquez, First Vice President; Rodrigo Escobar Gil, Second Vice President; Paulo

Sérgio Pinheiro, Felipe González, Luz Patricia Mejía Guerrero, and María Silvia Guillén, Commission Members.