

OPINION No. 31/1999 (UNITED STATES OF AMERICA)

Communication addressed to the Government on 20 July 1998

Concerning Severino Puentes Sosa

The State is a party to the International Covenant on Civil and Political Rights

1. The Working Group on Arbitrary Detention was established by resolution 1991/42 of the Commission on Human Rights. The mandate of the Working Group was clarified and extended by resolution 1997/50. Acting in accordance with its methods of work, the Working Group forwarded to the Government the above-mentioned communication.
2. The Working Group conveys its appreciation to the Government for having forwarded the requisite information in good time.
3. The Working Group regards deprivation of liberty as arbitrary in the following cases:
  - (i) When it manifestly cannot be justified on any legal basis (such as continued detention after the sentence has been served or despite an applicable amnesty act) (category I);
  - (ii) When the deprivation of liberty is the result of a judgement or sentence for the exercise of the rights and freedoms proclaimed in articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and also, in respect of States parties, in articles 12, 18, 19, 21, 22, 25, 26 and 27 of the International Covenant on Civil and Political Rights (category II);
  - (iii) When the complete or partial non-observance of the international standards relating to a fair trial set forth in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned is of such gravity as to confer on the deprivation of liberty, of whatever kind, an arbitrary character (category III).
4. In the light of the allegations made, the Working Group welcomes the cooperation of the Government. The Working Group transmitted the reply provided by the Government to the source but did not receive its comments. The Working Group believes that it is in a position to render an opinion on the facts and circumstances of the case, in the context of the allegations made and the response of the Government thereto.
5. Severino Puentes Sosa is a Cuban national and a legal immigrant to the United States. He is alleged to have entered the United States in 1980 under an agreement signed by President Jimmy Carter and the Cuban authorities. It is claimed that even though Severino Puentes Sosa has completed serving a prison term to which he was sentenced he, along with other Cuban citizens, continues to be detained at a Louisiana country jail. He allegedly appears

before a panel every year which examines whether his reintegration into society is possible. The source alleges that his release is often denied on the basis of the panel's preconceived notions that he is an untrustworthy individual.

6. The Government, in its response dated 15 October 1998, justified both on facts and in law the continued detention of Severino Puentes Sosa. The Government first explained the applicable legal regime.

7. In order to determine what law to apply where a challenge to immigration detention has been presented, recent amendments to the Immigration and Nationality Act (INA) must be considered. In any particular case, the relevant facts in determining what statutes and regulations govern detention are the date the alien's immigration proceedings commenced, whether the alien is under a final order of exclusion, deportation, or removal, and whether the alien has been convicted of a serious criminal offence enumerated in the statute.

8. Before passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Public Law No. 104-208 (30 September 1996), courts held that the Attorney-General had statutory authority to detain inadmissible aliens subject to final orders of exclusion, citing the Attorney-General's express authority to detain inadmissible aliens pending a hearing before an immigration judge, her obligation to deport such aliens immediately unless she determines that immediate deportation is impracticable or improper, and her discretionary authority to grant (and revoke) immigration parole. These rules still apply to aliens whose exclusion proceedings commenced prior to 1 April 1997 (8 CFR sections 235.3 (e) and 241.20).

9. The Attorney-General was directed to detain excluded aliens convicted of aggravated felony crimes by former INA section 236 (e), 8 USC section 1226 (e) (1994), in addition to the Immigration Act of 1990, Public Law No. 101-649 (29 November 1990). The courts construed former section 236 (e) as a limit on the release or immigration parole of excludable aliens (rather than a limit on the authority to detain such aliens). Pre-IIRIRA section 236 (e) still applies to aliens in proceedings initiated before 1 April 1997.

10. The Immigration and Nationality Act addresses the detention and release of illegal aliens both pending removal proceedings and pending actual removal from the United States. It should be emphasized that United States law has always contemplated that any alien denied admission to the United States or ordered deported from the country will be promptly returned to his/her own country or to a third country willing to accept him/her. Current law contemplates that such removal will occur within 90 days of a final order requiring an alien to leave the United States. Further, while the statute is more restrictive regarding the detention and release of aliens in immigration proceedings who have been convicted of certain enumerated crimes, the restrictions are clearly aimed at individuals convicted of serious or repeated offences, among whom the incidence of further criminal activity and flight to avoid deportation has been well documented.

11. The Government argues that the case inquired into by the Working Group involves a criminal alien who cannot be promptly repatriated because his own Government has failed to issue travel documents or otherwise honour its obligation under international law to accept the return of its nationals. Because of recent amendments to the immigration statute, different provisions of law may apply depending on the effective dates of the legislation and when

proceedings commenced in an individual alien's case. While many of the recent changes reflect the heightened concern of the United States Congress with criminal aliens who commit further crimes and fail to comply with immigration orders, the statute uniformly reflects a careful balancing of the interests of the United States and the need to protect its lawful inhabitants from potentially dangerous aliens against the humanitarian concerns that necessarily arise when such an alien is illegally present in the United States but is unreturnable because the designated country of deportation will not accept him. The statute thus provides for release at the discretion of the Attorney-General under terms that impose minimal demands on aliens who wish to live and work in the community while awaiting deportation - that they not endanger other persons or property, and that they not abscond to avoid further proceedings or eventual enforcement of their immigration orders.

12. The statutory and regulatory guidance regarding the detention and release of criminal alien offenders who remain in the United States although ordered deported is presently provided by the transition period custody rules (TPCR) in section 303 (b) (3) (b) of IIRIRA, if their administrative immigration proceedings commenced before 1 April 1997.

13. The custody and release of aliens who were denied admission or ordered excluded from the United States in proceedings that commenced before 1 April 1997 continue to be governed by the statutory scheme in place prior to that date. If the Attorney-General determines that immediate exclusion is not practicable or proper, such aliens may be paroled from custody (8 USC sections 1227 (a), 1182 section 2 (d) (5) (a) (1994, supp. 1997)).

14. Immigration parole is discretionary and authorized on a "case-by-case basis for urgent humanitarian reasons or significant public benefit" (8 USC section 1182 section (d) (5) (a) (supp. 1997)). An Immigration and Naturalization Service (INS) district director thus may parole an excluded alien whose continued detention is not in the public interest (8 CFR section 212.5 (a) (5)).

15. Additional regulations provide annual consideration for parole to Cuban nationals who arrived in the "Mariel boatlift" in 1980 who have failed to gain legal status in the United States because of their criminal convictions in Cuba and/or the United States (8 CFR section 212.12). An excludable alien who has been convicted of a crime defined as an aggravated felony must demonstrate that his release will not endanger the safety of other persons or property (8 USC section 1226 (e) (3) (1994)).

16. Criminal aliens denied admission or found deportable in removal proceedings commenced after 1 April 1997 may be conditionally released at the end of the 90-day removal period unless the Attorney-General determines that the alien is a risk to the community or unlikely to comply with the order of removal (8 USC section 1231 (a) (supp. 1997)). Consideration is given to such factors as the alien's criminal history, rehabilitation or recidivism, and relatives or other equities in the United States (8 CFR section 241.4 (1998)). Inadmissible aliens under final orders of removal may apply to the district director for parole; deportable aliens under final orders of removal may also appeal the district director's custody determination or seek amelioration of the conditions under which release has been approved before the Board of Immigration Appeals (see, generally, 8 CFR section 236 (1998)).

17. In short, for criminal aliens who cannot be promptly removed from the United States, IIRIRA section 303, amended INA section 241 (a) (6) and the Attorney-General's statutory parole authority eliminate the possibility of indefinite detention without discretionary review pending efforts to return an alien to his own country.

18. The Government accordingly contends that international law is not violated by the detention of dangerous criminal aliens unlawfully present in the United States; that the applicable statutes, administrative regulations and judicial precedent reflect a thorough weighing of the interests of the United States and those of the individuals subject to removal proceedings.

19. In the light of the above, the Government dealt with the case of Severino Puentes Sosa. Severino Puentes Sosa left the port of Mariel, Cuba, and arrived in the United States on 25 June 1980 at Key West, Florida. He has been granted discretionary parole into the United States three times. Parole has been revoked because of his criminal conduct. Shortly after his arrival in the United States, he was transferred to the refugee camp in Indiantown Gap, Pennsylvania, and on 6 October 1980 he was paroled by the INS to a sponsor. Shortly thereafter, on 11 November 1980, Mr. Puentes Sosa was arrested in Howard County, Maryland, and charged with two counts of purse-snatching and one count of a traffic offence. Records indicated that he was released on bail or released on recognizance. On 1 January 1981, in Perth Amboy, New Jersey, Mr. Puentes Sosa and two other individuals committed a serious crime. They were arrested and charged with aggravated sexual assault, kidnapping, first degree, and aggravated assault, second degree. On 14 October 1982 he pleaded guilty to kidnapping and aggravated assault and was sentenced to a term of 10 years in prison. Also, his criminal record discloses an arrest for robbery in Perth Amboy, on 12 March 1981. This charge was subsequently dismissed.

20. On 29 October 1985 he was released from prison and transferred to INS custody. On 17 November 1986, an immigration judge ordered his exclusion; however, because of the impossibility of deporting him back to Cuba, he remained under INS custody. While under INS custody, Mr. Puentes Sosa received several disciplinary reports as follows:

28 July 1987 - refusing to work

8 October 1987 - using intoxicants

22 January 1988 - destruction of government property

25 February 1988 - disruptive conduct/refusing an order

7 July 1988 - disorderly conduct.

21. Also while under INS custody, Mr. Puentes Sosa was interviewed by an INS parole panel on 7 April 1988, and on 3 February 1989 by the associate commissioner for enforcement. He was denied parole. On 19 January 1990 a Department of Justice parole panel reviewed Mr. Puentes Sosa's records and recommended that he be granted parole. Mr. Puentes Sosa was released from INS custody on 27 December 1990 through the sponsorship of a halfway house programme, in Kansas City, Missouri. On 21 March 1991, the halfway house requested that the

INS revoke Mr. Puentes Sosa's parole due to his non-compliance with the programme's rules and regulations. Reportedly, he was cited on three different occasions for being intoxicated, leaving the house twice without permission, not reporting his paycheques and being abusive to staff, among others. On 22 March 1991, Mr. Puentes Sosa was returned to INS custody.

22. After returning to INS custody, on 16 October 1991, he received a disciplinary report for making, possessing or using intoxicants. Mr. Puentes Sosa was again interviewed by an INS parole panel on 19 November 1991 but denied parole at that time. On 13 October 1992, he was again interviewed and on 9 November 1992, the associate commissioner for enforcement approved his parole.

23. On 4 February 1994, Mr. Puentes Sosa was released from INS custody and placed in a halfway house programme, with International Self Help in Los Angeles, California. However, shortly after his arrival, he became a problem by violating the rules and regulations of the programme. Reportedly, he started drinking alcohol and stealing from other residents. On 24 February 1994, he tested positive for consumption of marijuana, and on 8 June 1994, for use of cocaine. He was referred to a detox centre for 30 days, without success. After being considered dangerous to himself, staff and community, on 17 November 1994, the halfway house requested that the INS revoke his parole. However, he absconded prior to being arrested by the INS.

24. On 4 May 1995, Mr. Puentes Sosa was arrested for tampering with the identification marks on a firearm and possession of a narcotic controlled substance. The first count was dismissed and a warrant issued for the second. On 11 August 1994, he was arrested by the Los Angeles Police Department (LAPD) and charged with possession of a narcotic controlled substance (cocaine). On 1 June 1995, he pleaded guilty. On 19 June 1995, he was again arrested by the LAPD for possession/purchase of cocaine. On 17 July 1995, he pleaded guilty and was convicted of possession of narcotics (cocaine). He was sentenced to concurrent terms of three years' imprisonment for the two offences. On 11 November 1995, he was charged by the LAPD with first-degree residential burglary, burglary and kidnapping to commit a robbery. On 26 February 1996, he pleaded guilty and was convicted of residential burglary, first degree, and was sentenced to two years in prison, the sentence to run concurrently with the three years in prison for the two previous convictions. On 26 August 1997, Mr. Puentes Sosa was returned to INS custody. He was interviewed by a parole panel on 12 May 1998 and his continued detention was directed on 16 July 1998. Pursuant to 8 CFR section 212.12, the INS will reconsider his parole status within one year of the date the decision was taken.

25. The response of the Government clearly sets out the circumstances in which Severino Puentes Sosa was detained and released. Whenever Mr. Puentes Sosa has been granted parole he has not only failed to comply with the conditions of parole but has on repeated occasions committed serious criminal offences for which he was prosecuted. After serving his latest sentence, Mr. Puentes Sosa was returned to INS custody and was interviewed by a parole panel on 12 May 1998. His continued detention was directed on 16 July 1998. The record does not show that he was subsequently released on parole.

26. Under the relevant law, the Attorney-General has the discretion to grant parole to detained aliens on a case-by-case basis, after determining that the alien's immediate expulsion is neither practicable nor proper. In any event, regulations applicable to Cuban nationals who arrived with the "Mariel boatlift" require the alien to be considered for parole on an annual basis. This applies to the case of Mr. Puentes Sosa, whose exclusion proceedings commenced prior to 1 April 1997.

27. The Working Group has given due consideration to the facts and circumstances in which Mr. Puentes Sosa has been denied temporary parole. The Group is aware that he was last denied temporary parole on 16 July 1998. Considering that Mr. Puentes Sosa has, in the past, not only violated his conditions of parole but also committed offences of a serious nature while on parole, the Working Group does not consider his detention to be arbitrary.

Adopted on 1 December 1999