

OEA/Ser.L/V/II
Doc. 92
2 July 2018
Original: English

REPORT No. 80/18

PETITION 1850-11

REPORT ON ADMISSIBILITY

GARETH HENRY, SIMONE CARLINE EDWARDS, AND FAMILIES
JAMAICA

Approved by the Commission electronically on July 2, 2018.

Cite as: IACHR, Report No. 80/18, Petition 1850-11. Admissibility. Gareth Henry, Simone Carline Edwards, and Families. Jamaica. July 2, 2018.



I. INFORMATION ABOUT THE PETITION

Petitioner:	Gareth Henry, Human Dignity Trust, and Freshfields Bruckhaus Deringer LLP
Alleged victim:	Gareth Henry, Simone Carline Edwards, and families
State denounced:	Jamaica ¹
Rights invoked:	Articles 1, 2, 4, 5, 11, 13, 16, 17, 22, 24, 25 and 26 of the American Convention on Human Rights; ² and Articles I, II, IV, V, VIII, IX, XI, XVIII and XXII of the American Declaration of the Rights and Duties of Man ³

II. PROCEEDINGS BEFORE THE IACHR⁴

Filing of the petition:	December 22, 2011
Notification of the petition to the State:	November 6, 2013
State's first response:	January 23, 2014
Additional observations from the petitioner:	April 14, October 15, and November 11, 2014; November 13, 2015
Additional observations from the State:	July 16, 2014; March 6, 2015

III. COMPETENCE

Competence <i>Ratione personae</i>:	Yes
Competence <i>Ratione loci</i>:	Yes
Competence <i>Ratione temporis</i>:	Yes
Competence <i>Ratione materiae</i>:	Yes; American Convention (deposit of instrument of ratification made on August 7, 1978)

IV. DUPLICATION OF PROCEDURES AND INTERNATIONAL *RES JUDICATA*, COLORABLE CLAIM, EXHAUSTION OF DOMESTIC REMEDIES AND TIMELINESS OF THE PETITION

Duplication of procedures and international <i>res judicata</i>:	No
Rights declared admissible:	Articles 4 (Life), 5 (Humane Treatment), 8 (Fair Trial), 11 (Privacy), 13 (Freedom of Thought and Expression), 16 (Freedom of Association), 17 (Right to Family Life), 22 (Freedom of Movement and Residence), 24 (Equal Protection), 25 (Judicial Protection), and 26 (Economic, Social and Cultural Rights) of the Convention, in connection with Articles 1.1 (Obligation to respect rights) and 2 (Obligation to Take Measures); and Article XI (Health) of the American Declaration
Exhaustion of domestic remedies or applicability of an exception to the rule:	Yes; exception set forth in Article 46.2(a) of the Convention
Timeliness of the petition:	Yes; under the terms of section VI

¹ In keeping with Article 17(2)(a) of the Commission's Rules of Procedure Commissioner Margarette May Macaulay, a Jamaican national, did not participate in the deliberations or decision in this matter.

² Hereinafter, the "American Convention" or the "Convention."

³ Hereinafter, the "American Declaration."

⁴ The observations submitted by each party were duly transmitted to the opposing party.

V. ALLEGED FACTS

1. The petition alleges that Jamaica is in violation of its obligations under the American Convention by continuing to criminalize private consensual sexual activity between adult males, and by protecting from domestic legal challenge these colonial-era “buggery” and “gross indecency” laws. Petitioners submit that this perpetuates Jamaica’s culture of violent homophobia and encourages both the State and the general population to persecute not only male homosexuals, but also the broader lesbian, gay, bisexual, trans, and intersex (LGBTI) community.

2. The petitioners claim that Jamaica engages in the structural denial of human rights to LGBTI persons. They allege that LGBTI persons are victims of discrimination, harassment, verbal and physical abuse, and homicides, and that the Jamaican government has failed to prevent, investigate and punish these crimes. They add that police officers are often complicit in homophobic crimes, and that they disclose the sexual orientation of LGBTI individuals in their neighborhoods or prisons in order to enable or provoke third parties to target them for abuse. Petitioners allege that LGBTI individuals are afraid to report homophobic attacks, and therefore they lack the protection of the law and relevant authorities.

3. The petitioners allege that specific sections of the Offenses Against the Person Act of 1864 (also referred to as “OAPA” and “buggery laws”) criminalize buggery, defined as anal sex, and “acts of gross indecency” between men, in public or private, with a maximum penalty of 10 years’ imprisonment. They argue that buggery laws are used to prosecute and legitimize discrimination and violence toward LGBTI persons based on sexual orientation and/or gender identity.

4. The petitioners claim that Mr. Henry, a gay man, was often harassed and beaten from the time he was a child due to his sexual orientation. They allege that Mr. Henry was forced to leave his hometown and family due to the homophobic attacks, and was compelled to move from place to place. From December 2003 to March 2007, petitioners claim that Mr. Henry was often harassed by police officers. In particular, they claim that Mr. Henry was brutally assaulted two times by police officers because of his sexual orientation.

5. The petitioners allege that the first attack occurred on Christmas Day of 2003, when Mr. Henry was beaten by an officer in front of a crowd of 70 people who encouraged the attack. They claim that Mr. Henry attempted to report the incident two times without success because police either refused to file the report or required him to submit information about the assailant that was inaccessible to him.

6. The petitioners allege that the second assault occurred on February 14, 2007, just after police agents identified him as a gay man. They allege that a mob of 200 people was chasing other gay men and chanting that gay people must be killed, and that the officers, rather than protect Mr. Henry, insulted and beat him. They claim that Mr. Henry was able to report the crime to the police after two attempts, but he was asked to provide a witness in order to proceed with the investigation. They allege that the same day of the attack and the day after, police officers showed up at his home and threatened him. They assert that Mr. Henry suffered severe injuries as a consequence of this second assault, and that on this occasion he sought medical care for the first time following an attack. They allege that he had previously avoided doing so because health care personnel also discriminate against LGBTI people.

7. The petitioners affirm that, in his role as an advocate for LGBTI rights and HIV/AIDS prevention, Mr. Henry and his colleagues were not allowed to provide information and express their views on those issues, and were verbally and physically attacked multiple times in public spaces by police officers and third parties when they were doing advocacy work in the community. Petitioners allege that Mr. Henry reported many of these attacks, but police never investigated them. Petitioners allege that subsequent homophobic aggression led Mr. Henry to flee his country, and was granted asylum in Canada in June 2008.

8. The petitioners allege that Simone Carline Edwards is a lesbian woman who suffered a homophobic attack on August 29, 2008, that almost killed her. Petitioners claim that Ms. Edwards and her brothers, one of whom is also gay, were shot multiple times in her home in Spanish Town by two men who belong to a homophobic gang. They claim that Ms. Edwards lost one of her kidneys and part of her liver as a

result. Petitioners allege that Ms. Edwards recognized one of the assailants, and that her brother identified one of the gunmen in an identification parade. They add that Ms. Edwards's brother asked for witness protection but it was refused. They argue that Ms. Edwards was never informed of any progress on the police investigation and that she and her brother were never asked to go to court. They report that, despite the identifications made by the Edwards, the only assailant who had been captured was later released, and that the second gunman was never arrested. They claim that Ms. Edwards and her family were not able to return to their home after the shooting because they were afraid of reprisals, and that she and her daughter were compelled to continuously move from place to place. They indicate that she fled Jamaica in September 2009 after receiving two more homophobic threats, and that she was granted asylum in the Netherlands.

9. The petitioners claim that Mr. Henry's and Ms. Edwards' families were also targeted for discrimination and violence on the basis of Mr. Henry's and Ms. Edwards' sexual orientation. They allege that Mr. Henry's mother, sister and other family members also sought asylum in Canada due to discrimination based on their relationship with him. The petitioners likewise allege that Ms. Edwards and her daughter were forced to separate for two years, until she was able to bring the child to the Netherlands. They assert that one of Ms. Edwards's brothers also sought asylum in the Netherlands, as he was targeted and wounded during the shooting of August 29, 2008 because he is gay. They add that another of Ms. Edwards's brothers had to leave his job because he was harassed based on his siblings' sexual orientation.

10. With respect to the requirement of prior exhaustion of domestic remedies, the petitioners claim the exceptions set forth in Article 46.2(a) and (b) of the American Convention apply to their case. Regarding Article 46.2(a), they argue that Jamaica does not have an appropriate domestic remedy to challenge buggery laws because the Charter of Fundamental Rights and Freedoms (hereinafter "the Charter"), a Constitutional Amendment passed in 2011, prohibits bringing a constitutional claim against them. They maintain that the State's indication that a gay activist presented a constitutional claim against the OAPA in a domestic court is not a demonstration of the existence of an adequate remedy, since that activist finally withdrew his action due to homophobic threats, before the court could decide on the admissibility or merits of the case. Furthermore, they assert that Jamaica does not identify what remedy would be available, or how that remedy would be adequate under Article 31(3) of Commission's Rules.

11. Regarding Article 46.2(b), the petitioners argue that the appropriate remedy for the violations they suffered is a proper investigation of the incidents and the prosecution of the offenders. They maintain that the victims were denied access to that remedy because, even when they risked their safety to inform the police about the attacks they suffered, the police either did not file the reports or failed to investigate the incidents. In addition, they submit that the State failed to explain how the action established in section 19 of the Charter would be an effective remedy, and how it would offer the victims guarantees against public harassment and violence. Further, they allege that their petition was submitted within a reasonable period of time, and therefore the exception set out in Article 32.2 of the Commission's Rules applies. Finally, the petitioners claim that this petition does not duplicate any petition pending before the IACHR, and that Jamaica mischaracterizes the requirements of Article 33 (1) (b) of Commission's Rules.

12. The State argues that the petition is inadmissible because petitioners failed to exhaust domestic remedies. The State notes that a constitutional challenge concerning the offenses against the Person Act, while prohibited under the Charter, would not be the only available remedy. The State alleges that victims can seek constitutional redress by virtue of section 19 of the Charter, for actual incidents which resulted in a denial of their rights to life, humane treatment, private and family life, freedom of thought, expression and association, and freedom of movement. It further alleges that petitioners declined to bring judicial proceedings in relation to the alleged crimes with no valid reason. The States notes that a gay rights activist brought a suit before the Supreme Court in relation to the interpretation of the OAPA. For these reasons, the State alleges petitioners did not exhaust domestic remedies, and that they failed to submit their petition within the six-month period established in Article 46.1(b) of the American Convention.

13. The State argues that the IACHR does not have the competence to determine whether the provisions contained in the OAPA are compatible with the American Convention. The State indicates that such competence lies exclusively with the Inter-American Court by virtue of Article 64(2) of the American

Convention, and that Jamaica has not accepted its competence. The State asserts that, should the Commission declare this petition admissible, it would be encroaching on an area that is reserved exclusively to States insofar as their domestic laws are involved, and it would entail an illegal and ultra vires act. Additionally, the State asserts that the current petition duplicates, under the terms of Article 33 of the Commission's Rules, another pending petition, as it makes the same claims.

VI. EXHAUSTION OF DOMESTIC REMEDIES AND TIMELINESS OF THE PETITION

14. The petitioners assert that the exceptions set forth in Articles 46.2(a) and (b) of the American Convention apply as a result of the abovementioned arguments. In turn, the State indicates that the petitioners failed to exhaust domestic remedies and they did not submit the petition within the six-month period.

15. Regarding the State's argument about the possibility to challenge the interpretation of the OAPA before the Supreme Court, the Commission notes that the Constitutional Amendment of 2011 prohibits bringing a constitutional claim against buggery laws and that the only action brought before the Supreme Court was withdrawn, allegedly due to homophobic threats, before the court could decide on its admissibility. For this reason, the Commission concludes that the exception to the requirement of prior exhaustion of domestic remedies set forth in Article 46.2(a) of the American Convention applies. Likewise, the Commission finds that the petition was filed in a reasonable time, as some consequences of the denounced acts still persist, and therefore the admissibility requirement of timeliness established in Article 32.2 of the Commission's Rules is met.

VII. COLORABLE CLAIM

16. In view of the elements of fact and law presented by each party, and given the allegations concerning a context of violence and discrimination against LGBTI people and the impact of buggery laws on that situation, the Commission finds that, if proved, the alleged facts relating to threats to life, personal integrity, interference with private and family life, obstacles to the right of residence and movement, unequal treatment, lack of access to justice and judicial protection, and interference in access to health care, could establish possible violations of Articles 4, 5, 8, 11, 17, 22, 24, 25 and 26 of the American Convention, in connection with Articles 1.1 and 2 thereof, to the detriment of Mr. Henry and Ms. Edwards.

17. Furthermore, the Commission considers that, if proven, the alleged facts of aggression, harassment, and interference with the dissemination of ideas and information in the context of Mr. Henry's advocacy work, could establish possible violations of Articles 13 and 16 of the American Convention. Moreover, the alleged threats and effects on the alleged victims' integrity, family life, and right of residence and movement of Mr. Henry's and Ms. Edwards' family members, could constitute possible violations of Articles 5, 17 and 22 of the American Convention. Finally, the Commission finds that, if proved, the alleged threats and lack of investigation and judicial protection following the shooting of Ms. Edwards and her brothers could establish violations of Articles 4, 5, 8 and 25 of the American Convention.

18. The Commission has established that, once the American Convention enters into force for a State that has ratified it, the Convention, and not the American Declaration, becomes the primary source of law to be applied by the Commission, provided that the petition alleges violations of rights substantially identical to those enshrined in both instruments. In this case, the Commission notes that the rights recognized in Articles I, II, IV, V, VIII, IX, XVIII and XXII of the Declaration alleged by the petitioners are expressly protected by the Convention; therefore, the Commission will analyze those alleged violations under the Convention.

19. In relation to Article XI (Health) of the American Declaration, the Commission will analyze in the merits stage the correspondence with Article 26 of the American Convention. In this regard, because of the general reference to economic, social and cultural rights in Article 26 of the Convention, which must be determined in relation to the OAS Charter and the corresponding instruments, in cases where a violation of the Declaration is alleged to be related to the content of Article 26 of the Convention, it is appropriate to analyze its correspondence at the merits stage.

20. Finally, the Commission finds that there is no duplication of a pending matter because the petition referred to by the State concerns a precautionary measure, a procedure of different nature than the present petition and related to different persons.

VIII. DECISION

1. To find the instant petition admissible in relation to Articles 4, 5, 8, 11, 13, 16, 17, 22, 24, 25, and 26, in connection with Articles 1.1 and 2 of the American Convention; and Article XI of the American Declaration;

2. To find the instant petition inadmissible in relation to Articles I, II, IV, V, VIII, IX, XVIII and XXII of the American Declaration; and

3. To notify the parties of this decision; to continue with the analysis on the merits; and to publish this decision and include it in its Annual Report to the General Assembly of the Organization of American States.

Done and signed on the 2nd day of the month of July, 2018. (Signed): Esmeralda E. Arosemena Bernal de Troitiño, First Vice President; Luis Ernesto Vargas Silva, Second Vice President; Francisco José Eguiguren Praeli, Joel Hernández García, Antonia Urrejola, and Flávia Piovesan, Commissioners.