

BEFORE THE

INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

WAYNE SMITH AND HUGO ARMENDÁRIZ

VS.

THE UNITED STATES OF AMERICA

CASE NO. 12.561

WRITTEN COMMENTS OF AMICUS CURIAE

HUMAN RIGHTS WATCH

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I. INTEREST OF AMICUS CURIAE HUMAN RIGHTS WATCH

Human Rights Watch is a non-profit organization established in 1978 that investigates and reports on violations of fundamental human rights in over 70 countries worldwide with the goal of securing the respect of these rights for all persons. It is the largest international human rights organization based in the United States. By exposing and calling attention to human rights abuses committed by state and non-state actors, Human Rights Watch seeks to bring international public opinion to bear upon offending governments and others and thus bring pressure on them to end abusive practices. Human Rights Watch (“HRW”) has filed amicus briefs before various bodies, such as U.S. courts of appeal and the Inter-American Commission on Human Rights.

II. INTRODUCTION

Amicus HRW files this brief in support of Petitioners Wayne Smith and Hugo Armendáriz and all other non-citizens residing in the United States who face mandatory deportation because of convictions deemed aggravated felonies. Under U.S. law, a non-citizen with an aggravated felony conviction is subject to mandatory deportation without a discretionary hearing to consider family or community ties, regardless of the length of the non-citizen’s residence, and irrespective of the fact that the non-citizen has already served the sentence for his crime. These laws violate the American Declaration on the Rights and Duties of Man (“American Declaration”) and customary international law.

U.S. laws imposing mandatory deportation violate the American Declaration’s protection of community and family ties, and harm the human rights of children. The mandatory deportation of persons convicted of certain, often minor, crimes means that families, such as those of Petitioners Smith and Armendáriz, will be torn apart in

contravention of Articles V and VI of the American Declaration, which guarantee the right to family life. U.S. laws also deny children of non-citizens their procedural right to participate in deportation (removal) proceedings that affect them, foreclosing the opportunity for a judicial or administrative body to employ the best interests of the child standard, and ultimately violating the children's right to family unity. These measures run afoul of Article VII of the American Declaration, as interpreted alongside the U.N. Convention on the Rights of the Child.

U.S. laws not only harm family ties, but they also devastate immigrant communities. More specifically, U.S. laws violate Article V of the American Declaration by foreclosing consideration of community ties in the cases of non-citizens with aggravated felony convictions. Under U.S. law, non-citizens who have spent most of their lives in the United States, and who are deeply connected to their communities, are categorically subject to mandatory removal based on aggravated felony convictions.

U.S. laws have a particularly devastating effect on refugees with aggravated felony convictions. Not only are these individuals denied a discretionary hearing to demonstrate family or community ties, but in some cases, they face return to persecution without even a hearing as to their need for refugee protection. Refugees with aggravated felony convictions for which they were sentenced to an aggregate of five years are ineligible even for "withholding of removal," a weak form of refugee protection that prevents *refoulement* but grants few substantive rights. U.S. laws therefore violate the American Declaration's procedural guarantees of Article XVIII and the substantive pledge of the right to seek and receive asylum under Article XXVII.

III. BACKGROUND

This case arises from the 1996 amendments to U.S. immigration laws. Prior to 1996, U.S. immigration laws allowed non-citizens like Petitioners Smith and Armendáriz to apply for relief from deportation based on family and community ties and fear of persecution. The 1996 amendments changed the immigration laws in two pertinent respects: (1) convictions of a broad range of crimes—termed “aggravated felonies”—now render non-citizens subject to deportation,¹ and (2) non-citizens convicted of aggravated felonies are no longer eligible for relief from deportation, including relief under Section 212(c) of the U.S. immigration laws, which allowed consideration of family and community ties. If these non-citizens were sentenced to incarceration of five years or more, they are also ineligible for protection from return to persecution. The result is that non-citizens like Petitioners are now subject to mandatory deportation irrespective of family unity, community ties, and fear of persecution.

Non-citizens convicted of aggravated felonies are not eligible for either 212(c) relief or its statutory successor, cancellation of removal.² These forms of relief allow non-citizens in deportation (removal) proceedings to demonstrate their “family ties within the United States, residence of long duration in this country (particularly where the inception of residence occurred while the [non-citizen] was of young age), evidence of hardship to the [non-citizen] and family if deportation occurs, service in this country’s Armed Forces, a history of employment, the existence of property or business ties, evidence of value and service to the community, proof of a genuine rehabilitation if a

¹ See 8 U.S.C. § 1101(a)(43).

² See 8 U.S.C. § 1229b(A)(b) (2006) (cancellation of removal is not available to an alien convicted of an aggravated felony).

criminal record exists, and other evidence attesting to a [non-citizen's] good character.”³ An administrative judge presiding over a removal proceeding may grant relief from deportation after balancing these positive equities against the non-citizen's criminal record.⁴

After the 1996 laws, individuals like Petitioners, who have made valuable contributions to their communities, started families, and raised U.S. citizen children, are categorically ineligible for cancellation of removal, often because of relatively minor convictions. Thousands of non-citizens have been affected by the 1996 amendments. Between 1997 and 2005, 672,593 non-citizens were deported for criminal offenses; it is unclear how many of these were lawful permanent residents.⁵ Moreover, based on the 2000 census, HRW estimates “that approximately 1.6 million spouses and children living in the United States were separated from their parent, husband, or wife because of these deportations.”⁶

IV. ARGUMENT

A. The Mandatory Deportation of Non-Citizens With Criminal Convictions Violates International Protections of Family and Private Life.

Because U.S. immigration laws impose mandatory deportation without a discretionary hearing where family and community ties can be considered, these laws fail to protect the right to family and private life, in violation of Articles V and VI of the American Declaration. Articles V and VI provide broad protection for every person to establish a family and protection against “abusive attacks upon his honor, his reputation,

³ *Matter of Marin*, 16 I & N Dec. 581, 585 (BIA 1978); see also *Matter of C-V-T*, 22 I. & N. Dec. 7, 11 (BIA 1998) (enumerating similar factors).

⁴ *Matter of Marin*, *supra* note 3, at 585; *Matter of C-V-T*, *supra* note 3, at 11-12.

⁵ Families Separated and Immigrants Harmed By United States Deportation Policy, Human Rights Watch, U.S. Program (forthcoming, expected June/July 2007) [hereinafter “HRW Report”], at text accompanying footnote 5.

⁶ *Id.*; see also *id.* at text accompanying footnotes 90-95 (summarizing available statistics).

and his private and family life.” In the deportation context, the Commission has established that interference with family life may be justified only “where necessary to meet a pressing need to protect public order, and where the means are proportional to that end.”⁷ “[T]he state’s right and duty in maintaining public order” through expulsion or deportation of removable non-citizens “must be balanced against the harm that may result to the rights of the individuals concerned in the particular case.”⁸ As explained in detail below, any interest of the United States in public order is far outweighed by the devastating effect of mandatory deportation on Petitioners, their family unity, and their community ties.

1. Mandatory Deportation Violates the American Declaration’s Protections of Family Life and the International Human Right to Family Unity.

U.S. immigration laws violate the American Declaration’s protection of family life by imposing mandatory deportation without consideration of family unity concerns. The principle of family unity, protected by Articles V and VI of the American Declaration, is recognized by various international instruments. Both the Universal Declaration of Human Rights (“UDHR”) and Article 23 of the International Covenant for Civil and Political Rights (“ICCPR”) state: “[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the State.”⁹ Article 17 of the ICCPR clarifies that no one shall be “subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence.”¹⁰

The United Nations Human Rights Committee has recognized the importance of

⁷Inter-Am. C.H.R., *Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System*, OEA/Ser.L./V/II.106, Feb. 28, 2000 [hereinafter “Canada Report”], ¶ 166.

⁸*Id.*

⁹Universal Declaration of Human Rights, Dec. 10, 1948, art. 16(3) U.N. Doc. A/810 [hereinafter “UDHR”]; International Covenant on Civil and Political Rights, Art. 23, Dec. 19 1966, pmbl., 999 U.N.T.S. 171 [hereinafter “ICCPR”].

¹⁰ICCPR, Art. 17.

considering family unity in deportation cases. In various cases, including Winata v. Australia and Madafferi v. Australia, the Committee has found that deportation constituted an impermissible violation of the right to family unity.¹¹ In Winata, for example, the Committee found that Australia had violated the ICCPR when attempting to deport two Indonesian nationals. The Committee found deportation to be an unjustifiable interference in the Indonesian nationals' family life because their thirteen-year-old Australian citizen son would have to either remain alone in Australia or accompany his parents and leave a "long-settled" family life in Australia.¹² In Madafferi, the petitioner, an Italian national, was unlawfully present in Australia, and faced removal to Italy based on prior criminal convictions. The Human Rights Committee found his deportation an interference with the family in violation of the ICCPR because it would have led to separation from his Australian national wife and four Australian citizen children, or impose the hardship of moving to Italy on them.¹³

Consistent with these Human Rights Committee decisions, the European Court of Human Rights ("European Court") has repeatedly recognized the right to family life in the immigration context. When considering cases alleging violations of the right to "family life" in Article 8(1) of the European Convention on Human Rights, the analog to Article V of the American Declaration, the European Court has defined a balancing test to consider whether a state policy is "necessary in a democratic society."¹⁴ This balancing test requires consideration of the specific facts of an individual's case, including length of residence, strength of family ties, and nature of the individual's

¹¹ U.N. C.C.P.R. Human Rights Committee, Winata v. Australia, Judgment of Jul. 26, 2001, Communication No. 930/2000, U.N. Doc. CCPR/C/72/D/930/2000 (2001); U.N. C.C.P.R. Human Rights Committee, Madafferi v. Australia, Judgment of July 26, 2004, Communication No. 1011/2001, U.N. Doc. CCPR/C/81/D/1011/2001 (2004).

¹² Winata, *supra* note 11, ¶ 7.2.

¹³ Madafferi, *supra* note 11, ¶ 9.8.

¹⁴ Eur. Ct. H.R., Beldjoudi v. France, Judgment of March 26, 1992, No. 12083/86, ¶ 67.

criminal offense, if any.

The U.S. Supreme Court has also recognized and protected the institution of the family. The Court has held that the U.S. “Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in [the United States’] history and tradition.”¹⁵ In a decision upholding the familial rights of grandparents, the U.S. Supreme Court cited to numerous precedents in which it had previously recognized and protected the institution of the family.¹⁶

Despite this domestic and international precedent, U.S. immigration laws impose mandatory deportation without consideration of family unity, with harsh results on non-citizens and their families. Consider, for example, Ramon H., who faces deportation for conviction of an aggravated felony, and who therefore cannot present evidence of his strong family ties to the United States.¹⁷ Ramon is married to a U.S. citizen and has two U.S. citizen daughters.¹⁸ One of his daughters told the immigration judge considering Ramon's case that her "dad is the one who mainly supports the family."¹⁹ Ramon nevertheless faces mandatory deportation without consideration of the effect of deportation on his family.

U.S. immigration laws thus preclude consideration of family unity even in the cases of long-term residents with U.S. citizen family members. Although deportation from the United States might be legitimate in some circumstances -- whether to maintain public order and safety, prevent crime, or protect morals -- mandatory deportation without consideration of family unity unjustifiably and disproportionately interferes with

¹⁵ *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977).

¹⁶ *Id.* at 504 n.12 (citing cases). See generally Linda Kelly, Preserving the Fundamental Right to Family Unity: Championing Notions of Social Contract and Community Ties in the Battle of Plenary Power Versus Aliens' Rights, 41 Vill. L. Rev. 725 (1996).

¹⁷ HRW Report, at text accompanying footnote 148.

¹⁸ *Id.*

¹⁹ *Id.* at text accompanying footnote 149.

non-citizens' family unity, in violation of the American Declaration.

2. Mandatory Deportation Violates Article V of the American Declaration, Which Protects the Private Life of Non-Citizens.

U.S. immigration laws not only fail to consider family unity but they also ignore community ties, in violation of Article V's protection against "abusive attacks upon . . . private . . . life." Non-citizens who reside in the U.S. have deep ties that extend beyond their immediate families. Non-citizens are religious leaders, military veterans, small business owners, and community leaders. Many of them have lived in the United States for the majority of their lives.²⁰

As the European Court has recognized, the right to private life includes the protection of one's community ties, non-familial relationships, and social life. Mandatory deportation without a 212(c)-like discretionary hearing ignores those ties, leaving non-citizens with no opportunity to demonstrate that their community ties outweigh any grounds of deportation. This failure to consider community ties becomes more egregious as a non-citizen's residency in the U.S. lengthens and her ties to the U.S. strengthen.

a. The Honorable Commission Should Define "Private Life" to Require Consideration of Non-Familial Relationships, Community Ties, and Length of Residency in Deportation Proceedings.

The Honorable Commission should interpret the right to private life consistently with its analysis of Article 11 of the American Convention, which also involves the right to private life, and in accordance with the European Court's understanding of private life. The European Court has interpreted the term "private life" in Article 8 of the European Convention on Human Rights, which mirrors Article V of the American Declaration, to

²⁰ See HRW Report, at text accompanying footnotes 113-126.

