

OEA/Ser.L/V/II.
Doc. 86
16 March 2020
Original: English

REPORT No. 76/20
PETITION 387-09
REPORT ON ADMISSIBILITY

DELROY EDWARDS AND OTHERS
UNITED STATES OF AMERICA

Approved electronically by the Commission on March 16, 2020.

Cite as: IACHR, Report No. 76/20, Petition 387-09. Admissibility. Delroy Edwards and others.
United States of America. March 16, 2020.

I. INFORMATION ABOUT THE PETITION

Petitioner	International Human Rights Law Clinic at American University (IHRLC)
Alleged victim	Delroy Edwards and others ¹
Respondent State	United States of America
Rights invoked	Articles I (life, liberty and personal security), II (equality before law), XI (preservation of health and well-being), XXV (protection from arbitrary detention), and XXVI (due process of law) of the American Declaration on the Rights and Duties of Man ²

II. PROCEEDINGS BEFORE THE IACHR³

Filing of the petition	March 10, 2009
Additional information received during initial review	September 8, 2016
Notification of the petition	June 27, 2014
State's first response	September 8, 2016
Additional observations from the petitioner	May 20, 2009; June 4, December 3, 2010; October 14, 2011; January 25, 2012; February 22, 2013; September 3, 2015; January 20, 2016; June 27, November 20, 2018

III. COMPETENCE

<i>Ratione personae:</i>	Yes
<i>Ratione loci:</i>	Yes
<i>Ratione temporis:</i>	Yes
<i>Ratione materiae:</i>	Yes, American Declaration (ratification of the OAS Charter on June 19, 1951)

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 I (life, liberty and personal security), II (equality before law), XI (preservation of health and well-being), XVII (recognition of juridical personality and civil rights), XVIII (fair trial), XXIV (petition), XXV (protection from arbitrary detention), and XXVI (due process of law) of the American Declaration
Exhaustion or exception to the exhaustion of remedies	Yes, exceptions set forth in Articles 31.2.a and b apply
Timeliness of the petition	Yes, under the terms of Section VI

V. SUMMARY OF ALLEGED FACTS

1. The petitioner submits that the conditions of detention and circumstances of confinement at the Administrative Maximum detention center (hereinafter "ADX") in Florence, Colorado, violates the inmates' right to be free from cruel, infamous or unusual punishment, and right to humane treatment. It contends that the prisoners' inability to gain entrance to the Step Down Unit Program (hereinafter "the Program"), aimed at allowing the inmates to earn their way into less restrictive facilities by showing good behavior, violates their right to due process and is discriminatory. Finally, it submits that the transfer of prisoners convicted of terrorism related offences to the ADX facility, irrespective of the threat they posed to either the prison

¹ The petitioner initially presented the petition in the name of Zaid Safarini and others inmates held at the ADX facility. However, in a communication dated June 26, 2018, the petitioner listed the following inmates as the alleged victims: Delroy Edwards, Donald Heisler, David Spicer, Greg Murray, Dawane Mallett, Ruben Castro, Peter Mauchlin, and Jeff Fort. On November 20, 2018, they indicate that Ruben Castro had withdrawn from the petition.

² Hereinafter "the American Declaration" or "the Declaration".

³ The observations submitted by each party were duly transmitted to the opposing party.

population or the general public, violates the right to equal protection before the law⁴. The petitioner lists seven inmates (hereinafter “the alleged victims”) still held at ADX.

2. The petitioner alleges that, although held in “general population” units, the inmates at ADX spend at least 22 hours each day in isolation, in cells of 5.9 square meters with a single narrow window, which provide no direct sunlight or fresh air. It submits that the ADX procedures are specifically intended to increase the inmates’ isolation by restricting their contact with and knowledge of the world outside the prison walls, in addition to submit them to intensive trip-search every time they leave or re-enter their cell. While ADX procedures state that inmates are afforded a minimum of 10 hours out-of cell exercise per week, inmates say they are only usually granted 3 to 5 hours, during which they are usually placed alone in 10 x 10 feet metal cages. It also claims that the inmates are prohibited from being administered psychotropic drugs or psychiatric medicines whether those medicines are necessary to the inmate or not. The petitioner contends that the State justifies such egregious conditions by the existence of the Step Down Unit Program, to which the inmates can be referred by showing good behavior⁵. While various factors are taken into account to determine the admissibility of an inmate into the Program, the petitioner condemns the fact that “the seriousness of the inmate’s criminal history” or “involvement with criminal organization” could previously lead to their deferment from the Program, calling into question ADX’s claim to be a behavior modification program – inmates can’t mitigate their past involvement with criminal organizations or actions. Although said criteria is not a formal requirement anymore, the petitioner alleges that it reappeared in another form, as the Review Committee now takes into account the prisoner’s criminal history and the reasons why he was transferred to ADX in determining his eligibility for placement and advancement in the Program. The petitioner also denounces the fact that the inmates who are found to satisfy the requirements of the Program are then referred to the Warden, who has complete discretion over the final step-down decision. Moreover, the petitioner indicates that the ADX procedures contemplates a minimum of 36 months for an inmate to successfully progress through the Step-Down program and leave ADX, with a minimum of twelve months in solitary confinement. According to the unit manager for the general population units, less than five percent of the inmates at ADX get admitted into the Program after only twelve months in solitary confinement.

3. The petitioner indicates that none of the alleged victim has been admitted into the Program or has been able to complete it, even though some have been at ADX for years and have met all behavioral requirements. They are therefore condemned to indefinite, possibly lifelong, solitary confinement, which violates the prohibition of cruel, inhuman and degrading treatment because they are being held in prolonged isolation⁶. The petitioner indicates that Donald Heisler has been in ADX since 2004. He was transferred into the Program in 2014, 2015, and 2017, and every time being eventually removed from it. The petitioner alleges discriminatory treatment by the prison officials, as well as discretionary decisions that could not be challenge by the alleged victim. His last application to the Program was denied, after five years spent in solitary confinement and despite his release date coming up soon, and the benefits he could gain from the Program. David Spicer was transferred to ADX in 2007 and placed in solitary confinement. Despite having completed almost twenty of the educational programs, his placement into the Program was denied because he had failed to, at the moment of his application, actively participate in and complete the same programs for which he received completion certifications in the past. He requested administrative remedies on three occasions, but each time he was told that he was appropriately housed at ADX. He has been in solitary confinement for eleven years. Greg Murray was transferred to the Program weeks before the petitioner’s visit to ADX, while having been denied access six months before. After his transfer, he was informed he would have to stay locked in his cell for a week in order to write an essay – the petitioner alleges that this is not formally required by the Program. He also has to keep a journal for the Unit Manager, a task that makes him uncomfortable but not complying would jeopardize his place in the Program. Delroy Edwards has been in ADX since 1995, and he integrated the Program twenty years later. He was removed following an incident involving another inmate, and he never had the chance to challenge this decision. Dawane Mallet has been at ADX since 2006. He was

⁴ With regard to this, the petitioner indicates that within hours of the 9/11 attacks, many Arab and Muslims inmates who were “convicted of, charged with, associated with, or in any way linked to the terrorist activities” were rounded up into administrative detention and then summarily transferred to ADX by the Federal Bureau of Prisons. The petitioner alleges that some of those inmates had lived in lower security facilities for years prior to 9/11 and had never been considered a serious security threat.

⁵ The program requires that inmates, in order to be eligible, show a minimum of twelve months of clear conduct and demonstrate participation and completion of all unit team-recommended programs.

⁶ The petitioner refers to the Inter-American Court of Human Rights’ decision in *Velasquez Rodriguez v. Honduras*, Merits, July 29, 1998, at par. 187.

removed from the Program in 2011, and applied to re-enter about two years later but was denied – the petitioner alleges that he was told that this was because he was involved in a law suit against the Federal Bureau of Prison, which went ongoing until 2016. Although he was encouraged in 2017 to pursue his current positive programming, his placement into the Program was denied a few months later because he did not meet the “minimum of 12 months of clear conduct”, decision which was reiterated on September of the same year. He further reports that his account has been frozen for about two years due to outstanding unpaid debt from sick calls and legal copies. The petitioner indicates that Mallet has filed 406 administrative remedies between January 1, 2006 and October 2, 2018. Jeff Fort arrived at ADX in 2006, and was transferred to a pre-intermediate unit in 2017. The petitioner alleges that a guard accused him of communicating in code with gang affiliates and, as a result, he was moved back to his former unit with three months phone restriction and one month commissary restriction. Peter Mauchlin is seventy-three years old and has trouble seeing out of one of his eyes, and as such has not sought out entrance into the Step-Down Program because he is concerned about his alertness to threats if placed around other ADX prisoners. The alleged victim explained that he has accumulated debt from making legal copies that cost him several hundred dollars and that he now has a lien on any money he earns in the prison. He states that ADX staff has frozen his account at \$19.00 so that he does not meet the requirement for being indigent, but now he cannot afford the legal fees to file complaints or to make copies.

4. The petitioner contends that the US legislation does not provide an effective remedy to the alleged victims. It argues the inmates have no protected right to access the administrative complaint process, and thus their ability to exhaust this remedy is left to the discretion of prison officials. Such process is in addition ineffective⁷ and does not afford due process of law. Prisoners are dependent on prison employees to be able to file grievances against prison employees⁸, creating a fear of retaliation from prison staff and presenting privacy and confidentiality concerns. Also, if a prisoner misses a deadline, fails to submit a required form, or fails to provide a copy of a form at any step, their chance for any remedy may be dismissed outright. The petitioner indicates that only when, and if, such process is completed can inmates file in court. However, they rarely succeed, even when cases are filed *pro se* with less stringent standards. Constitutional remedies involve questions of due process of law, equal protection, and cruel and inhuman treatment, which because of their complexity would require legal assistance⁹. However, the alleged victims lack the financial means to retain their own counsel, and have no opportunity to work or earn money in ADX, and the United States government does not provide legal counsel for claims once the person has been found guilty and incarcerated. The petitioner points out to other hurdles, including the detention conditions that make communications with legal practitioners complicated¹⁰, the cost of making copies of judicially requested documents and the court fees. Therefore, the petitioner submits that due to indigency, lack of legal aid at State expense, and the complexity of constitutional cases, the alleged victims have no ability to bring successful challenge to their conditions. Accordingly, they are not required to exhaust the domestic remedies.

5. For its part, the State contends that the American Declaration is a nonbinding instrument that does not itself create legal rights or impose legal obligations on member States of the OAS, and thus, the Commission lacks competence to issue a binding decision vis-à-vis the United States. Additionally, the State submits that the petition is inadmissible under Article 34(c), or alternatively Article 42, of the Rules of procedure since of the 22 alleged victims named in the initial petition or in further communications from the petitioner, 11 have since been transferred out of ADX to lower-security prison facilities¹¹.

6. The State also contends that the petitioners failed to exhaust the domestic administrative and judicial remedies, thus rendering their petition inadmissible. It submits that 6 of the alleged victims failed to exhaust the three-tiered administrative procedure for inmates’ grievances, which allows for constitutional

⁷ The petitioner indicates that between March 2016 and February 2017, a total of 3,522 requests for administrative remedies were filed by inmates at ADX Florence, and 10 of these were recorded as ‘granted’ (0.2%).

⁸ The petitioner indicates that the ability of the alleged victims to exhaust domestic remedies is often left at the discretion of prison officials, which by their action or inaction often lead to the inmates missing the administrative or judicial deadlines.

⁹ Refer to Report No 48/01, Case 12.067, Michael Edwards; Case 12.068, Omar Hall; Case 12.086, Brian Schroeter and Jeronimo Bowleg, The Bahamas, April 4, 2001 and Report No. 56/02, Case 12.158, Benedict Jacobs v. Grenada, Inter-Am. C.H.R., Doc. 5 rev.1 at 601, OEA/Ser.L/V/II.117 Doc. 1 rev. 1, 7 March 200.

¹⁰ The petitioner refers in particular to the difficulty to plan visits and set up appointments and the impossibility to effectively communicate by mail and exchange legal documents, both in person and by phone.

¹¹ All the alleged victims included in the final list of victims provided by the petitioner were still at ADX at that moment.

complaints¹², either by failing to initiate an administrative claim or by declining to appeal an unfavorable decision by the Warden or the Regional Director¹³. The State adds that the inmates can also pursue judicial remedies in US federal courts to obtain appropriate relief. The State contends that such remedies are frequently effective for inmates proceeding without a lawyer, and that the fact that the alleged victims have been able to obtain counsel to represent them in this matter before the Commission demonstrates that they have indeed been able to obtain legal counsel. The alleged victims are not excused from exhausting domestic judicial remedies merely because they would lack the assistance of a lawyer. According to the ADX records, 6 of the alleged victims¹⁴ have declined to seek such judicial remedies and, of the remaining 3, Mr. Mauchlin is party to ongoing civil cases concerning the conditions of his confinement at ADX, which are pending and have not yet been resolved in U.S. federal courts. As for Mr. Mallett, he has pursued judicial remedies through U.S. federal courts on several occasions, although he does not to our knowledge have any pending federal litigation. All 11 Petitioners have therefore failed to exhaust domestic remedies.

7. Additionally, the State submits that the petitioners have failed to state facts that tend to establish a violation of the American Declaration under Article 34(a) of the Rules. The State contends that the alleged victims are eligible for participation in the Program, and that they do not need to prove that they have mitigated the reasons for their incarceration in order to be eligible for it, the key question being the ability of the inmate to safely function in a less-restrictive unit without posing a security risk. The State indicates that of the 23 alleged victims associated at some point with the petition, 12 of them have been transferred out of ADX, including individuals incarcerated for terrorism-related offenses. Additionally, the State submits that the petitioner failed to state facts that tend to establish a violation based on the conditions of their confinement, including recreational opportunities and social interactions¹⁵, or on mental health care available to the inmates¹⁶.

VI. EXHAUSTION OF DOMESTIC REMEDIES AND TIMELINESS OF THE PETITION

8. The Commission observes that the petitioner alleges that the existing administrative remedies allowing the alleged victims to formulate their grievances relating to their internment conditions does not afford due process, and that discriminatory and partial practices were observed. It also points to the extremely low success rate of the administrative remedies filed by inmates at ADX Florence. The petitioner furthermore alleges fear of retaliation if procedures were to be intended and denounces that a large discretion is afforded to the prison's warden. Additionally, the petitioner indicates that the ADX procedures contemplates a minimum of 36 months for an inmate to successfully progress through the Step-Down program and leave ADX, with a minimum of twelve months in solitary confinement. Finally, the petitioner contends that some of the criteria applied in such remedies impose to great a burden on the inmates. The Commission considers that, based on the elements available and allegations made by the parties, such remedies do not appear *prima facie* to offer due process to the alleged victims. Accordingly, the Commission concludes that the exception set forth in Article 31.2.a of the Rules of procedure applies in this case. The IACHR notes in this regard that the alleged lack of due process will be analyzed, as appropriate, in the report that the Commission adopts on the merits of the case, in order to determine if they do indeed constitute violations of the American Declaration.

9. Regarding the civil remedies aimed at challenging the conditions of detention of the alleged victims, the Commission considers that motions dealing with legal issues of the nature raised in the petition, such as the right to due process of law, the right to humane treatment, and the adequacy of their prison conditions, are procedurally and substantively complex and cannot be effectively raised or presented by a

¹² The State indicates that requests for administrative relief received under this procedure include challenges of recommendations made by the Program.

¹³ The State indicates that Between January 1, 2012 and August 15, 2016, Mr. Castro and Mr. Edwards did not request administrative remedies on the issues covered by this Petition. Mr. Heisler and Mr. Murray filed a request for an administrative remedy on certain mental health complaints, but declined to appeal. Mr. Mauchlin filed a request for an administrative remedy on denial of his admission into the Step-Down Program, but declined to appeal.

¹⁴ Delroy Edwards, Jeff Fort, Donald Heisler, Greg Murray and David Spicer

¹⁵ The State additionally indicates that the European Court of Human Rights found that the conditions of confinement in the most restrictive environment at ADX, when taking into account the existing procedural protections, did not constitute torture or ill-treatment for purposes of the obligations under the European Convention on Human Rights in the *Babar Ahmad and Others v. UK* case.

¹⁶ The bureau uses a three-pronged approach, including the creation of specialized secure mental health units and providing enhanced mental health services for inmates in ADX.

prisoner in the absence of legal representation¹⁷. Based on the available information, the Commission considers that the unavailability of legal aid provided by the State to the alleged victims, despite their indigency, in the context of a constitutional challenge would *prima facie* have prevented the petitioners to exhaust the remedies under domestic law regarding this process and that, therefore, the exception to the prior exhaustion of domestic remedies set forth in Article 31.2.b of the Rules of Procedure applies in this case.

10. In view of the context and characteristics of the instant case, and the ongoing character of the alleged violations, the Commission considers that the petition was filed within a reasonable time, thus it meets that admissibility requirement.

VII. COLORABLE CLAIM

11. The Commission notes that this petition includes allegations regarding the inhumane conditions of detention and circumstances of confinement of the alleged victims, without opportunity for review of their status, as well as the lack of due process and the discriminatory treatment. In view of these considerations and after examining the factual and legal elements presented by the parties, the Commission considers that the claims of the petitioner are not manifestly unfounded and require a substantive study since the alleged facts, if corroborated as true, could characterize violations of Articles I (life, liberty and personal security), II (equality before law), XI (preservation of health and well-being), XVII (recognition of juridical personality and civil rights), XVIII (fair trial), XXIV (petition), XXV (protection from arbitrary detention), and XXVI (due process of law) of the American Declaration.

VIII. DECISION

1. To find the instant petition admissible in relation to Articles I, II, XI, XVII, XVIII, XXIV, XXV, XXVI;

2. 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.

Approved by the Inter-American Commission on Human Rights on the 16th day of the month of March, 2020. Joel Hernández, President; Antonia Urrejola, First Vice President; Flávia Piovesan, Second Vice President; Esmeralda E. Arosemena Bernal de Troitiño, and Julissa Mantilla Falcón, Commissioners.

¹⁷ Report N° 48/01, Case 12.067, Michael Edwards; Case 12.068, Omar Hall; Case 12.086, Brian Schroeter and Jeronimo Bowleg, The Bahamas, April 4, 2001.