

MICHAEL MACKSON AND ORS., v. UNITED STATES, PETITION NO., P-990-08

PETITIONERS ADDITIONAL INFORMATION REGARDING EXHAUSTION OF DOMESTIC REMEDIES UNDER ARTICLE 31 OF THE RULES OF PROCEDURE OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

This Petition was filed with the Inter-American Commission on Human Rights on September 13, 2006. In it, Petitioners sought redress from the United States and the State of New Jersey for the violation of their right to vote, their right to equal protection of the laws and their right to rehabilitation. As elaborated in their Petition, these rights are guaranteed under articles I (right to rehabilitation), II (right to equal protection of the laws), XVII (right to rehabilitation) and XX (right to vote) of the American Declaration on the Rights and Duties of Man (“American Declaration”). As set forth more fully below, Petitioners sought but were denied redress for violation of their rights to vote and to equal protection of the laws before domestic courts. Petitioners did not pursue redress for violation of their right to rehabilitation --- a right allied to their right to vote --- before domestic courts, because pursuing such redress in the circumstances would have been futile. Because Petitioners have properly exhausted all adequate and effective remedies available to them domestically or because pursuing them would have been futile, this Petition should be deemed admissible.

I. PETITIONERS HAVE EXHAUSTED ALL AVAILABLE, ADEQUATE AND EFFECTIVE DOMESTIC REMEDIES FOR VIOLATION OF THEIR RIGHT TO VOTE AND TO EQUAL PROTECTION OF THE LAWS

On January 6, 2004, Petitioners filed a complaint in the Superior Court of New Jersey, Chancery Division, Union County, challenging a New Jersey state law which in relevant part provides:

No person shall have the right of suffrage ... [w]ho is serving a sentence or is on parole or probation as the result of a conviction of any indictable offense under the laws of this or another state or of the United States.¹

The statute, 19:4-1 (8), was enacted pursuant to Article 2, ¶ 7 of the Constitution of New Jersey, which permits the Legislature to “pass laws to deprive persons of the right of suffrage who shall be convicted of such crimes as it may designate.” The U.S. Supreme Court has interpreted the U.S. Constitution as affording States the discretion to deny the right to vote to persons convicted of felony offences. *See, Richardson v. Ramirez*, 418 U.S. 24 (1974). The Supreme Court has also repeatedly held that the test for discriminatory conduct under the equal protection clause of the U.S. Constitution is whether the application of the law, policy or practice was intended to discriminate against a certain class of persons on the basis of race, gender or other protected status. *See, Washington v. Davis*, 426 U.S. 229 (1976) (holding that under the Equal Protection Clause of the Fourteenth Amendment, “[an] official action will not be held unconstitutional solely because it results in a racially disproportionate impact”). In other words, the Supreme Court has interpreted the U.S. Constitution to

¹ New Jersey Statute 19:4-1 (8).

incorporate an intent-based theory of discrimination, not an effects-based one. U.S. courts of appeals around the United States have applied this intent-based test specifically in the context of alleged discrimination under the federal Voting Rights Act.² The Supreme Court has declined to review any of these decisions. Accordingly, petitioners decided not to raise similar such constitutional claims in their State court litigation.

Because of the Supreme Court's holding in *Ramirez* and the significant impediments presented by equal protection analysis under the federal Voting Rights Act, Petitioners sought to challenge the New Jersey disfranchisement law, 19:4-1, solely under the New Jersey Constitution, not the U.S. Constitution. In the litigation, Petitioners unsuccessfully argued that the New Jersey disfranchisement statute precluding those on parole or probation from the right to vote was not unconstitutional under the U.S. Constitution --- *Ramirez* prevented such an argument --- but rather argued that as applied the law was unconstitutional under State law because it had the effect of denying African-American and Latino communities of New Jersey equal protection of the laws, and specifically, equal participation in the State's political process. In support of their arguments, Petitioners referenced official government and other reports that clearly demonstrate that application of laws, policies and practices in New Jersey resulted in a disproportionate number of the minority African-American and Latino populace being disfranchised.

In a written opinion dated July 12, 2004, the New Jersey Superior Court dismissed Petitioners' claims and on November 2, 2005, the Appellate Division upheld that dismissal.³ On broadly similar grounds to those advanced by the Superior Court, the Appellate Division held that the New Jersey disfranchisement law was not subject to constitutional scrutiny and specifically was not constrained by principles of equal protection. In other words, the Court ruled that the disfranchisement law was itself grounded in the Constitution and that it authorized the Legislature to deny racial minorities in New Jersey the right to fair and effective participation in the political/electoral process. The Appellate Division also held that an alleged equal protection violation under the State Constitution could under no circumstances be proved by disparate impact analysis, but required proof of discriminatory intent on the part of the Legislature that enacted it. Thus, the Appellate Division adopted the same intent-based theory of discrimination as the U.S. Supreme Court in *Davis*.

Petitioners sought review of the Appellate Division's ruling by the highest court in New Jersey, the State Supreme Court, and on March 16, 2006, without comment, the State Supreme Court exercised its discretion not to review the lower courts' decisions, leaving Petitioners with no recourse before U.S. courts - state or federal - for the denial of their rights to vote and to equal protection of the laws.⁴

² See, *Johnson v. Governor of Florida*, 405 F. 3d. 1214 (11th Cir. 2005), *cert denied*, 546 U.S. 1015 (2005); *Farrakhan v. Washington*, 338 F.2d. 1009 (9th Cir., 2003), *rehearing denied*, 359 F. 3d 1115 (*en banc*), *cert. denied sub nom Locjke v. Farrakhan*, 543 U.S. 984 (2004); *Hayden v. Pataki*, 449 F.3d. 305 (2d. Cir., 2006) (*en banc*) clarified by No. 04-3886-pr 2006 U.S. App. LEXIS 13922 (2d. Cir., June 1, 2006).

³ *NAACP v. Harvey*, 381 N.J. Super. 155 (App. Div. 2005) *cert. denied*, 186 N.J. 363 (2006) (copy attached)

⁴ Because there were no federal issues were raised in the litigation, the decision of the Appellate Division was not reviewable by the U.S. Supreme Court.

Thus, in accordance with Article 31 of the Commission's Rules of Procedure Petitioners have pursued and exhausted all available adequate and effective remedies available to them under domestic law for the violation of their rights to vote and to equal protection of the laws.

II. THERE IS NO REMEDY AVAILABLE UNDER DOMESTIC LAW FOR VIOLATION OF PETITIONERS' RIGHT TO REHABILITATION

Article 31(1) of the Rules of Procedure of the Inter-American Commission requires that remedies of the domestic legal system be pursued and exhausted. However, when pursuing a remedy domestically would prove futile because, for instance, the law does not provide for one, exhaustion is not required. As detailed in their Petition, Petitioners' right to rehabilitation is an inherent aspect of their voting rights and violation of the latter constitutes a violation of this right. Ptn., Part C. In their domestic proceedings seeking redress for violation of their right to vote and to equal protection of the laws, Petitioners did not also seek redress for violation of their right to rehabilitation, because doing so would obviously have proven futile for the same reasons detailed in Part I above.⁵

Petitioners' claims that their disfranchisement violates their right to rehabilitation would have had no reasonable prospect of success before domestic courts, and need not have pursued such redress before domestic courts before proceeding before this Commission.

III. CONCLUSION

For the reasons set forth in Parts I and II, this Commission should deem this petition admissible as it was filed within six months from Petitioners having pursued and exhausted all adequate and effective remedies available to them under New Jersey State and U.S. federal laws.

Dated: June 25, 2009

Respectfully submitted:

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⁵ See, *Tracy Lee Housel v. U.S.*, Pet. No. 129/02, Report 16/04 (February 27, 2004) (finding that "a petitioner may be excused from exhausting domestic remedies with respect to a claim where it is apparent from the record before it that any proceedings instituted on that claim *would have no reasonable prospect of success in light of prevailing jurisprudence of the state's highest courts.*"); see also, *Selmouni v. France*, 29 EHRR 403, 437 (2000) ("the remedy available to the applicant was not . . . an ordinary remedy sufficient to afford him redress in respect of the violations he alleged."); *Baumann v. France*, 34 EHRR 44, at ¶ 45 (2002) (noting that a remedy is exhausted when it is "de facto" ineffective).