

OEA/Ser.L/V/II.
Doc. 193
2 July 2020
Original: English

REPORT No. 183/20
PETITION 1307-12
REPORT ON ADMISSIBILITY

DAVID JOHNSON
UNITED STATES OF AMERICA

Approved electronically by the Commission on July 2, 2020.

Cite as: IACHR, Report No. 183/20, Petition 1307-12. Admissibility. David Johnson. United States of America. July 2, 2020.

I. INFORMATION ABOUT THE PETITION

Petitioner	UNROW Human Rights Impact Litigation Clinic of American University Washington College of Law
Alleged victim	David Johnson
Respondent State	United States of America
Rights invoked	Articles II (equality before law), V (honor, personal reputation and private and family life), VIII (residence and movement), and XIX (nationality) of the American Declaration on the Rights and Duties of Man ¹

II. PROCEEDINGS BEFORE THE IACHR²

Filing of the petition	July 9, 2012
Additional information received during initial review	May 31, 2018
Notification of the petition	September 11, 2017
State's first response	June 29, 2018
Additional observations from the petitioner	March 1, 2019

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 II (equality before law), V (honor, personal reputation and private and family life), VIII (residence and movement), and XIX (nationality) of the American Declaration on the Rights and Duties of Man
Exhaustion or exception to the exhaustion of remedies	Yes, January 9, 2012
Timeliness of the petition	Yes

V. SUMMARY OF ALLEGED FACTS

1. The petition alleges that the United States (the "State" or "United States") subjected David Johnson (the "alleged victim" or "Mr. Johnson"), to a discriminatory treatment by denying him automatic citizenship -on the basis of his status as the child of an unwed father and by subjecting him to mandatory removal without considering his family and cultural ties to the United States. Petitioners argue that such discrimination was justified under former 8 U.S.C. § 1432, a statute that denies automatic derivative citizenship to the illegitimate children of naturalized U.S. citizen fathers while permitting such citizenship for the children of unmarried U.S. citizen mothers and married U.S. citizen fathers.

2. The petitioner submits that the alleged victim was born in Jamaica in 1965 to Ronald Johnson and Joan Francis. On the day Mr. Johnson was born, Joan Francis surrendered him into Ronald Johnson's sole custody and care, and was never involved in his life after his birth. On October 1, 1972, when Mr. Johnson was 7 years old, he entered the United States as a legal permanent resident, and his father naturalized on December 26, 1973. The petitioner affirms that Ronald Johnson always believed his minor son would automatically derive U.S. citizenship after his naturalization, as he was also raised and lived continuously in the United States until he was forcefully removed on August 25, 2011.

¹ Hereinafter "the American Declaration" or "the Declaration".

² The observations submitted by each party were duly transmitted to the opposing party.

3. The petitioner indicates that the alleged victim was subjected to three separate removal proceedings over the past 20 years. The US Immigration and Naturalization Service ("INS")³, sought to deport Mr. Johnson on the basis of being convicted for carrying a firearm during and in relation to a drug trafficking crime, and for unlawful possession of a controlled substance and aggravated assault. On August 21, 1992, the INS issued an Order to Show Cause, claiming the alleged victim was deportable from the United States based on his criminal offenses. Nevertheless, the immigration judge terminated the proceedings for reasons that were not discussed in the order.

4. A few years later, on June 21, 1996, INS issued another Order to Show Cause, claiming Mr. Johnson was deportable on account of his drugs and firearms convictions. The petitioner ratifies that on December 16, 1996, during the pendency of the removal proceedings, Mr. Johnson filed a Form N-600 Application for Certificate of Citizenship with the INS, claiming that he derived United States citizenship from his father's naturalization. Mr. Johnson relied on 8 U.S.C. § 1432(a)(3), which in subsection stated that "*[t]he naturalization of the parent having legal custody of the child when there has been a legal separation of the parents*" confers citizenship on that child. On February 9, 1998, the immigration judge terminated the proceedings, stating that Mr. Johnson "*appears to be [a] U.S. citizen by [his] father's [naturalization].*" The INS did not appeal. However, later, on April 5, 2000, the INS denied the application for citizenship because Mr. Johnson, whose parents had never married, could not show that his parents had legally separated. He did not appeal the INS's denial.

5. The petitioner declares that on January 28, 2002, Mr. Johnson was convicted of possession of a firearm by a convicted felon and was sentenced to 108 months' imprisonment. Near the end of that term, on June 18, 2008, the Department of Homeland Security ("DHS") initiated removal proceedings against the alleged victim and served him with a Notice to Appear, alleging that he was an alien removable by virtue of his 2002 and 1989 convictions. On June 18, 2008, the DHS notified the Notice of Custody Determination and stated that Mr. Johnson shall be detained in custody; also, that he may not request a review of this determination by an Immigration Judge because the Immigration and Nationality Act prohibit his release from custody. The alleged victim argued that preclusion principles barred DHS from relitigating the issue of his citizenship because the immigration judge in the 1998 proceedings had found him to be a United States citizen. He also petitioned for a writ of habeas corpus on July, 2008.

6. On May 21, 2009, the Immigration Judge: (a) denied Mr. Johnson's motion to terminate the proceedings; (b) ordered his deportation by concluding that DHS was not precluded from litigating the issue of Mr. Johnson's citizenship, because the 1998 termination order did not make any citizenship finding; likewise, it indicated that even if this obstacle were absent, Mr. Johnson's commission of an additional crime since the 1998 proceedings lifted any preclusion bar that might otherwise have existed; and (c) ruled that he did not derive citizenship from his father's naturalization. Mr. Johnson appealed this decision to the Board of Immigration Appeal ("BIA") and petitioned for a writ of habeas corpus, raising the same citizenship issue he litigated in the removal proceedings.

7. On May 28, 2010, the Immigration Court issued an order of removal and rejected Mr. Johnson's claim to U.S. citizenship; and afterwards, on April 20, the BIA dismissed the appeal, arguing that not to remove an alien who continues to engage in criminal conduct after the termination of earlier removal proceedings would frustrate one of the core purposes of the Immigration and Nationality Act ("INA")—the prompt removal of criminal aliens, and agreeing that he did not obtain citizenship through his father's naturalization. Even though Mr. Johnson filed a petition for review, the US Court of Appeals for the Fourth Circuit denied the petition for review and the habeas corpus on May 24, 2011 because Mr. Johnson did not qualify for citizenship by not satisfying the "legal separation" requirement under former Section. § 1432; and rejected his challenge that such law discriminated on the basis of illegitimacy.

8. On August 25, 2011, the alleged victim was deported to Jamaica and separated from his family and the life he built in the U.S. The petitioner attests that Mr. Johnson filed a petition for writ of certiorari, which was declined by the U.S. Supreme Court on January 9, 2012; and with such writ he exhausted all domestic remedies available in U.S. legislation.

³ INS powers in this area have since been transferred to the Department of Homeland Security ("DHS")

9. The petitioner further declares that in the proceedings for Mr. Johnson's removal, the State did not conduct a balancing test⁴ to weigh its interest in removing him against his individual human right to protection of his family and private life. Mr. Johnson was raised in the United States since he was 7 years old, and was removed by the U.S. at the age of 46. During all this time, he never once visited Jamaica. His entire family –father, stepmother, sisters, nieces, nephews, and others- are in the U.S.

10. According to the petitioner, the statute under former U.S.C. § 1432(a)(3)⁵ denies automatic derivative citizenship to the children of unwed and naturalized U.S. citizen fathers, while permitting such citizenship for the children of unmarried and naturalized U.S. citizen mothers. In this case, the petitioner points out that Mr. Johnson's mother abandoned her parental duties and rights on the day he was born, and that his father was the one who took the sole legal custody. The petitioner holds that such discrimination based on the sex of the U.S. citizen parent for seeking automatic derivative citizenship, violates the following rights recognized in the American Declaration: honor, personal reputation, private and family life, residence and movement, and nationality; and that it reinforces historic biases and negative stereotypes regarding children of unwed parents and single fathers.

11. For its part, the State reaffirms its position that the American Declaration is a statement of political commitments on the part of the Member States of the Organization of American States ("OAS"), and that it does not create legally binding obligations on the United States. In addition, the State request the Commission to dismiss the Petition because it does not state facts that tend to establish a violation of any provision of the Declaration, and is thus inadmissible under Article 34(a) of the Rules of Procedure.

12. According to the State, the statutory scheme embodied in former Section 321⁶ of the INA is substantially related to the United States' important objective of protecting the rights of both parents when one or both parents become naturalized U.S. citizens. Congress sought to protect the parental rights of the noncitizen parent, whose "*parental rights could be effectively extinguished*" when only one parent was naturalized. The baseline standard articulated in 321(a)(1)⁷, that both parents must naturalize in order to confer automatic citizenship on a child, "recognizes that either parent—naturalized or noncitizen—may have reasons to oppose the naturalization of their child, and it respects each parent's rights in this regard." The statute protected both parents' rights by preventing the automatic acquisition of U.S. citizenship by a child of a parent who had chosen not to naturalize. The State affirms that this mechanism reflected the fact that naturalization is a "*significant legal event with consequences for the child here and perhaps within his country of birth or other citizenship*".

13. The State also sustains that the Section 321 (a)(3) provision is based on what the U.S. Supreme Court termed the "undeniable difference in the circumstance of the parents at the time a child is born." When a child is born out of wedlock, the child's legal relationship—and biological connection—to his mother is typically established by virtue of the birth itself. A child's father, however, must take some step to legally

⁴ Some of the factors of the balancing test include: the age at which the non-citizen immigrated to the host state; the non-citizen's length of residence in the host state; the non-citizen's family ties in the host state; the extent of hardship the non-citizen's deportation poses for the family in the host state; the extent of the non-citizen's links to the country of origin; evidence of the non-citizen's rehabilitation from criminal activity; and the non-citizen's efforts to gain citizenship in the host state.

⁵ § 1432(a)(3) "*Children born outside United States of alien parents; conditions for automatic citizenship (a) A child born outside of the United States of alien parents, or of an alien parent and a citizen parent who has subsequently lost citizenship of the United States, becomes a citizen of the United States upon fulfillment of the following conditions: (...) (3) The naturalization of the parent having legal custody of the child when there has been a legal separation of the parents or the naturalization of the mother if the child was born out of wedlock and the paternity of the child has not been established by legitimation(...)*"

⁶ The old section 321 was codified in the U.S. Code at 8 U.S.C. 1432.

⁷ This statutory provision was repealed almost 20 years ago by the Child Citizenship Act of 2000 ("CCA"), which among other things eliminated the legitimation provision at issue in Mr. Johnson's claim and eliminated any reference to gender. By repealing former Section 321, codified at the time at 8 U.S.C. § 1432, and enacting the CCA, Pub. L. 106-395, 114 Stat. 1631, 1632, Congress continued its efforts to significantly broaden the class of children eligible for citizenship. Congressional reports show that the CCA aimed to "modif[y] the provisions of the [INA] governing acquisition of United States citizenship by certain children born outside of the United States, principally by providing citizenship automatically to such children." H.R. REP. NO. 106-852, at 3 (2000). In enacting the CCA, Congress sought to "ensure that children are not deprived of U.S. citizenship because their parents did not realize they had to go through the certificate of citizenship process after bringing the children to the United States." *Id.* at 4–5. But because the statute does not apply to individuals who were 18 years of age or older when the law became effective on February 27, 2001, former Section 321 continues to govern the citizenship claim of individuals such as Mr. Johnson who were born before February 27, 1983.

formalize his relationship to the child through legitimation. According to the State, if the unwed father took steps to put himself on the same footing as the mother with respect to being recognized as a parent as a legal matter through legitimation, the scheme in Section 321(a) would made no sex-based distinction between a child's mother and father.

14. The State adduces that from the time of Mr. Johnson's father's naturalization in 1973 until the time the alleged victim turned 18 in 1983, Mr. Johnson's father could have sought a certificate of U.S. citizenship for his son pursuant to former Section 322 of the INA.⁸ That provision provided that a child born abroad would be a citizen upon petition of the child's parent if at least one parent was a U.S. citizen (either by birth or naturalization), the child was under the age of 18, and the child resided permanently in the United States pursuant to a lawful admission for permanent residence. The State indicates that the validity of a statute is not called into question merely because an individual's misreading of the law, and consequent inaction, deprived his son of the readily available benefit of citizenship.

15. For these reasons as well, the State certifies that the Commission should dismiss the petition in light of the "fourth instance formula" because it does not have the competence to second-guess the legal and evidentiary judgment calls of domestic courts unless there is "unequivocal evidence ... that guarantees of due process have been violated."

VI. EXHAUSTION OF DOMESTIC REMEDIES AND TIMELINESS OF THE PETITION

16. Both, the Petitioner and the State, have declared that Mr. Johnson has effectively exhausted all available US domestic remedies.

17. The Commission observes that the presumed victim filed a petition for writ of certiorari, which was declined by the U.S. Supreme Court on January 9, 2012; and with such, he exhausted all domestic remedies available in U.S. legislation. Since writ of certiorari was denied by the Supreme Court of the United States on January 9, 2012 and the petition was filed in the Commission on July, 9, 2012, the Commission also declares that the petition was filed in a timely manner, in accordance with Article 31.1 of the IACHR's Rules of Procedure.

VII. COLORABLE CLAIM

18. The Petitioner adduces that the only reasons the State refused to admit that Mr. Johnson automatically derived naturalization were because of his father's sex and his birth out of wedlock. Further Petitioners allege that if the mother and not the father came into the US under the same condition, then the alleged victim would had had automatic derivative citizenship; hence the law applied was based on unlawful discrimination. The Petitioner asks the Commission to: (a) declare that denying automatic derivative citizenship based on a parent's gender and his status of unwed, violates the American Declaration, and (b) recommend that the United States recognize Mr. Johnson as a United States citizen.

19. On the other hand, the State claims that the Commission should dismiss the petition in light of the "fourth instance formula" because it argues the Commission does not have the competence to second-guess the legal and evidentiary judgment calls of domestic courts unless there is "unequivocal evidence ... that guarantees of due process have been violated." The State attests that the Petitioner has not provided sufficient evidence that the United States discriminated against Mr. Johnson based on his father's unwed status and sex, in violation of equal protection under the law, or that the State violated his right to family life, residence, or nationality and emphasizes that international law recognizes the right of States to regulate the exclusion and admission of noncitizens, subject to the states' international obligations.

20. In view of the elements of fact and law presented by the parties and the nature of the matter brought to its attention, the Commission believes that the claims of the Petitioner are not manifestly unfounded and require a substantive study on the merits as the alleged facts, and if proved, that the State denied Mr. Johnson automatic citizenship because his parents were never married, and his father naturalized instead of his mother, and subjected him to mandatory removal without considering his family and cultural ties to the United States, this claims may represent violations of the rights enshrined in Articles II (equality before law), V

⁸ Codified then at 8 U.S.C. § 1433

(honor, personal reputation and private and family life), VIII (residence and movement), and XIX (nationality) of the American Declaration.

21. Regarding the State's pleadings on the doctrine of fourth instance, the Commission reiterates that, within the framework of its mandate, it is competent to declare a petition admissible and rule on its merits when the petition addresses domestic proceedings that could violate rights protected by the American Declaration.

VIII. DECISION

1. To find the instant petition admissible in relation to Articles II (equal protection), V (honor, personal reputation and private and family life), VIII (residence and movement), and XIX (nationality) of the American Declaration, to continue with the analysis on the merits; and

2. To notify the parties, 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 2nd day of the month of July, 2020. Joel Hernández (dissenting opinion), President; Flávia Piovesan, Second Vice President; Margarete May Macaulay, Esmeralda E. Arosemena Bernal de Troitiño, and Julissa Mantilla Falcón, Commissioners.