

***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

**JUNE 6, 2007**

***PRESENTED ON BEHALF OF HUMAN RIGHTS WATCH BY:***

Jayashri Srikantiah

Gloria Borges

Lin Yee Chan

Stanford Immigrants' Rights Clinic

Stanford Law School

559 Nathan Abbott Way

Stanford, CA 94305-8610

Tel.: (650) 724-2442

Fax: (650) 723-4426

E-Mail: [jsrikantiah@law.stanford.edu](mailto:jsrikantiah@law.stanford.edu)

## TABLE OF CONTENTS

I.	INTEREST OF AMICUS CURIAE HUMAN RIGHTS WATCH.....	1
II.	INTRODUCTION.....	1
III.	BACKGROUND.....	3
IV.	ARGUMENT.....	4
A.	The Mandatory Deportation of Non-Citizens With Criminal Convictions Violates International Protections of Family and Private Life.....	4
1.	Mandatory Deportation Violates the American Declaration’s Protections of Family Life and the International Human Right to Family Unity.....	5
2.	Mandatory Deportation Violates Article V of the American Declaration, Which Protects the Private Life of Non-Citizens.....	8
a.	The Honorable Commission Should Define “Private Life” to Require Consideration of Non-Familial Relationships, Community Ties, and Length of Residency in Deportation Proceedings.....	8
b.	Mandatory Deportation Cannot be Justified by State Interests in Maintaining Order.....	12
B.	Mandatory Deportation Harms the Human Rights of Children in Violation of the American Declaration.....	14
1.	Mandatory Deportation of a Parent Harms a Child’s Right to Family Unity as Defined in Article 9 of the U.N. Convention on the Rights of the Child.....	16
2.	Mandatory Deportation Without a Hearing Fails to Utilize the Best Interests of the Child Standard as Defined in Article 3(1) of the U.N. Convention on the Rights of the Child.....	17
3.	Mandatory Deportation of a Parent Harms a Child’s Right to Participate in Proceedings that Affect His Welfare as Defined in Article 12 of the U.N. Convention on the Rights of the Child.....	19
C.	U.S. Immigration Laws that Impose <i>Refoulement</i> on Refugees With Criminal Convictions Violate the American Declaration and the Refugee Convention.....	20

1.	The Per Se Denial of Withholding of Removal to “Aggravated Felons” With Aggregate Five Year Sentences Violates the American Declaration’s Guarantees of Due Process and the Right to Seek Asylum.....	21
2.	The Per Se Denial of Withholding of Removal to Refugees Convicted of Certain “Aggravated Felonies” Violates the Guarantees of the Refugee Convention.....	23
3.	The American Declaration and the Refugee Convention Require Individualized Hearings in Order to Determine Whether a Refugee Falls Within an Exception to <i>Non-Refoulement</i> .....	24
V.	CONCLUSION.....	28

## **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,<sup>1</sup> 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.<sup>2</sup> 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

---

<sup>1</sup> See 8 U.S.C. § 1101(a)(43).

<sup>2</sup> 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.”<sup>3</sup> 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.<sup>4</sup>

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.<sup>5</sup> 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.”<sup>6</sup>

#### 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,

---

<sup>3</sup> *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).

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

<sup>5</sup> 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.

<sup>6</sup> *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.”<sup>7</sup> “[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.”<sup>8</sup> 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.”<sup>9</sup> Article 17 of the ICCPR clarifies that no one shall be “subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence.”<sup>10</sup>

The United Nations Human Rights Committee has recognized the importance of

---

<sup>7</sup>Inter-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.

<sup>8</sup>Id.

<sup>9</sup> Universal 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”].

<sup>10</sup> ICCPR, 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.<sup>11</sup> 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.<sup>12</sup> 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.<sup>13</sup>

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."<sup>14</sup> 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

---

<sup>11</sup> 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).

<sup>12</sup> Winata, *supra* note 11, ¶ 7.2.

<sup>13</sup> Madafferi, *supra* note 11, ¶ 9.8.

<sup>14</sup> 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.”<sup>15</sup> 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.<sup>16</sup>

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.<sup>17</sup> Ramon is married to a U.S. citizen and has two U.S. citizen daughters.<sup>18</sup> One of his daughters told the immigration judge considering Ramon's case that her "dad is the one who mainly supports the family."<sup>19</sup> 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

---

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

<sup>16</sup> *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).

<sup>17</sup> HRW Report, at text accompanying footnote 148.

<sup>18</sup> *Id.*

<sup>19</sup> *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.<sup>20</sup>

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

---

<sup>20</sup> See HRW Report, at text accompanying footnotes 113-126.

include a range of relationships and information from one's personal, professional, and business life. Like the European Court, and consistently with the Commission's Article 11 findings, the Honorable Commission should find that U.S. laws' imposition of mandatory deportation without a 212(c)-like hearing violates Article V's protection of private life.

In its report in Morales de Sierra v. Guatemala, the Commission interpreted the "private life" language in Article 11 of the American Convention<sup>21</sup> to include the development of one's personality.<sup>22</sup> The petitioner in Morales challenged nine articles of the Guatemalan Civil Code that discriminated against women within the institution of marriage. The challenged provisions conferred certain rights to husbands while denying those same rights to women. The Commission found that the Guatemalan domestic laws violated the petitioner's right to privacy. In its decision, the Commission defined "private life" as including the "the ability to pursue the development of one's personality and aspirations, determine one's identity, and define one's personal relationships."<sup>23</sup> The Honorable Commission cited the seminal European Court decision of Niemitz v. Germany, tracking that decision's broad definition of the term "private life."<sup>24</sup>

The European Court in Niemitz considered the scope of the State's ability to obtain a citizen's private correspondence at his place of work, and during the course of its decision, broadly defined private life in a manner that readily encompassed non-familial relationships and community ties.<sup>25</sup> The Niemitz Court determined that the right to

---

<sup>21</sup> Article 11 of the American Convention provides: "No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation."

<sup>22</sup> See Inter-Am. C.H.R., Maria Eugenia Morales De Sierra v. Guatemala, Case 11.625, Report N° 4/01, Jan. 19, 2001 (English translation available at [www.cidh.org/women/guatemala11.625aeng.htm](http://www.cidh.org/women/guatemala11.625aeng.htm)).

<sup>23</sup> Id., ¶ 46.

<sup>24</sup> Id., ¶ 46 & n.26.

<sup>25</sup> Eur. Ct. H.R., Niemitz v. Germany, Judgment of Dec. 16, 1992, No. 13710/88.

private life under Article 8 of the European Convention should be widely interpreted: “it would be too restrictive to limit the notion [of private life] to an ‘inner circle’ in which the individual may live his own personal life as he chooses and to exclude therefrom entirely the outside world not encompassed within that circle. Respect for private life must also comprise to a certain degree the right to establish and develop relationships with other human beings.”<sup>26</sup> This definition encompasses non-familial relationships and community ties: the development of one’s personality is based on interaction with others including family as well as non-familial relationships like those with friends, business colleagues, and acquaintances.<sup>27</sup> The European Court has since interpreted private life as “a broad term not susceptible to exhaustive definition.”<sup>28</sup>

The European Court has considered the protection of private life in the context of deportation as well and included community ties, non-familial residence, and length of residence as part of its consideration. In Beldjoudi v. France, the petitioner argued that deportation from France based on various criminal convictions would impermissibly interfere with his Article 8 right to family life, and the European Court agreed.<sup>29</sup> Beldjoudi is significant, however, because of Judge Martens’ concurrence, expressing a view that has since been more widely accepted by the European Court. Judge Martens observed that deportation not only violated Beldjoudi’s right to family life, but his right to private life as well. Judge Martens explained that “[e]xpulsion severs irrevocably all social ties between the deportee and the community . . . and . . . the totality of those ties

---

<sup>26</sup> Id., ¶ 29.

<sup>27</sup> See id.

<sup>28</sup> Eur. Ct. H.R., Bensaid v. United Kingdom, Judgment of Feb. 6, 2001, No. 44599/98, ¶ 47; see also id. (“Article 8 protects a right to identity and personal development, and the right to establish and develop relationships with other human beings and the outside world.”).

<sup>29</sup> Eur. Ct. H.R., Beldjoudi v. France, Judgment of Mar. 26, 1992, No. 12083/86.

may be said to be part of the concept of private life, within the meaning of Article 8,”<sup>30</sup> the European analog to Article V. Judge Martens concluded that “expulsion to a country where . . . the deportee, as a stranger to the land, its culture, and its inhabitants, runs the risk of having to live in almost total social isolation, constitutes an interference with his right to respect for private life.”<sup>31</sup> Judge Martens’ concurrence has guided the European Court in future cases, with the Court explicitly incorporating a broad definition of private life in deportation cases.<sup>32</sup>

In C v. Belgium, for example, the European Court considered the petitioner’s “real social ties in Belgium,” noting his long-term residency (“[h]e lived there from the age of 11”), and educational and professional experience (“he went to school there, underwent vocational training there, and worked there for a number of years”).<sup>33</sup> The Court concluded that these factors meant the petitioner had “accordingly . . . established a private life there [in Belgium] within the meaning of Article 8 (art. 8), which encompasses the right for an individual to form and develop relationships with other human beings, including relationships of a professional or business nature.”<sup>34</sup> Although the European Court found that petitioner’s crime outweighed countervailing factors, declaring the deportation legitimate, the Court only reached its judgment after a process of considering the petitioner’s private life and other equities, a process that is absent in the U.S. immigration laws as to non-citizens facing deportation because of aggravated felony convictions.<sup>35</sup>

---

<sup>30</sup> Id., Concurring Opinion of Judge Martens, ¶3.

<sup>31</sup> Id.

<sup>32</sup> See generally Nicholas Blake & Raza Husain, Immigration, Asylum, and Human Rights 173-74 (2003) (collecting cases); Claire Ovey & Robin White, Jacobs and White: The European Convention on Human Rights 220-22 (3d ed. 2002) (summarizing commentary on European Court’s definition of private life).

<sup>33</sup> Eur. Ct. H.R., C. v. Belgium, Judgment of July 9, 1996, No. 21794/93, ¶ 25.

<sup>34</sup> Id.

<sup>35</sup> Commentators have characterized the European Court’s approach to deportation cases as in viewing “private and family life as a

Like the European Court, the Honorable Commission should find that “private life” under Article V encompasses length of residency, the extent of a non-citizen’s education in her “host” country, and non-familial relationship contacts in the “host” country. Under this definition, many non-citizens facing mandatory deportation from the United States have private lives that militate against deportation. Hector J., for example, attended public school in New York, and completed an associate degree in human resources.<sup>36</sup> He worked as a community organizer and monitor for two non-profit groups in the United States that assist homeless and low-income families.<sup>37</sup> His deportation separated him from these important community connections as well as his daughter and mother.<sup>38</sup>

The Honorable Commission should find that a non-citizen’s community ties and non-familial relationships are necessarily implicated in his Article V right to privacy. The Honorable Commission should further find that U.S. laws imposing mandatory deportation constitute a violation of Article V’s protection of private life because they impose mandatory deportation without a hearing to consider community and other non-familial ties.

**b. Mandatory Deportation Cannot be Justified by State Interests in Maintaining Order.**

Particularly in the case of long-term non-citizen residents, mandatory deportation without consideration of family or community ties imposes an impermissible restriction on family and private life, out of all proportion to any state interest in maintaining order.

---

composite right" requiring "the decision maker to avoid restricting himself to looking at the circumstances of ‘family life’ and to take into account also significant elements of the much wider sphere of ‘private life.’” Blake & Husain, *supra* note 32, at 174 (quoting and citing *Nhundu and Chiwera v. Sec’y of State*, 01/TH/00613, 1 June 2001, ¶ 26).

<sup>36</sup> HRW Report, at text accompanying footnotes 146 & 147.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

The European Court has tackled the issue of long-term residents with criminal convictions facing deportation. In these cases, the European Court has found that deportation violates the resident's right to family and private life, in violation of Article 8 of the European Convention, the analog to Article V of the American Declaration. The petitioners in the cases are typically non-citizens who have spent a substantial part, if not all of their lives in the "host" state, but who face deportation because of criminal convictions. They have grown up and completed their education in the host state, held long residence, and developed deep ties with community and family members in the "host" state.

In Moustaquim v. Belgium, for example, the European Court found that the immigrant petitioner's ties to family life were so strong that his expulsion was not "necessary in a democratic society."<sup>39</sup> Similarly, in Beldjoudi v. France, the European Court held that expulsion of petitioner Beldjoudi was not proportionate to the legitimate aim pursued and therefore violated his right to family life.<sup>40</sup> In Lamguindaz v. United Kingdom, the European Court found that a non-citizen should remain in the U.K. despite criminal convictions because expulsion would constitute hardship out of proportion to state interests, in violation of Article 8(1) of the European Convention.<sup>41</sup>

As the European Court's decisions recognize, the devastation to family and community life is particularly acute in cases where non-citizens have resided in the "host" country for most of their lives. Precisely because of the strength of ties that develop with long residence, U.S. immigration laws imposing mandatory deportation on

---

<sup>39</sup> Eur. Ct. H.R., Moustaquim v. Belgium, Judgment of Feb. 18, 1991, No. 12313/86, ¶ 45, 26.

<sup>40</sup> Beldjoudi, *supra* note 29.

<sup>41</sup> Eur. Ct. H.R., Lamguindaz v. The United Kingdom, Judgment of June 28, 1993, No. 16152/90, ¶ 45-46. See generally Blake & Husain, *supra* note 32, at 192-95 (collecting additional European Court and Commission cases reaching conclusions that deportations of long-term residents violate family and private life rights).



long-time residents violate these residents' right to private and family life, and cannot be justified by reference to state interests in public order. This is so regardless of whether the resident faces deportation based on a criminal conviction. Indeed, the European Court has "taken far reaching decisions protecting the alien's right of residence against any interference by the state even in the face of serious criminal convictions."<sup>42</sup>

The Honorable Commission should find, consistent with these decisions, that mandatory deportation without a 212(c)-like hearing for individuals who have spent almost their entire lives in the U.S. deprives non-citizens of their Article V right to protection of family and private life.

**B. Mandatory Deportation Harms the Human Rights of Children in Violation of the American Declaration.**

U.S. mandatory deportation laws harm the human rights of children of non-citizen parents, in violation of Article VII of the American Declaration, which provides: "[a]ll women, during pregnancy and the nursing period, and all children have the right to special protection, care and aid." Article 19 of the American Convention likewise stresses that children have the right to special protection from the State: "Every minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the state." Article 16 of the Additional Protocol to the American Convention on Human Rights adds that every child has the right to grow up under parental protection and may be separated from her mother only in exceptional circumstances.

Both the Commission and Inter-American Court have interpreted these provisions in conjunction with the United Nations Convention on the Rights of the Child ("CRC").

---

<sup>42</sup> Kees Groenendijk, Elspeth Guild & Halil Dogan, *Security of Residence of Long-Term Migrants: A Comparative Study of Law and Practice in European Countries* 10 (1998).

In the Commission's Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System (hereinafter "Canada Report"), the Commission relied on the CRC in interpreting Article VII of the American Declaration.<sup>43</sup> Similarly, the Inter-American Court has considered the CRC as a source of law in interpreting Article 19 of the American Convention.<sup>44</sup> The Court has recognized that "[t]he child has the right to live with his or her family" and that "[a]ny decision pertaining to separation of a child from his or her family must be justified by the best interests of the child."<sup>45</sup>

U.S. mandatory deportation laws violate Articles 9, 3, and 12 of the CRC. Article 9(1) of the CRC protects the right to family unity, requiring States to ensure that a child is not "separated from his or her parents against their will" except when authorities "subject to judicial review" determine that separation of child and parent is "necessary for the best interests of the child."<sup>46</sup> Article 3(1) requires that in any and all actions concerning children, which would include deportation proceedings at which a child may lose all physical ties with her deported parent, "the best interests of the child shall be a primary consideration."<sup>47</sup> Finally, Article 12(2) outlines a child's procedural right to participate in proceedings affecting her welfare: "the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law."<sup>48</sup>

---

<sup>43</sup> Canada Report, *supra* note 7, ¶ 159-60.

<sup>44</sup> See Inter-Am. Ct. H.R., *Villagran Morales et al. (the "Street Children" case)*, Judgment of Nov. 19, 1999, Series C No. 63, ¶ 188.

<sup>45</sup> Inter-Am. Ct. H.R., *Judicial Condition and Human Rights of the Child*, Advisory Opinion OC-17/2002 of Aug. 28, 2002, Series A No. 17, ¶ 71, 73.

<sup>46</sup> Convention on the Rights of the Child, Dec. 12, 1989, 1577 U.N.T.S. 43, art. 9(1) [hereinafter "CRC"].

<sup>47</sup> CRC, art. 3(1).

<sup>48</sup> CRC, art. 12.

**1. Mandatory Deportation of a Parent Harms a Child’s Right to Family Unity as Defined in Article 9 of the U.N. Convention on the Rights of the Child.**

Mandatory deportation without a hearing at which the U.S. may consider the impact of deportation on the family’s ability to stay together directly violates a child’s substantive right to family unity. Article 9(1) of the CRC requires States to ensure that a child is not “separated from his or her parents against their will” except when authorities “subject to judicial review” determine that separation of child and parent is “necessary for the best interests of the child.”<sup>49</sup> Mandatory deportation does exactly what Article 9(1) prohibits: the U.S. imposes deportation, resulting in potential separation of the child from her parent against her will, and the decision to separate the child from her parent is triggered by the conviction of the parent, not an individualized decision based on the best interests of the child. Furthermore, even if it was in the best interest of the child to separate from her non-citizen parent, mandatory deportation without a 212(c)-like discretionary hearing forecloses a determination about the child’s welfare.

Under the CRC, States should consider the impact of deportation on family unity with regard to the practical effect of separation on affected children. Even if a child could avoid separation by following the deported parent, the state party must consider the effect of the uprooting on the child prior to deporting the parent.<sup>50</sup> Mandatory deportation necessarily fails to consider the private, individual interest of the child by denying a hearing at which the child’s views and interests might be considered, in contravention of the clear directives of Article 9(1).

---

<sup>49</sup> CRC, art. 9(1).

<sup>50</sup> See generally Jacqueline Bhabha, “More Than Their Share of Sorrows”: International Migration Law and the Rights of Children, 22 St. Louis U. Pub. L. Rev. 253, 261 (2003) (deportation of immigrant parent relegates child to “ ‘constructive deportation’ from his or her home on the one hand, or staying at home but enduring long-term separation from a parent on the other.”).

The Honorable Commission should look to the CRC to find that U.S. immigration laws' failure to consider children's rights by foreclosing any kind of hearing regarding family separation violates Article VII of the Declaration.

**2. Mandatory Deportation Without a Hearing Fails to Utilize the Best Interests of the Child Standard as Defined in Article 3(1) of the U.N. Convention on the Rights of the Child.**

The "best interests of the child" standard of Article 3(1) of the CRC should be central to any proceeding regarding children's rights in both U.S. and international law. Because U.S. laws impose mandatory deportation without consideration of the best interests of the children of non-citizens with aggravated felony convictions, the laws contravene Article 3(1) of the CRC.

Article 3 establishes that the best interests of the child standard should be "a primary consideration" in any action involving a child, "whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies."<sup>51</sup> The Inter-American Court has recognized the CRC's best interest of the child standard, observing that "all State, social, or household decisions that limit the exercise of any right must take into account the best interests of the child."<sup>52</sup> The standard is "a ubiquitous feature of international treaties and the reasoning of international institutions" that regulate the rights of children.<sup>53</sup> The Human Rights Committee and the European Court have relied on the "best interests" principle in their decisions.<sup>54</sup> In the context of child removal hearings, for instance, the European Court has incorporated the best interests of the child standard.<sup>55</sup> Further, the Canadian and Australian Supreme Courts

---

<sup>51</sup> CRC, art. 3.

<sup>52</sup> Inter-Am. Ct. H.R., *Judicial Condition and Human Rights of the Child*, *supra* note 45, at ¶ 65.

<sup>53</sup> Sonja Starr & Lea Brilmayer, *Family Separation as a Violation of International Law*, 21 *Berkeley J. Int'l L.* 213, 225 (1996).

<sup>54</sup> *See id.* at 225 nn. 73 & 74 (collecting cases).

<sup>55</sup> *See id.* at 273-74 (collecting and discussing child removal cases).

have recognized the best interests of the child standard of the CRC in considering deportation cases.<sup>56</sup>

Because U.S. law imposes mandatory deportation without a hearing at which the best interests of the child could be considered, the laws violate Article VII of the American Declaration. The deportation of a non-citizen parent implicates the well-being of his child, as the child effectively loses the physical, day-to-day contact with one of the most central relationships in her life. Indeed, the Commission has recognized the importance of considering the best interests of the child in the deportation context. In its Canada Report,<sup>57</sup> the Commission stated that “the absence of any procedural opportunity for the best interests of the child to be considered in proceedings involving the removal of a parent or parents raised serious concerns.”<sup>58</sup> While the state has a right and duty to maintain public order through immigration control, “that right must be balanced against the harm that may result to the rights of individuals concerned in that particular case.”<sup>59</sup>

The story of a U.S. citizen teenager, Gerardo Anthony Mosquera, Jr. is illustrative. Mosquera was son of a 29-year-long legal permanent resident who was deported after a conviction for selling a \$10 bag of marijuana to an undercover police officer.<sup>60</sup> Unable to be consoled after the loss of his father, Gerardo, a strong student interested in sports and taking care of his younger siblings, committed suicide by shooting himself in the head.<sup>61</sup> The Honorable Commission should be wary of a mandatory deportation scheme that forecloses consideration of the best interests of

---

<sup>56</sup> See Baker v. Canada, [1999] 2 S.C.R. 817 (Can.); Minister for Immigration and Ethnic Affairs v. Teoh, [1995] 128 A.L.R. 353 (Austl.).

<sup>57</sup> See Canada Report, supra note 43.

<sup>58</sup> Id., ¶ 159.

<sup>59</sup> Id., ¶ 166.

<sup>60</sup> Patrick J. McDonnell, Deportation Shatters Family, L.A. Times, Mar. 14, 1998.

<sup>61</sup> Id.

children of non-citizen parents.

**3. Mandatory Deportation of a Parent Harms a Child’s Right to Participate in Proceedings that Affect His Welfare as Defined in Article 12 of the U.N. Convention on the Rights of the Child.**

Mandatory deportation violates Article 12 of the CRC, which protects the right of children to participate in proceedings that affect them. More specifically, mandatory deportation deprives children of an opportunity to participate in a hearing at which they might explain the impact of a parent’s deportation on their welfare.

Article 12 requires that a child’s views must be given “due weight” in a proceeding affecting the child,<sup>62</sup> which would logically include a child’s physical separation from a parent or parents through deportation. Furthermore, Article 12(2) explicitly requires that a child be provided an “opportunity to be heard in any judicial or administrative proceeding” that affects the child, which would include a deportation hearing at which his non-citizen parent may be deported.<sup>63</sup> Mandatory deportation ignores each of these directives, as the failure to afford a hearing to non-citizens and their children eliminates both the opportunity for consideration of a child’s views and the participation of the child in the proceedings.

The case of eight-year-old Angelito Martinez is illustrative. Angelito faces separation from his father because of his father’s old, relatively minor convictions.<sup>64</sup> Angelito’s parents have been together for ten years.<sup>65</sup> Angelito’s father explains in an interview with HRW that he “was [Angelito’s] soccer coach at school” and that he typically helped Angelito “with his homework.”<sup>66</sup> Despite the deep bond between

---

<sup>62</sup> CRC, art. 12.

<sup>63</sup> *Id.*

<sup>64</sup> HRW Report, at text accompanying footnote 168.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at text accompanying footnote 167.

Angelito and his father, Angelito faces separation from his father, without an opportunity to tell a decision-maker about the effect of that separation on his young life.

As this example illustrates, U.S. mandatory deportation laws contravene the CRC's explicit procedural guarantee of a child's right to participate in a proceeding affecting his welfare. Accordingly, the Honorable Commission should find that U.S. immigration laws imposing mandatory deportation violate Article VII of the American Declaration, interpreted with reference to Article 12 of the CRC.

**C. U.S. Immigration Laws That Impose *Refoulement* on Refugees With Criminal Convictions Violate the American Declaration and the Refugee Convention.**

U.S. immigration laws imposing mandatory deportation violate Articles XVIII, XXVI, and XXVII of the American Declaration, as interpreted consistently with the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol Relating to the Status of Refugees (hereinafter collectively referred to as "Refugee Convention").<sup>67</sup> The U.S. provides two forms of relief for refugees fleeing persecution— withholding of removal, which provides bare protection against *refoulement*, and more robust asylum relief, which provides a pathway to permanent residence.<sup>68</sup> Even the weaker form of relief— withholding of removal— is per se unavailable to non-citizens with aggravated felonies sentenced to an aggregate term of at least five years imprisonment and to those whom the Attorney General determines have been convicted of a particularly serious crime.<sup>69</sup> U.S. law denies these refugees even a hearing as to their dangerousness and their refugee claims, instead denying relief on a categorical basis. U.S. laws therefore

---

<sup>67</sup> Although Petitioners' cases do not involve claims for refugee protections, a discussion of U.S. immigration laws' effect on non-citizens with criminal convictions would be incomplete without exploration of the effect of the laws on non-citizen refugees.

<sup>68</sup> See 8 U.S.C. § 1158 (asylum); 8 U.S.C. § 1231(b)(3) (withholding of removal).

<sup>69</sup> 8 U.S.C. § 1231(b)(3).

contravene the due process and substantive protections of the American Declaration as interpreted alongside the Refugee Convention, which allow for exceptions to *non-refoulement* in only a narrow set of cases and after individualized hearings.<sup>70</sup>

**1. The Per Se Denial of Withholding of Removal to “Aggravated Felons” With Aggregate Five Year Sentences Violates the American Declaration’s Guarantees of Due Process and the Right to Seek Asylum.**

Non-citizen refugees convicted of aggravated felonies for which they were sentenced to prison for five years or more are statutorily barred from refugee protections under U.S. law. The U.S. denies these refugees the right to even present their case for withholding of removal—the weaker form of refugee relief—to immigration officials. This denial of withholding to non-citizens with five year sentences violates the due process guarantees of Articles XVIII and XXVI of the American Declaration.<sup>71</sup> The per se denial of protection from return to persecution for refugees with certain criminal convictions also violates Article XXVII, guaranteeing the “right . . . to seek and receive asylum in foreign territory, in accordance with the laws of each country and with international agreements.”

The Commission recently considered laws similar to the U.S. categorical bar in its Canada Report. The Commission reviewed Canada’s laws restricting asylum in the cases of individuals with criminal convictions, and expressed concern that the restrictions ran afoul of the American Declaration’s due process protections. The Canadian law at issue excluded an individual from asylum if the individual had “committed a crime punishable

---

<sup>70</sup> The principle of *non-refoulement* is enshrined in Article 33 of the Refugee Convention. See generally Sir Elihu Lauterpacht & Daniel Bethlehem, *The Scope and Content of the Principle of Non-Refoulement*, UNHCR (Jun. 20, 2001), at 2-5 (collecting international agreements recognizing *non-refoulement* principle).

<sup>71</sup> Cf. Inter-Am. C.H.R., Decision of the Commission as to the Merits of Case No. 10.675, OEA/Ser. L/V/II.95, doc. 7, Mar. 14, 1997, at ¶ 163 (“The Commission finds that the United States summarily interdicted and repatriated Haitian refugees to Haiti without making an adequate determination of their status, and without granting them a hearing to ascertain whether they qualified as ‘refugees.’”)



by a maximum term of imprisonment of ten years or more and the Minister [of Citizenship and Immigration] is of the opinion that [he] constitute[s] a danger to the public.”<sup>72</sup> In the Canada Report, the Commission criticized the exclusionary law on the ground that it failed to provide asylum-seekers who fell within its provisions with an individualized hearing before an impartial adjudicator.<sup>73</sup> The Commission declared that “[d]eterminations in such cases are not administrative but substantive in nature, requiring appropriate procedural guarantees” and that “[t]he effective observance of the rights of asylum seekers and the obligation of non-return necessarily presuppose the existence of a procedure to effectively determine who is entitled to be accorded these protections.”<sup>74</sup>

Here, the Honorable Commission should be even more concerned about the rights of non-citizens with five year sentences who are refugees, as the U.S. restrictions cover a wider swath of non-citizens, and provide no discretion to administrative officers in evaluating their claims. Whereas Canada denies protection to refugees with *ten* years imprisonment and who are determined by the Department of Citizenship and Immigration to be dangerous, the U.S. categorically denies protection to persons who are convicted of a felony punishable by as little as *five* years of aggregate imprisonment.

Under the Commission’s analysis in the Canada Report, the U.S.’s policy of categorically denying withholding of removal to all refugees convicted of aggravated felonies with five year sentences, without even the opportunity for an individualized hearing, violates the American Declaration’s guarantees of the right to seek asylum (Article XXVII) and due process (Articles XVIII and XXVI).

---

<sup>72</sup> Canada Report, ¶ 57.

<sup>73</sup> *Id.*, ¶ 60-70; see also *id.*, ¶ 61 (“Where the claimant demonstrates fear of persecution placing his or her life or personal integrity at risk, the crime would have to be “very grave” indeed to justify exclusion. Moreover, in evaluating the nature of the crime, all relevant factors, including mitigating and aggravating factors, are to be taken into account.”).

<sup>74</sup> *Id.*, ¶ 62.

## 2. The Per Se Denial of Withholding of Removal to Refugees Convicted of Certain “Aggravated Felonies” Violates the Guarantees of the Refugee Convention.

The U.S. categorical bar on withholding of removal for non-citizens convicted of aggravated felonies with five year sentences also contravenes the Refugee Convention, which informs the Commission’s interpretation of the American Declaration.<sup>75</sup> Indeed, Article XXVII of the American Declaration specifically references international law, protecting the right to seek and receive asylum “in accordance . . . with international agreements.”

The Refugee Convention only permits exceptions to *non-refoulement* in a small subset of exceptional cases. Article 33(2) of the Refugee Convention allows a narrow exception to *non-refoulement* in the case of a refugee who has been convicted of a “particularly serious crime” and constitutes a “danger to the community.” *Refoulement* should be “contemplated pursuant to this provision only in the most exceptional of circumstances.”<sup>76</sup> “Particularly serious crimes should at least have to be a capital crime or a very grave punishable act,”<sup>77</sup> such as “murder, rape, armed robbery, arson, etc.”<sup>78</sup>

The U.S. bar to withholding relief extends far beyond particularly serious crimes, and encompasses minor crimes, such as tax evasion, document fraud, obstruction

---

<sup>75</sup> The Commission has in many instances consulted other treaties and conventions that protect human rights, including in the refugee context. See Canada Report, ¶ 38 (noting Commission’s long-standing practice of invoking other human rights instruments when interpreting and applying the American Declaration and Convention); Inter-Am. C.H.R., Decision of the Commission as to the Merits, Case No. 10.675, *supra* note 71, ¶ 154-55 (interpreting Article XXVII of American Declaration and Article 22(7) of the American Convention in conformity with the Refugee Convention).

<sup>76</sup> Lauterpacht & Bethlehem, *supra* note 70, ¶ 186.

<sup>77</sup> See UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees (Jan. 1992), ¶ 55 [hereinafter UNHCR Handbook]. Note that the requirement that the crime must be a “capital crime or a very grave punishable act” is a description of what constitutes a “‘serious’ non-political crime” for the purposes of Article 1F. The “particularly serious crime” exception in Article 33(2) is presumed to require that the individual refugee be even more dangerous in order to fall under this exception. See Lauterpacht & Bethlehem, *supra* note 70, ¶ 147 (“Article 33(2) indicates a higher threshold than Article 1F . . .”).

<sup>78</sup> Lauterpacht & Bethlehem, *supra* note 70, ¶ 186.

of justice, gambling-related offenses, and transportation for the purpose of prostitution,<sup>79</sup> as long as the refugee was sentenced to incarceration for five years or more. Crimes such as tax evasion and document fraud, though serious, do not begin to reach the type of grave punishable acts that would qualify for exceptions to *non-refoulement*. Moreover, the U.S. actually expands this criminal bar even further by giving the U.S. Attorney General the discretion to declare even less serious aggravated felonies, with sentences of *less than* five years, per se “particularly serious,” and order non-citizens deported without the ability to apply for refugee protection.<sup>80</sup>

By creating exceptions to refugee protection that span far wider than the “particularly serious crime” exception provided in the Refugee Convention, the U.S. contravenes the *non-refoulement* principle of that Convention.

### **3. The American Declaration and the Refugee Convention Require Individualized Hearings in Order to Determine Whether a Refugee Falls Within an Exception to *Non-Refoulement*.**

Even if the U.S. prohibition on withholding relief satisfies the Refugee Convention’s “particularly serious” crime standard, the prohibition still violates the American Declaration’s guarantee of asylum and due process because U.S. laws fail to provide individualized hearings. Consistently with the requirements of the American Declaration, Article 32(2) of the Refugee Convention compels all states to provide due process to refugees and allow refugees “to submit evidence to clear [themselves], and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority.”<sup>81</sup> Even as to individuals

---

<sup>79</sup> See 8 U.S.C. 1101(a)(43) (2006); see also HRW Report, at text accompanying footnote 42.

<sup>80</sup> See 8 U.S.C. 1231(b)(3)(B).

<sup>81</sup> See also UNHCR Handbook, *supra* note 77, at ¶ 154-58; UNHCR, UNHCR Comments Relating to Serious Criminals and Statutory Review (2002), ¶ 3 available at [http://www.unhcr.org/uk/legal/positions/UNHCR%20Comments/comments\\_2002\\_clause20.htm](http://www.unhcr.org/uk/legal/positions/UNHCR%20Comments/comments_2002_clause20.htm) (“The applicability of Article 33(2) has to be judged on a case-by-case basis . . . A criminal conviction for a crime regarded as

convicted of particularly serious crimes, this due process provision requires consideration of all mitigating circumstances surrounding the commission of the crime.<sup>82</sup>

The UNHCR, in addressing similar criminal bars to refugee protections enacted by the United Kingdom, has declared that it is not sufficient simply to declare certain criminal convictions particularly serious. Rather, “[a] judgment on the potential danger to the community necessarily requires an examination of the circumstances of the refugee as well as the particulars of the specific offence.”<sup>83</sup> Thus, under the Refugee Convention, even individuals convicted of serious crimes should be guaranteed an opportunity to show that they do not in fact pose a danger to the community.<sup>84</sup> Indeed, the danger to the community exception “hinges on an appreciation of a *future* threat from the person concerned rather than on the commission of some act in the past.”<sup>85</sup> Past criminality is not per se evidence of *future* danger. Accordingly, the Refugee Convention requires three major considerations in determining whether a refugee falls under its Article 33(2) exception: (1) consideration of the severity of the crime, (2) consideration of the individual mitigating circumstances of the refugee, and (3) consideration of whether the refugee actually poses a *future* danger to the community. U.S. immigration laws do not provide refugees with five-year sentences with consideration of these factors, or any

---

‘particularly serious’ does not per se suffice . . . [a] further judgment has to be made that the particular refugee . . . poses a present or future threat.”).

<sup>82</sup> See UNHCR Handbook, *supra* note 77, ¶ 157 (“In evaluating the nature of the crime presumed to have been committed, all the relevant factors—including any mitigating circumstances—must be taken into account.”); James C. Hathaway, *The Rights of Refugees Under International Law* 350 (2005) (“[E]ven when the refugee has committed a serious crime, *refoulement* is only warranted when account has been taken of all mitigating and other circumstances surrounding commission of the offence.”) (citing *Betkoshabeh v. Minister for Immigration and Multicultural Affairs* (1998) 157 ALR 95 (Aus. FC, July 29, 1998) at 102, rev’d on grounds of mootness at (1999) 55 ALD 609 (Aus. FFC, July 20, 1999)); see also *id.* at 351 (“particularized *refoulement* cannot be based on the refugee’s criminal record *per se* – as seems increasingly to be the practice in the United States”).

<sup>83</sup> UNHCR, UNHCR Comments Relating to Serious Criminals and Statutory Review, *supra* note 81, ¶ 4; see also UNHCR Handbook, *supra* note 77, ¶ 156 (“it is . . . necessary to strike a balance between the nature of the offence presumed to have been committed by the applicant and the degree of persecution feared”); Guy Goodwin-Gill & Jane McAdam, *The Refugee in International Law* 241 (3d ed. 2007) (“From a due process perspective, whether a refugee is a danger to the community . . . is a matter to be determined on the basis of the evidenced relating to that individual, considered against an understanding of the concept of security.”).

<sup>84</sup> See Hathaway, *supra* note 82, at 351.

<sup>85</sup> Lauterpacht & Bethlehem, *supra* note 70, ¶ 147; see also *id.*, ¶ 164 (“While past conduct may be relevant to an assessment of whether there are reasonable grounds for regarding the refugee to be a danger to the country in the future, the material consideration is whether there is a prospective danger to the security of the country.”).

other individualized determination of their refugee claim, and thus run afoul of the Refugee Convention.

Even non-citizens eligible for withholding of removal—because their sentences are less than five years—are not eligible for the full range of asylum protections. U.S. laws do not permit refugees granted withholding of removal to petition for family members or naturalize, and thus violate Article VI of the American Declaration, which protects the right to family formation and unity.<sup>86</sup> Further, the standard for obtaining withholding of removal is much higher than that for asylum, and does not correspond to the standard contemplated by the Refugee Convention. The UNHCR has clarified that, “[a]sylum seekers are not required to prove their fear ‘beyond a reasonable doubt’, or that it would be ‘more probable than not’ that the feared harm will materialize.”<sup>87</sup> In contrast, applicants for withholding must show that there is a “clear probability” of persecution, a heightened standard requiring that “it is more likely than not” that the applicant would be subject to persecution if deported.<sup>88</sup> The higher standard of proof for withholding means that bona fide refugees convicted of aggravated felonies drawing sentences of less than five years face *refoulement* if they cannot meet the heightened standard for withholding of removal.

A real-life example illustrates the harshness of U.S. laws' categorical denial of withholding and asylum protections to non-citizens convicted of aggravated felonies with

---

<sup>86</sup> The UNHCR has suggested “it is hoped that countries of asylum will apply liberal criteria in identifying those family members who can be admitted with a view to promoting a comprehensive reunification of the family.” UNHCR, Executive Committee Conclusions on Family Reunification, Doc. No. 24 (Oct. 21, 1981), available at <http://www.unhcr.org/cgi-bin/texis/vtx/print?tbl=EXCOMid=3ae68c43a4>. Contrary to Article 34 of the Refugee Convention, which specifies that host countries “shall as far as possible facilitate the assimilation and naturalization of refugees,” U.S. laws do not provide a pathway for refugees granted withholding to naturalize.

<sup>87</sup> UNHCR, Refugee Status Determination 2.2.2.2 (2005), available at [www.unhcr.org/publ/PUBL/43144dc52.pdf](http://www.unhcr.org/publ/PUBL/43144dc52.pdf). The burden of showing a “well-founded fear” is satisfied if there is a “reasonable possibility that the applicant would face some form of harm if returned to the country of origin . . .” *Id.*

<sup>88</sup> *INS v. Stevic*, 467 U.S. 407, 424 (1984).

sentences of five years or more. Mark McAllister, originally from Northern Ireland, was barred from withholding and asylum because of a conviction for three counts of possession with intent to distribute the drug known as ecstasy. McAllister feared persecution because of his family's political opinion in Ireland. Both of his parents were harassed and arrested by the Royal Ulster Constabulary because of their activities with the Irish National Liberation Army. The family's house was repeatedly shot at while the family was at home. Despite McAllister's legitimate and well-founded fear of persecution, the U.S. immigration authorities categorically denied him withholding of removal based on a determination that his conviction was an aggravated felony and a particularly serious crime.<sup>89</sup>

As this example illustrates, by categorically denying withholding of removal to non-citizens with five-year sentences for aggravated felonies, U.S. immigration laws fail to protect refugees from *refoulement*. This failure constitutes a violation of the American Declaration, as considered alongside the Refugee Convention.

---

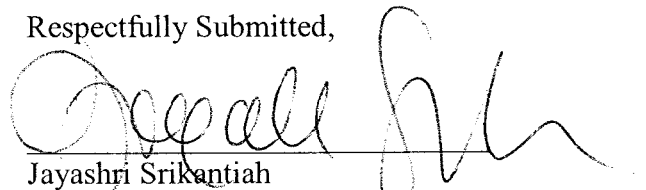
<sup>89</sup> See HRW Report, at text accompanying footnote 223. See also *McAllister v. Ashcroft*, 2004 U.S. Dist LEXIS 29598 (D. N.J. July 21, 2004).

**V. CONCLUSION**

For all the reasons more fully stated herein, Amicus Human Rights Watch urges the Honorable Commission to find that U.S. immigration laws imposing mandatory deportation violate Articles V, VI, VII, XVIII, XXVI, and XXVII of the American Declaration.

Date: June 6, 2007

Respectfully Submitted,

A handwritten signature in black ink, appearing to read 'Jayashri Srikanthiah', written over a horizontal line.

Jayashri Srikanthiah  
Stanford Immigrants' Rights Clinic  
Stanford Law School  
*Counsel for Amicus Curiae*  
*Human Rights Watch*