

OEA/Ser.L/V/II.
Doc. 279
23 September 2020
Original: English

REPORT No. 263/20
PETITION 888-11
REPORT ON INADMISSIBILITY

MUSTAFA OZSUSAMLAR
UNITED STATES OF AMERICA

Approved electronically by the Commission on September 23, 2020.

Cite as: IACHR, Report No. 263/20. Petition 888-11. Inadmissibility. Mustafa Ozsusamlar.
United States of America. September 23, 2020.

I. INFORMATION ABOUT THE PETITION

Petitioner	Mustafa Ozsusamlar
Alleged victim	Mustafa Ozsusamlar
Respondent State	United States of America
Rights invoked	None specified

II. PROCEEDINGS BEFORE THE IACHR

Filing of the petition	June 29, 2011
Additional information received during initial review	September 30, 2011
Notification of the petition	December 17, 2015
State's first response	March 28, 2017
Additional observations from the petitioner	November 10 and 27, 2017

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	N/A
Exhaustion or exception to the exhaustion of remedies	Yes, in terms of Section VI
Timeliness of the petition	Yes, in terms of Section VI

V. SUMMARY OF ALLEGED FACTS

1. Mustafa Ozsusamlar, the petitioner and alleged victim, claims that his human rights were violated by the United States upon his arrest and further trial, conviction and detention. The alleged victim was born in Turkey, and has been a naturalized American citizen since 1998. He was arrested on December 5, 2001 in Washington D.C. and charged with conspiracy to bribe a public official, bribery of a public official; conspiracy to commit fraud in connection with identification documents, fraud in connection with identification documents; conspiracy to transport undocumented aliens, and transportation of undocumented aliens. He was tried and convicted before a jury and found guilty on May 14, 2004. On February 1, 2007, he was sentenced to 235 months in prison and three years of supervised release. The petitioner alleges unlawful arrest and search, discriminatory treatment, violations of his due process guarantees, lack of access to health services and violations to the Vienna Convention on Consular Relations.

2. The petitioner claims that he was unlawfully arrested while he was in a rented van that was legally parked on a public street. He claims that the arresting officer approached and interrogated him because of his "perceived race" as a "middle easterner", and subsequently arrested him because he believed he was a Muslim. The petitioner alleges that he and his van were searched without a warrant. He states that he was taken to U.S. Immigration headquarters after his arrest and questioned without being informed of his *Miranda* rights.¹ The petitioner additionally alleges irregularities at his trial and subsequent sentencing. He claims that the federal judge who sentenced him on February 1, 2007 conspired with United States prosecutors and the petitioner's own defense counsel to deny him a fair trial. He further alleges that his defense counsel

¹ See *Miranda v. Arizona*, 384 U.S. 436, [1966] (held that it is a constitutional violation for the police to fail to warn an arrested individual of his right to remain silent, right to retain an attorney or have an attorney provided for him if he cannot afford one, and that anything the arrested individual may be used him in a court of law.)

intentionally failed to adequately cross examine key witnesses and raise “Speedy Trial Act” objections, in violation of his Sixth Amendment rights.² Finally, the petitioner states that his sentencing was based on “aggravating factors” that were never proven by the United States.

3. The petitioner appealed his conviction to the United States Court of Appeals for the Second Circuit on May 22, 2008, focusing on three due process claims arising from his arrest³ and argued that all evidence gained as a result of his arrest should have been ruled inadmissible at trial. On May 22, 2008, the Court of Appeals ruled that the arresting officer’s conduct did not violate the petitioner’s due process constitutional rights, finding that the initial contact between the petitioner and the arresting officer was consensual, and that the officer had reasonable suspicion to detain the petitioner⁴.

5. The petitioner first raised claims related to his alleged due process violations in a *habeas corpus* petition filed in the U.S. District Court for the S.D.N.Y. on April 7, 2009, in which he alleged that: a) his counsel provided ineffective assistance; b) his sentence was unreasonable; c) his Sixth Amendment right to a speedy trial was violated; d) and his *Miranda* rights were violated. The U.S. District Court for the S.D.N.Y. denied the petition on all four grounds on January 7, 2010, finding that the petitioner received effective counsel, that the time between his arrest and trial did not violate the “Speedy Trial Act”, that the petitioner failed to demonstrate a violation of his due process rights and that the record supported the sentence, including that the officers would have made any statement before having his *Miranda* rights read to him.⁵ The petitioner sought a certificate of appealability from the Second Circuit Court of Appeals, which was denied on July 15, 2010. Two months after the appellate court’s denial, on September 8, 2010, the petitioner filed a new motion with the U.S. District Court for the S.D.N.Y., to amend his original *habeas corpus* petition with two new claims. Both of these claims alleged ineffective assistance of counsel at trial.⁶ On August 28, 2013, the U.S. District Court for the S.D.N.Y. ruled that this new motion was untimely, and that he raised new claims that did not “relate back” to his initial *habeas corpus* petition.

6. On December 10, 2013, the petitioner filed a “Complaint of Judicial Misconduct or Disability” against the sentencing judge before the Judicial Council of the Second Circuit Court of Appeals. The complaint alleged gross misconduct by the judge⁷. The Chief Judge for the Second Circuit Court of Appeals conducted an investigation, including an exhaustive review of the trial transcript, and dismissed all allegations as meritless.

7. Between 2005 and 2014, the petitioner filed several additional federal lawsuits against three of his criminal defense attorneys (alleging conspiring with the prosecution), two Assistant United States Attorneys (alleging facilitating perjury in witnesses, presenting false evidence, and conspiring to deprive petitioner of a fair trial), and an undercover FBI agent (alleging perjury). All of these lawsuits were considered

² Following 18 USCS § 3161(c)(1), “in any case in which a plea of not guilty is entered, the trial of a defendant charged in an information or indictment with the commission of an offense shall commence within seventy days from the filing date [and making public] of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs.”

³ a) Petitioner claims the arresting officer lacked reasonable suspicion to justify his initial contact with petitioner; b) the arresting officer did not have reasonable suspicion to justify detaining him; c) that he was coerced into giving to police falsified DMV license forms.

⁴ *United States v. Ozsusamlar*, 278 Fed. Appx. 75 (2d Cir. 2008) The Second Circuit also found that the officer did not use coercion to obtain evidence, as the petitioner voluntarily turned over that evidence.

⁵ First, the Court indicated that petitioner’s counsel presented mitigating evidence at sentencing related to his age, health, and charitable work and discussed petitioner’s willingness to serve as an informant with the United States. Second, the Court ruled that the delays in Plaintiff’s trial were reasonable due to petitioner’s attempt to substitute new counsel, trial preparation, petitioner’s travel to Washington D.C, and that “a continuance with an exclusion of time under the Act served the interests of Justice.” Third, the Court found that petitioner did not identify any statements in the officer’s testimony that occurred before he was read his *Miranda* rights. Finally, the Court found that the U.S. District Court for the S.D.N.Y. had made specific factual findings with respect to each aggravating factor, and considered all mitigating factors including the petitioner’s charitable work and advanced age. The Court noted that petitioner raised no new evidence or arguments in his *habeas corpus* petition that would lead the Court to question the decisions that were made during sentencing.

⁶ The first claim alleges petitioner’s counsel failed to object to the admission into evidence of a letter written by petitioner, and the second claim asserted that counsel failed to cross examine four key witnesses.

⁷ These claims included: transferring the case from Washington, D.C., to New York to “get a jury against middle eastern people”; intentionally allowing perjured, racist testimony; making racist comments to the jury that petitioner was Muslim; sleeping “constantly” in the court room; having a history as a “call-girl”; “suffering from a cocaine overdose” during trial; asking to be informed when petitioner was released from prison, and being “busted by New York police for harboring and employing [undocumented immigrants].”

and dismissed by various courts.⁸ Notably, all of these lawsuits were filed *in forma pauperis*, which allows litigants who have limited funds to file federal lawsuits for free, without having to pay filing fees. On March 12, 2014, the petitioner's status and ability to file *in forma pauperis* was revoked by the United States District Court for the S.D.N.Y., after he was found to have filed his fifth duplicative and meritless lawsuit; pursuant to federal statute, 28 U.S.C. § 1915(g), if a litigant files three or more meritless or duplicative lawsuits *in forma pauperis*, he is barred from filing additional lawsuits free of charge.

8. Finally, the petitioner denounces the conditions of his incarceration, alleging harassment, discriminatory treatment and violation of his correspondence, and contending that he is held in CMU or SHU units with inmates convicted on terrorism charges. On December 15, 2008, the petitioner filed a Request for Administrative Remedy with the Bureau of Prisoners, alleging that he was being prevented from calling the Turkish Consulate.⁹ The Correctional Counselor and the Administrator of National Inmate Appeals both told him that if he added the Turkish Consulate's number to his "phone list" he would be able to contact the Consulate. Additionally, he alleges that from August 4, 2008, until this petition was submitted on December 11, 2011, he was deprived of necessary medical treatment by prison staff. In September 2011, the petitioner filed a constitutional lawsuit before the U.S. District Court for the Southern District of Illinois against the United States Penitentiary, Marion, Clinical Director Dr. David Szoke¹⁰, in which he alleged that Dr. Szoke was "deliberately indifferent" to his medical needs, involving his kidney stones, inguinal hernia, dental problems, and a "head infection." In an opinion dated March 30, 2015, the Court granted summary judgement in favor of Dr. Szoke regarding all four allegations¹¹, finding that the defendant had appropriately monitored and treated the petitioner's conditions, and that some claims were meritless because the defendant was absent from USP Marion for seven of the eight months the petitioner complained of pain, and finally that he had no control over dental treatment procedures. The petitioner appealed this dismissal to the Court of Appeals for the Seventh Circuit, which in turn dismissed the appeal on October 28, 2016, for failure to pay the requisite filing fee. The petitioner's appeal, along with the original constitutional action he filed in 2011, were all filed *in forma pauperis*, while the petitioner was barred from filing additional lawsuits *in forma pauperis* in 2014. The Seventh Circuit Court found that the petitioner "perpetrated a fraud on the district court and this court by not disclosing his ineligibility to proceed *in forma pauperis*."¹²

9. For its part, the State submits that the petitioner has not demonstrated that his petition meets the admissibility requirements under the IACHR's Rules of Procedure. The State argues that the petitioner did not exhaust domestic remedies related to his federal court lawsuits before submitting his petition as per Article 31 of the Rules of Procedure, as well as he continued to file lawsuits after he filed this petition before

⁸ See *Ozsusamlar v. Tulman*, 2008 U.S. Dist. LEXIS 125656 (S.D.N.Y. June 27, 2008) (dismissing complaint for failure to state claim and warning of consequences of accumulating "three-strikes" for filing meritless lawsuits); *Ozsusamlar v. Southwell*, 2007 U.S. Dist. LEXIS 104193 (S.D.N.Y. June 18, 2007) (dismissing complaint for failure to state claim and for asserting claims against immune party); *Ozsusamlar v. Southwell*, U.S. App. LEXIS 29914 (2nd Cir. June 25, 2009) (dismissing appeal because it lacked "arguable basis in law or fact"); *Ozsusamlar v. Campanella*, 2006 U.S. Dist. LEXIS 102315 (S.D.N.Y. July 18, 2006) (dismissing complaint "pursuant to 28 U.S.C. § 1915(e)(2)"); see also *Ozsusamlar v. Ponds*, 2004 U.S. Dist. LEXIS 32627 (S.D.N.Y. Mar. 16, 2004) (explaining that complaint was being dismissed for lack of subject-matter jurisdiction, improper venue, and failure to state a claim).

⁹ Pursuant to 20 Ill. Adm. Code 504.810, as a prerequisite to filing a Request for Administrative Remedy, petitioner was required to attempt to informally settle his complaint with a Correctional Counselor. The Correctional Counselor's Comments section of the Request for Administrative Remedy form states that if petitioner adds the Turkish Consulate's number to his "phone list," his calls to the Consulate will not count against his set telephone call allotment. On June 1, 2009, Harrell Watts, Administrator of National Inmate Appeals, responded to petitioner's Request for Administrative Remedy with a letter repeating the Correctional Counselor's instructions.

¹⁰ Specifically, petitioner filed claims pursuant to *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971) (establishing a cause of action for plaintiffs when a federal officer, who is acting under the color of federal authority, violates a plaintiff's constitutional rights.)

¹¹ Regarding petitioner's kidney stones, the Court found that Dr. Szoke appropriately monitored petitioner's condition to make sure it did not worsen, and prescribed ibuprofen for his pain. The Court ruled that Dr. Szoke's treatment for the hernia was appropriate because petitioner never claimed it cause him pain and the surgery consultants Dr. Szoke eventually referred petitioner to agreed that surgery was unnecessary. The Court decided that petitioner's dental claims were meritless because Dr. Szoke was absent from USP Marion for seven of the eight months petitioner complained of pain, and Dr. Szoke had no control over dental treatment procedures. Finally, the Court ruled that Defendant had no awareness of petitioner's condition during the six weeks he claimed to be bed ridden with a "head infection." The Court also noted that there was no evidence that Dr. Szoke was aware that petitioner did not have the necessary funds to acquire the antihistamines he suggested petitioner buy from the Commissary. See *Ozsusamlar v. Szoke*, 2015 U.S. Dist. LEXIS 40384, at *20 (S.D. Ill. Mar. 30, 2015).

¹² *Ozsusamlar v. Szoke*, 669 F. App'x 795, 797 (7th Cir. 2016) (Explaining that Ozsusamlar sought leave from the district court to proceed *in forma pauperis* on appeal without disclosing his three-strike status in 2015, and as a result the district court granted *in forma pauperis* status.)

the IACHR. Additionally, the petition is devoid of any information regarding the timeliness of the petition, as is required by Article 28.7. The petitioner has also not demonstrated in what way he “was denied access to the remedies under domestic laws and ha[s] been prevented from exhausting them”. Finally, the State argues that the petition does not state facts that tends to demonstrate a violation of the rights contained in the Declaration.

10. The State contends that it counts with robust due process procedures, including the right to appeal a conviction and sentence, the right to further post-conviction review through the writ of *habeas corpus*, and the right of all to file a case in court to challenge actions that deprive persons of their constitutional rights. The petitioner can and have made use of some of these procedures and safeguards. The State indicates that the petitioner is, as of 2016, currently addressing his legal issues through a Title 28 U.S.C. Section 2255 petition in the US Court of Appeals for the Second Circuit in New York, a remedy aimed at correcting an erroneous sentence. Additionally, the State contends that the petitioner filed at least 26 cases in federal courts, and challenges against alleged mistreatment by the BOP. The State indicates that one case was filed on April 20, 2015, before the Seventh Circuit U.S. Court of Appeals and that a decision of March 30, 2015, comprehensively addressed issues relating to treatment of the petitioner in federal prison. The appeal of such decision is still pending as of March 14, 2016¹³. Thus, the petitioner has clearly not exhausted his remedies in domestic courts.

11. Additionally, the State submits that the petitioner presented numerous requests for administrative remedies for allegation relating to his treatment in prison, which when denied by the federal Bureau of Prisons contained a response providing specific explanations of how to seek further review. The petitioner has provided no information indicating whether he ever sought further review in accordance with those instructions.

12. The State further contends that the petition does not state facts that tend to establish a violation of the rights in the American Declaration, as required under the Rules of Procedure. Notably, the petitioner has presented a complaint dated September 30, 2011, with allegations that US rights, rules and Vienna Convention on Consular Relations have been violated, without however referring to any of the provisions of the American Declaration or how they are implicated in the petitioner’s case. The petitioner’s exhibits include correspondence from the Turkish Consulate in Chicago, showing that he was able to correspond successfully with Turkish consular authorities. Finally, the exhibits make clear that the BOP informed the petitioner about how to contact consular officers from Turkey and such calls would not count against the petitioner’s allotment of calls permitted from prison.

VI. EXHAUSTION OF DOMESTIC REMEDIES AND TIMELINESS OF THE PETITION

13. The Commission notes that the petitioner states he was denied access to the remedies under domestic laws and have been prevented from exhausting same. However, the petitioner presents no evidence to support his statements regarding exhaustion or how he would have been prevented from exhausting domestic remedies regarding any of his claims. The Commission notes that, for its part, the State argues that the petitioner did not exhaust domestic remedies related to his federal court lawsuits before submitting his petition and failed to exhaust the domestic remedies in time since he continued to file lawsuits after the filing of the petition in front of the Commission. The State refers to the “robust due process procedures” afforded to the petitioner and the adequacy of these remedies for addressing his alleged violations, including the right to appeal a conviction and sentence, the right to further post-conviction review and the right to file a case in court challenging actions that deprive persons of their constitutional rights, and indicate that these remedies are still available to the petitioner, even while he is incarcerated. The State argues that the petitioner has failed to comply with Article 31 requirements by failing to seek further review of prison administrative decisions that denied him relief, where the responses provided specific explanations on how to do so.

14. The Commission notes that the petitioner appealed his conviction to the United States Court of Appeals for the Second Circuit on May 22, 2008. On May 22, 2008, the Court of Appeals rejected his claim. On April 7, 2009, the petitioner filed a *habeas corpus* petition before the U.S. District Court for the S.D.N.Y alleging ineffective assistance, unreasonable sentence and violations to his constitutional rights. The U.S. District Court for the S.D.N.Y. denied the petition on all grounds on January 7, 2010 and on July 15, 2010, the petitioner was denied a certificate of appealability by the Second Circuit Court of Appeals. The Commission concludes that this

¹³ The appeal was dismissed on October 28, 2016, on the grounds that the petitioner had perpetrated a fraud by not disclosing his ineligibility to proceed *in forma pauperis*.

decision exhausted the domestic remedies, in accordance with Article 31.1.a of the Rules of procedure. However, given that the petition before the IACHR was received on June 29, 2011, the Commission concludes that it fails to comply with the six-month period established in Article 32.1 b of the Rules of procedure.

15. The Commission observes that on September 8, 2010, the petitioner filed a new motion with the U.S. District Court for the S.D.N.Y., to amend his original *habeas corpus* petition with two new claims. On August 28, 2013, the U.S. District Court for the S.D.N.Y. rejected the motion, ruling that it was untimely, and that the petitioner had raised new claims that did not “relate back” to his initial *habeas corpus* petition. The petitioner does not allege, nor does the record show, that he sought to appeal the *habeas corpus* denial before the Court of Appeals. Accordingly, the Commission finds that the domestic remedies were not exhausted.

16. On December 15, 2008, the petitioner filed a Request for Administrative Remedy with the Bureau of Prisoners, alleging that he was being prevented from calling the Turkish Consulate. The Correctional Counselor and the Administrator of National Inmate Appeals both told him that if he added the Turkish Consulate’s number to his “phone list” he would be able to contact the Consulate. The record does not indicate, nor does the petitioner allege, that he has appealed this finding, or that he has taken any further actions to remedy this situation. Additionally, the Commission notes that the petitioner is an American citizen and that the record contains communication from the Turkish consulate in Chicago, addressed to the petitioner.

17. On December 10, 2013, the petitioner filed a “Complaint of Judicial Misconduct or Disability” against the sentencing judge, alleging gross misconduct, before the Judicial Council of the Second Circuit Court of Appeals. The complaint was dismissed. Between 2005 and 2014, the petitioner filed several additional federal lawsuits against three of his criminal defense attorneys (alleging conspiring with the prosecution), two Assistant United States Attorneys (alleging facilitating perjury in witnesses, presenting false evidence, and conspiring to deprive petitioner of a fair trial), and an undercover FBI agent (alleging perjury). They were all dismissed¹⁴. The Commission observes that petitioner did not appeal any of his losses in these cases to the Court of Appeals for the Second Circuit, and thus conclude that the domestic remedies were not exhausted.

18. The Commission finally notes that, in September 2011, the petitioner filed a constitutional lawsuit before the U.S. District Court for the Southern District of Illinois against the United States Penitentiary, Marion, Clinical Director Dr. David Szoke. On March 30, 2015, the Court granted summary judgement in favor of Dr. Szoke regarding all allegations. The petitioner appealed to the Court of Appeals for the Seventh Circuit, which in turn dismissed the appeal on October 28, 2016, for failure to pay the requisite filing fee. The Commission recalls that petitioners must exhaust domestic remedies in accordance with domestic procedural legislation. The Commission cannot regard the petitioner as having duly complied with the requirement of prior exhaustion of domestic remedies if said recourse has been rejected on reasonable, not arbitrary, procedural grounds. It does not appear that the petitioner tried to correct the situation, and, accordingly, the Commission cannot conclude that the domestic remedies were exhausted.

VIII. DECISION

1. To find the instant petition inadmissible;
2. To notify the parties of this decision; and to publish this decision and include it in its Annual Report to the General Assembly of the Organization of American States.

Approved by the Inter-American Commission on Human Rights on the 23rd day of the month of September, 2020. Joel Hernández, President; Flávia Piovesan, Second Vice President; Margarete May Macaulay, and Julissa Mantilla Falcón, Commissioners.

¹⁴ See *Ozsusamlar v. Tulman*, 2008 U.S. Dist. LEXIS 125656 (S.D.N.Y. June 27, 2008) (dismissing complaint for failure to state claim and warning of consequences of accumulating “three-strikes” for filing meritless lawsuits); *Ozsusamlar v. Southwell*, 2007 U.S. Dist. LEXIS 104193 (S.D.N.Y. June 18, 2007) (dismissing complaint for failure to state claim and for asserting claims against immune party); *Ozsusamlar v. Southwell*, U.S. App. LEXIS 29914 (2nd Cir. June 25, 2009) (dismissing appeal because it lacked “arguable basis in law or fact”); *Ozsusamlar v. Campanella*, 2006 U.S. Dist. LEXIS 102315 (S.D.N.Y. July 18, 2006) (dismissing complaint “pursuant to 28 U.S.C. § 1915(e)(2)”; see also *Ozsusamlar v. Ponds*, 2004 U.S. Dist. LEXIS 32627 (S.D.N.Y. Mar. 16, 2004) (explaining that complaint was being dismissed for lack of subject-matter jurisdiction, improper venue, and failure to state a claim).