ORIGINAL

No. 03-10796

Supreme Court, U.S.
FILED
MAR 0 1 2004
OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

IN RE OLUDARE OGUNDE, et al. — PETITIONER
(Your Name)

VS.

_____ — RESPONDENT(S)

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

The petitioner asks leave to file the attached petition for a writ of certiorari without prepayment of costs and to proceed *in forma pauperis.*

[✓] Petitioner has previously been granted leave to proceed *in forma pauperis* in the following court(s):
U.S. District courts in Roanoke and Alexandria, Virginia; U.S Court of Appeals for the Fourth Circuit; U.S. Supreme Court

[ ] Petitioner has **not** previously been granted leave to proceed *in forma pauperis* in any other court.

Petitioner's affidavit or declaration in support of this motion is attached hereto.

(Signature)

03-10796

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 2003

Supreme Court, U.S.
FILED
MAR 0 1 2004
OFFICE OF THE CLERK

In Re: OLUDARE OGUNDE, MIKE PHOUNG,
GEIR THORISSON, ADEBAYO COLLIER,
LEVIN CRUZ, ORELL SHARRIEFF,
GILBERTO BENAVIDES, DAVILO STOUTE,
X. GAO,

Petitioners.

RECORD NO._____

On Petition for Writs of Habeas Corpus

PETITION FOR WRITS OF HABEAS CORPUS

Oludare Ogunde, #244290; Mike Phoung,
#187911; Geir Thorisson, #263907;
Adebayo Collier, #274711; Levin Cruz,
#271462; Orell Sharrieff, #165798;
Gilberto Benavides, #228656; Davilo
Stoute, #199012; X. Gao, #186115

Pro se

Address: Greensville Correctional Center
901 Corrections Way
Jarratt, VA 23870

QUESTIONS PRESENTED

1. Given the United States' consent to the compulsory jurisdiction of the International Court of Justice (ICJ) over Vienna Convention related disputes under the Optional Protocol Concerning the Compulsory Settlement of Disputes, April 24, 1963, Art.I [1970], 21 U.S.T. 326, T.I.A.S. No. 6820, are the courts of the United States bound by the interpretation of the Articles of the Vienna Convention by the ICJ?

2. Does the United States by not informing the petitioners without delay following their arrests of their rights under Article 36, paragraph 1(b), of the Vienna Convention on Consular Relations, and thereby depriving their respective consulate of the possibility to render the assistance provided for by the Convention to the petitioners, breach its obligation to the petitioners under Article 36, paragraph 1, of the Vienna Convention? And if yes, (3) are the convictions and sentences imposed on the petitioners in the Commonwealth of Virginia in violation of Article 36 paragraph 1(b) of the Vienna Convention void?

4. Is the United States under an international obligation not to apply the doctrine of "procedural default," or any other doctrine of its internal law, so as to preclude the exercise of the rights accorded to petitioners, as foreign nationals, under Article 36 of the Vienna Convention?

REASON FOR NOT FILING APPLLICATION IN THE DISTRICT COURT

In conformity with the provision of Title 28, U.S.C §2242 and Rule 20.4(a) of the Rules of the Supreme Court of the United States, petitioners state as follows:

1. That the petition cannot be filed in the state court because the time for filing such petition under state law has expired or because the filing of this petition would constitute a second petition that is barred under Virginia Code §8.01-654(B)(2).

2. That the petitioners are similarly barred from filing this petition in the district court due to the expiration of the one-year statute of limitations prescribed under Title 28, U.S.C § 2244(d)(1). And the requisite standard for filing a second or successive petition under Title 28, U.S.C § 2244(b)(2) cannot be met given the circumstance:

3. That the petitioners cannot exhaust their state remedies because the Commonwealth of Virginia does not have any corrective process available to remedy the violations alleged in this petition.

4. That the issues raised in this petition are premised on the decision of the International Court of Justice at The Hague in the Lagrand case, which decision construes the provisions of the Vienna Convention on Consular Relations in a manner directly opposite to the construction accorded the treaty by this court in Breard v. Greene, 523 US 371, 140L.Ed 2d 529, 118 S,Ct 1352 (1998), and the myriad of lower court cases interpreting the provisions of the treaty.

5. Finally, that the issue presented in this petition is deserving of immediate and expedient resolution by this court, a resolution that would define, once and for all, the circumference of foreign nationals' rights under the treaty and the remedy for its violation.

REASON WHY THE WRIT WILL BE IN AID OF THE COURT'S APPELLATE JURISDICTION AND THE EXCEPTIONAL CIRCUMSTANCES THAT WARRANT THE EXERCISE OF THE COURT'S DISCRETIONARY POWERS

On March 31, 2004, the International Court of Justice at The Hague ordered the United States government to review 51 capital cases in which Mexican nationals were not informed of their right to contact their consular officials as required by the Vienna Convention of 1963. This decision is a Pandora's box that this honorable Court must address now before its content spills over the lower courts. Many foreign nationals, as the petitioners, are currently confined in state and federal prisons in violation of the rights guaranteed under the Vienna Convention. It is foreseeable that thousands of petitions will be filed by these foreign nationals to seek relief in the state and federal courts on the basis of the decision of the ICJ, and many appeals will be pursued should the lower courts refuse to honor the ICJ decision. These numerous filings will inturn end up in this Court on applications for review, and perhaps strain the resources of this Court. For this reason, the granting of this petition to resolve the questions presented will be in aid of the Court's appellate jurisdiction. Through this petition the Court can define the boundaries and application of the ICJ decision. And in doing so, preserve the judicial resources of this Court and the lower courts. In addition, the domestic and international import of the questions raised in this petition is an exceptional circumstance that warrants the exercise of the court's discretionary powers. Perhaps no other case in recent history would affect as many prisoners were this Court to resolve the questions presented.

STATEMENTS OF FACT

The petitioners are foreign nationals imprisoned pursuant to felony convictions in the courts of the Commonwealth of Virginia. They are citizens of nations that are parties to the treaty, Vienna Convention on Consular Relations ("Vienna Convention"). The United States is also a party to this treaty. See 21 U.S.T. 77, T.I.A.S. No. 6820.

Oludare Ogunde, a citizen of Nigeria, was convicted by a jury in Arlington County Circuit Court in 1997 of 15 counts of credit card theft, 2 counts of attempted grand larceny, and 1 count each of credit card forgery and credit card fraud. He was sentenced to 15 years in prison. Also, in 1997, he was convicted upon his guilty pleas in Fairfax County Circuit Court of 1 count each of credit card theft, attempted credit card fraud, attempted credit card forgery, and forging a public record. He was sentenced to a total of 5 years in prison, which sentence is to run consecutively with the Arlington County sentence.

Mike Phoung, a citizen of Laos, was convicted by a jury in Fairfax County Circuit Court in 1991 of 2 counts each of use of firearm, abduction, and robbery. He was sentenced to a total of 121 years in prison.

Geir Thorisson, a citizen of Iceland, was convicted by a jury in Spotsylvania County Circuit Court in 1998 of 1 count each of malicious wounding and robbery. He was sentenced to a total of 20 years in prison.

Adebayo Collier, a citizen of Sierra-Leone, was convicted by a jury in Fairfax County Circuit Court in 1998 of 1 count of abduction. He was sentenced to 20 years in prison with 11 years suspended.

Levin Cruz, a citizen of Honduras, was convicted in 1998 upon his guilty pleas in Alexandria City Circuit Court to 4 counts of robbery. He was sentenced to 25 years in prison with 5 years suspended.

Orell Sharrieff, a citizen of Jamaica, was convicted by a trial judge in Newport News Circuit Court in 1988 of 3 counts of armed robbery. He was sentenced to a total of 43 years in prison.

Gilberto Benavides, a citizen of El Salvador, was convicted in 1995 upon his guilty plea to 1 count of malicious wounding in Fairfax County Circuit Court. He was sentenced to 10 years in prison.

Davilo Stoute, a citizen of Panama, was convicted by a jury in the Circuit Court for the City of Portsmouth in 1992 of 1 count of possession with intent to sell/deliver crack cocaine. He was sentenced to 40 years in prison. In addition, he was convicted in the City of Manassas Circuit Court in 1992 of 1 count each of malicious wounding and use of firearm. He was sentenced to 22 years in prison with 10 years suspended.

X. Gao, a citizen of the Republic of China, was convicted in the Fairfax County Circuit Court in 1991 of 1 count each of robbery, abduction, use of firearm, and burglary. He was sentenced to a total of 52 years.

The ten petitioners named were respectively arrested, convicted, and sentenced to lengthy periods of incarceration by the municipal authorities of the Commonwealth of Virginia without being advised of the rights to consular notification and assistance guaranteed under Article 36, paragraph 1 of the Vienna Convention on Consular Relations.

At the time of their arrests, convictions, and sentences, the petitioners were denied the access to, and the assistance of, their consular officers. With the exception of petitioner Geir Thorisson, none of the petitioners has been afforded access to his consulate officers as of the filing of this petition. And the authorities of the United States or the Commonwealth of Virginia have not taken any steps to advise the petitioners of their rights under the treaty or taken corrective actions to remedy the violations of the rights of the petitioners under Article 36(1).

All the petitioners have exhausted their direct appeals and post-conviction remedies, where available, to no avail. At least in one instance when the violation of Article 36(1) was raised, the federal court, as well as the state court, ruled that the claim was procedurally barred. See Oludare Ogunde v. Director, Virginia Department of Corrections, CA-00-404-AM (E.D.VA.2001); affirmed, Ogunde v. Director, Virginia Department of Corrections, 36 Fed Appx 508 (4th Cir. 2002).

At the very minimum, the presence of the respective consular officers of petitioners' countries of origin would have ensured the general fairness of the criminal proceedings, provided a cultural bridge for the petitioners in an unfamiliar and threatening forum,

forestalled or cushioned the vulnerability of petitioners to interrogations, and enhanced the quality of legal representation afforded the petitioners at the pretrial, trial, and post-trial stages of the criminal process.

The rights of the petitioners to relief in this court is premised on the definitive ruling of the International Court of Justice at The Hague in the Lagrand case (Germany v. United States of America), 2001 I.C.J. 104 (Judgment of June 27, 2001). Significantly, the Lagrand decision expounded that the provisions of Article 36 of the Vienna Convention create individual rights for the detained foreign national, and the laws and regulations of the United States, including the rules of criminal law and procedure, must enable full effect to be given to the purposes for which those rights of the arrested foreign national are intended.