

HENRY & EDWARDS v. JAMAICA

*Case Digest of Gareth Henry and Simone
Carline Edwards v Jamaica at the
Inter-American Commission on Human
Rights*

Human
Dignity
Trust

Prepared February 2021

CASE DIGEST

Gareth Henry and Simone Carline Edwards v Jamaica

Case 13.637

Inter-American Commission on Human Rights

Report No. 400/20, 31 December 2020

[Preliminary merits report 28 September 2019]

Petitioner(s): Gareth Henry and Simone Carline Edwards

Respondent: Jamaica

Alleged Victims: Gareth Henry, Simone Carline Edwards & families

Background:

On 21 December 2011, the Human Dignity Trust initiated a case at the Inter-American Commission on Human Rights (the “*Commission*”) on behalf of leading Jamaican LGBT activist Gareth Henry, with Simone Edwards joining the case in 2014. Both petitioners had been subjected to severe anti-LGBT violence and were forced to flee Jamaica because of the hostile environment and the lack of protection from the state.

The Petition alleged that Jamaica is in violation of its obligations under the American Convention on Human Rights (the “*ACHR*”), the American Declaration on the Rights and Duties of Man (the “*Declaration*”), and other international human rights obligations, by continuing to criminalise private, consensual sexual activity between adult males and by failing to afford adequate protection to all LGBT Jamaicans.

On 2 July 2018, the Commission issued its report determining that the Petition was admissible (IACHR, Report No. 80/18, Petition 1850-11. Admissibility. Gareth Henry, Simone Carline Edwards, and Families. Jamaica. July 2, 2018). The Commission notified the parties and invited them to reach a friendly settlement. No agreement was reached and the Commission proceeded to consider the Petition on its merits.

On 28 September 2019, the Commission issued a confidential decision on the merits of the petition (IACHR, Report No. 159/19, Case 13.637. Merits. Gareth Henry, Simone Carline Edwards and families. Jamaica. September 28, 2019), finding Jamaica in violation of the ACHR and urging the state to repeal the offending laws and take other measures to protect LGBT

Jamaicans. Before making the decision public, the Commission afforded the parties an opportunity to make submissions on Jamaica's implementation of the recommendations.

The petitioners made submissions to the Commission on the Jamaican government's failure to implement the Commission's recommendations, while the Jamaican government did not respond to the Commission's request to comment. The Report was duly finalised and authorised for publication by the Commission on 31 December 2020, and this was communicated to the petitioners on 17 February 2021.

Challenged Provisions:

The Petition sought to challenge the following provisions of the [Offences Against the Person Act 1864](#):

Section 76. Whosoever shall be convicted of the abominable crimes of buggery, committed either with mankind or with any animal, shall be liable to be imprisoned and kept to hard labour for a term not exceeding ten years.

Section 77. Whosoever shall attempt to commit the said abominable crimes, or shall be guilty of any assault with intent to commit the same, or of any indecent assault upon any male person, shall be guilty of a misdemeanour, and being convicted thereof, shall be liable to be imprisoned for a term not exceeding seven years, with or without hard labour.

Section 79. Any male person who, in public or private, commits, or is a party to the commission of, or procures or attempts to procure the commission by any male person of, any act of gross indecency with another male person, shall be guilty of a misdemeanour, and being convicted thereof shall be liable at the discretion of the court to be imprisoned for a term not exceeding two years, with or without hard labour.

In addition, the Petition argued that the following 'savings law' clause of the [Constitution of Jamaica 1962](#) (as amended by Section 2, [Charter of Fundamental Rights and Freedoms \(Constitutional Amendment\) Act 2011](#)) violated Jamaica's obligations under the ACHR, the Declaration and other international human rights instruments, on the basis that it purports to shield the criminalising provisions from constitutional challenge:

Section 13(12) Nothing contained in or done under the authority of any law in force immediately before the commencement of the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011, relating to –

(a) Sexual offences

...

shall be held to be inconsistent with or in contravention of the provisions of this Chapter.

Remedies sought:

The Petition sought the following remedies:

1. The following declarations from the Commission:
 - (i) The enduring criminalisation of private, consensual sexual activity between adult males under sections 76 (“buggery”), 77 (“attempt” to commit buggery) and 79 (“gross indecency” between males) of the Offences Against the Person Act 1864 (the “OAPA”) violates Jamaica’s obligations under the ACHR, the Declaration and other international instruments;
 - (ii) Jamaica’s enactment and maintenance of Section 13(12) of the Constitution of Jamaica, introduced by the Section 2 of the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act 2011 (the “Constitutional Amendment”), shielding the “buggery” and “gross indecency” laws from constitutional challenge, violates Jamaica’s obligations under the ACHR, the Declaration and other international instruments.
 - (iii) Jamaica’s maintenance and enforcement of the “buggery” and “gross indecency” laws and the Constitutional Amendment “have contributed to a social and political environment which is hostile and contrary to the rights of homosexuals in Jamaica”;
 - (iv) Jamaica has “failed to take adequate steps to protect the rights and well-being of Jamaican citizens who are homosexual from mistreatment”, violating its obligations under the ACHR, the Declaration and other international human rights instruments.
2. That the Commission “instruct Jamaica to repeal the buggery laws and the Constitutional Amendment and to take adequate steps to protect its homosexual citizens”, in accordance with its obligations.
3. That the Commission order such other relief as it thinks fit.

The Petition argued that the continuing criminalisation of private, consensual sexual activity between adult males and Jamaica’s failure to protect Jamaican homosexuals violates the following provisions:

- Articles 1 & 24 of the ACHR and Article II of the Declaration (non-discrimination/equal protection)
- Article 2 of the ACHR (domestic legal effects)
- Article 4 of the ACHR and Article I of the Declaration (right to life)
- Article 5 of the ACHR (right to humane treatment)
- Article 11 of the ACHR and Articles V & IX of the Declaration (right to privacy)

- Article 13 of the ACHR and Article IV of the Declaration (freedom of thought and expression)
- Article 16 of the ACHR and Article XXII of the Declaration (freedom of association)
- Article 17.1 of the ACHR and Article V of the Declaration (right to family life)
- Article 22 of the ACHR and Article VIII of the Declaration (freedom of movement)
- Right to judicial protection: Article 25 of the ACHR and Article XVIII of the Declaration (right to judicial protection)
- Article 26 of the ACHR and Article XI of the Declaration (right to health and well-being)
- Jamaica's other obligations under international law, specifically under certain universal human rights treaties to which it is a party, as well as the principles and purposes of the United Nations.

Violations:

The Commission explicitly identified the following violations:

- The right to privacy (Article 11, ACHR) & the right to equal protection (Article 24, ACHR)

"... the Commission concludes that the State of Jamaica is responsible for the violation of the principle of equality and non-discrimination and the right to privacy, as enshrined in Articles 11 and 24 of the American Convention, in connection with the obligations established in Articles 1.1 and 2 of the same instrument, to the detriment of Gareth Henry and Simone Carline Edwards." [para. 85]

- The right to humane treatment (Article 5.1, ACHR) & the right to freedom of movement (Article 22.1, ACHR)

"The IACHR believes that by maintaining Offences Against the Person Act in its legislation, the State has contributed to the perpetration of said violence in the terms indicated above, for which reason it considers that it is responsible for the violations of the right to humane treatment, the freedom of movement and residence as enshrined in Articles 5.1 and 22.1 of the American Convention, in connection with the established obligations in Articles 1.1. and 2 of the same instrument, to the detriment of Gareth Henry and Simone Carline Edwards." [para. 88]

- The principle of legality (Article 9, ACHR)

"The Commission considers that the criminalization of conducts that are part of rights recognized by international human rights law constitutes, per se, a violation of the principle of legality, taking into account the Inter-American standards referred to in the preceding paragraphs.

By virtue of the considerations indicated above, the Commission concludes that the State of Jamaica is responsible for the violation of the principle of legality as enshrined in Article 9 of the American

Convention, in connection with the obligations established in Articles 1.1 and 2 of the same instrument, to the detriment of Gareth Henry and Simone Carline Edwards.” [paras. 92-93]

- The right to judicial protection (Article 25.1, ACHR)

“In the instant case, the Commission notes that the Constitution of Jamaica establishes that sexual offences shall not be held to be inconsistent with or in contravention of the provisions of the Constitution. The State argued that it is possible to challenge the relevant sections of the Offences Against the Person Act, but did not provide evidence of an available and effective remedy.

The Commission recalls that a challenge to sections 76, 77 and 79 of the Offences Against the Person Act was filed in 2013, but it was later withdrawn, and another challenge was filed in 2015, but it has yet to be resolved.

The IACHR considers that the mere presentation of an action does not prove that availability and effectiveness of a remedy... In view of the foregoing, the Commission considers that Gareth Henry and Simone Carline Edwards did not have an effective remedy for the protection against acts that violate their human rights.

By virtue of the considerations indicated above, the Commission concludes that the State of Jamaica is responsible for the violation of the right to judicial protection as enshrined in Article 25.1 of the American Convention, in connection with the obligations established in Articles 1.1. and 2 of the same instrument, to the detriment of Gareth Henry and Simone Carline Edwards.” [paras. 96-99]

Conclusions and Recommendations:

The Commission made the following recommendations to Jamaica in light of the above violations:

1. Provide full reparation – economic compensation and measures of satisfaction – for the human rights violations identified above.
2. Adopt the following measures of non-repetition to prevent similar incidents in the future:
 - Repeal sections 76, 77 and 79 of the OAPA;
 - Adopt anti-discrimination legal framework to prohibit discrimination based on sexual orientation, gender identity or expression – real or perceived – and body diversity;
 - Collect and analyse data on the prevalence and nature of violence and discrimination based on sexual orientation, gender identity or expression – real or perceived – and body diversity;

- Apply due diligence in the prevention, investigation, punishment and reparation of violence against LGBTI persons, whether in the family, community or public sphere and ensure that investigations are not permeated by prejudice;
- Conduct training for Jamaican public officials, particularly judges, prosecutors, public defenders, security forces and the education, employment and health sectors on sexual orientation, gender identity and gender expression, body diversity, and the challenges faced by LGBTI people;
- Ensure Jamaica’s educational programs are designed with a gender perspective – to deconstruct stereotypes and prejudices – and include comprehensive sexuality education in the school curriculum.

Points to note:

- **On the situation for LGBTI people in Jamaica:**

The Commission referred to, among other things, its own 2012 and 2015 reports (and various other materials) which expressed concern with regard to the discrimination and violence experienced by LGBTI people in Jamaica, the lack of anti-discrimination protections, and the impact of criminalising legislation. [paras. 37-44]

- **On the impact of criminalisation:**

“... as stated previously, both the Inter-American Commission and the Inter-American Court, international organizations, and national courts have expressed that there is a link between sodomy laws and human rights abuses against LGBTI persons inasmuch as said laws condone discrimination, stigmatization and violence by providing a social sanction for abuse and contributes to the occurrence of homophobic and transphobic crimes as well as to other abuses. The IACHR has also expressed that the mere existence of sodomy laws can impact mental health by creating anxiety, guilt and depression among LGBTI persons affected by the law.”

In the instant case, the Commission recalls that both Gareth Henry and Simone Carline Edwards have suffered a series of acts of violence against them related to their sexual orientation, including threats of death and physical violence and related to a context of homophobia and violence against LGBTI people in Jamaica. The continuing threats against their lives and integrity forced them to flee Jamaica and seek asylum elsewhere.” [para. 86-87]

- **On international/comparative jurisprudence:**

The Commission drew on the considerable jurisprudence of international/regional human rights mechanisms (*Toonen v Australia*, *Dudgeon v United Kingdom*, *Norris v Ireland*) and national

courts (*Lawrence v Texas*, *National Coalition for Gay and Lesbian Equality & Anr v Minister of Justice*, *Navtej Singh Johar v Union of India*, *Caleb Orozco v Attorney General of Belize*, *Jason Jones v Attorney General of Trinidad & Tobago*) in reaching the view that criminalisation is incompatible with fundamental human rights. [para. 63-76]

- **On the right to equality/non-discrimination:**

“With regards to the principle of equality and non-discrimination, the Commission and the Court have stated that it constitutes a central and fundamental pillar of the Inter-American human rights system. The notion of equality stems directly from the unity of humankind and is inseparable from the essential dignity of the person, in response to which the latter is incompatible with any situation that might lead to treating a given group deemed to be superior with privilege or, inversely, treating a group deemed inferior with hostility or in any way that might discriminate its enjoyment of the rights that are effectively recognized to those who do not consider themselves subject to said situation.” [para. 52]

“... the [Inter-American] Court has stated that the scope of the right to non-discrimination due to sexual orientation is not limited to the fact of being a homosexual per se, but includes its expression and the ensuing consequences in a person’s life. The protection against discrimination based on sexual orientation is not only about less favourable treatment for being lesbian or gay. It also covers discrimination because an individual acts on their sexual orientation, by choosing to engage in consensual sexual activity in private, or to enter into a long-term couple relationship with a partner of the same sex.” [para. 56]

“Both the Inter-American Court and the Commission have already determined that the criminalization of same [sex] consensual relationships violates the principle of equality and non-discrimination and the right to privacy.” [para. 60]

“... the Inter-American Commission has considered that provisions that punish a given group of persons for engaging in a consensual sexual act or practice with another person of the same sex are not admissible, for this is directly at odds with the prohibition on discrimination based on sexual orientation.” [para. 62]

- **On the right to privacy:**

“[The Inter-American Court] also pointed out that “privacy is an ample concept that it not subject to exhaustive definitions and includes, among other protected realms, the sex life and the right to establish and develop relationships with other human beings.” [para. 57]

- **On the right to humane treatment:**

“In cases of arbitrary use of criminal law, the IACHR has considered that the threat of possible arrest, or the mere issuance of an arrest warrant, although not executed, can represent a violation of personal

integrity inasmuch as it causes uncertainty and anxiety and can affect the physical and emotional health of the individual.” [para. 59]

- **On ‘proportionality’ and criminalisation:**

“In this case, however, the Commission deems it unnecessary to analyse the legitimacy of the restrictions and difference of treatment contemplated by the Offences Against the Person Act, because, on the one hand, both the IACHR and the Inter-American Court have already established that the existence of buggery and serious or gross indecency laws is contrary to the rights recognized in the American Convention such as the principle of non-discrimination and the right to privacy.

On the other hand, the Commission recalls that in cases in which the difference of treatment is based on one of the categories forbidden in Article 1.1 of the Convention, such as sexual orientation, the State has the burden to justify its actions on the basis of compelling reasons which implies that the reasons used by the State to justify the restrictions are particularly serious and supported through arguments. In the absence of said justification and the difference in treatment will be presumed unconventional.

The IACHR notes that in the instant case, the State did not present any justification for the interference for the interference in private life and difference in treatment pursuant to the Offences Against the Person Act...” [para. 82-84]