Communication No. 2348/2014 of Nell Toussaint: Author's Comments on Canada's Submissions on Admissibility

Executive Summary

The author rejects Canada's arguments that she does not qualify as a victim of the challenged policy of excluding undocumented migrants from IFHP coverage.

She rejects Canada's suggestion that she could have avoided the effect of Canada's policy of denying IFHP coverage for health care necessary for life to undocumented migrants by seeking to obtain permanent residency before she became ill. The author commenced attempts to regularize her status well before she became ill and took extraordinary measures, including litigation, to overcome financial barriers which barred her from submitting an application for humanitarian and compassionate consideration for permanent residency. She was only able to proceed with an application after the Federal Court of Appeal ordered the Minister to consider her request for a fee waiver, at which time she had already experienced irrevocable harm from the denial of IFHP coverage on the basis of her immigration status.

The author rejects Canada's argument that because she is now receiving health care as a permanent resident her challenge to the exclusion of undocumented migrants from IFHP coverage has become inadmissible as an *actio popularis* or has become moot. The communication does not address the effect of the impugned policy in the abstract. It documents how the policy was applied to the author as an individual and how she was individually harmed by it. She relies on the clear finding of fact by the domestic courts in her case that as a result of the denial of IFHP coverage she suffered severe psychological stress and was exposed to a risk to her life as well as to long-term, and potentially irreversible, negative health consequences.

The author rejects Canada's argument that her communication has become moot merely on account of revisions to IFHP adopted in 2012 which left the exclusion of undocumented migrants in place. A State party may not render a communication moot simply by making changes to policy or legislation which do not in any way address or remedy the substance of the alleged violation.

The author does not agree that the consideration of the communication on the merits should be delayed pending litigation currently underway which challenges the 2012 changes to the IFHP. Those changes affect particular classes of refugee claimants and do not affect the ineligibility of undocumented migrants such as the author who did not make a claim to be a Convention refugee. Only the 2012 changes are being challenged in that litigation, and the claimants in that litigation as well as the court have distinguished the issues in that case from those considered in the author's case. The remedy granted by the Federal Court, now under appeal, declared the 2012 changes of no force and effect but left intact the exclusion of undocumented migrants. Therefore, the author requests that the Committee proceed with the consideration of her communication on the merits.

A. The Author is a Victim of a Violation

i) Clarification of the Facts Regarding the Author's Attempts to Secure Permanent Residency Status

1. Canada incorrectly states that the author applied for permanent residency "after she became ill" and suggests that she could have applied earlier for humanitarian and compassionate consideration of an application for permanent residency, and thus obtained access to health care as a legal resident. In fact, as documented at paragraph 33 of the author's petition, the author first sought to legalize her status at the suggestion of an employer in 2005. She was unable to proceed with an application in the intervening years because she was unable to afford the fee for an application for humanitarian and compassionate consideration. In 2008, on the advice of an immigration consultant, she submitted a request for waiver of the fee for an application for humanitarian and compassionate consideration on the basis of her poverty but was denied. The author then took the extraordinary step of commencing legal action to overturn the Minister's refusal to consider her request for a fee waiver. As documented at paragraph 39 of the petition, this litigation was ongoing at the time that she applied for IFHP coverage and throughout the hearings before the Federal Court and the Federal Court of Appeal into the denial of IFHP coverage for her urgent health care needs. The Federal Court of Appeal only ordered the Minister to consider the author's application for a fee waiver in April 2011, after which time the author proceeded with her application. Due to a change in spousal status, she was able to secure coverage for health care under provincial health insurance on the basis of a spousal sponsorship application in May 2013.

ii) The author's petition is not an *Actio Popularis*

2. Canada argues that because the author has now obtained residency in Canada and as such has access to provincial health care, her challenge to Canada's ongoing policy of denying health care to undocumented migrants is an "*actio popularis*" and hence is inadmissible.

3. With respect, the author submits that Canada's argument entirely misconstrues the Committee's concept of *actio popularis.* In the present case, the author challenges Canada's policy of denying IFHP coverage for health care to undocumented migrants on the basis of immigration status, without regard to whether such denial may place life, personal security, and long term health at risk. The alleged effects of the policy are not submitted "in the abstract." Rather, the author herself experienced particular consequences of the impugned policy. The evidence of these consequences was thoroughly reviewed by the trial judge who held that:

> The evidence before the Court establishes both that the applicant has experienced extreme delay in receiving medical treatment and that **she has suffered severe psychological stress** resulting from the uncertainty surrounding whether she will receive the medical treatment she needs. More importantly, **the**

record before the Court establishes that the applicant's exclusion from IFHP coverage has exposed her to a risk to her life as well as to long-term, and potentially irreversible, negative health consequences.[1]

As documented in the petition, the Federal Court of Appeal upheld these findings and Canada has not contested them. The provision of health care since the author secured legal residency status has neither removed nor provided compensation for the effects of psychological stress or long term health consequences of the denial of health care she suffered when she was an undocumented migrant.

4. An application of the concept of *actio popularis* in the present case would deny standing to victims of violations who have been directly and individually harmed by an impugned law or policy solely on the basis that the continued violation by the state Party is no longer directly affecting the author. A communication from a victim of torture submitted by a victim who had subsequently escaped the torture, for example, submitted both for the purpose of establishing violation of her ICCPR rights and for the purpose of preventing recurrence of such practices on other victims, would be deemed inadmissible. This is certainly not consistent with the Committee's jurisprudence.

5. The author's communication addresses the State Party's policy of excluding undocumented migrants from IFHP coverage, even when life is placed at risk by such denial and even when the denial of access to health care will have long term health consequences. The evidence is clear that the author was individually affected by the impugned policy and that she is not challenging the policy "in the abstract". Therefore in the author's submission, the communication is not an *actio popularis*. Foror the same reason, the fact that the author now has health care coverage does not render her communication moot since it does not eradicate the harm to her health that she was found to have suffered by the denial of health care.

ii) The Petition is not moot

6. Canada argues that the petition ought to be found moot because the 1957 Order in Council establishing the IFHP on which the author's exclusion from coverage was based was replaced by subsequent executive orders in 2012 revising the eligibility for the IFHP. It is noteworthy, however, that Canada does not suggest that the 2012 changes in any way remedied, altered or mitigated the impugned policy. As noted in the author's petition, the 2012 changes to the IFHP altered other aspects of eligibility, denying coverage to additional groups while continuing to deny coverage to undocumented migrants.

7. Canada relies on jurisprudence in which the Committee has found communications to be inadmissible when, at the time of submission of the petition, the State had already abolished an

[1] Nell Toussaint, Communication submitted for Consideration under the First Optional Protocol to the International Covenant on Civil and Political Rights at para 7.

impugned provision,[2] where "the State party has amended the legislation in question, abolishing with retroactive effect the provision in the law which the author considers discriminatory"[3], or where an alleged risk of harm to the author (deportation) was no longer a risk.[4] None of these cases is analogous to the present communication. Canada has not remedied or mitigated in any way the exclusion of undocumented migrants from access to the IFHP and the author has been directly harmed by that exclusion.

8. The finding sought by Canada would undermine the purpose and effect of the Optional Protocol by permitting the state Party to render a communication moot simply by making changes to a program or policy without in any way addressing the substance of the communication. The author notes that in previous cases in which Canada has argued mootness on the basis of changes to impugned legislation or policy, where the substance of the impugned provision or legislation has not been changed, the Committee has not accepted Canada's arguments.[5]

B. Author's Request for Compensation is Admissible

9. Canada argues in paragraphs 30 and 31 of its submission that the author has not exhausted domestic remedies with respect to any claim for monetary compensation for violation of her rights under the ICCPR and that her request that the Committee recommend compensation for the violation of her rights is not admissible. The author urges the Committee to reject this submission on three grounds: i) There were no effective domestic remedies for monetary compensation for breaches of rights under the ICCPR; ii) The author exhausted domestic remedies for monetary compensation for violations for breaches of rights to life, security of the person and non-discrimination under the Canadian Charter; iii)The Committee has previously recommended monetary compensation for violations of Covenant rights where such compensation was found to be required for the State party's compliance with obligations under article 2(3)(a) of the ICCPR. Such recommendations have not depended on victims having initiated separate litigation under domestic law to seek monetary damages.

10. The author's request that the Committee recommend compensation for the effects of the violations of her rights under the ICCPR relies on the State party's recognition of the Committee's competence to consider communications and to provide views as to the state Party's obligations under the Covenant, including obligations under article 2, paragraph 3(a) to

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[2] J. H. W. (name deleted) v. Netherlands, Communication No. 501/1992, U.N. Doc. CCPR/C/48/D/501/1992 (1993) at para 5.2.
[3] A.P.L. v. d.M. v. The Netherlands, Communication No. 478/1991, U.N. Doc. CCPR/C/48/D/478/1991 (1993) at paras 6.2-6.3.
[4] Mrs. Olga Dranichnikov v. Australia, Communication No. 1291/2004, U.N. Doc. CCPR/C/88/D/1291/2004 (2007), para. 6.3.
[5] Ballantyne, Davidson, McIntyre v. Canada, Communications Nos. 359/1989 and 385/1989, U.N. Doc. CCPR/C/47/D/359/1989 and 385/1989/Rev.1 (1993) paras 7.2 - 7.3.

provide a victim of violations of rights under the Covenant with an effective remedy, including compensation as well as to take measures to prevent similar violations in the future.[6]

11. Domestic courts in Canada do not have authority to award monetary compensation for violations of rights under the ICCPR. The author could not have made a claim for compensation for the violation of her rights under the ICCPR before Canada's domestic courts and in this respect there were no domestic remedies to exhaust with respect to compensation for violations of her rights under the ICCPR.

12. The author sought remedies before the domestic courts by way of the protections of the rights to life and non-discrimination in the *Canadian Charter of Rights and Freedoms* (the Charter) – which is the "primary vehicle" in Canada for the provision of effective domestic remedies to violations of rights under international human rights law, and particularly for rights to life, security of the person and non-discrimination under the ICCPR.[7]

13. Under section 24(1) of the Charter, courts of competent jurisdiction may grant such remedies to individuals for infringement of Charter rights as are considered appropriate and just in the circumstances. Such remedies may include, in some circumstances, monetary compensation. In her Notice of Application to the Federal Court the author sought as remedy a declaration that her rights had been violated "and such other directions that this Honourable Court considers appropriate."[8] Had the Federal Court or the Federal Court of Appeal upheld the author's allegations of violations of rights under the Charter, those courts would have had a broad discretion to award appropriate and just remedies, including compensation.

14. Absent a finding of infringement of a Charter right, however, no remedy could be granted to the author by the domestic courts. As the Supreme Court of Canada stated in *Vancouver (City)* v. *Ward*[9] at paragraph 4, in determining whether it is appropriate and just that monetary damages be awarded under section 24(1) of the Charter, the first step in the inquiry is to establish that a Charter right has been breached. No such finding having been made by the domestic courts, they had no jurisdiction to award the author compensation for the severe effects of the denial of IFHP coverage which the courts acknowledged to have occurred.

15. Given the finding by the Federal Court of Appeal that the Charter had not been breached, the author had no prospect of success for any other claim for compensation for the violation of her rights. Therefore, she has exhausted effective domestic remedies with respect to this aspect of her communication.

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[6] Vladimir Petrovich Laptsevich v. Belarus, Communication No. 780/1997, U.N. Doc. CCPR/C/68/D/780/1997 (2000) at para. 10.

[7] Nell Toussaint, Communication submitted for Consideration under the First Optional Protocol to the International Covenant on Civil and Political Rights at paras 62-63.

[8] Notice of Application issued August 10, 2009.

[9] *Vancouver (City)* v. *Ward* [2010] 2 SCR 28, 2010 SCC 27.

16. Moreover, the author submits that in cases such as this one, where the primary issue is with a law or policy which is alleged to have violated Covenant rights, the Committee has not and ought not to require victims to have conducted additional domestic litigation aimed solely at monetary compensation in order for the Committee to include a recommendation of monetary compensation in addition to changes in law or policy. In previous communications in which authors have been found to have exhausted domestic remedies to violations of Covenant rights by way of unsuccessful claims under domestic constitutional rights, the Committee has recommended monetary compensation for violations of Covenant rights, including in cases where victims have not sought monetary damages in the domestic litigation.[10]

17. Similarly, in previous communications with respect to Canada, in which domestic remedies have been pursued by way of unsuccessful claims under the Canadian Charter, the Committee has not required a separate action before domestic courts seeking monetary damages in order to recommend monetary compensation for breaches of Covenant rights. In *Mansour Ahani v. Canada*[11] the Supreme Court had dismissed the author's claim that his rights had been violated under the Canadian Charter.[12] There had been no domestic litigation seeking monetary damages. The Human Rights Committee found in that case that domestic remedies had been exhausted and that Canada had violated articles 9, 13, and 7 of the Covenant. The Committee proceeded to recommend that Canada make reparation to the author if it comes to light that torture was in fact suffered subsequent to deportation, as well as take steps to avoid similar rights violations in the future. [13]

18. The author submits that if the Committee finds that the author's rights under the Covenant have been violated in the present case, it would be consistent with the Committee's jurisprudence to request the State party to provide her with monetary compensation as well as to take steps to ensure that no similar violation should take place in the future.

19. In the alternative, the author submits that the determination of whether compensation is an appropriate remedy in this case should be deferred until the communication has been considered on its merits.

C. Consideration of the Merits Should Not be Deferred Pending the Outcome of Domestic Litigation Directed at a Separate Issue

20. Canada has requested an extension of time for filing its submission until a reasonable time after other human rights issues surrounding the IFHP scheme have been resolved.[14] Canada makes reference to the effect of the decision of the Federal Court in *Canadian Doctors for Refugee Care*

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[10] Mr. Alfonso Ruiz Agudo v. Spain, Communication No. 864/1999, U.N. Doc. CCPR/C/76/D/890/1999 (2002) at paras 4.7, 9.1 and 11.

[11] Mansour Ahani v. Canada Communication No. 1051/2002.

[12] *Ahani v. Canada (Minister of Citizenship and Immigration)* 2002 SCC 2.

[13] Mansour Ahani v. Canada Communication No. 1051/2002 at para 12.

[14] Request for an Extension of Time for Filing and submission of the government of Canada on the Admissibility of the Communication to the Human Rights Committee of Nell Toussaint, Communication No 2348/2014 at paras 34, 37.

v. Canada (Attorney General) [*Canadian Doctors for Refugee Health Care*][15] and its intention to appeal that decision (which appeal has now been launched). The Federal Court found in that case that changes made in 2012 to the IFHP to deny health care to particular classes of refugee claimants and refugee claimants from particular countries of origin violated the right in section 12 of the Canadian Charter "not to be subjected to cruel and unusual treatment of punishment" and the right under section 15 of the Charter to non-discrimination on the ground of national origin. Both findings related solely to the new changes to the program put in place in 2012 and the court did not disturb or part from the finding of the Federal Court and the Federal Court of Appeal in the author's case.

21. The issue raised in the author's petition is therefore unaffected by the appeal in *Canadian Doctors for Refugee Health Care.*[16] The present communication is limited to the denial of IFHP health coverage to an undocumented migrant (without legal status) seeking humanitarian and compassionate consideration for permanent residence. In the Notice of Application for *Canadian Doctors for Refugee Health Care,* the applicants expressly distinguished their claim from the author's on the basis that, unlike the author, those applicants had entered Canada through legal channels as refugee claimants and as such had been eligible for IFHP coverage until the changes implemented in 2012. In upholding the applicants' claims in the *Canadian Doctors for Refugee Health Care* case, the Federal Court was careful to establish that the challenged exclusion of refugee claimants from particular countries is "readily distinguishable from that which confronted the Federal Court of Appeal in *Toussaint*."[17]

22. The determination of the constitutionality of the IFHP in *Canadian Doctors for Refugee Health Care* will therefore have no impact on whether the IFHP violated the rights of the author and continues to violate the rights of undocumented migrants. There are no undocumented migrants among the claimants in that case and no evidentiary record with respect to undocumented migrants. The remedy sought and granted by the Federal Court in *Canadian Doctors for Refugee Health Care* has not altered in any way the denial of health care coverage to undocumented migrants under either the previous or the current provisions of the IFHP which have been declared unconstitutional. In *Canadian Doctors for Refugee Health Care,* the Federal Court declared Orders in Council PC 2012-433 and PC 2012-945 to be of no force or effect but suspended the declaration for four months[18] Canada has appealed that decision to the Federal Court of Appeal and asked the Federal Court of Appeal to stay during the appeal the Federal Court order which declared the 2012 changes to be of no force and effect. The Federal Court of Appeal denied the stay request, noting that in the result "everyone would be in the same position as if the 2012 OIC's had not been adopted."[19]

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[15] *Canadian Doctors For Refugee Care v. Canada* (Attorney general), 2014 FC 651 (CanLII) [*Canadian Doctors For Refugee Care v. Canada*] http://canlii.ca/t/g81sg.

[16] Nell Toussaint, Communication submitted for Consideration under the First Optional Protocol to the International Covenant on Civil and Political Rights at para 31.

[17] *Canadian Doctors for Refugee Health Care* at para 738.

[18] *Ibid* at paras 1089, 1097.

[19] *Attorney General of Canada and Minister of Citizenship and Immigration* v. *Canadian Doctors for Refugee Care et al.,* Order of Webb, J.A. dated October 31, 2014 and Reasons for Order reported at 2014 FCA 252, para. 10

23. Whether the decision of the Federal Court in *Canadian Doctors for Refugee Health Care* is reversed or upheld by the Federal Court of Appeal will not affect in any way whether undocumented migrants will continue to be denied IFHP coverage. The author has no standing to take part in that appeal[20] and does not seek to do so, and submits it would be unfair to delay the consideration of her communication pending lengthy appeal proceedings in another case in which she has no involvement and which does not address the substance of her complaint. The author is in failing health and asks that consideration of the merits of her communication not be delayed.

[20] Canada has taken the position at paragraph 18 of its submissions that the author has no standing to challenge the 2012 changes to the Order in Council.