Communication No. 2348/2014 of Nell Toussaint:

Author's Comments on Canada's Submissions on Admissibility and Merits

Executive Summary

Admissibility

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*. Her 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 she cannot seek a future change to the State party's policy of excluding irregular migrants from IFHP coverage. As is the stated position and practice of the Committee, appropriate remedies for violations of human rights include, where relevant, not only victim-specific remedies but also guarantees of non-repetition, including changes in laws and practices, to prevent similar violations from occurring.

The author rejects Canada's argument that her communication has become moot merely because of her changed circumstances or on account of revisions to IFHP. The alleged violations need not be ongoing in order to be admissible. Moreover, a State party may not render a communication moot simply by making changes to a policy or program which do not in any way address or remedy the substance of the alleged violation.

The author rejects Canada's assertion that provisions in the 2012 revision and 2014 amended coverage that allow for the exercise of Ministerial discretion "in exceptional and compelling circumstances" meet Canada's obligation to ensure that similar violations will not occur in the future. The purpose of the 2012 changes was not to ensure access to necessary care for irregular migrants but rather to exclude classes of refugees from coverage. The fact that only 2 undocumented migrants have benefited from the discretionary provision in 3 years is evidence that it does not ensure non-repetition of the violations of rights experienced by the author.

The author rejects Canada's assertion that she has not exhausted domestic remedies with respect to monetary compensation. Although such compensation is rarely awarded by courts under the *Canadian Charter*, if she had succeeded in her *Charter* claims a court had the authority to "grant such remedies …. as are considered appropriate and just in the circumstances", including monetary compensation.

The author disagrees with Canada's assertion that provinces have primary constitutional authority for health care and that she has not exhausted remedies because she did not bring a constitutional challenge to her ineligibility for coverage under the provincial health care scheme.

Health care is an area of concurrent jurisdiction. The federal government has assumed responsibility for providing health care to immigrants who are ineligible for provincial health insurance and the author pursued an effective remedy by seeking IFHP coverage. The federal program must comply with the *Canadian Charter* and with the Covenant. A challenge to provincial health care on the same grounds would have had no reasonable prospect of success. In the circumstances of the author's precarious health condition it would unduly prolong the exhaustion of her domestic remedies to require her to bring a constitutional challenge to a provincial program for which she was ineligible until she became a permanent resident.

Merits

The author rejects Canada's argument that the Covenant does not impose positive obligations on States under articles 6, 7 and 9(1) and that her claims are inadmissible *ratione materie*. The argument that the ICCPR imposes no positive obligation to provide access to necessary health care is inconsistent with General Comment 6 and with the Committee's jurisprudence.

The author is not claiming a right to health but rather, is claiming that specific rights under the ICCPR have been violated in the context of access to health care through the IFHP. In particular, the right to life, the prohibition on inhuman and degrading treatment or punishment, the right to security of person, and the right to non-discrimination must be fully protected with respect to situations involving access to necessary health care, especially in regard to the most vulnerable groups in society. Irregular migrants fall in the latter category.

The author rejects Canada's argument that emergency and *pro bono* medical care was sufficient to protect Covenant rights. The Federal Court thoroughly reviewed the evidence with respect to access to emergency care and found that the author's life and long term health had been placed at risk. There is extensive evidence from other jurisdictions that emergency care is both insufficient to protect life and health and costly to governments. Moreover, Canada's statement that "irregular migrants are entitled to emergency care under provincial legislation" is not true in all provinces and territories.

The author contests Canada's statement that she herself caused the delay in regularizing her immigration status. It was in fact the refusal by the Immigration Minister to consider a request for fee waiver until ordered by the Federal Court of Appeal to do so that delayed the author securing permanent resident status.

With respect to Canada's argument that immigration status is not a prohibited ground of discrimination under article 26, the author notes that this ground has been widely recognized by human rights bodies. Irregular migrants face widespread discrimination, exclusion, exploitation and abuse. Differential treatment between citizens and non-citizens or between different groups of non-citizens must be undertaken for a legitimate objective and must be proportionate and reasonable.

Depriving irregular migrants of health care cannot be justified as a means of encouraging compliance with immigration laws. Such measures exacerbate the dangers that irregular migrants already endure and corrode the values of equality and dignity that are at the heart of international human rights. Such measures have been shown to be ineffective and costly.

Contents

I. Introduction

1. The author respectfully submits the following comments in response to Canada's April 2, 2015 "Submission on the Admissibility and Merits of the Communication." In light of the important matters that are raised in her communication the author is pleased to submit, along with her comments, two legal opinions from respected international human rights organizations addressing certain issues arising from Canada's submissions.[1] The first is submitted jointly by Amnesty International and Amnesty International Canada (Amnesty International). The second is submitted by the Economic, Social and Cultural Rights Network (ESCR-Net) and was prepared with the active participation of five human rights organizations which are members of that organization's Strategic Litigation Working Group.

2. As a preliminary comment, the author objects to Canada's mischaracterization of her claim as a demand for "free optimal medical care covering all possible medical needs" or a requirement that the State "provide and fully fund, an optimal or perfect level of health care and medications."

3. While the author welcomes Canada's submissions as to the actual health care that may have been available and will address those facts below, she respectfully suggests that Canada's mischaracterization of a claim from an indigent and marginalized migrant whose life was at risk, seeking access to the health care she needed to save her life is unhelpful. As noted in the author's petition, the common pattern of stigmatization of irregular migrants is to characterize them as seeking to take advantage of free benefits in host countries to which they have not contributed. As the former High Commission for Human Rights has noted, however, "the evidence shows that [irregular migrants] do not migrate with the objective of cheating the social security system or misusing the services of the country of destination. They are more likely to be working in a hospital than unfairly using its facilities. They tend to work in sectors that are dirty and dangerous, often doing jobs that local workers are unwilling to do."[2]

[1] The author notes that the Committee has benefitted from similar opinions in other cases, such as the opinion submitted by the International Commission of Jurists in the case of Communication No. 1932/*2010 Irena Fedatova v. The Russian Federation*.

[2] Navi Pillay, Foreward to The Economic, Social and Cultural Rights of Migrants in an Irregular Situation. United Nations, New York and Geneva, 2014 at p. 2.

4. As documented in the petition, the author worked hard in Canada for many years with low pay. Canada states that she "would not have paid any taxes out of her earnings" and hence "would not have made any contribution to the insurance scheme from which she sought to benefit" but in fact the author had taxes deducted from pay slips and for many years paid for any health care needs that arose. The health issues for which she sought coverage under the IFHP were serious and life threatening. Indeed, the long term health consequences of concern to the experts who gave evidence in her case before the Federal Court are, for the author, her present reality.

5. Since 2013 the author has suffered several of the potential consequences of inadequate preventative and diagnostic care for her conditions identified in the expert's reports. She has had a stroke, one of her legs has been amputated above the knee, she has gone blind in one eye, and she receives three to four hours of dialysis three times a week for her kidney. In May 2014 the author suffered an anoxic brain injury when her heart stopped beating for approximately 20 minutes. She is grateful for the quality of care she is currently receiving as someone with regularized residency status, but the reality she faced before her status was regularized was very different. As she described in her affidavit quoted by the Federal Court:

> I feel that administrators, receptionists, other patients and doctors who do not know the details of my circumstances may have negative ideas about people in my situation. They may think that I have set out to 'take advantage' of Canada's healthcare system, rather than thinking of me as an equal human being, a resident of Canada who has worked hard and contributed to society but who has become ill and needs healthcare to save my life.
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> When people are hostile toward me or do not want to allow me to have access to the healthcare I require, I feel that my life and health are devalued because of my immigration status and my disability. This leaves me depressed and anxious about my vulnerable situation and I have to work hard to maintain my dignity and self-esteem.[3]

6. It is extremely rare for irregular migrants to risk advancing any claim to their fundamental human rights precisely because they are likely to be further stigmatized in the process of claiming their rights. This is the first case in which the Committee has considered a claim of this nature and the author respectfully asks that her claim at least be accurately

[3] *Toussaint v Canada (Attorney General)*, 2010 FC 810 (CanLII) para 13

characterized and treated with the kind of respect that is expected of a process whose purpose is to protect the dignity and rights of all.

II. Admissibility

A. The communication is not an *actio popularis*.

7. As noted in the author's comments on Canada's submissions with respect to admissibility, the communication would fall in the category of *actio popularis* only if the author had not been individually subjected to and harmed by the impugned policy of denying IFHP coverage for necessary health care to irregular migrants on the basis of their immigration status, and if the challenged effects were therefore "in the abstract."[4] The Committee stated in *Aumeeruddy-Cziffra et al* v. *Mauritius*[5], that "no individual can in the abstract by way of an *actio popularis*, challenge a law or practice claimed to be contrary to the Covenant [...] if the law or practice has not already been concretely applied to the detriment of that individual."[6]

8. In this case it was the author herself who experienced the serious adverse consequences of the exclusion of irregular migrants from IFHP coverage. The author relies on concrete evidence of serious harm, reviewed in detail by the Federal Court and on the basis of which the Federal Court found that "the applicant has experienced extreme delay in receiving medical treatment and that she has suffered severe psychological stress …" The Court found that "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." The Court concluded that "the applicant has established a deprivation of her right to life, liberty and security of the person that was caused by her exclusion from the IFHP."[7]

9. The author was granted standing by the domestic courts to challenge her exclusion from the IFHP under the *Canadian Charter of Rights and Freedoms* as an individual alleging that her rights under the Canadian *Charter* had been infringed. She did not advance her claim on the

[4] November 2, 2014 Author's reply to Canada's submissions on admissibility, at paras 3 to 5
[5] *Aumeeruddy-Cziffra et al* v. *Mauritius,* Communication No. 35/1978
[6] *Ibid.*, at para 9.2.
[7] *Toussaint v. Canada (Attorney General),* 2010 FC 810 at para 91

basis of "public interest standing"[8] but as someone directly affected. Her standing to advance a claim that her individual rights had been violated was not contested before the domestic court and the findings of the Federal Court, after reviewing the evidence, substantiated the author's claim of individual harm. As documented in the petition, the Federal Court of Appeal upheld these findings and Canada has not contested them.

B. The request for a change to the policy that violated the author's rights is admissible.

10. Canada argues that if the author's personal rights were violated she would at most be entitled to a personal remedy and that seeking a policy change to prevent similar violations from being repeated in the future is contrary to the requirement of effective remedy in article 2(3). Canada consequently asks that "that the portion of the author's communication that concerns other undocumented migrants and seeks a forward-looking remedy is inadmissible pursuant to Articles 1 and 2 of the Optional Protocol and Rule 96(b) of the Rules of Procedure." (paragraph 17 of Canada's submissions)

11. In response, the author notes that this Committee has made it clear in General Comment 31 that reparation to individuals whose Covenant rights have been violated can include "guarantees of non-repetition and changes in relevant laws and practices." The Committee stated that:

> In general, the purposes of the Covenant would be defeated without an obligation integral to article 2 to take measures to prevent a recurrence of a violation of the Covenant. Accordingly, it has been a frequent practice of the Committee in cases under the Optional Protocol to include in its Views the need for measures, beyond a victim-specific remedy, to be taken to avoid recurrence of the type of violation in question. Such measures may require changes in the State Party's laws or practices.[9]

12. The Committee's jurisprudence with respect to the scope of obligations of State parties under article 2(3) in this respect is consistent with the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human*

[8] An example of public interest standing is found in the case of *Chaoulli v. Quebec (Attorney General)*, [2005] 1 S.C.R. 791, 2005 SCC 35 at para 35. In that case a physician and his patient were granted public interest standing to advance a claim under the *Canadian Charter of Rights and Freedoms* and under Quebec's *Charter of Human Rights and Freedoms*, CQLR c C-12, alleging that restrictions on access to private health insurance placed patients' lives at risk and hence violated the right to life and security of the person.

[9] General Comment 31 at para 17

Rights Law and Serious Violations of International Humanitarian Law [*Principles and Guidelines*] adopted by the General Assembly. The *Principles and Guidelines* affirm that a victim of a violation should be provided with "full and effective reparation" which includes "restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition." "Satisfaction" includes, inter alia, "effective measures aimed at the cessation of continuing violations."[10]

C. The Petition is not moot

i) Changes in the Author's Circumstances Subsequent to the Violation do not render the Communication Moot

13. Canada continues to rely on the argument that the communication is moot because the author, having regularized her immigration status, is now entitled to provincial health care. Canada also relies on the fact that the IFHP that was in place when the author was denied necessary medical care was replaced by the 2012 IFHP. After the 2012 changes to the IFHP were invalidated by order of the Federal Court in the *Canadian Doctors for Refugee Care* decision, they were replaced by a temporary measure, the 2014 IFHP Policy.

14. Canada's arguments regarding mootness are based on the false premise that the harm experienced by the author must be ongoing and that changes in the author's circumstances between the time of the alleged violation and the Committee's consideration of the communication render it moot. This is contrary to the Committee's jurisprudence, particularly in relation to the right to life, where, tragically, many victims who were directly affected at the time of an alleged violation are no longer directly affected at the time the communication is submitted or considered. The author's allegation that her rights were violated by the denial of access to the IFHP because of her immigration status prior to her having been granted legal resident status remains a live dispute that has not been resolved.

[10] Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, Adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005, http://www.ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx

15. The author further submits that the fact that the IFHP has been altered in certain ways since the time when she was denied coverage does not render her communication moot. The Committee has established in previous cases that changes made to impugned laws or policies subsequent to their having been applied to the victim do not retroactively render a communication inadmissible on the basis of mootness.[11]

16. The communication alleges that the author's rights were violated by the policy with respect to eligibility for IFHP that was in place when she sought access to it. Whether the denial of IFHP coverage under the previous programme violated the author's rights under the Covenant and whether she is entitled to a remedy for these violations has not been resolved or rendered moot by subsequent changes to the IFHP.

17. The finding sought by Canada would undermine the purpose and effect of the Optional Protocol by permitting the State party to render a communication inadmissible simply by making changes to a program or policy without addressing the substance of the alleged violation or providing any remedy to victims. 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.[12]

ii) The 2012 and 2014 changes to the IFHP Did not Address the Substance of the Author's Communication and do not render the communication moot.

18. Canada argues that the communication is moot because changes made in 2012 and 2014 allow Ministerial discretion to provide IFHP in exceptional and compelling circumstances. For, clarity, the author's position is that the substance of her allegations relate to the policy in place under the IFHP when she was denied access to necessary health care. The question of whether the rights of irregular migrants in similar situations are adequately protected under the 2012 and 2014 IFHP relates to whether the State party has met its obligation to ensure the non-repetition of the violation, not to whether the author's rights were violated or whether the communication is admissible. The alleged violation under the pre-2012 program was placed before the domestic

[11] *Singer* v. *Canada*, Communication No. 455/1991 para 11.3
[12] *Ballantyne, Davidson, McIntyre* v. *Canada*, Communications Nos. 359/1989 and 385/1989 paras 7.2 - 7.3; *Singer* v. *Canada*, *supra* para 11.3.

courts, and the author relies on the factual findings of the domestic courts to the effect that she was denied because of her irregular immigration status, that her life was placed at risk and that she experienced long term and potentially irreversible health consequences because of the policy in place at that time.

19. However, the author disputes Canada's suggestion that the substance of her allegations have in any way been remedied by subsequent changes to the IFHP in 2012 and 2014. The 2012 changes to the IFHP were implemented not to remedy any exclusions from the IFHP because of immigration status, but on the contrary, to extend such exclusions to classes of refugees. When Canada was questioned about the "cuts to the IFHP" at its recent periodic review, it described the purposes of the 2012 changes as being "to ensure that refugee claimants and rejected refugee claimants do not receive taxpayer funded benefits that are more generous than those provided to Canadian taxpayers."[13] When the 2012 changes were reviewed by the Federal Court, the Court found that the executive had introduced the "2012 changes to the IFHP for the express purpose of inflicting predictable and preventable physical and psychological suffering on many of those seeking the protection of Canada."[14]

20. Canada argues that the discretionary provision in the current IFHP authorizes the Minister to approve federal health insurance coverage to irregular migrants in exceptional and compelling circumstances. In paragraphs 10 to 12 of its observations Canada describes how this discretionary provision first appeared in the 2012 Order in Council[15], and properly points out that this Order in Council was struck down by the Federal Court as unconstitutional, with an appeal pending to the Federal Court of Appeal, and in 2014 was replaced with a new policy that also contained a discretionary provision.

21. It is to be noted that the discretion provided under the 2012 and 2014 changes to the IFHP was not available under the policy that was in place when the author was denied IFHP coverage. It was clear on the evidence that in the author's case, there was no consideration given to whether she should be provided with IFHP coverage because of the life-threatening nature of her condition. The domestic courts found that she was denied access to health care so as to put

[13] List of issues in relation to the sixth periodic report of Canada: Addendum Replies of Canada to the list of issues [Date received: 8 June 2015] CCPR/C/CAN/Q/6/Add.1 para 72.
[14] *Canadian Doctors for Refugee Care* v. *Canada (Attorney general)*, 2014 FC 651 (CanLII), para 587
[15] identified at page 13, footnote 26 of the author's December 28, 2013 communication

her life at risk, with long term health consequences, solely because of her immigration status. It was on the basis of a general policy of denying access to IFHP to those whom Canada refers to as "illegal" migrants that Canada argued, and the courts held, that the violation of the right to life in the author's case was justified. Therefore, Canada's submissions with respect to the provision of discretion in the subsequent changes to the IFHP are only relevant to the question of whether an effective remedy has been put in place to meet the State party's obligation to ensure that similar violations do not take place in the future.

22. In the author's submission, the provision of discretion under the 2012 and the temporary 2014 IFHP policies to provide IFHP coverage "in exceptional and compelling circumstances" does not meet Canada's obligation to ensure that similar violations as experienced by the author will not occur in the future.

23. Canada has not clearly provided in its laws, policies, practices or procedures that having an irregular or so-called "illegal" migration status is not to be considered as a negative factor in accessing IFHP coverage and that such coverage will be provided to irregular migrants where it is necessary for the protection of life, bodily integrity, and long term health. Indeed, the temporary revisions to the IFHP put in place to address the findings of the July 2014 Federal Court decision state only that discretion may be applied to "certain costs related to healthcare", while clarifying that "The IFHP is not intended to cover all migrants who are not covered by provincial or territorial health insurance plans or programs."[16]

24. Moreover, the Federal Court in the *Canadian Doctors for Refugee Care* case found the discretionary coverage provided in the 2012 changes to the IFHP inadequate even for the protection of life and personal security. The Court found that "the existence of Ministerial discretion is not a viable option in emergency medical situations," that it is "not widely known," and that it is "by definition, uncertain."[17]

25. Because any decision of the Minister to grant (or not to grant) coverage "in exceptional and compelling circumstances" is made on "his or her own initiative" arguably it is not

[16] Government of Canada, *Interim Federal Health Program Policies*, Effective Date November 5, 2014 online at http://www.cic.gc.ca/english/department/laws-policy/ifhp.asp

[17] *Canadian Doctors for Refugee Care* v. *Canada (Attorney general)*, 2014 FC 651 (CanLII), paragraphs 290 to 293

reviewable by the courts. Even if it were, both the Federal Court[18] and the Federal Court of Appeal[19] by their decisions in the author's case concerning access to the IFHP have given clear direction to government officials engaged in discretionary decision-making in relation to irregular migrants, that residing "illegally" in Canada is a valid factor to be taken into account in denying coverage. The Federal Court of Appeal decided that Canadian governments can refuse dangerously ill migrants access to medical treatment for the purposing of discouraging "defiance of [Canada's] immigration laws" and not be in violation of any of the principles of fundamental justice.[20]

26. Canada has provided additional information that "discretionary medical coverage has been applied for by at least three such migrants with no legal status in Canada, and granted in two of these cases." In the author's submission, the fact that only two irregular status migrants have been provided any benefits under the IFHP in over three years demonstrates that the discretionary provision under the revised IFHP has failed to ensure that irregular migrants will receive necessary health care.

27. The author therefore submits that both her request for victim-specific remedies for the violation of her rights under the IFHP in place at the time of her application, and her request, in order to ensure non-repetition of the violation, for a change to Canada's continued policy and practice of denying irregular migrants access to the IFHP on the basis of their immigration status raise live issues that have not been rendered moot by any subsequent changes to the IFHP.

D. The Author has Exhausted Domestic Remedies

28. The author relies on the legal opinions submitted by Amnesty International, paragraphs 5 to 8 and ESCR-Net, paragraphs 15 to 18 and paragraph 43 with respect to the exhaustion of domestic remedies. In addition, the author makes the following comments.

[18] *Toussaint v Canada (Attorney General)*, 2010 FC 810 (CanLII) at paragraph 94
[19] *Toussaint v. Canada (Attorney General)*, 2011 FCA 213 (CanLII) at paragraph 76
[20] *Ibid.*

i) The author has exhausted domestic remedies with respect to monetary compensation and that component of the communication is admissible

29. Canada argues that the author's communication is inadmissible for non-exhaustion of domestic remedies because at no time did she claim a right to monetary compensation in Canadian courts.

30. The author relies on her previous submissions responding to this argument, in her November 2, 2014 Comments on Admissibility. In those submissions, the author noted that 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 her rights under the *Canadian Charter of Rights and Freedoms*; and iii) the Committee's previous recommendations for monetary compensation for violations of Covenant rights recommendations have not depended on victims having initiated separate litigation under domestic law to seek monetary damages.

31. Under section 24(1) of the *Canadian 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."[21] 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.

32. 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.

33. 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

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

in order to recommend monetary compensation for breaches of Covenant rights. In *Mansour Ahani* v. *Canada*[22] the Supreme Court of Canada had dismissed the author's claim that his rights had been violated under the Canadian *Charter*.[23] 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. [24]

ii) Canada's federal level of government has assumed responsibility for providing necessary health care to migrants who are ineligible for provincial health insurance and must comply with the Covenant in exercising this responsibility

34. In paragraphs 22 to 27 of Canada's submissions, Canada argues that provinces have primary responsibility for health care, that the federal government provides health care for foreign nationals who are excluded from provincial programs on an "*ex gratia*" basis and that the author failed to exhaust domestic remedies because she did not challenge her exclusion from provincial programs.

35. The author disagrees with this argument and submits that it is contrary to the accepted understanding of both the federal and provincial roles in health care in Canada and the requirements of exhaustion of domestic remedies.

36. The author's position is that health care is an area of concurrent jurisdiction, that the federal government has key responsibilities in this area and that whether or not the IFHP is provided on an *ex gratia* basis or is a constitutional responsibility that falls on the federal government, the federal government has assumed the responsibility for providing health care to migrants who are not eligible for provincial health care insurance and is required to comply with both the *Canadian Charter* and with the Covenant in the exercise of these responsibilities.

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[22] *Mansour Ahani* v. *Canada* Communication No. 1051/2002
[23] *Ahani v. Canada (Minister of Citizenship and Immigration)* 2002 SCC 2
[24] *Mansour Ahani* v. *Canada*, Communication No. 1051/2002 at para 12

37. Both the federal and provincial governments play an important role in the provision of health care in Canada. As explained by the Supreme Court of Canada in *Schneider* v. *The Queen*[25]:

> "Health is not a subject specifically dealt with in the *Constitution Act* either in 1867 or by way of subsequent amendment. It is by the Constitution not assigned either to the federal or provincial legislative authority. Legislation dealing with health matters has been found within the provincial power where the approach in the legislation is to an aspect of health, local in nature. . . On the other hand, federal legislation in relation to "health" can be supported where the dimension of the problem is national rather than local in nature. . . In sum "health" is not a matter which is subject to specific constitutional assignment but instead is an amorphous topic which can be addressed by valid federal or provincial legislation, depending in the circumstances of each case on the nature or scope of the health problem in question."

38. More recently the Supreme Court of Canada has concluded that the delivery of health care services does not constitute a protected core of the provincial power over health care and is not "immune from federal interference".[26]

39. The federal government has constitutional jurisdiction over immigrants.[27] It has assumed responsibility for migrants' health care by providing health care coverage under the IFHP for migrants who are not covered by provincial health insurance and clearly has legislative competence to do so. It is the federal government which has the authority to determine eligibility for the IFHP. It is the federal government which determined, for example, that "illegal" migrants who are victims of trafficking are eligible for IFHP coverage. Exclusion of the author and other irregular migrants from IFHP coverage is a decision made by the federal government. It is her exclusion from IFHP coverage that the author alleges violated her Covenant rights. The author submits it is with respect to that violation that she is obliged to have exhausted her domestic remedies and that she has done so.

40. The IFHP is the only health care scheme in Canada available for migrants prior to their becoming permanent residents.[28] The Federal Court of Appeal observed that when the author

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[25] *Schneider* v. *The Queen*, [1982] 2 SCR 112, 1982 CanLII 26 (SCC), per Estey, J. at pp. 141 and 142

[26] See *Canada (Attorney General)* v. *PHS Community Services Society*, [2011] 3 SCR 134, 2011 SCC 44 (CanLII), para 66.

[27] See paragraph 28, footnote 32 of the author's December 28, 2013 communication.

[28] *Toussaint v Canada (Attorney General)*, 2010 FC 810 (CanLII) paras 81 and 91

initially arrived in Canada she was in Canada legally and was eligible for coverage under the IFHP. She became ineligible when she over-stayed her visa and became, in Canada's terms "illegal" and on this basis was disqualified from IFHP coverage. In contrast, as a newcomer to Canada without permanent resident status, the author never was eligible for coverage under Ontario's provincial health scheme. She only became eligible for provincial health insurance coverage on April 30, 2013, three months following the date she was approved in principle to become a permanent resident.[29]

41. As the author pointed out in paragraph 93, note 114 of her December 28, 2013 communication, in *Irshad (Litigation Guardian of) v. Ontario (Minister of Health)* the residency and immigration status requirements for Ontario's provincial public health care insurance scheme were unsuccessfully challenged on constitutional grounds before the Ontario Court of Appeal. The Supreme Court of Canada refused to hear an appeal from that decision.[30]

42. It has been generally accepted that those who are ineligible for provincial health care because of residency or immigration status under the federal *Immigration and Refugee Protection Act* will rely on the IFHP for access to necessary health care. Thus, in the recent case of *Canadian Doctors for Refugee* Care the Federal Court held that the consequences of denial of access to the IFHP to certain categories of refugee claimants were the responsibility of the federal government and the court ordered that IFHP coverage be reinstated. The Court noted that the decision of the federal government to deny health insurance to categories of refugees was described by the Minister of Health for Ontario as "an abdication of responsibility towards some of the most vulnerable in our society."[31] The Court stated that "although it is commendable that provinces such as Saskatchewan are "filling the gap" on a case-by-case basis, I am not persuaded that ad hoc provincial largesse constitutes a reasonable alternative to funded health insurance coverage."[32]

[29] Author's December 28, 2013 communication, para 6

[30] Application for leave to appeal to the Supreme Court of Canada dismissed September 13, 2001 (Gonthier, Major and Binnie JJ.). S.C.C. File No. 28571. S.C.C. Bulletin, 2001, p. 1582.

[31] *Canadian Doctors for Refugee Care*, para 262

[32] *Ibid.* at para 62

iii) The Denial of IFHP Caused the Author's Rights to be Violated

43. Canada also relies on a statement by the Federal Court of Appeal to the effect that the "operative cause" of the author's difficulties is her exclusion from provincial health care coverage.

44. The author notes that the concept of "operative cause" applied by the Federal Court of Appeal has been rejected in subsequent jurisprudence from the Supreme Court of Canada.[33] The author submits that the approach adopted by the Supreme Court of Canada is consistent with the Committee's approach and that the Committee should therefore not rely on the concept of "operative cause" applied by the Federal Court of Appeal.

45. In *Canada* v. *Bedford*[34] the Supreme Court of Canada held that the standard for causation between a law and the violation of the rights to life and security of the person under section 7 of the *Canadian Charter* is not that of a "direct" causal connection, which is how "operative cause" was used by the Federal Court of Appeal. Rather, the Supreme Court of Canada held that a "sufficient causal connection" is the appropriate standard and that a "sufficient causal connection standard does not require that the impugned government action or law be the only or the dominant cause of the prejudice suffered by the claimant, and is satisfied by a reasonable inference, drawn on a balance of probabilities . . .. A sufficient causal connection is sensitive to the context of the particular case and insists on a real, as opposed to a speculative, link."

46. The "sufficient causal connection" standard supports the finding of the Federal Court that the deprivation of the author's right to life, liberty and security of the person "was caused by her exclusion from the IFHP"[35]. But for the decision to deny IFHP coverage to irregular migrants on the basis of their immigration status, the author would have had access to the health care she required for the protection of life and long term health.

47. The author submits that the causal connection as found by the Federal Court in the author's case is more than sufficient to meet the Committee's standard of causation in relation to

[33] *Canada (Attorney General)* v. *Bedford*, [2013] 3 SCR 1101, 2013 SCC 72 (CanLII)
[34] *Ibid*.
[35] *Toussaint v Canada (Attorney General)*, 2010 FC 810 (CanLII) at paragraph 91

violations of the Covenant, which is that of a "causal link"[36], much the same as the Supreme Court of Canada's standard of "causal connection". In *Lantsova* v. *The Russian Federation* the Committee noted that the "the State party has not refuted the **causal link** between the conditions of the detention of Mr. Lantsov and the fatal deterioration of his state of health." (emphasis added) The Committee found in that case that "the State party failed to take appropriate measures to protect Mr. Lantsov's life", including a failure to provide necessary health care, and concluded that "there has been a violation of paragraph 1 of article 6 of the Covenant."[37]

iv) Exclusion from Provincial Health Care on the Same Grounds Would Unreasonably Prolong the Exhaustion of Domestic Remedies and Would Have No Reasonable Prospect of Success

48. In response to Canada's argument that she was required to initiate a challenge to provincial health care programs in order to have exhausted domestic remedies, the author relies on the opinions of Amnesty International, paragraphs 5 to 8 and ESCR-Net, paragraphs 15 to 18 and paragraph 43. As noted in these opinions, the author has raised the substance of the alleged violation and requested a remedy capable of redressing the violation. This determination of effective remedies must be made on the basis of existing programs and the responsibilities that each level of government has assumed. In the context of the Canadian health care system, the most effective remedy for migrants who are ineligible for provincial health insurance is to secure coverage under the IFHP. Moreover, whether on an *ex gratia* basis or not, having assumed the role of providing health care through the IFHP, the federal government is required to ensure that the IFHP conforms with the Covenant.

49. As noted by Amnesty International (paragraph 8) and ESCR-Net (paragraph 18) a second round of litigation to advance before domestic courts the same claims against a provincial government as have already been advanced in relation to the federal government, would unreasonably prolong the author's attempt to secure domestic remedies. A requirement that similar claims be advanced against every level of government with competence to provide a

[36] *Lantsova* v. *The Russian Federation*, Communication No. 763/1997 at para 9.2
[37] *Ibid.*

remedy would simply create a shield for governments in Canada and other federal states to hide behind complexities of overlapping jurisdiction and internal division of powers.

50. In addition, as stated in the opinion of Amnesty International, litigation against the province on the same grounds would have no reasonable prospect of success. In noting that she had not challenged her exclusion from provincial health insurance, the Federal Court of Appeal did not suggest that such a challenge would have any chance of success. On the contrary, the court found that a violation of the right to life of irregular migrants in the health care context is in accordance with principles of fundamental justice and hence not contrary to section 7 and that immigration status is not a prohibited ground of discrimination under section 15 of the *Charter*. These findings would be equally fatal to a challenge to provincial health insurance restrictions. Such a challenge would have no reasonable prospect of success. Moreover, in the circumstances of the author's precarious health condition it would unduly prolong the exhaustion of her domestic remedies to require her to have started again to pursue provincial health care coverage after she was denied leave to appeal to the Supreme Court of Canada on April 5, 2012, three years following her initial request for coverage under the IFHP in May 2009. The author relies on Article 5(2) (b) of the Optional Protocol and the Committee`s jurisprudence that remedies must be effective and not unreasonably prolonged.[38]

III. Merits

A. Articles 6, 7, 9

51. With respect to the alleged violations of articles 6, 7 and 9, Canada argues that the author was in every important instance able to receive required medical care through access to emergency care in hospitals and *pro bono* care and that the author's own conduct - in particular, her delay in seeking to regularize her status in Canada - resulted in her delay in eligibility for state-funded health insurance. Canada argues that articles 6, 7 and 9(1) of the Covenant do not

[38] See the Committee's Views in Communication 563/1993, *Arellana* v. *Colombia*, paras 8.2 and 10; Communication 612/1995, *Villafañe et al.* v. *Colombia*, paras 5.2, 8.8 and 10; and Communication No. 1556/2007, *Marija and Dragana Novaković* v. *Serbia*.

entitle the author or other undocumented migrants to free, optimal medical care covering all possible health needs.

52. The seriousness of the consequences of the denial of access to coverage for necessary health care were documented in the author's petition and reviewed in detail by the Federal Court. The author relies on her previous submissions and on the findings of the domestic courts to respond to the suggestion that she received all the medical care she needed for the protection of her right to life and security of the person. She emphasizes that there is no reason for the Committee to question the findings of fact made by the Federal Court with respect to the consequences of the denial of IFHP coverage, particularly given the courts' unfavourable response to the author's legal claims. As the Committee has held in previous cases, it is generally for the courts of States parties to the Covenant to evaluate facts and evidence in a particular case, unless it is found that the evaluation was clearly arbitrary or amounted to a denial of natural justice.[39]

53. The following are the author's responses to specific issues raised by Canada with respect to the merits of the allegations of violations of articles 6, 7 and 9(1).

i) The Covenant imposes positive obligations to provide access to health care necessary for the protection of life and bodily integrity

54. Canada argues that Articles 6, 7 and 9(1) protect against intentional infliction of harm, but do not impose positive obligations to provide health insurance for all medical needs of undocumented migrants. On this basis, Canada argues that the substance of the author's allegations is the right to health, a matter which is inadmissible *ratione materie*.

55. The author relies on the legal opinions of ESCR-Net (paragraphs 24 to 27) and Amnesty International (paragraphs 25 to 31) which provide references to this Committee`s commentary and other authority and commentary rejecting a narrow, exclusively "negative rights"

[39] *Mehrez Ben Abde Hamida* v. *Canada*, Communication No. 1544/2007, views adopted on 18 March 2010, para. 8.4; *Tarlue* v. *Canada*, Communication No. 1551/2007, decision on inadmissibility adopted on 27 March 2009, para 7.4; Communication No. 1455/2006, *Kaur* v. *Canada*, decision on inadmissibility adopted on 30 Oct. 2008, para 7.3; Communication No. 1540/2007, *Nakrash* v. *Sweden*, decision on inadmissibility adopted on 30 Oct. 2008, para 7.3; Communication No. 1494/2006, *A.C.* v. *The Netherlands*, decision on inadmissibility adopted on 22 July 2008; *Chadzjian* v. *The Netherlands*, Communication No. 1494/2006, para 8.2

interpretation of Covenant rights. With respect to article 6, the Committee established in General Comment No. 6 that "the right to life has been too often narrowly interpreted. The expression 'inherent right to life' cannot properly be understood in a restrictive manner, and the protection of this right requires that States adopt positive measures."[40] Article 6 should not be interpreted narrowly in the present case in the fashion advanced by Canada.

56. With respect to Canada's argument that if there are positive obligations under articles 6, 7 and 9 to provide access to health care, these are restricted to circumstances of detention, the author notes that such a restriction is inconsistent with the Committee's jurisprudence and with the Committee's insisting that these rights ought not to be interpreted narrowly. Canada argues that the case of *L.M.R.* v. *Argentina* is distinguishable because the victim was denied an abortion which would have been consistent with Argentine law and "the State was considered responsible for its failure to guarantee a procedure to which the author was lawfully entitled." In the author's view, such a consideration may relate to the Committee's finding in that case of a violation of article 26 of the Covenant, but the Committee's finding with respect to articles 6 and 7 made no reference to any requirement that the health care that was denied be guaranteed by law in order for Covenant rights to be engaged.. It would be unreasonable to restrict protection of these Covenant rights to circumstances where the rights are guaranteed in domestic statutes.

57. The author notes that the case of *Marija and Dragana Novaković* v. *Serbia* Communication No. 1556/2007 also did not involve a situation of detention. In that case the Committee considered whether article 6 may apply in cases the victim had received inadequate health care in clinics. The Committee recalled General Comment No. 6 "in which it declared that the protection of the right to life requires that States adopt positive measures to this end. In some cases the Committee has found violations of this treaty obligation."[41] Although the Committee found insufficient evidence that the apparent negligence by individual physicians could be directly attributed to the State, it found a violation of article 2, paragraph 3 in conjunction with article 6 of the Covenant resulting from the State's failure to ensure timely proceedings against the persons responsible for the victim's death and appropriate compensation.[42]

[40] Human Rights Committee, General Comment 6, Article 6 (Sixteenth session, 1982) para 5
[41] Para 7.2
[42] Communication No. 1556/2007, *Marija and Dragana Novaković* v. *Serbia* (2010) para 8

58. Finally, the author notes that the restrictive approach to the obligations with respect to article 6, 7 and 9 would deny vulnerable groups such as irregular migrants the equal protection of Covenant rights. Canada contrasts the circumstances of the author with that of detained persons as follows:

> Unlike detained persons, the author was free to leave Canada at any time. She was free to apply to regularize her immigration status and become eligible for provincial health care coverage. She was free to access any medical care that she could afford or that would be provided to her *pro bono* by Canadian hospitals and medical professionals. Most importantly, she was not denied access to medical care by virtue of not being eligible for state-funded health insurance; she was only not provided all medical care immediately and free of charge.

59. In fact, each statement made by Canada about the author is false. She was impecunious and would not have been able to purchase a plane ticket to leave Canada had she wanted to; she was unable to apply to regularize her immigration status because of the Minister's refusal to waive the fees; she could not afford to purchase her own medical care and she was denied coverage under the IFHP for ANY medical care. The author submits that the consequences of States parties' refusal to provide access to state-funded medical care must be assessed in the context of the vulnerability of those affected. Where a person is unable to afford to pay for medical care, the "right" to purchase health care is an illusory right and does not adequately protect the right to life. The author submits that a State party's responsibility to protect the right to life is not satisfied by leaving vulnerable groups "free" to access any health care they can convince hospital or physicians to provide on a charitable basis. While it is true that States parties have particular obligations to protect the rights of those who have been deprived of liberty, a restriction of positive obligations to circumstances of detention alone would be contrary to the requirement of universality and equal enjoyment of Covenant right.

ii) "Emergency" and "*pro bono*" medical care was insufficient

60. Regarding Canada's argument that access to emergency care in life threatening situations is sufficient to comply with the requirements of the Covenant, the author relies on the opinion of ESCR-Net (paragraphs 24 to 27). As noted in that opinion, access to emergency care in circumstances where life is at risk does not meet a standard of medical care sufficient to protect life, bodily integrity and long term health. The author emphasizes that as documented in her

petition, her complicated medical condition required the ongoing attention of specialist physicians and diagnostic testing as would have been provided under the IFHP, as "necessary health care." Urgent last-minute admission to hospital to prevent her from dying was insufficient to protect her life and health. The Federal Court had the benefit of extensive evidence from physicians and specialists and reviewed in detail some of the author's experiences attempting to secure necessary health care in emergency departments.[43] Notwithstanding, the Court found that extreme delay in obtaining diagnostic and other health care and lack of access to the managed health care she required, endangered the author's life and health.[44]

61. The author disagrees with Canada's observation in paragraph 50 that while she experienced "some delay in obtaining some medical care or medications, she was in every important instance able to receive it. . ." The author experienced "extreme" delay, as found by the Federal Court and quoted in paragraph 49 of Canada's observations. In the same passage the Federal Court found that she also suffered "severe psychological stress from the uncertainty surrounding whether she will receive the medical treatment she needs". Dr. Stephen Hwang, whose August 25, 2009 expert report was quoted from in paragraph 12 of the Federal Court's decision, stated that the author "has already suffered from serious and to some degree irreversible health consequences due to lack of access to appropriate care, which resulted in inadequately treated, uncontrolled diabetes and hypertension." Dr. Gordon Guyatt, whose August 21, 2009 report was also quoted from in paragraph 11 of the Federal Court's decision, stated: "Negotiating *pro bono* care by a number of such doctors is clearly extremely unsatisfactory and potentially dangerous."

62. Canada made the same submission to the Federal Court of Appeal as it makes to this Committee, when it argued to the Court that "in Ontario, where the appellant lives, hospitals cannot deny emergency medical treatment to anyone, when to do so would endanger life: *Public Hospitals Act*, R.S.O. 1990, c. P.40."[45] The Federal Court of Appeal rejected the foregoing submission and stated it was "not prepared to interfere with the Federal Court's factual

[43] *Toussaint v Canada (Attorney General)*, 2010 FC 810 (CanLII) paras 7 to 13
[44] Paragraph 6, author's December 28, 2013 communication
[45] *Toussaint v. Canada (Attorney General)*, 2011 FCA 213 (CanLII) para 59

conclusion that the [author] was exposed to a significant risk to her life and health, a risk significant enough to trigger a violation of her rights to life and security of the person."[46]

63. Subsequent to the author's case, the Federal Court in *Canadian Doctors for Refugee Care* v. *Canada (Attorney general)* reviewed evidence of whether access to emergency care protected the life and health of refugee claimants who had been cut from IFHP eligibility by the 2012 changes. The Court in effect came to the same conclusion as the Federal Court in the author's case, stating "Hospital emergency rooms also do not provide primary health care, nor do they provide the kind of preventative health care (such as diabetic monitoring or treatment for mental health conditions, for example) that would allow patients to avoid the hospital in the first place."[47]

64. Experts are agreed that the restriction of health services for migrants to emergency health care not only deprives them of the health care necessary to the protection of life and long term health, but that denying access to diagnostic and preventative health care may create greater expenses. As noted by Manuel Carballo, the Director of the Centre on Migration and Health in his affidavit provided to the Federal Court in the author's case, "prevention, early diagnosis and treatment of illness in this vulnerable population will provide savings in the longer term, both in terms of relieving suffering and stress and reducing health care costs associated with longer term health problems."[48]

iii) Canada does not provide emergency care to undocumented migrants through provincial legislation across the country

65. Canada's statement in paragraph 93 of its observations that "undocumented migrants such as the author are entitled to emergency or urgent medical care under provincial legislation, such as the Ontario Hospitals Act." is contradicted by a review of applicable provincial legislation.

66. In the provinces of Saskatchewan, Manitoba, Newfoundland and Labrador, and Prince Edward Island, there is no legislation requiring the provision of medical services to individuals

[46] *Ibid*., para 61
[47] *Canadian Doctors for Refugee Care* v. *Canada (Attorney general)*, 2014 FC 651 (CanLII), para 278
[48] See paragraph 43, footnote 49 of the author's December 28, 2013 communication for a link to the affidavit.

who are not entitled to medical services as part of each province's respective provincial health insurance plan. Nor is there such legislation in any of Canada's three territories.

67. In Ontario, where the author resides, section 21 of the *Public Hospitals Act* legislates that a hospital is not required to admit any person as an in-patient "unless by refusal of admission life would thereby be endangered." While this legislation requires that in-patient medical services be provided where there is immediate danger to life, it does not provide access to other medical services that may be required in order to prevent endangering life and thereby protect the right to life.

68. Provisions like the legislation in Ontario exist in British Columbia, Alberta, and New Brunswick, and are similarly insufficient in requiring that adequate medical services be provided to undocumented migrants in order to protect their right to life or security of the person.[49] The legislation from British Columbia and New Brunswick would allow undocumented migrants to receive in-patient medical services. However, like in Ontario, medical services required to protect the right to life or security of the person that are unrelated to hospital admission are not legally available to undocumented migrants whereas such services would be covered by the IFHP. While the Alberta legislation mandates that uninsured persons not be refused admission or other services in an emergency situation, it does not anticipate situations that may not be assessed as an "emergency", but must be addressed in order not to endanger the life of the afflicted person. The author being refused an ultrasound[50] is an example of such a situation where her medical needs did not appear urgent, but where an ultrasound was a crucial step in treating an otherwise life-threatening condition.

69. Legislation in the province of Quebec on its face goes further in protecting the right to life than exists in any other province or territory. In Quebec, under section 7 of *An Act respecting*

[49] Under section 4(1) of British Columbia's *Hospital Act* a hospital "must not refuse to admit a person on account of the person's indigent circumstances." Under section 20(1) of New Brunswick's *Hospital Act* a "a regional health authority shall not refuse to admit a person as a patient to a hospital facility operated by it, if the person, from sickness, disease, injury or other cause, requires hospital services" and under sections 20(2) and 20(3) "a regional health authority may refuse to admit a person as a patient if the person's life is not endangered by the refusal." Under section 38(4) of Alberta's *Hospitals Act*, "no person shall, in an emergency, be refused admission to an approved hospital or be refused the provision of any services by an approved hospital by reason only of the fact that the person is not entitled to receive insured services.

[50] *Toussaint v Canada (Attorney General)*, 2010 FC 810 (CanLII) para 9

health services and social services, "every person whose life or bodily integrity is endangered is entitled to receive the care required by his condition" and "every institution shall, where requested, ensure that such care is provided."

iv) The author did not delay in regularizing her immigration status

70. Regarding paragraphs 60 and 61 of Canada's observations, the author rejects the argument that it is reasonable to deny access to necessary health care until immigration status is regularized. However, Canada's observation that the author chose not to regularize her status and had she not so chosen then she would have been entitled to provincial health insurance coverage years earlier is also incorrect.

71. As described in the decision of the Federal Court[51], the author tried to apply for permanent resident status on humanitarian and compassionate grounds as early as September 12, 2008. Being indigent she could not pay the fee for so doing and asked Canada to waive the fee. Canada wrongly claimed it did not have the legal authority to waive the fee. The author challenged Canada's position in the Federal Court and although she was unsuccessful in that court her appeal to the Federal Court of Appeal did succeed, the decision being released on April 29, 2011. Subsequently, on January 30, 2013, the author was approved in principle for permanent residence status.[52] For over four years from September 12, 2008 until January 30, 2013, the author was doing her best to regularize her immigration status. The delay in regularizing her immigration status was not of the author's choosing.

72. At all times Canada was aware of the author's intention to apply for permanent residence and blocked the author's efforts by claiming it had no authority to entertain her request for a fee waiver, a position that the Federal Court of Appeal on April 29, 2011 held was wrong in law. Any delay was caused by Canada, not the author.

[51] *Toussaint v Canada (Attorney General)*, 2010 FC 810 (CanLII) para 14
[52] author's December 28, 2013 communication, paragraph 6 and paragraph 36, note 42

B. Articles 2, 26

73. With respect to the author's allegation that she has been denied access to the IFHP on the basis of immigration or citizenship status, and that this contravenes her right under article 2(1) to the equal enjoyment of the rights to life and security of the person without discrimination and her right to non-discrimination under article 26, Canada argues i) that provincial health insurance coverage is provided to residents irrespective of citizenship and with a wide variety of immigration statuses and that the only commonality amongst the various groups of eligible persons is that their residency is lawful; and ii) that legality of residence is not a prohibited ground of discrimination and does not come within the meaning of "other status" to bring it within the scope of Article 26. In the alternative, Canada argues that if immigration status or lawful residency is a prohibited ground of discrimination, such discrimination is reasonable when irregular migrants are required to regularize their immigration status in order to qualify for access to publicly funded health care, and that such a policy choice is one to which the Committee should show deference.

i) Health Insurance is Provided to Wide Range of Different Immigration Statuses

74. With respect to whether provincial health insurance is available to residents irrespective of citizenship and with a wide variety of immigration statuses, the author notes that the fact that those within a range of immigration statuses have access to provincial health care does not mean that others are not being denied because of their immigration status. A number of immigration statuses are not covered by provincial health insurance and for this reason have been deemed eligible for IFHP coverage. These include refugee claimants awaiting a determination of their claim, unsuccessful refugee claimants, and victims of human trafficking. The author, who was awaiting determination of a constitutional claim to a fee waiver in order to proceed with an application for humanitarian and compassionate consideration of her application for permanent residency, also was not eligible for provincial health insurance. However, unlike persons in these other categories she also was deemed ineligible for IFHP coverage because of her irregular immigration status.

75. The fact that many non-citizens with various immigration statuses are not denied access to provincial health care does not mean that immigration status should not be recognized as a

ground of discrimination under the category of "other status." By analogy, it is no defense to a suggestion that disability should be recognized as a ground of discrimination to show that many people with different types of disabilities are not excluded by a particular program.

ii) Immigration Status is a Prohibited Ground of Discrimination

76. The author relies on paragraphs 134 to 142 of her petition; paragraphs 13 to 16 of the Amnesty International opinion and paragraphs 28 to 34 of the ESCR-Net opinion to respond to Canada's argument that "illegal" immigration status or residency status is not a prohibited ground of discrimination.

77. Navi Pillay, the former High Commissioner for Human Rights has described the circumstances of irregular migrants as follows:

> In 2010, under the leadership of the Office of the United Nations High Commissioner for Human Rights (OHCHR), the international organizations making up the Global Migration Group expressed their deep concern about the human rights of international migrants in an irregular situation in a landmark joint statement. The Group observed that migrants in an irregular situation were more likely to face discrimination, exclusion, exploitation and abuse at all stages of the migration process. They often face prolonged detention or ill-treatment and, in some cases, enslavement, rape or murder. They are more likely to be targeted by xenophobes and racists, victimized by unscrupulous employers and sexual predators, and can easily fall prey to criminal traffickers and smugglers. Rendered vulnerable by their irregular status, these men, women and children are often afraid or unable to seek protection and relief from the authorities in countries of origin, transit or destination. Clearly, the irregular situation in which international migrants may find themselves should not deprive them either of their humanity or of their human rights. International human rights law provides that everyone, without discrimination, must have access to the fundamental human rights provided in the international bill of human rights.
>
> Where differential treatment is contemplated, between citizens and non-citizens or between different groups of non-citizens, this must be consistent with international human rights obligations, undertaken for a legitimate objective, and the course of action taken to achieve this objective must be proportionate and reasonable.[53]

78. Canada refers to undocumented or irregular migrants as "an undefined class of unknown individuals termed "undocumented migrants." However this group has been quite precisely defined. The Global Migration Group defines "irregular migrant" as "every person who, owing

[53] Navi Pillay, *supra* footnote 2

to undocumented entry or the expiry of his or her visa, lacks legal status in a transit or host country. The term applies to migrants who infringe a country's admission rules and any other person not authorized to remain in the host country."[54]

79. Immigration or citizenship status, regardless of legal status or documentation, is widely recognized in international, regional and domestic law as a prohibited ground of discrimination. In its commentary on the right to non-discrimination leading to the unequal enjoyment of rights under the International Covenant on Economic, Social and Cultural Rights, the Committee on Economic, Social and Cultural Rights has emphasized that "Covenant rights apply to everyone including non-nationals, such as refugees, asylum-seekers, stateless persons, migrant workers and victims of international trafficking, regardless of legal status and documentation."[55]

80. This Committee has recognized in a number of previous cases dealing with property restitution that citizenship and residency requirements may contravene article 26.[56] Exclusions of sub-categories of non-citizens, including irregular migrants, must, as noted by the High Commissioner for Human Rights, also be prohibited where such distinctions are not reasonable and objective.

81. Canada relies on the Committee's views in *Castell Ruiz et al. v. Spain*, where it considered that an individual's choice of a type of employment contract did not constitute a ground of discrimination under article 26 of the Covenant and *Shergill v. Canada* dealing with differential treatment of Canadian citizens with respect to old age security, based on whether their country of origin had a bilateral treaty with Canada. Neither of these cases dealt with discrimination against non-citizens or categories of non-citizens.

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[54] Global Migration Group, *International Migration and Human Rights: Challenges and Opportunities on the Threshold of the 60th Anniversary of the Universal Declaration of Human Rights* (2008), p. 7.

[55] *General comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para 2, of the International Covenant on Economic, Social and Cultural Rights)*, E/C.12/GC/20, UNCESCR, (2 July 2009) para 30

[56] Communications No. 516/1992, *Simunek* v. *Czech Republic*, para. 11.6; No. 586/1994, *Adam* v. *Czech Republic*, para. 12.6; No. 857/1999, *Blazek* v. *Czech Republic*, para. 5.8; No. 945/2000, *Marik* v. *Czech Republic*, para. 6.4; No. 1054/2002, *Krìz* v. *Czech Republic*, para. 7.3; No. 1463/2006, *Gratzinger* v. *Czech Republic*, para. 7.5; No. 1533/2006, *Ondracka and Ondracka* v. *Czech Republic*, para. 7.3; No. 747/1997, *Des Fours Walderode* v. *Czech Republic*, paras. 8.3–8.4; and No. 1563/2007, *Junglingova* v *Czech Republic*, para 7.3

iii) Differential treatment is not reasonable and objective in pursuit of a legitimate aim

82. Canada argues in the alternative that if discrimination on the basis of irregular immigration status in relation to access to necessary health care is prohibited as an "other status" under article 26, then the differential treatment is reasonable and objective as a means of encouraging irregular migrants to regularize their immigration status.

83. In response, the author relies on paragraphs 144 to 163 of her petition, paragraphs 18 to 24 of the Legal Opinion of Amnesty International and paragraphs 12 to 14 of the ESCR-Net legal opinion.

84. The author notes that even if the aim of the policy is to encourage irregular migrants to regularize their immigration status promptly, Canada has provided no objective evidence to suggest that denying access to health care necessary for the protection of their lives encourages the prompt regularization of immigration status or increases compliance with immigration laws. As referenced in the expert opinions and in the petition, all available objective evidence demonstrates the contrary – that denying access to health care has no deterrent effect but incurs significant costs for governments in public health and emergency care.

85. In fact, most barriers to regularizing immigration status are in the control of the State party. In the author's case the Minister's refusal to waive fees for the consideration of her application for permanent residency delayed any regularization of immigration status. Being deprived of health care necessary for life is an unreasonable and disproportionate consequence of any delay in regularizing immigration status, particularly when the State party itself is the cause of the delay.

86. Canada relies on *Oulajin and Kaiss v. The Netherlands*, HRC Communication No. 426/1990 (1992) to argue that the "equal application of common rules in the allocation of benefits" is not discrimination contrary to article 26. However, in that case, the common rules were based on criteria distinguishing own children from foster children in the allocation of child benefits. The fact that benefit programs such as child benefits require common rules to

determine eligibility does not mean that discriminatory exclusions of a marginalized group based on immigration status is permitted in accessing health care.

87. Finally, Canada submits that deference is owed to States in their determination of the allocation of scarce economic resources in light of competing societal interests. The author submits that such deference does not apply in cases where the most marginalized group has been denied access to health care necessary for life. Moreover, Canada has not provided any evidence to contradict the evidence that denying access to diagnostic and preventative care incurs greater, not lesser, costs for governments.

Dated the 22nd day of August, 2015

Attachments:

Amnesty International Legal Opinion dated August 21, 2015

ESCR-Net Legal Opinion dated August 22, 2015