Communication No. 2348/2014

Author's comments on Canada's submission dated 1 February 2019 concerning the implementation of the Views adopted by the Human Rights Committee on 24 July 2018

May 13, 2019

The Committee requested that within 180 days Canada provide information about the measures taken to give effect to the Committee's views. Canada refuses to take any measures whatsoever. Canada's response is inconsistent with good faith consideration and implementation of the Committee's views.

1. In the author's submission, Canada's response to the Committee's views fails to meet the standard of good faith under international human rights law. With respect to the interpretation of the International Covenant on Civil and Political Rights (the "Covenant") and its application to the facts of this case, Canada simply stands by the decision of its domestic courts with respect to the right to life and to non-discrimination in the *Canadian Charter of Rights and Freedoms*. This is contrary to article 27 of the Vienna Convention on the Law of Treaties since Canada is simply relying on interpretations of similar provisions in its internal law as justification for its failure to implement its treaty obligations. To simply affirm Canada's agreement with its own policy and with the decisions of its domestic courts as a basis for refusing to implement decisions under the optional protocol undermines the objective and purpose of the optional protocol and of the Covenant.

2. Canada made submissions as to its views on the interpretation of the Covenant and its application to the facts of this case and these were considered and rejected by the Committee. Canada's response simply reiterates the arguments that were fully considered by the Committee.

3. As Sarah Joseph observes[1], the Committee "is the pre-eminent interpreter of the ICCPR which is itself legally binding" and its decisions are ". . . therefore strong indicators of legal obligations so rejection of those decisions is good evidence of a State's bad faith attitude towards its ICCPR obligations." Canada has failed to provide any reason why, in this instance, its disagreement with the Committee's views warrants a refusal to implement a decision of the Committee. Other States parties ensure access to essential health care without discrimination based on irregular immigration status. Canada has offered no reason why it should not similarly comply with the views of the Committee and instead continues to put the lives of irregular migrants at risk.

[1] Sarah Joseph and Melissa Castan, "*The International Covenant on Civil and Political Rights: Cases, Materials and Commentary*"(Oxford, OUP, 3rd ed. 2013) at page 22, quoted by Kate Fox Principi in "UN Individual Complaint Procedures – How do States Comply?", 30 June 2017,volume 37 Human Rights Law Journal No. 1-6, p. 9, fn. 55.

4. Canada argues that the Committee should have deferred to the "factual findings" of the Federal Court of Appeal that the "operative cause" of the risk to the author's life caused by the denial of access to essential health care was not the actions of the State Party, but rather the author's choice to work in Canada as an irregular migrant[2]. However, the "operative cause" analysis of the Federal Court of Appeal was not a finding of fact, but rather a legal analysis which would apply to any similar case in which lives are put at risk by a policy of refusing to provide health care or any other service essential to life to irregular migrants.

5. With respect to "factual findings" the Federal Court of Appeal stated that it upheld

> "the Federal Court's factual conclusion that the appellant 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. The Federal Court had an evidentiary basis for its finding."

6. It proceeded to find, however, that this is not enough to legally establish a violation of section 7 of the *Canadian Charter of Rights and Freedoms*. At paragraph 67 of its decision, the Federal Court of Appeal stated:

> "As mentioned above, based on this evidence, the Federal Court found that the Order in Council created a risk to the appellant. That is true in the sense that if the Order in Council were broader and provided her with all of the treatment and medication she needs, all risk would be averted. But that is not sufficient *legally* to demonstrate that the Order in Council has caused injury to the appellant's rights to life and security of the person." (emphasis added)

7. Canada is suggesting that the Committee should defer to the legal analysis of the Federal Court of Appeal as to the nature of the causal connection required to establish a violation of the right to life under article 6. However, if the Committee were to accept Canada's position regarding the operative cause of the risk to life in this case, irregular migrants would be deprived of any rights under the Covenant. The "operative cause" of any alleged violation would be the choice to become an irregular migrant. This is not engaging in good faith with the authority of the Committee or its analysis of obligations under article 6 of the Covenant– which the Federal Court of Appeal did not consider.

[2] Canada made the same submission to the Committee prior to the Committee adopting its views. Canada's previous submissions about "operative cause" can be found in its August 14, 2014 submissions at paragraph 21 footnote 16 and paragraph 31 footnote 21, and in its April 2, 2015 submissions in the 3rd paragraph of the executive summary and in paragraphs 26 and 60.

8. Canada's suggestion in paragraphs 17 and 18 of its response that access to health care must be extricated from protections afforded by the right to life under article 6 is an extreme example of what Craig Scott and Philip Alston have referred to as "negative inferentialism" – narrowing the scope of protections in the Covenant in order to maintain a rigid separation of the rights in the Covenant from the rights in the International Covenant on Economic, Social and Cultural Rights.[3] This is not only inconsistent with Canada's international human rights obligations to recognize interdependence and indivisibility; it is also incompatible with jurisprudence under the *Canadian Charter of Rights and Freedoms*. For example, in *Canada (Attorney General) v. PHS Community Services Society*, 3 S.C.R. 134 at paragraph 91 (cited in paragraph 173 and footnote 79 of the author's petition) the Supreme Court of Canada held that denying an exemption from the application of Canada's *Controlled Drugs and Substances Act*, "deprives the clients of Insite of potentially lifesaving medical care, thus engaging their rights to life and security of the person."

9. The legal differentiation between access to health care and access made reasonable by insurance coverage is narrow and goes against the spirit. Canada knows this and that is why it stresses, mistakenly, that the Federal Court of Appeal said the risk to the author's life was not caused by Canada's denying her access to the Interim Federal Health Program.

10. Canada argues that negotiating States such as Canada, while recognizing the interdependence of rights, did not envisage the right to life under the Covenant to require a certain level of essential health care. While such expectations are not in any way determinative of the actual content of rights as interpreted by the Committee in the context of evolving jurisprudence, it is clear from Canada's earliest dialogue with the Committee that this is precisely what Canada envisaged. In 1983, in its inaugural review of compliance with the Covenant, Canada was asked by the Committee: "Is Article 6 considered in Canadian law to impose an obligation to take socio-economic measures to protect the right to life?" Canada responded as follows:

> "Article 6 of the Covenant requires Canada to take the necessary legislative measures to protect the right to life. These measures, as indicated by Canada in its report, may relate to the protection of the health or social well-being of individuals. However, it should be noted that this Article only imposes minimum requirements. It must be supplemented by the provisions of the International Covenant on Economic, Social and Cultural Rights."[4]

[3] Craig Scott and Philip Alston "Adjudicating constitutional priorities in a transnational context: A comment on Soobramoney's legacy and Grootboom's promise", 2000 SAJHR 206.
[4] Consideration of Reports Submitted by States Parties under Article 40 of the Covenant, Addendum - Canada UN Doc CCPR/C/1/Add.62 (15 September 1983), page 23.

11. Subsequently, in 1993 in its response to a question from the Committee on Economic, Social, and Cultural Rights, Canada assured that Committee that section 7 of the *Charter* "ensured that persons were not deprived of the basic necessities of life." [5] Canada again asserted this position in 1998 before the Committee on Economic, Social, and Cultural Rights.[6]

12. Regarding paragraph 19 of Canada's response and its reference to General Comment No. 36, the author notes that the Committee conducted what were probably the most extensive consultations ever held by a UN treaty body in the preparation of General Comment No. 36. It is frequently the case that in such consultations, States parties propose interpretations that accord with their domestic law and policies and these positions often are not accepted by the Committee as being in accordance with international norms. The link between access to essential health care and the right to life is recognized by most domestic and regional courts and human rights bodies. Canada's views are not authoritative. If Canada is to engage in good faith with the Committee's views, it should revise its interpretation of the scope of the right to life in relation to access to essential health care in accordance with international norms.

13. Canada quotes paragraph 11.3 of the Committee's decision out of context when it states in paragraph 20 that the Committee "imports a standard of progressive realization by suggesting that States parties have an obligation under Article 6 of the *Covenant* [right to life] to provide access to health care services that are "reasonably available and accessible" in the State in question." What the Committee clearly stated was as follows:

> "States parties may be in violation of article 6 even if such threats and situations do not result in loss of life. In particular, as a minimum, States parties have the obligation to provide access to existing health-care services that are reasonably available and accessible *when lack of access to the health care would expose a person to a reasonably foreseeable risk that can result in loss of life*." (emphasis added)

14. Canada argues that the Committee's views fail to distinguish between providing access to health care and providing state-funded health care coverage. Unequal protection of the right to life based on socio-economic status and ability to pay for private health care is clearly contrary to international human rights law. Under international human rights law States may choose among various options to ensure access to health care, but whatever the means chosen they must accord with the right to the equal enjoyment of the right to life.

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[5] UN Committee on Economic, Social and Cultural Rights, Summary Record of the 5th Meeting, 8th Sess., UN Doc E/C.12/1993/SR.5 (25 May 1993) at paragraph 21, quoted by one of Canada's provincial superior courts of justice in *Victoria (City)* v *Adams*, 2008 BCSC 1363 at paragraph 98.

[6] UN Committee on Economic, Social and Cultural Rights, Responses to the Supplementary Questions Emitted by the United Nations Committee on Economic, Social and Cultural Rights (E/C.12/Q/CAN/1) (November 1998) at paragraphs 1, 53, quoted in *Victoria (City)* v *Adams*, *supra*, at paragraph 99.

15. With respect to Canada's arguments at paragraphs 22 to 24 that the author was able to receive adequate medical care in spite of the denial of access to the Interim Federal Health Program, these same arguments were advanced at the Federal Court and were not found to accord with the evidence. Canada subsequently made the same arguments before the Federal Court of Appeal but that court did not interfere with the factual findings of the Federal Court. The Human Rights Committee has now reviewed the evidence and has similarly come to the conclusion that the author was unable to secure access to essential health care. Canada's statement that "a serious risk to the author's life was in no way a reasonably foreseeable or preventable outcome" is contrary to the medical opinions that clearly established such a risk.[7] The evidence was clear that the author could not afford to avail herself of the private health care necessary to adequately protect her life and long term health and that *pro bono* and emergency health care was inadequate.

16. Canada's position that irregular migrants ought not to enjoy the protection from discrimination on the basis of "other status" under article 26 is disappointing and surprising. It clearly would be unacceptable for the Committee to deny irregular migrants any protection from discrimination under the Covenant. Such discrimination may be justified in certain circumstances based on Covenant standards, but to argue that irregular migrants should have no protection from discrimination at all, and that States should not have to justify such discrimination based on established international human rights norms, is at odds with positions taken by Canada internationally to promote the human rights of migrants.[8] There is a strong consensus internationally that migrants face widespread discrimination and that it is a central obligation of States to ensure that they are treated with equal dignity and rights. Differential treatment in eligibility with respect to some services may be justified where based on reasonable and objective criteria, but the Committee's views make it clear that differential treatment resulting in risk to life and long term health cannot be justified as reasonable on any objective criteria. Canada's position that States should not even have to justify ANY differential treatment on the basis of immigration status is well outside of international consensus.

17. The author suggests that the Committee seek clarification of Canada's official position on the rights of migrants to be protected from discrimination under the Covenant, and on whether the same protections Canada promotes elsewhere should apply within Canada itself.

18. Canada's argument against recognizing immigration status as a ground is based on criteria developed by courts under Canada's domestic law to assess whether a ground should be recognized as analogous to protected grounds under section 15 of the *Canadian Charter of*

[7] See paragraphs 2.8 to 2.10, and footnotes 2 and 4 of the Committee's Views.
[8] See, for example, https://www.canada.ca/en/immigration-refugees-citizenship/news/2017/12/statement_for_internationalmigrantsday2017.html

Rights and Freedoms. In this respect, Canada is not engaging in good faith with its obligations under the Covenant, limiting its obligations to protect irregular migrants from discrimination by applying the provisions of its domestic law, contrary to article 27 of the Vienna Convention. In light of the plight of migrants globally and the rise of discrimination toward this vulnerable group, such a position would be entirely at odds with the Committee's mandate to further the broad purposes of the Covenant.

19. Regarding paragraph 28 of Canada's response, the Committee noted in paragraph 7.2 of its Views the uncontroverted evidence that "the State party's statement that irregular migrants are entitled to emergency care under provincial legislation is not true in all provinces and territories". Canada's assertion without qualification "that in Canada, all migrants can access basic services, including emergency health care, regardless of migration status." is untrue. Moreover, the Committee correctly relied on findings of fact that the author's life was put at risk and that access to *pro bono* and emergency health care is not sufficient to protect the right to life.

20. Canada's refusal to acknowledge the serious harm it has caused the author by violating her Covenant rights in denying her access to its Interim Federal Health Program is of great concern, both to the author on a personal level and for the potential harm Canada appears prepared to inflict on other irregular migrants based on an ill-conceived and remorseless misunderstanding of its obligations to irregular migrants who face serious negative health consequences.

21. For Canada to say that it is sufficient that it now has discretion to grant irregular migrants health care coverage in "exceptional and compelling circumstances" is spurious. There are no guidelines for the exercise of such discretion nor is there any provision for any judicial or administrative review thereof. By its insistence that it is not prepared to accept the Committee's decision that there has been a violation of article 6 and 26 rights, Canada leaves decision-makers free to exercise discretion against irregular migrants invoking principles, as did the Federal Court of Appeal, that are in violation of their Covenant rights.

22. By ratifying the Covenant Canada's executive branch of government undertook under article 2(3) (a) of the Covenant to remedy violations of Covenant rights. The Committee has determined that the author's rights under articles 6 and 26 were violated by the executive (Ministerial) decision to deny the author access to the Interim Federal Health Program, which itself was created by an executive order-in-council made by Canada's Cabinet.[9] The Committee found that from 2006 to 2013 the author actually suffered harm as a result of such violations,

[9] See the Committee's Views, paragraphs 2.6 and 2.14, and the Author's petition dated December 28, 2013, paragraph 4, footnote 4, footnote 35, and Annex 3.

notwithstanding that subsequently her status was regularized.[10] The harm was identified and warned against in the uncontroverted medical expert opinions accepted by the domestic courts and the Committee.[11] For Canada now to deny its obligation to compensate the author is unconscionable.

23. Recently Canada's chief executive, Prime Minister Justin Trudeau, in a letter to Amnesty International[12] claimed that Canada considers the Committee's Views in good faith and yet he avoided acknowledging Canada had violated the author's rights and categorically stated that the author has fully exhausted all her recourse. Given this approach, Canada can no longer proclaim it is in the vanguard of international human rights. This loss of standing can be remedied by reclaiming the high ground by acknowledging that, in the author's case, it has hidden behind formalism, instead of enhancing the spirit of its own *Canadian Charter of Rights and Freedoms* and its cherished treaty obligations.

[10] See, among others, paragraph 10.5 of the Committee's Views.
[11] See the extensive references to those expert medical opinions in footnotes 2 and 4 of the Committee's Views.
[12] Letter dated April 9, 2019 from the Right Honourable Justin Trudeau, Prime Minister of Canada, to Mr. Alex Neve, Secretary General, Amnesty International.