AUTHOR'S RESPONSE TO SUPPLEMENTARY SUBMISSION OF THE GOVERNMENT OF CANADA TO THE HUMAN RIGHTS COMMITTEE ON THE ADMISSIBILITY AND MERITS OF THE COMMUNICATION OF MS. NELL TOUSSAINT

COMMUNICATION NO. 2348/2014

JULY 26, 2016

I. INTRODUCTION AND SUMMARY

1. By letter dated May 26, 2016 the author was forwarded Canada's supplementary submissions on admissibility and merit concerning communication No. 2348/2014 of Ms. Nell Toussaint.

2. The author continues to rely on her petition and her previous response to Canada's submissions on the admissibility of the petition and her previous response to Canada's submissions on the admissibility and merits of the communication.

3. The author makes the following additional observations in reply to Canada's supplementary submissions. In summary, the author reaffirms that the communication is admissible, that domestic remedies have been exhausted, that the petition is not moot, that the communication is not an *actio popularis*, and that it is compatible with the provisions of the *Covenant*. The author further rejects Canada's submissions with respect to the merits which, in the author's submission, misrepresent the facts, misconstrue the nature of her complaint and propose an unreasonably restrictive understanding of obligations under the *Covenant*.

II. ADMISSIBILITY

A. The author has not failed to exhaust domestic remedies

i) Canada relies on an unreasonable standard for the exhaustion of domestic remedies within a federal system of government which would permit Canada to avoid responsibility for a failure to perform its obligations under the Covenant on the basis of provisions of its internal legal order

4. The federal government has not denied that it could have provided the author with necessary health care by permitting undocumented migrants to receive coverage for essential health care under the Interim Federal Health Program ("IFHP"). Canada has justified its decision to deny health care to undocumented migrants on the basis of its desire to encourage compliance with federal immigration law. Yet Canada attempts, indirectly, to avoid responsibility under international human rights law for its decision, Canada relies on its federal system to argue that the author must not only exhaust domestic remedies in relation to federal government's denial of healthcare, but must also exhaust domestic remedies in relation to provincial health care programs.

5. Canada's arguments that remedies must be sought against each level of government is based on a mischaracterization of the nature of the author's claim. The author does not challenge "the under-inclusiveness of publicly funded health care in Canada" as Canada characterizes her allegation. Rather, she challenges the federal government's denial of health care under the Interim Federal Health Program. It was this denial that was found by the Federal Court to have violated her right to life by subjecting her to significant threats to life and negative long term health consequences.

6. For reasons which are further explained below, the author submits that in the context of the division of responsibilities for health care among different levels of government in Canada, she sought a remedy against the appropriate level of government. Additionally, as stated in the author's previous submissions, initiating a subsequent challenge against a

provincial government on the same grounds under the Canadian *Charter of Rights and Freedoms* ("Charter") would have no reasonable prospect of success and would unreasonably prolong the exhaustion of domestic remedies.

7. More fundamentally, however, the author submits that the effect of Canada's position with respect to the exhaustion of domestic remedies is to shield its policies from accountability for violations of the Covenant. Canada argues that in order for the author's complaint against the federal government to be admissible, she must have pursued remedies against other governments in Canada that might have been in a position to provide health care. Canada is thus relying on the provisions of its federal system to avoid direct responsibility for failing to perform its obligation under the Covenant with respect to the rights of the author.

8. The author notes that the federal government did not justify its decision to deny the author health care on the basis that such health care was the responsibility of another level of government. The federal government has not encouraged any other level of government in Canada to provide health care to the author or any other undocumented migrants. In this context, the author submits that she is entitled to seek a remedy against the federal government for violating her rights under the Covenant and need not seek a similar remedy against other levels of government in order for her allegations against the federal government to be found admissible.

9. The author submits that the exhaustion of domestic remedies requirement in federal states should be applied consistently with the Committee's following observation at paragraph 4 of its General Comment 31 on The Nature of the General Legal Obligation Imposed on States Parties to the Covenant:

> The executive branch that usually represents the State Party internationally, including before the Committee, may not point to the fact that an action incompatible with the provisions of the Covenant was carried out by another branch of government as a means of seeking to relieve the State Party from responsibility for the action and consequent incompatibility. This understanding

> flows directly from the principle contained in article 27 of the Vienna Convention on the Law of Treaties, according to which a State Party 'may not invoke the provisions of its internal law as justification for its failure to perform a treaty'. Although article 2, paragraph 2, allows States Parties to give effect to Covenant rights in accordance with domestic constitutional processes, the same principle operates so as to prevent States parties from invoking provisions of the constitutional law or other aspects of domestic law to justify a failure to perform or give effect to obligations under the treaty. In this respect, the Committee reminds States Parties with a federal structure of the terms of article 50, according to which the Covenant's provisions 'shall extend to all parts of federal states without any limitations or exceptions.'[1]

ii) The Author Sought a Remedy Against the Appropriate Level of Government

10. The author submits that in the context of Canada's federal system and shared responsibilities for health care, she pursued the most reasonable course in seeking access to an effective remedy by challenging the federal government's denial of health care under the IFHP. As Canada states in its supplementary submissions, in Canada's federal system of government, provincial or territorial governments' funding of health care through provincial public health insurance programmes is "guided by the provisions of the *Canada Health Act.*[2]" Canada argues that the "division of responsibility among different orders of government is a legitimate choice and one which must be respected by the Committee." Canada notes that the author inquired about her coverage under OHIP in June 2009 and was told she did not qualify under Ontario's *Health Insurance Act* as she was not lawfully a resident of Ontario at that time.[3] Canada argues that "it is the provinces that have the responsibility to determine eligibility for publicly-funded health care within Canada's federal system, and thus it is against this level of government that the author should have sought a domestic remedy."

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[1] Human Rights Committee, General Comment 31
[2] *Canada Health Act*, RSC 1985, c C-6, online: http://laws.justice.gc.ca/e
[3] *Health Insurance Act*, R.S.O. 1990, c. H6, online: http://www.canlii.org/en/on/laws/stat/rso-1990-c-h6/latest/rso-1990-c-h6.html?resultIndex=1

11. In addition to the author's previous submissions on this point, the author has solicited the opinion of a group of leading experts in the field of constitutional and health law in Canada.[4] These experts are of the opinion that Ms. Toussaint reasonably sought a remedy against the federal government, rather than a province, for failure to provide her with health care coverage for emergency and essential health care. A scan of the letter is attached as Appendix A to this submission, but for convenience, the substance of the letter is set out as follows:

> "In Canada, constitutional jurisdiction over health care is shared between the federal and provincial governments.[5] Through the exercise of its spending power, the federal government contributes to the funding of provincial health insurance plans, and it relies on this financial incentive to secure provincial compliance with the program conditions of the *Canada Health Act* ("*CHA*").[6] In addition, the federal government is responsible for the administration and delivery of health care services to certain categories of the population who fall within federal jurisdiction. As such, the federal government has the constitutional authority to provide health care to irregular migrants, such as Nell Toussaint. Moreover, for the reasons outlined below, we believe that it was reasonable for Ms. Toussaint to see the federal, rather than a provincial, government as the appropriate object of her legal challenge.

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[4] The experts, with a link to their resumes, are:
Professor Y.Y. Brandon Chen, Faculty of Law, University of Ottawa
http://uottawa.academia.edu/YYBrandonChen
Professor Martha Jackman, Faculty of Law, University of Ottawa
https://commonlaw.uottawa.ca/en/people/jackman-martha
Professor Angela Cameron, PhD, Faculty of Law, University of Ottawa
https://commonlaw.uottawa.ca/en/people/cameron-angela
Professor Jennifer Koshan, Faculty of Law, University of Calgary
http://law.ucalgary.ca/law_unitis/profiles/jennifer-koshan
Professor Bruce Ryder, Osgoode Hall Law School, York University
http://www.osgoode.yorku.ca/faculty-and-staff/ryder-bruce-b/
Professor Margot Young, Allard School of Law, University of British Columbia
http://www.allard.ubc.ca/faculty-staff/margot-young
Professor Catherine Dauvergne, Allard School of Law, University of British Columbia
http://www.allard.ubc.ca/faculty-staff/catherine-dauvergne
Professor Sharry Aiken, Faculty of Law, Queen's University
http://law.queensu.ca/faculty-research/faculty-directory/aiken
Professor Constance MacIntosh, Schulich School of Law, DalhousieUniversity
http://www.dal.ca/faculty/law/faculty-staff/our-faculty/constance-macintosh.html

[5] *Schneider v. R.*, [1982] 2 S.C.R. 112 at 141-142; *Eldridge v. British Columbia (A.G.)*, [1997] 3 S.C.R. 624 at paras. 24-25; *Canada (A.G.) v. PHS Community Services Society*, [2011] 3 S.C.R. 134 at paras. 66-69.
[6] R.S.C., 1985, c. C-6.

First, irregular migrants in Canada are disqualified from provincial health insurance coverage, and such disentitlement is largely attributable to federal legislation. In particular, the *CHA* requires the provinces to extend health care coverage to all residents within their respective jurisdictions, but expressly excludes anyone who is not "lawfully entitled to be or to remain in Canada."[7] In turn, federal immigration legislation determines whether foreign nationals are permitted to enter and remain in Canada and under what conditions.

Second, the federal government, through its Interim Federal Health Program ("IFHP"), currently funds the cost of providing health care to certain classes of foreign nationals that do not qualify for provincial health insurance coverage. These include, *inter alia*, individuals under immigration detention, unsuccessful asylum seekers awaiting removal from Canada, and deportees whose removal has been temporarily suspended due to generalized insecurity in their country of origin. These individuals, like irregular migrants, are generally portrayed by the federal government as lacking the proper immigration authorization to enter or to remain in Canada. Given the similarity of their respective situations and legal status, Ms. Toussaint reasonably concluded that irregular migrants, such as herself, ought likewise to be included in the IFHP and so eligible for federal health care coverage.

Third, the exclusion of irregular migrants from provincial health insurance coverage has been found valid by Canadian courts. In *Manassian v. Alberta (Minister of Health)*, the Alberta Court of Queen's Bench upheld the denial of provincial health care to an asylum seeker, whom the Court deemed to be "a person without status," on the basis that she did not qualify as a resident within the meaning of provincial health insurance legislation.[8] In *Irshad (Litigation guardian of) v. Ontario (Ministry of Health)*, in which a group of migrants, including a man without legal right to remain in Canada, challenged their ineligibility for provincial health insurance, the Ontario Court of Appeal found that such exclusion did not offend the *Canadian Charter of Rights and Freedoms*.[9]

12. For these reasons, we are of the opinion that Ms. Toussaint reasonably sought a remedy against the federal government, rather than a province, for failure to provide her with health care coverage." The author submits the she has exhausted domestic remedies on the following basis:

[7] *Ibid.*, s. 2.
[8] (1990), 65 D.L.R. (4th) 744 at para. 19.
[9] (2001), 55 O.R. (3d) 43, leave to appeal to Supreme Court of Canada refused, 28571 (September 13, 2001).
* Qualifications of the signatories to this letter are available at the websites shown beneath their respective names.

i) The author challenged under the Canadian *Charter of Rights and Freedoms*, which forms part of Canada's constitution, the denial of health care by the federal government from an existing program that provides health care to some immigrants who are not eligible for provincial health care and which could, if the federal government so chose, also include undocumented migrants in the circumstances of the author. The author has exhausted domestic remedies with respect to the allegation that the federal government has violated her rights under the Covenant. The fact that a similar allegation could be advanced against another level of government in Canada's federal system does not limit the author's right to pursue a remedy against the federal government for its alleged violation of her Covenant rights.

ii) The exclusion of categories of immigrants without legal residency status from provincial health care programs had previously been found by Canadian courts to be constitutional.

iii) The author's constitutional challenge under the Charter to her exclusion from the IFHP was rejected on the basis that denying health care to migrants without legal status, even if it violates the right to life, is permitted under the Canadian Charter as a reasonable means to encourage compliance with Canada's federal immigration laws. The courts also held that immigration status is not a prohibited ground of discrimination under the Charter. The reasoning of the courts in relation to the author's exclusion from the IFHP and Canada's opposition to her claim would equally apply to her ineligibility for provincial programs. A subsequent challenge advancing the same arguments against a provincial government would likely have met with opposition from the federal government,[10] would have involved protracted litigation

[10] Under Canadian law Canada's federal government must be given notice of any constitutional question raised in court proceedings and may take part therein. See, for example, section 57 of the Federal Courts Act, RSC 1985, c F-7.

on grounds that have already been considered, and would have no reasonable prospect of success.

B. The communication is not moot

13. Canada relies on the case of *Dranichnikov v. Australia,* to argue that the author's communication is moot. Canada notes that the author's residency status has changed. She is now a permanent resident of Canada and eligible for cost-shared provincial health insurance under the terms of the *Canada Health Act* and the provincial *Health Insurance Act*.

14. In the author's submission, the Committee's decision in *Dranichnikov v. Australia* is actually supportive of the admissibility of her claim. In that case, the author alleged that her rights under articles articles 6, 7 and 9 of the Covenant *would* be violated *if* she were to be deported to Russia. Having been granted a protection visa such that there was no longer any threat of deportation to Russia, the Committee found the allegations related to the threat of deportation to be moot.

15. In the present case, the author alleges that she *was* denied access to health care necessary for the protection of her life and long term health – not that she is under threat of such denial. Her allegation is therefore analogous to the components of the communication in *Dranichnikov* which the Committee found to be admissible – allegations that she was denied a fair hearing with respect to the procedures before the refugee tribunal. Although the author was no longer subject to those procedures and her family had been granted a permanent protection visa, the author had been subject to these procedures in the past and the allegation with respect to tribunal procedures were found to be admissible. Similarly, in the present case, an allegation that the author's rights under the Covenant were violated in the past is not rendered moot by the fact that changes in the author's circumstances mean that the impugned policy is no longer applicable to her.

16. Canada further relies on *A.P.L.-V.D.M. v. The Netherlands* and on *J.H.W. v. Netherlands* to argue that the author "cannot, at the time of submitting the complaint, claim to be a victim of a violation of the *Covenant*."[11] However, the Committee's decision in *A.P.L.-V.D.M. v. The Netherlands* relied on the particular facts of that case, in which an impugned restriction on benefits had been abolished, with retroactive effect. Similarly, in *J.H.W. v. Netherlands* the impugned provision had been abolished. In the present case, the exclusion of undocumented migrants from access to health care has not been abolished and the serious violation of the author's rights under the Covenant, which included long term health consequences, has in no way been remedied. Any finding that her complaint is inadmissible because of mootness would be contrary to the Committee's longstanding jurisprudence with respect to access to effective remedies for violations of Covenant rights.

C. The Communication is not an Actio Popularis

17. Relying on *Jazairi v. Canada* and *Kavanagh v. Ireland*, Canada argues that the Committee has recognized that "to the extent [an] author argues that [a] scheme as a whole is in breach of the *Covenant*, [the] claim amounts to an *actio popularis* reaching beyond the circumstances of the author's own case."[12] However, what the Committee held in *Jazairi* was that "an individual must be personally and directly affected by the violations claimed" and that in that case, the allegations with respect the "scheme as a whole" reached "beyond the circumstances of the author's own case." In the present case, the author challenges her exclusion from the IFHP which personally and directly affected her. As noted in previous submissions, the author's request for a remedy that includes guarantees of non-repetition of the violation is entirely consistent with the Committee's views on appropriate remedies in previous cases.

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[11] *A.P.L. v. d.M. v. The Netherlands*, HRC Communication No. 478/1991, U.N. Doc. CCPR/C/48/D/478/1991 (1993), views adopted on 26 July 1993, para. 6.3.

[12] See *Jazairi v. Canada*, HRC Communication No. 958/2000, U.N. Doc. CCPR/C/82/D/958/2000, views adopted on 11 November 2004, para. 7.6; see also *Kavanagh v. Ireland*, HRC Communication No. 1114/2002, UN. Doc. CCPR/C/76/D/1114/2002, views adopted on 30 October 2002, at para. 4.3.

18. Canada also argues that ministerial discretion that is now provided within the IFHP such that the Minister may grant access to the IFHP for individuals without lawful status in Canada. . Canada states that the Minister has exercised such discretion twice since 2012, granting IFHP benefits to two undocumented migrants but notes that "the focus of the IHFP remains on the provision of publicly-funded health care to lawfully-admitted refugees and asylum seekers; specially designated groups receiving resettlement assistance (e.g. Afghan interpreters from 2009 to 2013); victims of human trafficking; and detainees under the *IRPA*"

19. The author notes that since the discretion provided to the Minister under the revised IFHP was not in effect at the time she was denied, so the question of whether it is exercised in a manner that now ensures that irregular migrants are not denied essential health care is only relevant to the question of whether Canada has taken measures to ensure non-repetition of the violation. In this respect, the author notes that Canada has avoided stating that the discretion is or will be exercised according to any criterion relating to the protection of life and long term health. The two cases in which discretion has been granted suggest that rare exceptions have been made based on particular immigration circumstances rather than on the basis of the need for health care necessary for the protection of the right to life under article 6 of the Covenant.

D. The Author Does not Argue that the Covenant includes "a right to publicly-funded, primary health care"

20. Canada describes the author's communication as a claim that articles 6, 7 and 9 of the *Covenant* include a right to publicly-funded primary health care. However, Canada has entirely misconstrued the author's claim as relying on "a right to publicly funded primary health care."

21. First, eligibility for the IFHP at the time the author applied for and was denied coverage was restricted to those who were unable to afford privately funded health care. The IFHP was not premised on a "universal right to publicly funded health care" but rather on providing access to essential health care for those who could not afford to pay for their own health care and who were ineligible for provincial health insurance. The author's allegation is not that the State party failed to provide publicly funded health care but that it deprived her of access to health care necessary for the protection of her life and long term health.

22. Canada further argues that the author had access to necessary health care because Ontario's *Public Hospitals Act* secures emergency health care to everyone, regardless of civil status or residency, where refusal of admission would endanger the person's life. [13] As noted in previous submissions, the Federal Court reviewed expert evidence along with the evidence of the author's attempts to secure necessary health care through emergency services in hospitals. The Court concluded that access to these emergency services, when the author was able to access them, was insufficient for the protection of the author's life and long term health. The author additionally relies on previous submissions documenting the fact that access to health care only when life is immediately in danger does not protect the right to life of a person in the author's situation, with serious ongoing health problems requiring diagnostic and ongoing medical care.

23. Canada additionally relies on the provision of Ontario's *Public Hospitals Act*, to argue that "universal availability of emergency and essential health care fulfills Canada's obligations related to the protection of life under Article 6(1) of the *Covenant*." However, Ontario's *Public Hospitals Act* does not guarantee access to "emergency and essential" health care in public hospitals. On the contrary, it affirms that admission to hospital may be refused to "any person who is not a resident or a dependent of a resident of Ontario, unless by refusal of admission life would thereby be endangered." Admission to a public hospital only when life is endangered is far from the provision of "essential" health care necessary to protect

[13] *Public Hospitals Act*, RSO 1990, c. P.40, s. 21, online: http://www.canlii.org/en/on/laws/stat/rso-1990-c-p40/latest/rso-1990-c-p40.html?resultIndex=1.

life. The IFHP, on the other, was explicitly designed "to provide emergency and essential health care coverage."

24. With respect to Canada's suggestion that the federal government relies on "universal availability of emergency and essential health care" to fufil its obligations under article 6(1) of the Covenant, the author further refers to her previous submissions, demonstrating that access to emergency care is not ensured in all provinces.

25. With respect to Canada's submissions that the author was able to secure some access to health care from hospital emergency services, *pro bono* physicians and community health centres, the author reiterates that the Federal Court reviewed all of the evidence of the author's attempts to secure health care from these sources and found "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." In the author's submission, the Committee should defer to these factual findings of the domestic court rather than re-assessing this evidence based on Canada's submissions.

26. In this respect, it is also important to recall the wording of the original decision to deny the author access to health care coverage under the IFHP. That decision makes it clear that what the author sought was not premised on a right to "universal publicly funded health care" but rather on a right to access essential health coverage which she was unable to secure by any other means. The decision stated that

> "The Interim Federal Health Program is an interim **measure to provide emergency and essential health care coverage to eligible individuals who do not qualify for private or public health coverage and who demonstrate financial need**. [emphasis added]. IFHP services aim to serve individuals in the following four groups of recipients: Refugee claimants; Resettled Refugees, Persons detained under the Immigration and Refugee Protection Act (IRPA); and, Victims of Trafficking in Persons (VTIPs). As you have not provided any information to demonstrate that

your client falls into any of the above-mentioned categories, I regret to inform you that your request for IFHP coverage cannot be approved."[14]

27. The Canadian *Charter of Rights and Freedoms*, like the ICCPR, protects the right to life but does not contain a freestanding right to health. Canada advanced the same argument before the Federal Court as it is advancing before the Committee – that the author's challenge to being deprived of access to the IFHP amounts to a positive rights claim to publicly funded health care. The Federal Court responded as follows:

> The respondent submits, citing *Chaoulli v. Québec (Attorney General)*, 2005 SCC 35, that there is no freestanding constitutional right to healthcare under the Charter. The respondent reasons that if there is no such freestanding right for citizens of Canada then "it clearly follows that non-citizens residing illegally in Canada certainly do not" possess such rights. …. The respondent accurately cites the decision of Chief Justice McLachlin and Justice Major; they held that "[t]he Charter does not confer a freestanding constitutional right to health care": Chaoulli at para. 104. What the respondent fails to note is that they went on to state: "However, where the government puts in place a scheme to provide health care, that scheme must comply with the Charter": Chaoulli at para. 104. The present case is concerned with a scheme (the IFHP) that the government has put in place to provide health care to certain individuals; it is not concerned with whether non-citizens, or citizens for that matter, have a freestanding right to healthcare.[15]

28. The Federal Court found that the intentional exclusion of the author from the IFHP constituted "government action."[16] On the basis of a careful review of the evidence, the Federal Court concluded that the federal government's action of depriving the author of access to an existing health care program through which she would have had access to "emergency and essential health care" necessary for the protection of life violated her right to life and security of the person under the Canadian Charter. The Federal Court of Appeal did not disturb the Federal Court's findings of fact.

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[14] Decision of Craig Shankar dated July 10, 2009 online http://www.socialrightscura.ca/documents/legal/tousaint%20IFBH/Decision%20Letter%20re%20Application%20for%20IFHP.pdf

[15] Decision of Justice Zinn, FC at para 75.

[16] Decision of Justice Zinn FC at para 87.

29. In the author's submission, the same reasoning and the same conclusion apply with respect to the author's right to life under article 6 of the Covenant. The author is not claiming a right to healthcare. She is alleging a deprivation of her right to life which, in her circumstances, required access to a program that provided coverage of emergency and essential health care. The domestic court's finding of fact substantiating that the impugned government action amounted to a deprivation of the right to life under the Canadian Charter and also meets the Committee's standard in relation to a deprivation of life under article 6. In the author's submission, the Committee ought to accept the findings of fact of the domestic court which was in the best position to assess the evidence.

30. The key question regarding compliance with article 6, which Canada does not address, is the finding of the domestic courts that a violation of the right to life in this case is not arbitrary because it was justified as a measure to promote compliance with immigration law. With respect to that question, the author relies on her previous submissions and the evidence of experts, which can be summarized as follows:

- There is no evidence that depriving undocumented migrants of access to health care necessary for life is an effective means of promoting compliance with immigration law.
- Most undocumented migrants migrate in search of work, not for access to health care.
- States which provide access to health care for undocumented migrants have not experienced increases in illegal immigration on that account.
- There are more proportionate and effective means of controlling illegal immigration, including deportation, which are available to Canada and were available with respect to the author.
- The author did not argue that she was entitled to remain in Canada in order to secure access to health care necessary for life – only that she should not be deprived of access to health care programs necessary for the protection of her life while she was under the jurisdiction of Canada.

31. In these circumstances, as previously submitted, the author submits that the deprivation of her right to life was arbitrary and therefore inconsistent with the State party's obligations under the Covenant.

E. Article 26: requiring lawful residency is not an objective and reasonable basis on which to deny access to essential and emergency health care under the IFHP

32. Relying on *Danning v. The Netherlands* Canada notes that the Committee accepts that "[a] differentiation based on reasonable and objective criteria does not amount to prohibited discrimination within the meaning of article 26."[17] The author notes that in *Danning v. The Netherlands* the differentiation at issue was with respect to differential insurance rates for married and unmarried individuals, which the Committee found to be based on reasonable and objective criteria. Such a distinction is, in the author's view, not analogous to a refusal of emergency and essential health care on the basis of immigration status, both because the interest at stake engages the right to life and personal security and because the ground of the distinction at issue in the present case – that of immigrations status - is recognized as a basis for widespread discrimination and stigmatization in many countries with devastating consequences.

33. Citing *Shergill v. Canada* Canada argues that "lawfulness of residence is not a prohibited ground of discrimination in determining an individual's eligibility for publicly-funded health care."[18] However, in *Shergill v. Canada* the Committee considered allegations that residency requirements and differential pension rates based on whether Canada has a reciprocal social security agreement with the author's country of origin were discriminatory contrary to article 26. The author in that case was a lawful resident of Canada.

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[17] *Danning v. The Netherlands*, HRC Communication No. 180/1984, U.N. Doc. CCPR/C/OP/2, views adopted on 9 April 1987, at para. 13.

[18] See also *Shergill v. Canada*, HRC Communication 1506/2006, U.N. Doc CCPR/C/94/D/1506/2006, views adopted on 18 November 2008, para.7.6 (the Committee considered that differentiating in the allocation of Old Age Security pension benefits based on the *duration* of an individual's residence in Canada did not constitute discrimination under Article 26).

34. Canada argues that the requirement that a person have lawful residence in Canada in order to access a program providing publicly-funded primary health care is "a neutral, objective requirement that is not related to race, colour, sex, language, religion or any of the grounds enumerated in Article 26. Canada argues that such a differentiation is not intended to stigmatize, nor does it have this effect; that it recognizes public health insurance as a reciprocal scheme: beneficiaries make contributions to the insurance scheme from which they then seek a benefit on a prepaid basis, and on uniform terms and conditions.[19] Relying on *Oulajin & Kaiss v. The Netherlands* Canada argues that the equal application of such common rules in the allocation of benefits does not constitute discrimination, and does not violate Canada's obligations under Article 26 of the *Covenant*.[20] The author submits, however, that the distinction at issue in *Oulajin & Kaiss v. The Netherlands* between foster children and biological children, and the interest at stake – access to child benefits – was entirely different from the nature of the distinction drawn in the present case. In fact, in finding no violation of article 26, the Committee noted in *Oulajin & Kaiss v. The Netherlands* that "the Child Benefit Act makes no distinction between Dutch nationals and non-nationals, such as migrant workers." (para 7.5).

III. THE COMMUNICATION SHOULD BE UPHELD ON THE MERITS

35. Canada requests that the Committee view the author's communication to be wholly without merit on the basis that articles 6, 7 and 9(1) of the *Covenant* "protect against the intentional infliction of harm, but do not impose positive obligations to provide state-funded health insurance to undocumented migrants, sufficient to cover all their medical needs." Canada submits that the author "received publicly-funded emergency health care services, essential to the preservation of her life, and was not prevented from obtaining

[19] Health Canada, "Canada Health Act – Frequently Asked Questions," online: http://hc-sc.gc.ca/hcs-sss/medi-assur/faq-eng.php (The *Canada Health Act* affords provinces and territories discretion in determining how to finance health insurance plans. Financing can be through the payment of premiums, payroll taxes, sales taxes, other provincial or territorial revenues, or by a combination of methods. Provinces/territories that levy premiums also offer financial assistance based on income so that low-income residents can have their payment reduced or be entirely exempted from the cost).

[20] See esp. *Oulajin & Kaiss v. The Netherlands*, HRC Communications Nos. 406/1990 and 426/1990, UN. Doc. CCPR/C/46/D/406/1990 and 426/1990, views adopted on 5 November 1992 at para. 7.5.

primary health care from various community organizations, on a *pro bono* basis, or on the basis of private health insurance. Importantly, the author was not prevented from coming forward to regularize her immigration status. Any lacunas in coverage were the author's responsibility and are not attributable to Canada. The facts do not support a conclusion that there has been any violation of Article 6, 7 or 9(1)."

36. With respect to Canada's submissions that the author received emergency health care services, essential to the preservation of her life and was not prevented from obtaining primary health care on the basis of private health insurance, the author notes that she was living in destitution at the time she applied for coverage under the IFHP and had no option of paying for health care. In response to Canada's suggestion that the author received "publicly funded emergency health services, essential to the preservation of her life," the author relies on previous submissions which note that i) the Federal Court found that the author had been denied health care necessary for the protection of her life and long term health; and that ii) the author was billed for health care she received from emergency departments because she did not have IFHP coverage." With respect to Canada's submission that the author "was not prevented from coming forward to regularize her immigration status" the author refers to the facts outlined in the petition with respect to her attempts to have her application for permanent residency reviewed on humanitarian and compassionate grounds, which were prolonged by the refusal of the Minister to consider the author's request that fees which she could not afford to pay be waived. The Minister only agreed to consider this request when ordered to do so by the Federal Court of Appeal.

37. Canada argues that the refusal of publicly funded health care to those who do not have lawful residence "does not stigmatize in purpose or effect, nor is it punitive." The author relies on her previous submissions and the opinions of Amnesty International and ESCR – Net with respect to the widespread stigmatization and discrimination affecting irregular migrants. The Human Rights Committee has also expressed concern about such discrimination in its reviews of states parties and its comments regarding compliance with

article 26. Most recently, the Committee expressed concern that irregular migrants have been denied access to the IFHP by Canada, recommending that "**The State party should ensure that all refugee claimants and irregular migrants have access to essential health care services irrespective of their status."**

38. Finally, with respect to Canada's submission that depriving migrants of access to health care even when necessary for life "is not stigmatizing or punitive in its effect" the author points to her own affidavit, cited by the Federal Court, to document the stigmatizing effect of the impugned restrictions on the author personally:

> I am extremely grateful for the services that I have been provided by doctors and service providers, despite the fact that I am unable to pay for them. On the other hand, I find it humiliating and degrading to have to negotiate with doctors and other healthcare service providers to receive healthcare, out of charity. It makes me feel that I am not considered of the same worth or value as other patients.
>
> I am aware that many doctors, receptionists and people in waiting rooms who hear me explain why I have no health coverage and ask for compassion based on my serious circumstances may have negative attitudes about immigrants seeking healthcare in Canada. I feel vulnerable to being treated as an outsider. 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.
>
> 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.

IV. Conclusion

39. The author asks the Committee to find that her rights under articles 2(1), 6, 7, 9 and 26 were violated and requests that the Committee recommend compensation for the violation of her rights and that the State party be requested to take necessary measures to ensure the non-repetition of the violation.