

Immigration and HIV/AIDS - Issues of medical testing, exclusion and discrimination

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Immigration as a term of international law means the act of persons of foreign origin who settle in a country and abide therein with or without the hope of return. Mehta states that, "Immigrant means a person who seeks admission to Canada for permanent residence."¹ For a country of immigrants, the question of immigration policy is central. But the goals and objectives of immigration policy, even in the short term, have never been clearly articulated and have at no time been the object of anything approaching a consensus among the influential elements and interested parties of the Canadian community. This persistent lack of clarity, reflecting deep divisions of interest and ideology within the community, has been matched by a diffusion and fragmentation of responsibility for formulating, executing and enforcing immigration policy, between the public and private sectors and between the federal and provincial levels of government.²

AIDS (acquired immunodeficiency syndrome) is the late stage of infection with HIV (human immuno-deficiency virus).³ Besides sexual intercourse, HIV can also be transmitted during drug injection by the sharing of needles contaminated with infected blood; by the transfusion, of infected blood or blood products; and from an infected woman to her baby - before birth, during birth or just after delivery. HIV is not spread through ordinary social contact; for example by shaking hand, traveling in the same bus, eating from the same utensils, by hugging or kissing. The term HIV/AIDS were not known to the medical fraternity till about two decades ago, yet it has emerged as a leading cause of death among young adults in US today.⁴ The last three years have seen a major increase in the scope and scale of the national, regional and international response to HIV/AIDS.⁵ The AIDS epidemic is an emergency threatening human welfare and prosperity throughout large parts of the developing world. The epidemic is having a severe impact, reversing hard won development gains in life expectancy and health, as well as economic and social development.⁶

The HIV/AIDS epidemic has resulted in particularly controversial migration policies. The disease's magnitude, lingering misconceptions about it,⁷ the lack of a cure, and its association with marginalized populations in an era of unprecedented movement of persons across borders, are factors that make HIV/AIDS-related restrictions on migration, especially a contentious issue. Immigration refers to the permanent resettlement of an individual from one country to another, either with legal authorization or without. Travel refers to shorter stays that are intended to be temporary. Both immigration and travel are subject to a variety of restrictions in countries throughout the world, and immigration has often been a source of social and political controversy.⁸ In Canada, short-term visitors with HIV have generally not been denied entry into the country since 1991, and thus far there has been no legal requirement for, or policy of mandatory testing for either short-term visitors or all long-term immigrants. However, there have still been significant restrictions on the immigration of HIV-positive persons to Canada. For example, persons known by immigration authorities to be HIV-positive are generally considered "medically inadmissible" and denied permanent resident status on the ground that they would place "excessive demands" on Canadian health or social services.⁹

Several years of experience in addressing the HIV/AIDS epidemic have confirmed that the promotion and protection of human rights constitute an essential component in preventing transmission of HIV and reducing the impact of HIV/AIDS. In general, "human rights" and "public health" share the common objective to promote and to protect the rights and well-being of all individuals. From the human rights perspective, this can best be accomplished by promoting and protecting the rights and dignity of everyone, with special emphasis on those who are discriminated against or whose rights are otherwise interfered with. The new model is based on measures such as harm reduction, education, voluntary testing and counseling, and protection of privacy. The United Nations International Guidelines on HIV/AIDS and Human Rights states: "There is no public health rationale for restricting liberty of movement or choice of residence on the grounds of HIV status ... Therefore any restrictions on these rights based on suspected or real HIV status alone, including HIV screening of international travelers, are

discriminatory and cannot be justified by public health concerns.”¹⁰ Canada, however, has generally followed the new public health model in all areas related to HIV, including immigration. In addition, the Canadian government’s position on HIV/AIDS in the context its immigration policy has been that “HIV/AIDS” is not considered a dangerous, infectious disease, but rather a chronic disease like cancer or heart disease”¹¹

Section 15 (1) of the Charter: “Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex or mental or physical disability.”¹²

In *Andrews Case*,¹³ McIntyre J. of the Supreme Court of Canada, referring to s.15 of the *Canadian Charter of Rights and Freedoms* [hereinafter the “Charter”] as:

“I would say then that discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed on others, on which withholds or limits access to opportunities, benefits, and advantages available to other members of society. Distinction based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual’s merits and capabilities will rarely be so chased.”

A number of cases indicate the *Charter* applies to the conduct of officials applying Canadian law abroad, and this should arguably include in the context of the Canadian immigration system also. In *Lee v. Canada*¹⁴ the Federal Court has reiterated, that for those seeking admission to Canada, the *Charter* does not apply: “Those who are non-citizens, outside of the territory of Canada cannot invoke the *Charter* as it is purported to be done here.”¹⁵ Galloway cites Wilson J’s statement in *McKinney v. University of Guelph* that “the purpose of the equality guarantee is the promotion of human dignity.”¹⁶ He notes that:

“She does not qualify this statement with reference to membership or to other criteria which would exclude strangers or otherwise limit the class of beneficiaries. Equality is presented as a universal value and the right to equality is a right which people have solely by virtue of being equal.”¹⁷

He argues that immigration policies that contravene the principles of human dignity protected by the *Charter*, such as those that discriminate based on race, cannot be acceptable. All the Canadians subject to Canadian laws are protected by the rights guaranteed in the *Charter* (which is the supreme law of the country), why should others subject to Canadian laws not also have the same protections? Furthermore, the principles expressed in the provisions of the *Charter* are fundamentally the same as those expressed in international human rights law, which Canada has agreed to respect and promote. Galloway points out that even if the government had a constitutional right not to admit any aliens, it does not follow that once it decides to do so, it can admit aliens according to any criteria or impose any conditions it chooses.¹⁸

Galloway, further wrote that the rights enshrined in the *Charter* that are according to “all persons” should equally be accorded to those who participate in the immigration program. The application of the *Charter* to persons seeking entry into Canada would afford them, in addition, to protection from discrimination, protection from infringement on their life, liberty and security of the person, and from other rights enshrined in the *Charter* as the most fundamental to Canadian society. In addition to substantive guarantees, it would provide procedural guarantees and finally a cause of action in Canadian courts if those guarantees were not met. He concludes:

“Having taken the responsibility for the treatment of aliens, the government is committed to ensuring that the treatment is proper, much as the Good Samaritan who offers treatment to an injured party is held legally liable for his or her negligence, but is under no obligation to intervene in the first place.”¹⁹

Professor Carlier²⁰ shows that relatively few countries have passed specific laws restricting the free movement of HIV-positive people. However, many countries have laws that allow them to prevent access on grounds of public health, and these have sometimes been used against HIV/AIDS sufferers. Carlier emphasizes that free movement is a fundamental principle— any exception to it must be based on powerful, exceptional grounds. He concludes with three recommendations:²¹

- (i) states should not allow any new measures that prevent freedom of movement for persons living with HIV/AIDS.
- (ii) states should examine their existing measures against the principle of proportionality. Public health doctors and epidemiologists will need to assist with this; their findings will enable national or European Community judges to assess court judgments and laws.

- (iii) states, European Union countries should try to harmonise their discordant laws governing policies towards nationals of third countries, including those from developing countries.

Goodwin-Gill²² points out that “HIV infection is not like certain psychopathic conditions in which the afflicted are unable to control their behaviour and for that reason constitute a potential danger to other members of society. A country of population can protect itself from the risk of HIV infection (either from foreign nationals or who are already residents) by engaging in safe sex practices, by refraining from sharing injection equipment, and by ensuring that donated blood and plasma are carefully screened. The entry of people with HIV/AIDS creates no direct and unavoidable risk to the health of the general public. And, Somerville²³ suggests that generalizing the concept that immigrants with HIV are themselves a danger to public health and safety “may set up a precedent that all HIV infected people in Canada could be characterized.” Given the stigma that people with HIV and AIDS already face in society, any policy that would worsen that stigma while providing uncertain (if any) benefit to the public must be avoided.

Some Impressions

The exclusion of prospective immigrants with HIV on the ground that they represent a danger to public health also stigmatizes all immigrants, who are often viewed as threatening. Singling out persons with HIV on the ground that they constitute a threat to public health is discriminatory, according to test set out in *Law*. When persons with HIV are singled out for exclusion, they are denied the benefit of admission to Canada based on personal characteristics, namely disability.

The cases where states should deny permanent residency to people with HIV on the ground that they are likely to place an “excessive demands” on health or social services is complex. Somerville and Wilson,²⁴ have noted that applying the “excessive demand” criterion for exclusion, without taking other considerations into account, would “indicate an unacceptable attitude toward migrants as person- in that it views them only in terms of the economic benefit they offer. In addition, it places only a monetary value on their worth ...in that it states that they do not merit the cost would present to society.” They further state that “all immigrants with HIV

will excessively burden the public purse reinforces views of immigrants as abusers of the social welfare system and of persons with HIV as positive who are unable to contribute to society.²⁵

Immigrants and people with HIV/AIDS are the groups that have historically suffered and currently suffer from stigma and discrimination. HIV continues to be associated primarily with marginalized populations such as prostitutes, men who have sex with men, and drug users. Immigrants are often perceived as abusers of the social welfare system, as criminals, and as carriers of disease. Both groups are easy targets for legislation designed to assuage the public's fears about disease.²⁶ The discussion of HIV-related restrictions has indicated that they serve no useful public health purpose. It can be added that they may be indirectly harmful to the protection of public health, since they divert scarce resources from more useful initiative. Such laws and their enforcement may also offend human rights standards and principles of ethics.²⁷ The exclusions may be considered mechanisms for coping with these fears and the loss that they threaten in a much wider context.²⁸ Somerville and Wilson²⁹ states

“that migrants are the perfect target group for politicians who wish to be seen as strong and effective leaders, to be doing something and not afraid to take tough measures.... At the same time, politicians are politically safe in excluding non-nationals, including on the basis of HIV status, because the persons most harmed by this do not have the right to vote, and therefore cannot retaliate against these politicians..”

Stereo-types and assumptions about persons with HIV/AIDS should not form the basis of Canadian immigration law and policy, the provisions of our immigration law must always be worded to clearly require individualized assessments as a matter of basic fairness. It is well established that the medical inadmissibility provision in the *Immigration Act*³⁰ requires case-by-case analysis that takes into account the individual circumstances of each applicant. It does not allow the blanket exclusion of those with HIV on public health grounds: any assumption that a given individual with HIV would engage in such behaviours that risk the public's health, in addition to being discriminatory, is mere speculation. Under the current legislation, exclusion of a person with HIV on public health grounds is only justified when it is demonstrated that the person will in fact be “likely” to engage in risk-producing behaviours. The exclusion based on “excessive demands” also requires, an individualized, case-by-case assessment under the current legislation; the mere fact that person has a particular illness or disability should not suffice to make that person medically inadmissible on excessive-cost grounds.³¹

Final Word

The persons with HIV status are not a threat to public health as the same is not transmitted through casual contact. The notion of “excessive demand” is deceptively simple and plausible and it is legally wrong to automatically assume, based on a person’s medical condition that they will place an excessive demand on health or social services, and that a fuller, individual assessment is required.³² The exclusion of immigrants with HIV is therefore, not necessary for the protection of local populations. HIV can be distinguished from airborne diseases, such as tuberculosis that are transmitted by the simple presence of an infected individual. “Migrants are frequently referred to in association with criminal activity and abuse of the welfare system.” The general characterization of migrants as abusers of social welfare systems or as criminals would indicate that migrants are perceived as morally different.³³ It is presumed that the United Nations efforts to strengthen or enforce, as appropriate, legislation, regulations and other measures to eliminate all forms of discrimination against and to ensure the full enjoyment of all human rights and fundamental freedoms by people living with HIV/AIDSand develop strategies to combat stigma and social exclusion connected with the epidemic,³⁴ would be respected in true spirit by drafters of Canadian legislations and all sorts of discriminatory policies and practices would be discouraged forthwith and steps initiated towards strengthening enforcement mechanism towards this direction.

¹ R. Sampat-Mehta, *International Barriers* (Ottawa: Harpell’s Press, 1973) at xxxi

² R. Whitaker, *Canadian Immigration Policy since Confederation* (Ottawa: Canadian Historical Association, 1991) at 3

³ National Aids Control Organisation, online: Government of India <<http://naco.nic.in/vsnaco/askdoctor/faq.htm>>

⁴ *Ibid*

⁵ Report on the Global HIV/AIDS epidemic- June 2000, online: UNAIDS

<http://www.unaids.org/epidemic_update/report/Epi_report.pdf>

⁶ *Ibid*

⁷ R. Jurgens, *HIV Testing and Confidentiality: Final Report*, 2nd ed. (Montreal: HIV/AIDS Legal Network & Canadian AIDS Society, 2001) at 21, online: <<http://www.aidslaw.ca/Maincontent/issues/testing/00toce.html>>

⁸ S.B. Goldberg, “Immigration issues and Travel Restrictions,” online: The Body: An AIDS and HIV Information Source <<http://www.thebody.com/encyclo/immigration.html>>

⁹ A. Klein, *HIV/AIDS and Immigration Final Report* (Montreal: HIV/AIDS Legal Network, 2001) at 2

¹⁰ Office of the United Nations High Commissioner for Human Rights and the Joint United Nations Programme on HIV/AIDS, *HIV/AIDS and Human Rights, International Guidelines* (United Nations: New York, 1998) at 42-43

¹¹ *Supra* note 9 at 7

¹² *Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982 being Schedule B of the Canada Act, 1982 (U.K.), 1982, c. 11

¹³ *Andrews v. Law Society of British Columbia*, [1989] 1 SCR 143; 56 DLR (4th) in P. Maclem, et al., *Canadian Constitutional Law*, 2nd ed. (Toronto: Emond Montgomery Publications, 1997) at 967

¹⁴ (1997), 126 F.T.R. 229, 37 Imm. L.R. (2d) 278

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- ¹⁵ Tie, C., “Only Discriminating Visa Officers need apply: Visa Officer Decisions, the Charter and Lee v. Canada (Minister of Citizenship and Immigration)” 42 Imm. L.R. (2d) 197
- ¹⁶ [1990] 3 S.C.R. 229 at 391; 76 D.L.R. (4th) 545
- ¹⁷ D.Galloway, “Strangers and members equality in an Immigration setting. (1994) 7 Can. J. L. & Jur. 149
- ¹⁸ D.Galloway, “The extraterritorial application of the Charter to visa applicants (1991) 23 Ottawa L. Rev. 335
- ¹⁹ *Ibid* at 363
- ²⁰ HIV knows no border online: The European Commission
<http://europa.eu.int/comm/development/aids/html/freemov_en.htm>
- ²¹ *Ibid*
- ²² G.S.Goodwin-Gill, “AIDS,HIV,Migrants and Refugees: International Legal and Human Rights Dimensions in K.M. Haour & R.Rector, eds., *Crossing Borders: Migration, Ethnicity and AIDS* (London: Taylor & Francis, 1996)
- ²³ M.A.Somerville, “The case against HIV antibody testing of refugees and immigrants” (1989) 141 Can. Med. A. J 891 in *Supra* note 9 at 53
- ²⁴ M.A.Somerville & S.Wilson, "Crossing Boundaries: Travel, Immigration, Human Rights and AIDS" (1998) McGill L.J. 782 at 809 also at online:<<http://www.journal.law.mcgill.ca/arts/434somer.pdf>>
- ²⁵ *Ibid* at 798
- ²⁶ Canadian HIV/AIDS Legal Network, online <<http://www.aidslaw.ca/maincontent/issues/immigration> >
- ²⁷ *Supra* note 24 at 832
- ²⁸ *Ibid* at 833
- ²⁹ *Ibid* at 798
- ³⁰ **Immigration and Refugee Protection Act**, S.C. 2001, c.27
- ³¹ *Supra* note 26
- ³² *Deol v Minister of Employment and Immigration* (1992), 18 Imm.LR (2d) 1 (FCA); *Litt v Canada*(Minister of Citizenship and Immigration) (1995), 26 Imm L R (2d) 153 (F.C.T.D.)
- ³³ *Supra* note 24 at 799
- ³⁴ United Nations Special Session on HIV/AIDS-Global Crisis-Global Action (25-27 June 2001) Declaration of Commitment on HIV/AIDS (No. A/RES/S-26/2),online: UNAIDS<
http://www.unaids.org/whatsnew/others/un_special/declaration/2706_en.htm>