APPLYING TORTURE AND ASYLUM PROTECTIONS TO PREVENT THE DEPORTATION OF PERSONS WITH HIV/AIDS

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Abstract

Granting a foreign national with HIV/AIDS permission to remain in a country, whether temporarily or indefinitely, is a weighty decision. Faced with limited resources and often fervent public antagonism towards increased immigration, states must pick and choose whom to expel from its borders. This paper examines the extent to which HIV status is considered in determining whether a petitioner is eligible or even has a right to remain in a country. The analysis consists largely of a comparison of the asylum and torture protections afforded to petitioners with HIV/AIDS in the United States, Canada, and the European Court of Human Rights. The latter two jurisdictions have articulated two tests to provide torture protections in very limited circumstances to persons suffering from HIV/AIDS. This paper critiques these tests and proposes an alternative that seeks to balance policy considerations, humanitarian aims, and ease of implementation.
Introduction

Incredible progress has been made in treating HIV/AIDS in recent years. With the right medications, people with the disease can live long and healthy lives. But in many poorer countries, HIV/AIDS is still a veritable death sentence. Without access to antiretroviral therapy, death occurs about a year after a full-blown AIDS diagnosis. Moreover, because HIV/AIDS is still hugely misunderstood and stigmatized in many poorer countries, those who contract the disease may find themselves shunned by friends and family, left to die alone. An estimated two million people die of AIDS each year. Many of these deaths could be avoided if treatment were more widely available.

Universal access to antiretroviral treatment by 2010 was one of the objectives of the Millennium Development Goals, adopted by all 192 United Nations member states and at least 23 international organizations. This benchmark has come and gone, and with access to antiretrovirals still far from universal today, many of the world’s countries are failing to provide life-saving medicines to their citizens suffering from HIV/AIDS. Furthermore, despite paying lip service to universal access, countries routinely deport HIV-positive foreign nationals to countries where they will be unable to obtain the treatment they need to survive.

This paper argues that states have both a moral and legal obligation to grant asylum or at least withholding of removal to petitioners from countries that do not provide treatment and offer

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only a cruel, inhuman, and degrading quality of life for their HIV-positive citizens. Immigration relief should be aimed at those individuals most in need of protection, rather than serving as a channel for states to express censure of other states’ policies or politics. Though “economic migrants” have been traditionally viewed as a separate category from “political refugees,”3 this dichotomy is in fact unsupportable either in principle or under the letter of the law. Nowhere in the law governing asylum or torture protections is it stated that relief should be restricted to victims of civil and political rights violations. This paper seeks to reconcile a larger belief that immigration protections should be applied equally to individuals suffering social and economic deprivations with the recognition that doing so may be impossible in light of the anti-immigration sentiments prevalent in many countries today. As long as social and economic rights violations are viewed as less legitimate grounds for asylum and torture relief, it may be necessary to develop limiting tests to cabin the numbers of persons for whom deportation is withheld. This paper further examines and operationalizes these considerations in the context of improving protections for persons with HIV/AIDS facing deportation.

In Part One, I focus on HIV-positive petitioners in the asylum context, unraveling the law as set out in the UN Convention relating to the Status of Refugees as well as domestic asylum laws in the United States and Canada. Courts have generally recognized “persons with HIV/AIDS” as a particular social group that may be targeted for persecution. The challenge for HIV-positive petitioners has been proving this persecution. No court has yet recognized such factors as lack of medical treatment, social stigma, and other harms arising from HIV/AIDS as

meeting the requirements of a “well-founded fear of persecution.” However, drawing parallels from the United States’ treatment of asylum seekers who have been subjected to female genital mutilation or forced sterilization, HIV-positive asylum seekers can make a strong case for persecution and should be granted asylum. I conclude this section by setting out the case for conferring refugee status on persons with HIV/AIDS.

Asylum law should be sufficient to protect HIV-positive individuals from being removed to countries where they would face both lack of access to life-saving treatment and severe dignitary harms. However, because asylum law remains mired in its orientation towards civil and political rather than economic refugees, it may be more effective to turn to other bodies of law to prevent the deportation of persons with HIV/AIDS. For this reason, Part Two examines HIV-positive petitioners in the torture context. The argument in short is that returning certain persons with HIV/AIDS to their home countries constitutes both a risk to life and a serious threat of cruel, inhuman, and degrading treatment meriting protection under the Convention against Torture and most domestic torture statutes. Both Canadian courts and the European Court of Human Rights (ECHR) have delivered judgments to this effect and have accordingly prevented the deportation of the HIV-positive petitioners in question.

In order to limit the scope of these decisions for fear of creating a flood of similar claims, Canada and the ECHR have developed tests restricting the circumstances under which persons with HIV/AIDS are eligible for torture protection. Part Three discusses Canada’s “unwilling rather than unable” test and the ECHR’s “exceptional circumstances” test for granting protective status under torture law to HIV-positive petitioners. This paper argues that both the Canadian and the ECHR tests are ultimately unsatisfactory and under-protective and instead proposes a test that looks purely at the conditions that the petitioner would face upon return.
Although the paper discusses a number of jurisdictions, it is ultimately aimed at an American audience. In each section, I set out the law and interpretation of the law in the U.S. as a baseline. American immigration judges often rely on guidelines promulgated by the U.N. High Commissioner for Refugees, so I also reference international law on refugees to fill in the content of U.S. law. After presenting the U.S. position, I work from there to identify other jurisdictions that provide a contrasting approach to the protection of persons with HIV/AIDS. Canada and the ECHR are useful comparisons as both have been more progressive in their treatment of foreign nationals with HIV/AIDS and American law makers are likely to find them somewhat persuasive. Ideally, law makers, judges, and non-governmental advocates in the U.S. seeking to expand torture and asylum protections to persons with HIV/AIDS will seek to emulate the example set by their Canadian and European counterparts.

I. Asylum and withholding of removal

Asylum is in many ways an exception in the international system, infringing on well-established principles of state sovereignty. By extending protections to non-citizens, one state may be viewed as interfering in the business of another. Moreover, many states already find it challenging to provide for their own citizens and, to put it lightly, prefer for the most part to discourage foreign nationals from taking up permanent residence. With such considerations in mind, the grant of refugee status conferring asylum eligibility has been very narrowly tailored, requiring a “wellfounded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion.”


5 1951 UN Convention relating to the Status of Refugees, Article I(A)(2)
framework, these constraints can operate very differently in practice depending on the interpretation of the various elements, which turns in large part on one’s understanding of the underlying purposes of asylum.

There is not just one accepted understanding of the underlying goals of asylum law. As examined by Matthew Price, a legal scholar and political scientist at Harvard, asylum can be aimed at expressing condemnation of other states’ behaviors and pressuring them to amend their behavior, changing norms at home, or the “palliative” purpose of protecting threatened individuals. With respect to this last objective, Price discusses the way in which “asylum is now discussed by academics, refugee advocates, and increasingly by courts, in humanitarian terms: as a kind of escape valve to otherwise restrictive immigration policies, intended to provide protection for foreigners who face serious threats of any kind to their security.” (emphasis added).

This paper embraces the idea of asylum as a humanitarian rather than simply political tool and argues that it can and should be used to provide needed protections for foreign nationals with HIV/AIDS. The following sections set out the asylum laws on the books, how they have been thus far applied to the cases of HIV-positive petitioners, and the argument for how the law could be better interpreted to confer asylum eligibility upon those HIV-positive petitioners most in need.

(b) Basic legal framework

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7 Id. at 4.
The United Nations Convention relating to the Status of Refugees was adopted on 28 July 1951 and entered into force on 22 April 1954. The Convention covers only persons who became refugees before 1 January 1951. The 1967 United Nations Protocol related to the Status of Refugees\(^8\) expands the substantive provisions of the 1951 UN Convention to all persons that meet the definition of “refugee” as defined in Article 1 of the Convention:

A. For the purposes of the present Convention, the term “refugee” shall apply to any person who:

(2) As a result of events occurring before 1 January 1951 and owing to wellfounded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it…\(^9\)

The Convention thus sets out the traditionally-recognized elements defining refugee status for the purposes of this paper: (1) a well-founded fear of persecution; and (2) membership in a particular social group.\(^10\) The subject of much debate, each of these requirements is discussed in greater detail in the sections that follow. Although the Convention itself does not deal specifically with the granting of asylum or other immigration relief, most states have

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\(^8\)1967 UN Protocol relating to the Status of Refugees, Article 2, “For the purpose of the present Protocol, the term “refugee” shall, except as regards the application of paragraph 3 of this article, mean any person within the definition of article 1 of the Convention as if the words “As a result of events occurring before 1 January 1951 and...” “and the words”... “a result of such events”, in article 1 A (2) were omitted.”

\(^9\)1951 UN Convention relating to the Status of Refugees, Article I(A)(2)

\(^10\)This paper looks at the population of petitioners whose asylum claims turn on their HIV status rather than on more traditional grounds such as incarceration, political targeting, or religious discrimination. As such, they would not fall into the categories of persons who had been persecuted on account of race, religion, nationality or political opinion. Membership in a particular social group is thus the critical category for the purposes of this paper.
adopted the Convention definition of “refugee,” at least in close approximation, and may grant asylum or another protected status to persons who satisfy the required elements.

The United States ratified the 1967 Refugee Protocol in 1968 and enacted the Refugee Act of 1980, which essentially incorporates all of the Convention provisions. To qualify for asylum, a petitioner must demonstrate that he meets the definition of “refugee.” Mirroring the Refugee Convention, the United States requires that persons granted refugee status show “a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.”

Petitioners may also be found eligible for asylum based on past persecution. If a petitioner can prove past persecution, he will automatically satisfy the “well founded fear of persecution” requirement. The only exceptions to this rule are if U.S. Citizen and Immigration Services (USCIS) can show that

11 8 USCS §1158(b)(1)(A), INA 208, “The Secretary of Homeland Security or the Attorney General may grant asylum to an alien who has applied for asylum in accordance with the requirements and procedures established by the Secretary of Homeland Security or the Attorney General under this section if the Secretary of Homeland Security or the Attorney General determines that such alien is a refugee within the meaning of section 101(a)(42)(A) (8 USCS § 1101(A)(42)(A)).

12 8 USCS §1101(a)(42)(A), INA 208, The term "refugee" means (A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.

13 8 C.F.R. § 1208.13(b)(1) An applicant shall be found to be a refugee on the basis of past persecution if the applicant can establish that he or she has suffered persecution in the past in the applicant's country of nationality or, if stateless, in his or her country of last habitual residence, on account of race, religion, nationality, membership in a particular social group, or political opinion, and is unable or unwilling to return to, or avail himself or herself of the protection of, that country owing to such persecution. An applicant who has been found to have established such past persecution shall also be presumed to have a well-founded fear of persecution on the basis of the original claim.

14 See e.g. Boer-Sedano v. Gonzales, 418 F.3d 1082 (9th Cir. 2005).
circumstances such that he no longer has a well-founded fear of persecution or (2) that the applicant could avoid future persecution by relocating to another part of his country.\textsuperscript{15}

Persons who have been recognized as refugees are eligible for asylum.\textsuperscript{16} If granted, asylum entitles the recipient to remain in the country, seek employment, and travel abroad.\textsuperscript{17} Asylees are able to eventually apply for citizenship.\textsuperscript{18}

\textsuperscript{15} 8 C.F.R. § 1208.13(b)(1)(i)…an asylum officer shall, in the exercise of his or her discretion, refer or deny, or an immigration judge, in the exercise of his or her discretion, shall deny the asylum application of an alien found to be a refugee on the basis of past persecution if any of the following is found by a preponderance of the evidence: (A) There has been a fundamental change in circumstances such that the applicant no longer has a well-founded fear of persecution in the applicant’s country of nationality or, if stateless, in the applicant’s country of last habitual residence, on account of race, religion, nationality, membership in a particular social group, or political opinion; or (B) The applicant could avoid future persecution by relocating to another part of the applicant’s country of nationality or, if stateless, another part of the applicant’s country of last habitual residence, and under all the circumstances, it would be reasonable to expect the applicant to do so.

\textsuperscript{16} Asylum cases in the United States go through several stages of review. Asylum seekers are first interviewed by U.S. Citizen and Immigration Services (USCIS) asylum officers. If they are not approved for asylum, their cases go before an Immigration Judge (IJ) with the Executive Office for Immigration Review (EOIR). IJ’s either grant the asylum or order the individual removed from the U.S., assuming that she or he is not eligible for other forms of relief such as withholding of removal on CAT grounds. IJ decisions can be appealed by either the government or the applicant. U.S. Citizen and Immigration Services, “Obtaining Asylum in the United States: Two Paths,” \url{http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=e3f26138f898d010VgnVCM10000048f3d6a1RCRD}, accessed 2/1/10. Appeals are heard by the Board of Immigration Appeals (BIA), an administrative agency which then issues decisions that are binding on all Department of Homeland Security (DHS) officers and Immigration judges unless overruled by the Attorney General or a Federal court. The BIA’s decisions can be appealed to the federal Court of Appeals. United States Department of Justice, Executive Office for Immigration Review, Board of Immigration Appeals, \url{http://www.justice.gov/eoir/blainfo.htm}, accessed 2/1/10.

\textsuperscript{17} 8 USCS § 1158 (C)(1) In general. In the case of an alien granted asylum under subsection (b), the Attorney General--

(A) shall not remove or return the alien to the alien’s country of nationality or, in the case of a person having no nationality, the country of the alien's last habitual residence; 
(B) shall authorize the alien to engage in employment in the United States and provide the alien with appropriate endorsement of that authorization; and
(C) may allow the alien to travel abroad with the prior consent of the Attorney General.

\textsuperscript{18} Foreign nationals seeking permission to stay in the United States might also apply for withholding of removal. While asylum claims must be filed within one year, withholding applications are not subject to this restriction. Persons whose opportunity to seek asylum has
Like the United States, Canada has also adopted the UN Convention definition of "refugee" in determining eligibility for asylum.\(^{19}\) Per Article 96 of the Canada Immigration and Refugee Protection Act, the Convention Refugee status essentially mirrors the traditional definition under international law, requiring that the petitioner prove both "persecution"\(^{20}\) and "membership in a particular social group."\(^{21,22}\)

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\(^{19}\) The immigration status determination process in Canada is also quite similar to that in the United States, as described in fn. 16. Asylum seekers are screened by officers of the Citizen and Immigration Canada Department to determine if they are eligible to have a claim heard by the Refugee Protection Division of the Immigration and Refugee Board of Canada (IRB), an independent administrative tribunal that determines which applicants are Convention Refugees or persons in need of protection. Petitioners who are denied a hearing with the IRB may appeal the decision in Federal Court. Petitioners whose claims for asylum or "person in need of protection" status may also appeal in Federal Court. The government is also entitled to appeal the grant of permanent or temporary status to the petitioner.

\(^{20}\) The Canadian Courts have interpreted "persecution" in much the same way as the United States, for example, holding that "the definition of Convention refugee comprises both a subjective and an objective element; that is, a person is not entitled to refugee status because he subjectively fears persecution unless he also demonstrates that fear to be objectively well founded." \(^{23}\) See, e.g., Yusuf v. Canada (Minister of Employment and Immigration), (1992) 1 F.C. 629; (1991) F.C.J. 1049, Canada: Federal Court, 24 October 1991, available at: http://www.unhcr.org/refworld/docid/403e24e84.html \(\text{[accessed 14 February 2010]}\)

\(^{21}\) With respect to the "member of a particular social group" requirement, Canadian jurisprudence reveals an interpretation similar to that in the U.S. In Canada (Attorney General) v. Ward, the Supreme Court of Canada defined "particular social groups" as (1) groups defined by an innate or unchangeable characteristic; (2) groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association; and (3) groups associated by a former voluntary status, unalterable due to its historical permanence. Ward v. Canada, (1993) 2 S.C.R. 689. Citing Canada (Minister of Employment and Immigration) v. Mayers, (1993) 1 F.C. 154 (C.A.); Cheung v. Canada (Minister of Employment and Immigration), (1993) 2 F.C. 314 (C.A.); Matter of Acosta, Interim Decision 2986,
Petitioners whose refugee claims are accepted are designated as “protected persons,” allowing them to stay in Canada and to apply for “permanent resident” status and eventually citizenship. Permanent residents can apply for citizenship after living in Canada for three years.

(b) Persecution

The United Nations High Commissioner for Refugees (UNHCR) *Handbook on Procedures and Criteria for Determining Refugee Status* recognizes that there is no universally accepted definition of “persecution.” However, the Handbook goes on to provide some clarification of the term, including that persecution requires subjective fear and that persecution may be based on a cumulative assessment of a number of acts that would not in and of themselves be considered persecutory.

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22 Canada Immigration and Refugee Protection Act, S.C., 2001, c. 27. 96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion, (a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or (b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.


26 (b) Persecution

51. There is no universally accepted definition of “persecution”, and various attempts to formulate such a definition have met with little success. From Article 33 of the 1951 Convention, it may be inferred that a threat to life or freedom on account of race, religion, nationality, political opinion or membership of a particular social group is always persecution. Other serious violations of human rights—for the same reasons—would also constitute persecution.

52. Whether other prejudicial actions or threats would amount to persecution will depend on the circumstances of each case, including the subjective element to which reference has been made in the preceding paragraphs. The subjective character of fear of persecution requires an
The UNCHR describes “persecution” as a threat to life or freedom or serious human rights violations.\(^{27}\) According to U.S. jurisprudence, “[P]ersecution is an extreme concept that does not include every sort of treatment our society regards as offensive.”\(^{28}\) Further defining what constitutes persecution, the courts have held that “mere discrimination” does not meet the threshold of extremity needed for a finding of persecution. However, severe or sustained discrimination or discrimination in combination with other harms can meet the threshold for a persecution finding.\(^{29}\)

Persecution requires both a subjective and objective risk. Fear of persecution is considered “well-founded” if petitioner subjectively believes in the risk and presents objective evaluation of the opinions and feelings of the person concerned. It is also in the light of such opinions and feelings that any actual or anticipated measures against him must necessarily be viewed. Due to variations in the psychological make-up of individuals and in the circumstances of each case, interpretations of what amounts to persecution are bound to vary.\(^{53}\) In addition, an applicant may have been subjected to various measures not in themselves amounting to persecution (e.g. discrimination in different forms), in some cases combined with other adverse factors (e.g. general atmosphere of insecurity in the country of origin). In such situations, the various elements involved may, if taken together, produce an effect on the mind of the applicant that can reasonably justify a claim to well-founded fear of persecution on “cumulative grounds”. Needless to say, it is not possible to lay down a general rule as to what cumulative reasons can give rise to a valid claim to refugee status. This will necessarily depend on all the circumstances, including the particular geographical, historical and ethnological context.


\(^{28}\) Ali v. Ashcroft, 366 F.3d 407, 410 (6th Cir. 2004) (quoting Ghaly v. INS, 58 F.3d 1425, 1431 (9th Cir. 1995)); See also Lumaj v. Gonzales, 462 F.3d 574, 577 (6th Cir. 2006) (adopting the Third Circuit’s finding that “persecution does not encompass all treatment that our society regards as unfair, unjust, or even unlawful or unconstitutional” (quoting Fatin v. INS, 12 F.3d 1233, 1240 (3d Cir. 1993)).

\(^{29}\) See, e.g., Wakkary v. Holder, 558 F.3d 1049 (9th Cir. 2009) citing Krotova v. Gonzales, 416 F.3d 1080, 1087 (9th Cir. 2005); Duarte de Guinac v. INS, 179 F.3d 1156, 1161-62 (9th Cir. 1999); Korablina v. INS, 158 F.3d 1038, 1044-45 (9th Cir. 1998); UNHCR Handbook on Procedures and Criteria for Determining Refugee Status, HCR/IP/4/Eng/REV.1, Reedited 1992, Originally published 1979, para 53 (“measures not in themselves amounting to persecution (e.g. discrimination in different forms), in some cases combined with other adverse factors (e.g. general atmosphere of insecurity in the country of origin)…can reasonably justify a claim to well-founded fear of persecution on “cumulative grounds”).
evidence that there is a reasonable possibility that the risk will manifest. Petitioners may establish eligibility for asylum based on evidence of past persecution without having to prove a well-founded fear of future persecution. However, past persecution is not particularly relevant to asylum in the context of HIV/AIDS, as most petitioners seeking eligibility on these grounds will not already have been subjected to the kind of treatment—deprivation of essential medicines, social rejection, and the like—that underlies their claims.

Persecution has been understood to encompass socio-economic rights violations. Michelle Foster of the Research Programme in International Refugee Law at the University of Melbourne Law School argues that over the last two decades, it has been well-established in courts throughout the world that persecution is not restricted to traditional notions of immediate threats to life or freedom. She cites cases in which Convention refugee status was granted to persons whose claims turned on the inability to obtain employment or to earn a livelihood.

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30 See, e.g., Ayele v. Holder, 564 F.3d 862, 868 (7th Cir. 2009) citing Capric v. Ashcroft, 355 F.3d 1075, 1085 (7th Cir. 2004); Ahmed v. Ashcroft, 348 F.3d 611, 618 (7th Cir. 2003); UNHCR Handbook on Procedures and Criteria for Determining Refugee Status, HCR/IP/4/Eng/REV.1, Reedited 1992, Originally published 1979, para 52 (recognizing subjective fear as a critical element of persecution); INS Proposed Regulations, 65 Fed. Reg. 76588-98 (Dec. 7, 2000) (defining persecution as “the infliction of objectively serious harm or suffering that is subjectively experience as serious harm or suffering by the applicant…”).


32 Foster, supra n. 3, pp. 90-94.

33 See, e.g., Castillo-Ponce v. Immigration and Naturalization Service, 1995 US App. LEXIS 27058 (9th Cir. 1995); Zhen Hua Li v. Attorney General of the United States; Immigration and Naturalization Service, 400 F.3d 157 (3rd Cir. 2005), in which a claim was upheld because the applicant was ‘blacklisted from government employment’ in China, which also resulted in loss of benefits such as ‘health coverage, food and medicine rations, and educational benefits’: at 169. For Canadian authority, see: Xie v. Canada (1994) FCJ No. 286, at para. 11. Shao Mei He v. Minister of Employment and Immigration (1994) FCJ No. 1243; and Li v. Canada (Minister of Citizenship and Immigration) (1994) FCJ No. 1745. Cited in Foster, supra n. 3, p. 95 fn 24.
inability to receive education, and—most importantly for the purposes of this paper—
deprivation of medical treatment.

(c) Member of a particular social group

Asylum law has traditionally focused more on protection of individuals subject to civil
and political persecution. Further, it has more frequently recognized physical harms as
persecution, turning a blind eye to more intangible but no less grave dignitary harms. As noted
by Price, “Jews in Nazi Germany and dissidents in the Soviet Union are the classic examples of
persecuted people.” However, the expansion of the “particular social group” category in recent
years has opened the door for new kinds of asylum claims.

Conduct does not rise to the level of persecution unless it is “on account of” race,
religion, nationality, membership in a particular social group, or political opinion.” For
petitioners claiming asylum solely on the basis of their HIV status, the relevant inquiry is
whether they can be categorized as a member of a particular social group. Race, religion,

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34 See e.g., Ali v. Canada (Minister of Citizenship and Immigration) (1997) 1 FCD 26; 1996 FCD
35 See Tchoukhrova v. Gonzales, 404 F.3d 1181, 1194 (9th Cir. Cal. 2005). (“Although denying
medical care or education on the basis of race, ethnicity, religion, political opinion, or
membership in a particular social group is, at a minimum, discrimination, where the denial
seriously jeopardizes the health or welfare of the affected individuals, a finding of persecution is
warranted.” In this case, the claimants were the parents of a severely disabled child with
cerebral palsy. Although this holding is significant, it is important to distinguish it from the HIV/AIDS
cases discussed throughout this paper in that the deprivation of medical treatment was
intentionally withheld from the child because of social stigma against disabled persons. The child
lacked basic medical treatment that was being provided to other children in his peer group.
While it is sometimes the case that hospitals refuse to treat persons with HIV/AIDS, more often the
petitioners claiming relief from deportation are simply unable to access antiretrovirals because
they are overly expensive or not available at all in their countries of origin.)
36 Matthew Price, p. 4, supra n. 6
37 See 8 USCS §1101(a)(42)(A), INA 208; 1951 UN Convention relating to the Status of Refugees,
Article I(A)(2).
nationality, and political opinion are much more inherently defined categories, while “particular social group” may encompass a broader range of characteristics, including HIV status.

The UNHCR Guidelines on International Protection define “particular social group” as “a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of human rights.”  

Most jurisdictions have adopted essentially the same definition of “particular social group.” The “particular social group” designation was intentionally created to protect persons who fall outside of the more specific religion, race, nationality, and political opinion

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38 UNHCR, Guidelines on International Protection, “Membership of a particular social group” within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees,” May 7, 2002, www.unhcr.ch. See also Matter of Acosta, 19 I&N Dec. 211, 233 (BIA 1985), modified on other grounds by Matter of Mogharrabi, 19 I&N Dec. 439 (BIA 1987) (defining “particular social group” as “a group of persons all of whom share a common, immutable characteristic. The shared characteristic might be an innate one such as sex, color, or kinship ties, or in some circumstances it might be a shared past experience such as former military leadership or land ownership...whatever the common characteristic that defines the group, it must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences.”); Sarkisian v. AG of the United States, 322 Fed. Appx. 136, 140 (3d Cir. 2009); Castillo-Arias v. United States AG, 446 F.3d 1190, 1194 (11th Cir. 2006);

39 See also Matter of Acosta, 19 I&N Dec. 211, 233 (BIA 1985), modified on other grounds by Matter of Mogharrabi, 19 I&N Dec. 439 (BIA 1987) (defining “particular social group” as “a group of persons all of whom share a common, immutable characteristic. The shared characteristic might be an innate one such as sex, color, or kinship ties, or in some circumstances it might be a shared past experience such as former military leadership or land ownership...whatever the common characteristic that defines the group, it must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences.”); Sarkisian v. AG of the United States, 322 Fed. Appx. 136, 140 (3d Cir. 2009); Castillo-Arias v. United States AG, 446 F.3d 1190, 1194 (11th Cir. 2006); Immigration and Refugee Board of Canada, “Membership in a Particular Social Group as a Basis for a Well-Founded Fear of Persecution - Framework of Analysis,” December 1991. “The member of the group is unable, by his/her own actions, to disassociate himself/herself from the group (involuntary membership)... Affiliation with the group is so fundamental to the person’s identity and human dignity that the person ought not to be required to disassociate himself/herself from that group (voluntary membership).”
categories. The development of the category is reflected in the progression of cases filed in the U.S. by persons who had suffered forced sterilization and female genital mutilation (FGM).

U.S. asylum policy on forced sterilization developed in response to the Chinese government’s widespread use of forced abortions, sterilizations, and involuntary insertions of intrauterine devices to control population growth in the 1980’s and 1990’s. When petitioners first began bringing asylum claims based on these practices, the BIA was reluctant to find persecution unless they had been performed for some discriminatory reason. In response to growing popular outrage against China’s use of such invasive reproductive measures, Congress stepped in to specifically legislate on the matter. On September 30, 1996, Congress amended the asylum statute such that victims of involuntary sterilization are entitled to a presumption of persecution on account of political opinion. This legislation effectively recognizes persons who have been subjected to forced sterilization as a particular social group meriting asylum protections.

Once it had been determined that a petitioner has been the victim of involuntary sterilization, the courts have cited a number of factors contributing to a finding of persecution that do not seem to fall under the traditional definition. In In re C--- Y--- Z---, the court extended asylum to a petitioner whose wife had been subjected to forced sterilization although he himself had not been forced to undergo the procedure. Ordinarily, such second order effects would not

40 Requena-Cruz, Richard Cid v. M.E.I., IAB 83-1059 (8 April 1986), p. 5, per Vidal. (“membership in a particular social group’ is a ground which must be given a broad and liberal interpretation in order to protect groups or individuals who do not necessarily have political, religious or racial ties at the root of their fear of persecution”) As cited in Immigration and Refugee Board of Canada, “Membership in a Particular Social Group as a Basis for a Well-Founded Fear of Persecution - Framework of Analysis,” December 1991.
41 See, e.g., In re Chang, 1989 BIA LEXIS 13 (B.I.A. 1989) (holding that forced sterilization does not constitute persecution on account of race, religion, nationality, membership in a particular social group, or political opinion).
be considered persecution. In In re Y---T---L, the petitioner was again a man whose wife had been involuntarily sterilized. The court held, “coerced sterilization is better viewed as a permanent and continuing act of persecution that has deprived a couple of the natural fruits of conjugal life, and the society and comfort of the child or children that might eventually have been born to them.” Having categorized the petitioner as a member of the particular social group of persons who have been victimized by forced sterilization, the court saw fit to consider dignitary and psycho-social harms such as the failure to have children, rather than risks to physical integrity or life that are more frequently included in the determination of persecution. The court has also noted that forced abortion would constitute persecution as well.

U.S. courts have adopted a similarly expansive view of harms that constitute persecution in cases of members of the particular social group of persons who have been subjected to FGM. In Bah v. Mukasey, the BIA had concluded that the three Guinean petitioners did not face future persecution because they had already been subjected to FGM and thus faced no further risk if returned to Guinea. On appeal, the court rejected this finding and remanded the case, holding that

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44 It has now become common practice for immigration judges, the BIA, and U.S. courts to grant asylum to persons whose spouses have suffered involuntary sterilization. See In re Y---T---L, 23 I. & N. Dec. 601,606 (“Our administrative decisions, and those of the various Immigration Courts, have granted asylum to significant numbers of persons who themselves, or whose spouses, have suffered involuntary sterilization within the meaning of the Act.”) 45 In re Y---T---L, 23 I. & N. Dec. 601. 46 Id. at 607. 47 See also Qili Qu v. Gonzales, 399 F.3d 1195, 1203 (9th Cir. 2005) (granting the petitioner’s application for withholding of removal, holding, “Involuntary sterilization irrevocably strips persons of one of the important liberties we possess as humans: our reproductive freedom. Therefore, one who has suffered involuntary sterilization, either directly or because of the sterilization of a spouse, is entitled, without more, to withholding of removal.”) 48 Id. (“Again the pain, psychological trauma, and shame are combined with the irremediable and ongoing suffering of being permanently denied the existence of a son or daughter.”). See also Zi Zhi Tang v. Gonzales, 489 F.3d 987, 992 (9th Cir. 2007) (finding that victims of forced abortion are entitled to protection because the effects “last a lifetime” and “the governmental infringement on a woman’s bodily integrity during a forced abortion results in, as one Congressman described it, “one of the most gruesome human rights violations in the history of the world.””).
the BIA had erred in failing to consider other forms of persecution such as domestic violence, rape, and sex trafficking.\textsuperscript{49}

As recognized in the Bah concurring opinion, the BIA and the courts have diverged from the more traditional conception of persecution in categorizing more prolonged and permanent forms of suffering as “persecution” in the FGM cases. For example, the court held in In re Bosede Olawumi, “[f]orced female genital mutilation is better viewed as a permanent and continuing act of persecution that has permanently removed from a woman a physical part of her body, deprived her of the chance for sexual enjoyment as a result of such removal, and has forced her to [sic] potential medical problems relating to this removal.”\textsuperscript{50} Once the court has determined that a petitioner is a member of the particular social group of women from a tribe that routinely practices FGM, it may consider factors such as deprivation of sexual satisfaction and potential medical problems ancillary to the original persecutory conduct, neither of which would fall within the traditional definition of persecution.\textsuperscript{51}

In the same way that the courts have recognized factors outside of the more traditional physical harms for the particular social groups of victims of FGM and forced sterilization, they should do the same for persons suffering from HIV/AIDS. Because the disease is as-yet incurable, it should certainly constitute an immutable characteristic meriting “particular social

\textsuperscript{49} Bah v. Mukasey, 529 F.3d 99, 116 (2d Cir. 2008). See also Kone v. Holder, 2010 U.S. App. LEXIS 3924 (2d Cir. Feb. 25, 2010) (citing Bah and referring to similar evidence that Ivorian and Dioula women face persecution beyond FGM including domestic violence and rape).

\textsuperscript{50} In re Bosede Olawumi, No. A70 651 629 (B.I.A. May 23, 2003) (per curiam). See also In re Mariama Dalanda Bah, No. A97 166 217 (B.I.A. Sept. 1, 2005) (per curiam) (“The persecution resulting from FGM is therefore continuing and permanent.”); Mohammed v. Gonzales, 400 F.3d 785, 800 (9th Cir. Cal. 2005) (likening FGM to forced sterilization and concluding that both constitute “continuing persecution”).

\textsuperscript{51} Harry Reid made proposal similar to that for forced sterilization to add a presumption of persecution on account of political opinion for women who had been subjected to FGM. Although Congress voted down this proposal, it passed statutes criminalizing FGM following the Kasinga case. See 18 U.S.C. § 116.
group” status. Further supporting this finding, many persons with HIV/AIDS, especially those coming from countries where it is a constant struggle to obtain treatment, would likely argue that their illness has become key to their identity. As described in Part (d)(1), below, the U.S. White House Counsel has gone so far as to acknowledge “HIV-positive individuals” as a social group for the purposes of asylum.

Particularly because the countries of the world have expressed such a commitment to tackling the global HIV/AIDS epidemic – mirroring the particular concern about FGM and forced sterilization that galvanized Congress and the U.S. courts to take action – persons with HIV should be recognized as a particular social group. As such, HIV-positive petitioners should be entitled to prove persecution based on non-traditional factors such as the lack of medical treatment, social stigma, and the dignitary harms of rapid physical deterioration and a cruel and inhuman death.

(d) “On Account Of” Causality

Under traditional asylum law, in order to prove refugee status, in addition to establishing persecution and membership in a particular social group, it must also be demonstrated that the persecution was “on account of” membership in the particular social group. According to Price, this so-called “nexus clause” serves as a mechanism for identifying when a state is acting illegitimately, reflecting “a distinctively liberal conception of legitimacy: one that protects pluralism by promoting the values of equality, religious toleration, and political accountability.” 52 Price further notes, however, that the nexus clause fails to encompass certain behaviors that the international community has judged as illegitimate under any circumstances,

52 Price, supra n. 6, p. 109.
such as torture, genocide, and arbitrary disappearances and killings.\footnote{Price, supra n. 6, p. 110.} As noted earlier, he suggests a growing acceptance of “palliative” asylum that would essentially jettison the nexus clause and provide protection for threatened individuals who can prove persecution even if this ill-treatment is not on account of any particular nefarious discrimination against them.

That said, it is still possible to make the argument that social and economic rights violations may be on account of membership in a particular social group. By reconceptualizing denial of social and economic rights as more systemic, structural persecution,\footnote{See “Political Legitimacy in the Law of Political Asylum,” 99 Harv. L. Rev. 450 (1985-1986) (in which the author emphasizes the need for courts to consider ‘structural persecution’) Cited by Foster, supra n. 3, p. 253, fn. 69.} the denial of social and economic benefits can be viewed as persecution caused by intentional governmental policies.\footnote{If a certain sector of the population is systematically denied food, water, education, or healthcare while others are well-cared for, it can be argued that this deprivation is caused by an intentional and persecutory policy on the part of the government. Admittedly, in this overly general and theoretical case, the particular social group might be characterized as “poor and disenfranchised members of country X,” which would almost certainly be rejected as overly broad by the courts. However, it should be possible to articulate a more defined social group such as “persons with HIV/AIDS” and still apply the same reasoning of “structural persecution” to prove the causality requirement for asylum eligibility.}

\textbf{(e) Persecution Attributed to the Government}

Finally, in order to meet the “persecution” requirement to be eligible for asylum, the petitioner must show that the acts in question can be attributed to the government, either directly or through the government’s responsibility to protect.\footnote{“Persecution” may be inflicted either by the government or by persons or organizations which the government is unable or unwilling to control. Valdiviezo-Galdamez v. AG of the United States, 502 F.3d 285, 288 (3d Cir. 2007) citing Kibinda v. AG of the United States, 477 F.3d 113, 119} For example, persecutory actions taken by police officers can certainly be imputed to the government.\footnote{Persecution” may be inflicted either by the government or by persons or organizations which the government is unable or unwilling to control. Valdiviezo-Galdamez v. AG of the United States, 502 F.3d 285, 288 (3d Cir. 2007) citing Kibinda v. AG of the United States, 477 F.3d 113, 119}
Although it does not appear in the text of the Refugee Convention itself, the UNCHR Handbook establishes the requirement that public officials or others that can be attributed to the government either directly engage in persecution or fail to fulfill their responsibility to protect from persecution. The Handbook provides,

“Persecution is normally related to action by the authorities of a country…Where serious discriminatory or other offensive acts are committed by the local populace, they can be considered as persecution if they are knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer effective protection.”

As demonstrated by the FGM and forced sterilization cases described above, the government’s responsibility for persecutory conduct may not be as direct when the persecution is on account of membership in a particular social group. The link is tenuous at best between the governments in question and some of the factors cited by the courts in these cases such as deprivation of sexual enjoyment and the inability to have children. In the case of members of the particular social group of persons with HIV/AIDS, the inability to directly connect the government to the petitioners’ suffering if returned to their countries should not be fatal to a finding of persecution. Moreover, one could argue that there is a direct link between the petitioners’ suffering and the governments of the countries to which they would be removed. If the government is responsible for ensuring universal access to antiretroviral therapy for its

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(3d Cir. 2007). See also Velasquez v. Ashcroft, 81 Fed. Appx. 673, 675 (9th Cir. 2003); Kopyonkina v. Mukasey, 313 Fed. Appx. 762, 769 (6th Cir. 2008).

57 Police officers are the prototypical state actor for asylum purposes. See, e.g., Hernandez-Montiel, 225 F.3d at 1097 (noting that petitioner’s assaults by the police demonstrated that he ‘is at risk of (being) persecuted (by) the very agency which purports to protect him by law’). In Boer-Sedano, the petitioner had been subjected to sexual and other physical abuse by a member of the Mexican police force.

citizens and fails to do so, it is also responsible for all of the effects on the person with HIV/AIDS of not receiving the necessary medicines.

(d) Application

The following sections present an overview of how asylum law has been applied to HIV-positive petitioners in the U.S. and Canada. My intention was to compare and contrast jurisdictions that have granted asylum solely on the basis of HIV status with the U.S., which has not. However, I was unable to find any jurisdictions that had ruled in favor of HIV-positive asylum seekers in the absence of other persecution on account of another protected ground like political opinion or nationality. Instead, I have included a section describing how an advocate for an HIV-positive petitioner might argue for asylum eligibility solely on the basis of her client’s HIV status.

i) The United States

For the most part, the U.S. has failed to offer any kind of meaningful protection to HIV-positive asylum seekers. There are few published immigration decisions concerning HIV-positive petitioners to begin with, since most immigration decisions take place at the IJ or BIA level. Asylum for HIV-positive petitioners in the U.S. is uncommon, though not unheard of. The cases in which asylum was granted, however, do not turn solely on the issue of HIV status, but also involve discrimination on the basis of sexual orientation or other factors.

The jurisprudence has generally recognized HIV-positive individuals living in certain countries or just HIV-positive individuals as a whole as satisfying the “particular social group” requirement for asylum. The White House General Counsel even acknowledged “HIV-positive individuals” as a social group in recommending that the INS and the Executive Office of Immigration Review should grant withholding of removal and asylum based “on the social group
category of HIV-positive individuals.” In response, the General Counsel of the Immigration and Naturalization Service sent a letter to all regional and district counsel stating that nothing in existing law or practice precludes recognition of “persons with AIDS” as a particular social group, if the proof in the individual case supports such a conclusion.

American courts have recognized the social group of “persons with HIV/AIDS.” In May 2006, the Second Circuit in *Sichone v. Gonzales* implied that it would have found that the petitioner satisfied the “member of a particular social group” requirement but denied her petition for review on the grounds that she had failed to meet the persecution requirement. In March 2007, the Seventh Circuit in *Parades v. United States Attorney-General* explicitly accepted that “Paredes’s characteristics of being a homosexual man with AIDS qualified him as a member of a particular social group.” However, the Court again held that he failed to prove a pattern of persecution against members of his social group.

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59 General Counsel of the Immigration and Naturalization Service letter, [http://www.immigrationequality.org/uploadedfiles/HIV%20asylum%20memo.pdf](http://www.immigrationequality.org/uploadedfiles/HIV%20asylum%20memo.pdf) “when permitted by statute, the INS and the Executive Office of Immigration Review (EOIR) should grant stays of deportation, suspension of deportations, extended voluntary departure, deferred action, and asylum based on the social group category of HIV-positive individuals.” (emphasis added)


61 *Sichone v. Gonzales*, 183 Fed. Appx. 50, 2nd Cir 2006, “Even assuming that Sichone offered sufficient evidence of her membership in a particular social group - Zambians who share the common, currently immutable characteristic of being HIV-positive - she failed to demonstrate that any suffering she might face on account of membership in that group was actually or effectively at the hands of the government.”

62 *Paredes v. United States AG*, 219 Fed. Appx. 879, “the IJ determined that, (Paredes) has never been subjected to any type of discrimination, much less persecution, on account of his sexual orientation and health status in the past. Moreover, (Paredes) has not provided any direct evidence to demonstrate that . . . if returned to Venezuela he will be the subject of persecution based on his sexual orientation and health status. (§§84) Further, (Paredes) did not provide any direct evidence to indicate that the government of Venezuela either controls or sponsors persecution (§§12) of homosexuals and HIV/AIDS infected individuals in Venezuela...”
As in *Paredes*, very few petitioners in the U.S. have been able to meet the “persecution” requirement to the court’s satisfaction. It is on these grounds, rather than through the “member of a particular social group” requirement, that the majority of such cases end with a denial of the petitioner’s asylum request.\(^{63}\) The limited cases in which the federal courts have remanded cases back to the BIA to reconsider granting asylum virtually ignore the petitioners’ HIV status and turn on more traditional evidence of “persecution.”\(^{64}\) The American jurisprudence emphasizes civil and political rights, not surprisingly since the United States is known as one of the most vociferous opponents to economic and social rights in the world. The fact that the American courts examined in this paper seem to decide all HIV cases on civil and political grounds, even when there is a clear economic and social dimension, is dispositive of its stance.

The BIA and U.S. courts have made it abundantly clear that inadequate medical care and social stigma directed at persons with HIV/AIDS do not reach the level of “persecution” required for asylum eligibility. The General Counsel of the Immigration and Naturalization Service in 1996 specifically stated,

> …the fact that an asylum claimant with HIV or AIDS cannot receive medical treatment in her country of origin equivalent to that available in the United States would be insufficient to establish eligibility for asylum. Also, social ostracism, by itself, does not amount to persecution. At the other extreme, torture or execution of persons because they have AIDS would of course meet the

\(^{63}\) See, e.g., *Ixtiilco-Morales v. Keisler*, 507 F.3d 651 (8th Cir. 2007) (denying protection to a gay, HIV-positive man from Mexico because he failed to prove a future risk of persecution); \(^{64}\) In *Boer-Sedano v. Gonzales* (August 2005), the 9th Circuit actually reversed the BIA’s decision on the asylum claim and remanded the case to the BIA to reevaluate Boer-Sedano’s withholding of removal and CAT claims. However, this decision turned on nine separate incidents in which a particular Mexican police officer forced the petitioner to perform oral sex on him, including one instance in which he held a loaded gun to his head. The Court’s determination that Boer-Sedano did face a have a well-founded fear of persecution was based entirely on the risks he faced as a gay man in Mexico, but had nothing to do with his HIV status. In fact, the social group of which Boer-Sedano was found to be a member was “alien homosexuals,” with no mention of his HIV status. *Boer-Sedano v. Gonzales*, 418 F.3d 1082 (9th Cir. 2005).
statutory definition…Each case must be evaluated on its own facts to determine whether the asylum applicant satisfies all the requirements of U.S. law.\footnote{General Counsel of the Immigration and Naturalization Service letter, http://www.immigrationequality.org/uploadedfiles/HIV%20asylum%20memo.pdf}

The courts have strictly adhered to this policy in all cases dealing with petitioners seeking asylum on the basis of their HIV status.\footnote{See, e.g., Ixtillico-Morales v. Keisler, 507 F.3d 651 (8th Cir. 2007), 12 (“Morales failed to establish that inadequacies in health care for HIV-positive individuals in Mexico was an attempt to persecute those with HIV. Our review of the record convinces us that these conclusions are supported by substantial evidence…”); Sichone v. Gonzales, 183 Fed. Appx. 50, 2nd Cir 2006 \textsuperscript{**3} Sichone had argued during her initial hearing that government hospitals did not have antiretroviral medications and that she could not afford treatment in a private hospital. Despite her showing that she likely would not be able to access lifesaving medical treatment, the Court found that “the government’s inability to afford HIV medication for all of its people, however regrettable, is not the sort of extreme treatment that shows persecution within the meaning of the INA.”} The BIA and U.S. courts have not yet granted asylum or withholding of removal solely on the basis of a petitioner’s medical situation rather than the effects of her HIV status on more traditional grounds for determining persecution like treatment in detention and vulnerability to harassment and physical abuse.

However, the U.S. might be moving in this direction.\footnote{See, e.g., Boer-Sedano v. Gonzales, 418 F.3d 1082 (9th Cir. 2005).} For example, although the \textit{Boer-Sedano} decision did not turn solely on the petitioner’s HIV status, the opinion includes some noteworthy dicta on the issue. The IJ had concluded that Boer-Sedano did not have a well-founded fear of persecution, rebutting the presumption based on past persecution, in part because “relocation [within Mexico] was possible.”\footnote{Id.} The Court rejected this claim, in part because “the evidence reveals that Boer-Sedano’s health status would make relocation unreasonable.” Boer-Sedano’s strain of HIV was resistant to virtually all existing medications, and he was receiving medications that were completely unavailable in Mexico. In holding that the INS had not met its burden of proof in showing that Boer-Sedano’s relocation to another part of Mexico was
reasonable, the Court included as a factor “the likelihood that serious harm would come to him if forced to relocate to Mexico where he could not obtain his required medication.” The Court does not explicitly articulate the weight that it gave to each of the factors it cites in determining that Boer-Sedano’s relocation within Mexico would be “unreasonable.” Nevertheless, this holding opens the door to considering a petitioner’s health status – and in particular, his HIV status and access to ARVs – in determining whether relocation is indeed reasonable.

ii) Canada

As in the U.S., judgments from Canadian Courts at all levels, as well as the Immigration and Refugee Board of Canada, have consistently denied asylum to HIV-positive petitioners seeking to establish persecution on the basis of their HIV status. However, the courts in Canada have more directly addressed the issue of whether lack of medical treatment and social ostracism constitute a level of risk meriting asylum or protection from detention.

In X (Re), 2008 CanLII 72195 (I.R.B.), the IRB found that the Mexican petitioner had an internal flight alternative (IFA) of relocating to Mexico City rather than remaining in Canada. The petitioner countered that the lack of available HIV treatment in Mexico City and throughout the country rules out the possibility of IFA anywhere in Mexico. The IRB considered this argument, but held that “the inability of a country to provide adequate health or medical care is

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69 Id.

70 However, as I was unable to find other opinions incorporating any kind of health considerations into their analyses since Boer-Sedano in 2005, this case was more likely an anomaly than an indication of an increasingly progressive attitude towards HIV-positive petitioners among U.S. courts.

71 Names of claimants are redacted from published IRB decisions.
not a basis on which a claim can be accepted…while the particular medications the claimant wants to take or has been taking may not be available, prescribed treatments are available.”

The IRB’s decision can be read two ways. First, it could stand for the proposition that because some measure of treatment was available in Mexico, the petitioner’s circumstances did not constitute persecution. This reading would imply that a more serious or complete deprivation of treatment might meet the “persecution” threshold. However, a second reading of the IRB’s decision treats “adequate” as an unnecessary modifier in the text of the 97(1)(b)(iv) requirement that the “risk is not caused by the inability of that country to provide adequate health or medical care.” Under this interpretation, the inability of a country to provide health or medical care is not adequate basis for a protection claim, period. Under either reading, persons from Mexico would not be eligible for protection on the basis of their HIV status, a rule that has been upheld in multiple IRB determinations.

In Leudjeu v. Canada (Citizenship and Immigration), [2007] F.C. 875 (CANLII), the Court denied the petitioner’s application for judicial review, rejecting the applicant’s claim that the Pre-Removal Risk Assessment (PRRA) officer had not accurately assessed the risks posed by her HIV status. The PRRA officer acknowledged serious discrimination against and mistreatment of persons with HIV/AIDS in Cameroon, the applicant’s country of origin, but did

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72 X (Re), 2008 CanLII 72195 (I.R.B.)
73 See also X (Re), 2006 CanLII 63517 (I.R.B.) (holding, after considering availability of HIV/AIDS treatment in Mexico, that gay, HIV+ Mexican petitioner did not have a well-founded fear of persecution and was not at risk of torture, cruel and unusual treatment or punishment); X (Re), 2007 CanLII 61466 (I.R.B.) (Holding “Mexico provides its workforce and indigent citizens with free AIDS treatment. Nonetheless, not everyone can access the system as it exists today. Section 97 does not protect individuals who claim they may not be able to access medical treatment in their own country due to their financial inability to pay for services that do not exist for others who can make payment for the same services. For this reason, claimant is not a person in need of protection under section 97 of the IRPA.”)
not find that it constitutes persecution. The Court made note that the officer had determined “that the applicant could get the available medical services existing in her native land.”

iii) The argument for asylum eligibility

Despite the unwillingness of the U.S., Canada, and other jurisdictions to grant asylum to HIV-positive petitioners, as the law has been interpreted and applied, HIV status should in fact be valid grounds for asylum. Persons with HIV/AIDS meet the requirements for asylum: (1) Membership in a particular social group; and (2) Persecution on account of membership in this particular social group.

First, it is clear that persons with HIV constitute members of the “particular social group” of persons with HIV/AIDS. The U.S. General Counsel and the INS have effectively recognized this social group, later confirmed by the U.S. courts in *Paredes* and *Sichone*. The Canadian Immigration and Refugee Board provides step-by-step guidelines to determine membership in a particular social group, the relevant section of which requires “that the group be defined by an internal characteristic, which might be 1) innate (gender, colour, kinship ties, etc.); or 2) immutable (past economic or social status, etc.); or 3) fundamental to members’ identity/human dignity…”  

HIV/AIDS fits easily into the second and third categories, since the disease is incurable and likely plays a major role in the lives of persons who have it, particularly in countries where treatment is difficult to obtain. On its face, case law as well as administrative and executive authority support finding that persons with HIV/AIDS constitute a “particular social group.”

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74 *Leudjeu v. Canada* (Citizenship and Immigration), 2007 FC 875 (CanLII).

Second, it should not be difficult to prove persecution in cases where petitioners would be returned to countries where they would be unable to access life-saving treatment and would quickly deteriorate and die a horrible death often in the absence of friends or family. The extreme social ostracism and harassment faced by many persons with HIV/AIDS in countries where the disease is still greatly misunderstood and stigmatized should further contribute to a finding of persecution. The UNCHR describes “persecution” as a threat to life or freedom or serious human rights violations.\(^7^6\) The U.S. courts have described persecution as an “extreme” concept that does not include everything that society regards as repugnant.\(^7^7\) Few things better describe an “extreme” “threat to life or serious human rights violations” than the conditions experienced by persons with HIV/AIDS upon return to countries that villainize disease and leave its victims to suffer and die terribly without any kind of social or medical support.

The UNHCR has stated held that “measures not in themselves amounting to persecution (e.g. discrimination in different forms), in some cases combined with other adverse factors (e.g. general atmosphere of insecurity in the country of origin)...can reasonably justify a claim to well-founded fear of persecution on “cumulative grounds”.\(^7^8\) In light of the American jurisprudence on FGM and forced sterilization, it is particularly appropriate to consider factors

\(^{77}\) See Ali v. Ashcroft, 366 F.3d 407, 410 (6th Cir. 2004) (quoting Ghaly v. INS, 58 F.3d 1425, 1431 (9th Cir. 1995)); See also Lumaj v. Gonzales, 462 F.3d 574, 577 (6th Cir. 2006) (adopting the Third Circuit’s finding that “persecution does not encompass all treatment that our society regards as unfair, unjust, or even unlawful or unconstitutional” (quoting Fatin v. INS, 12 F.3d 1233, 1240 (3d Cir. 1993)).
\(^{78}\) UNHCR Handbook on Procedures and Criteria for Determining Refugee Status, HCR/IP/4/Eng/REV.1, Reprinted 1992, Originally published 1979, para 53 (“measures not in themselves amounting to persecution (e.g. discrimination in different forms), in some cases combined with other adverse factors (e.g. general atmosphere of insecurity in the country of origin)....can reasonably justify a claim to well-founded fear of persecution on “cumulative grounds”). See also Wakkary v. Holder, 558 F.3d 1049 (9th Cir. 2009) citing Krotova v. Gonzales, 416 F.3d 1080, 1087 (9th Cir. 2005); Duarte de Guinac v. INS, 179 F.3d 1156, 1161-62 (9th Cir. 1999); Korablina v. INS, 158 F.3d 1038, 1044-45 (9th Cir. 1998);
other than physical suffering and the risk to life in determining persecution of an HIV-positive petitioner. The cumulative effect of factors such as harassment and social stigma, the dignitary harms inherent in the particularly terrible death by wasting illness—in addition to the indisputable risk to life and physical suffering—experienced by an HIV-positive asylum seeker should be adequate grounds on which to find persecution.

Persons with HIV/AIDS thus satisfy the requirements of “a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion”\(^\text{79}\) and should be eligible for asylum.

**II. Torture**

No jurisdiction has yet demonstrated any willingness to grant asylum to HIV-positive petitioners based entirely on the lack of medical treatment, social stigma, and other harms to which they would be subjected if returned to their countries of origin. The area in which the courts have made the most progress in protecting persons with HIV/AIDS is in the torture setting—classifying such harms as meeting the standard for “torture” warranting protection under CAT, Article 97 of the Canada Immigration and Refugee Protection Act, and Article 3 of the ECHR.

The Convention Against Torture was adopted on 10 December 1984 and entered into force on 26 June 1987. The most pertinent provision for immigration status determinations is Article 3, which includes language similar to the Refugee Convention’s prohibition on *refoulement* of refugees, but applied to all persons that face substantial risk of being subjected to

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\(^{79}\) See 8 USCS §1101(a)(42)(A), INA 208; 1951 UN Convention relating to the Status of Refugees, Article I(A)(2).
torture.\footnote{Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 3.} Torture is defined in Article 1 essentially as cruel and unusual punishment inflicted by or with the permission of the government.\footnote{Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 1. “For the purposes of this Convention, the term ‘torture’ means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.”} 

The United States signed the CAT on April 18, 1988, and ratified it on October 21, 1994, subject to certain declarations, reservations, and understandings, including that it was not self-executing and required domestic implementing legislation. Section 2242(b) of the Foreign Affairs Reform and Restructuring Act of 1998 incorporates Article 3 of the CAT.\footnote{Act Oct. 21, 1998, P.L. 105-277, Div G, Subdiv B, Title XXII, Ch 3, Subch B, § 2242, 112 Stat. 2681-822, provides: 
“(a) Policy. It shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States. 

(b) Regulations. Not later than 120 days after the date of enactment of this Act, the heads of the appropriate agencies shall prescribe regulations to implement the obligations of the United States under Article 3 of the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment, subject to any reservations, understandings, declarations, and provisos contained in the United States Senate resolution of ratification of the Convention.} 

Under United States law, a foreign national who can show that he is “more likely than not” to be tortured if removed is eligible for withholding or deferral of removal under CAT.\footnote{8 C.F.R. § 208.16(4) In considering an application for withholding of removal under the Convention Against Torture, the immigration judge shall first determine whether the alien is more likely than not to be tortured in the country of removal. If the immigration judge determines that}
Torture is defined as an “extreme form of cruel and inhuman treatment and does not include lesser forms of cruel, inhuman or degrading treatment or punishment that do not amount to torture.” Moreover, the treatment must be intentionally inflicted for a specific purpose at the instigation of or with the consent of a public official or someone acting in an official capacity. The “more likely than not” requirement sets a very high bar that only approximately 3% of applicants are able to meet. Because the standard is so high, CAT applicants should be able to meet and exceed the “well-founded fear of persecution” requirement for asylum. Petitioners who apply for relief only under CAT often do so because they have committed a serious crime and are ineligible for asylum. Protection under the CAT, like withholding of removal, is a mandatory form of relief.

Petitioners with successful CAT claims are entitled to a withholding or deferral of removal, but not nearly the same level of benefits as those with refugee status. For example, petitioners who are found to require protection under the CAT are not entitled to apply for

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84 8 C.F.R. § 208.18(a)(2)
85 Torture is defined under 8 C.F.R. § 208.18(a)(1) as “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or her or a third person information or a confession, punishing him or her for an act he or she or a third person has committed or is suspected of having committed, or intimidating or coercing him or her or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.”
86 Cite
87 8 U.S.C. 1231(b)(3)(B)(ii) Individuals seeking to obtain withholding of removal may not do so if they are deemed by the Attorney General to have committed a particularly serious crime. 8 CFR § 1208.17 Deferral of removal under the Convention Against Torture (a) Grant of deferral of removal. An alien who: has been ordered removed; has been found under § 1208.16(c)(3) to be entitled to protection under the Convention Against Torture; and is subject to the provisions for mandatory denial of withholding of removal under § 1208.16(d)(2) or (d)(3), shall be granted deferral of removal to the country where he or she is more likely than not to be tortured.
permanent residency\textsuperscript{89} or travel\textsuperscript{90}. These same restrictions are placed on anyone who is granted a withholding of removal, regardless of if under CAT. Deferral of removal is granted to persons with a successful CAT claim who are ineligible for withholding of removal due to past persecutory acts, conviction of a particularly serious crime, or for security reasons.\textsuperscript{91} Deferral of removal is very much a temporary status under the law, as it can be terminated at any time.\textsuperscript{92}

In Canada, under Article 97, a “person in need of protection” is akin to a CAT applicant under United States immigration law.\textsuperscript{93} “Persons in need of protection” are those whose removal would subject them to “(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or (b) to a risk to their life or to a

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{89} 8 CFR § 1208.17 (b) The immigration judge shall inform the alien that deferral of removal: (i) Does not confer upon the alien any lawful or permanent immigration status in the United States
\item \textsuperscript{91} 241(b)(3)(B) of the INA
\item \textsuperscript{92} 8 CFR § 1208.17 contains a number of provisions clarifying the limits of withholding of removal, including that the petitioner’s status is subject to review and termination at any time through a subsequent immigration hearing, that the petitioner may be removed to another country where he or she is not likely to be tortured, or that the withholding of removal may be terminated at the discretion of the Attorney General after receiving diplomatic assurances from the country to which the petitioner would be removed.
\item \textsuperscript{93} Canada Immigration and Refugee Protection Act, S.C., 2001, c. 27.
\item \textsuperscript{97} (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally (a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or (b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if (i) the person is unable or, because of that risk, unwilling to avail themselves of the protection of that country, (ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country, (iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and (iv) the risk is not caused by the inability of that country to provide adequate health or medical care
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risk of cruel and unusual treatment or punishment.” Persons in need of protection are granted the same protections as Convention Refugees.94

There are several exceptions to the granting of “person in need of protection” status. Most significantly for the purposes of this paper, a petitioner is only eligible for “person in need of protection” status if the “risk is not caused by the inability of that country to provide adequate health or medical care.”95

The Convention for the Protection of Human Rights and Fundamental Freedoms, known as the European Convention on Human Rights (ECHR), was adopted in 1950 and entered into force in 1953. All 47 members of the Council of Europe are parties to the Convention. In 1959, the European Court of Human Rights (at that time the European Commission of Human Rights) was established to adjudicate alleged violations of the Convention. The decisions are binding on state parties and states frequently rely on ECHR opinions to guide their own jurisprudence.96

There is no explicit right to asylum under the Convention or its protocols.97 The ECHR has most frequently considered questions of immigration status under Article 3 of the

95 Canada Immigration and Refugee Protection Act, S.C., 2001, c. 27. 97(1)(b)(iv)
96 Registry of the Court, “European Court of Human Rights: Questions and Answers.” http://www.echr.coe.int/NR/rdonlyres/37C26BF0-EE46-437E-B810-EA900D18D49B/0/ENG_Questions_and_Answers.pdf. Unlike many other international courts, individuals may bring claims directly to the Court. Before bringing a case to the ECHR, individuals must have exhausted available domestic remedies.
Convention, which prohibits torture or inhuman or degrading treatment or punishment.\(^98\)\(^99\)

ECHR Article 3 has been invoked by petitioners that face imminent removal and are seeking a withholding of this removal on the grounds that they would face torture or other grave mistreatment if returned to their countries of origin.\(^100\)

The ECHR has repeatedly stated that Article 3 protections are absolute and apply to all petitioners in all circumstances.\(^101\) In contrast to refugee status determination under the Refugee Convention, Article 3 protection does not require government or other official responsibility for the petitioner’s fear of inhuman or degrading treatment.\(^102\)

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\(^{98}\) No one shall be subjected to torture or to inhuman or degrading treatment or punishment. European Convention on Human Rights, 4 November 1950, Article 3.

\(^{99}\) Other articles of the Convention may also have implications for the legality of expelling the petitioner to his home country. The issue of HIV status as grounds for protection has been primarily considered under Article 3, which is therefore the focus of this section.

\(^{100}\) The principle that expulsion could constitute a violation of Article 3 was established in cases including \textit{Soering v. the United Kingdom}, Application No. 14038/88, judgment of 7 July 1989; \textit{Cruz Varas v. Sweden}, Application No. 15576/89, judgment of 20 March 1991; \textit{Vilvarajah and Others v. the United Kingdom}, Application Nos. 13163/87, 13164/87 and 13165/87, judgment of 30 October 1991; and \textit{Chahal v. the United Kingdom}, Application No. 22414/93, report of 27 June 1995.

\(^{101}\) \textit{D v. United Kingdom}, para 47 ("the court has repeatedly stressed in its line of authorities involving extradition, expulsion or deportation of individuals to third countries that Article 3 prohibits in absolute terms torture or inhuman or degrading treatment or punishment and that its guarantees apply irrespective of the reprehensible nature of the conduct of the person in question (see, most recently, the \textit{Ahmed v. Austria} judgment of 17 December 1996, Reports of Judgments and Decisions 1996-VI, p. 2206, para. 38; and the \textit{Chahal v. the United Kingdom} judgment of 15 November 1996, Reports 1996-V, p. 1853, paras. 73-74)); \textit{Soering v. The United Kingdom}, 1/1989/161/217 , Council of Europe: European Court of Human Rights, 7 July 1989, para. 88 ("Article 3 (art. 3) makes no provision for exceptions and no derogation from it is permissible under Article 15 (art. 15) in time of war or other national emergency. This absolute prohibition of torture and of inhuman or degrading treatment or punishment under the terms of the Convention shows that Article 3 (art. 3) enshrines one of the fundamental values of the democratic societies making up the Council of Europe. It is also to be found in similar terms in other international instruments such as the 1966 International Covenant on Civil and Political Rights and the 1969 American Convention on Human Rights and is generally recognised as an internationally accepted standard.")

\(^{102}\) \textit{Soering v. The United Kingdom}, 1/1989/161/217 , Council of Europe: European Court of Human Rights, 7 July 1989, available at: http://www.unhcr.org/refworld/docid/3ae6b6fec.html (accessed 16 February 2010), para. 91. "$...there is no question of adjudicating on or establishing the responsibility of the receiving country, whether under general international law, under the Convention or otherwise. In so far as any liability under the Convention is or may be incurred, it is
(a) Application

The following sections present an overview of how asylum law has been applied to HIV-positive petitioners by the United States, Canada, and the European Court of Human Rights. In recent years, both the ECHR and Canada have recognized that inadequate medical treatment, social stigma, and the dignitary harms implicated in expelling an HIV-positive petitioner may constitute grounds for protection. Despite this laudable development, both jurisdictions have been hesitant to set precedents that could result in a flood of new claims. In response, Canada created the “unwilling rather than unable” test and the ECHR the “exceptional circumstances” test, both aimed at limiting the number of petitioners that merit protection. These tests are described and critiqued in greater detail in Part III.

i) United States

The U.S. has been more generous in granting CAT protection than asylum eligibility to HIV-positive petitioners. However, the Court has similarly continued to rely on traditional factors that may coincide with HIV infection, but are ultimately independent from it. It seems that only petitioners who will face serious physical harms, incarceration, and other more typical civil and political rights violations are granted CAT protection.

In *Bosede v. Mukasey*, the court held that the IJ had failed to sufficiently consider the evidence that the petitioner would be imprisoned and tortured if deported. In remanding the case back to the BIA, however, the Court made little mention of the petitioner’s HIV status and discussed it only in the context of the additional challenges he would face while imprisoned.
Instead, the Court focused primarily on severe mistreatment and potential in Nigerian prisons, very traditional bases for determining “persecution” or risk of torture.

In *Jean-Pierre v. US Attorney General*, the court remanded a withholding of removal and CAT claim, holding that the BIA had failed to properly consider the petitioner’s arguments that he would be tortured in prison if removed to Haiti as a criminal deportee. Unlike in *Bosede*, the Court seemed convinced that Jean Pierre’s HIV status was central to his claim since his primary argument was that he in particular would face treatment that could constitute torture. However, the opinion still ultimately turns on consideration of traditional factors for persecution – inhumane conditions of incarceration – with little thought given to the cruel and inhuman effects that removal will have on his health.

Similarly, in *Lavira v. Attorney General*, the court held that the IJ had failed to consider the petitioner’s particular susceptibility to mistreatment in prison. As a HIV-positive amputee, he was much more likely to be seriously abused and to be unable to access basic necessities to maintain a minimum standard of health and wellbeing. While the opinion does discuss Lavira’s HIV status, it is almost entirely in the context of how it would affect his treatment in prison. The dispositive consideration is his treatment in prison, again a traditional measure of “persecution” or “torture.”

As reflected in these cases and others, the U.S. torture jurisprudence looks at HIV status only as a peripheral consideration that may further exacerbate traditional civil and political harms including imprisonment and physical injury. However, the courts have not considered lack

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104 Jean-Pierre v. US Attorney General 500 F.3d 1315 (11th Cir. 2007)
105 Lavira v. Attorney General, 478 F.3d 158 (3d Cir. 2007)
of medical treatment, social stigma, and other dignitary harms stemming directly from
HIV/AIDS as constituting conduct meriting CAT protection.

ii) Canada

Canada has been considerably more liberal than the U.S. in granting “person in need of
protection status” to petitioners on the basis of their medical status under Article 97 of the
Canada Immigration and Refugee Protection Act. Under Article 97, a “person in need of
protection” is akin to a CAT applicant under United States immigration law. “Persons in need of
protection” is someone whose removal would subject her to “(a) to a danger, believed on
substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against
Torture; or (b) to a risk to their life or to a risk of cruel and unusual treatment or punishment.”

There are several exceptions to the granting of “person in need of protection” status.
Most significantly for the purposes of this paper, a petitioner is only eligible for “person in need of
protection” status if the “risk is not caused by the inability of that country to provide adequate

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106 Canada Immigration and Refugee Protection Act, S.C., 2001, c. 27.
97. (1) A person in need of protection is a person in Canada whose removal to their country or
countries of nationality or, if they do not have a country of nationality, their country of former
habitual residence, would subject them personally
(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article
1 of the Convention Against Torture; or
(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if
(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of
that country,
(ii) the risk would be faced by the person in every part of that country and is not faced generally
by other individuals in or from that country,
(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of
accepted international standards, and
(iv) the risk is not caused by the inability of that country to provide adequate health or medical
care
health or medical care.”\textsuperscript{107} The key inquiry is the interpretation of this exception since otherwise\ HIV-positive petitioners fall squarely within the ambit of Article 97(b) “risk to life.”

The dispositive case on this issue is \textit{Covarrubias v. Canada}, which differs from those discussed thus far in that the petitioner was suffering from end-stage renal failure, not HIV/AIDS. Nevertheless, the Court’s reasoning turns on the inadequacy of medical treatment in the country of removal generally and is not specific to any particular illness or medical condition, so can be and has been applied as well to petitioners with HIV/AIDS.

The IRB had originally found that Covarrubias did not meet the definition of either a Convention refugee or a person in need of protection, holding that “whether or not one is sympathetic to this family because of the very serious health problems is not the point. The refugee or protected person process is not designed to address health care issues.”\textsuperscript{108} In reviewing this decision, the Federal Court of Appeal concurred with the IRB that inadequacy of health care did not constitute persecution where treatment was available, even at a significant cost.\textsuperscript{109}

The Court distinguished its ruling, however, noting:

…I find that the phrase "not caused by the inability of that country to provide adequate health or medical care" in subparagraph 97(1)(b)(iv) of the IRPA excludes from protection persons whose

\textsuperscript{107} Canada Immigration and Refugee Protection Act, S.C., 2001, c. 27. 97(1)(b)(iv)
\textsuperscript{109} \textit{Covarrubias v. Canada (Minister of Citizenship and Immigration) (F.C.A.),} 2006 FCA 365; (2007) 3 F.C.R. 169 . Canada: Federal Court of Appeal, 10 November 2006, available at: http://www.unhcr.org/refworld/docid/47161468d.html (accessed 14 February 2010), para 21: “I think it is clear that the intent of the legislative scheme was to exclude claims for protection under section 97 based on risks arising from the inadequacy of health care and medical treatment in the claimant's country of origin, including those where treatment was available for those who could afford to pay for it.”
claims are based on evidence that their native country is unable to provide adequate medical care, because it chooses in good faith, for legitimate political and financial priority reasons, not to provide such care to its nationals. If it can be proved that there is an illegitimate reason for denying the care, however, such as persecutorial reasons, that may suffice to avoid the operation of the exclusion.

Although the Court found that Mexico’s lack of treatment options available to the petitioner in *Covarrubias* did not qualify, by setting out this exception to 97(1)(b)(iv), it paved the way for a subsequent case that did qualify.

In *X (Re), 2008 CanLII 45152 (I.R.B.*)* the Court granted the HIV-positive Zimbabwean petitioner person in need of protection status, precluded his removal from Canada. This was the first, and seemingly only, example of an HIV-positive petitioner whom the Canadian courts have found did not fall under the 97(1)(b)(iv) exception.

The Court found that the unequal access to antiretroviral treatment and potential social stigma did not reach the level of persecution necessary to find the claimant a Convention refugee. As in the other cases cited in the previous section, the Court concluded that despite accepting that there is serious stigma and societal discrimination leveled against HIV positive persons and their families, it did not rise to the level of “persecution.”

However, the Court found that the claimant faced a risk to life under 97(1)(b) entitling him to status as a person in need of protection because “there is more than a mere possibility that he would not be able to access the medication he needs.” The opinion notes that the claimant was receiving a combination of three ARV drugs, at least one of which was not available in

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110 Id. at para. 21
111 Id. at para. 37
Zimbabwe at the time. His doctor further noted that interrupting the claimant’s treatment regime could result in his developing resistance to the drugs, failing to respond to further treatment, and dying. However, if the claimant were to continue to receive treatment, his doctor reported that he was in normal health and could expect a normal life expectancy.\textsuperscript{112}

As discussed at length in \textit{Covarrubias}, \textsection 97(1)(b)(iv) sets out the caveat to article 97, that the risk to life must not be caused by the inability of that country to provide adequate health or medical care. Although the \textit{Covarrubias} court held that \textsection 97(1)(b)(iv) should be interpreted broadly to limit the number of cases that survive this test, the Court in \textit{X (Re), 2008 CanLII 45152 (I.R.B.)} found that the applicant meets the requirements: “In this case, medical and health care is not only inadequate for those without funds, but is unavailable because the government authorities have chosen, for reasons which are not justifiable, to create a situation within the country whereby medical care is unavailable to most citizens other than those with government connections.”\textsuperscript{113}

The Court holds that this case does not fall under \textsection 97(1)(b)(iv) since the Zimbabwean government was not “unable” to provide medical care, but was simply “unwilling” to do so.\textsuperscript{114} By actually exploiting the very narrow exception to \textsection 97(1)(b)(iv) hesitantly asserted by the \textit{Covarrubias} Court, the Court in \textit{X (Re), 2008 CanLII 45152 (I.R.B.)} set an enormous precedent and established a limiting test for the protection of HIV-positive petitioners.

\textbf{iii) The European Court of Human Rights}

\textsuperscript{112} Id. at para. 14
\textsuperscript{113} Id. at para. 47
\textsuperscript{114}X (Re), (2008) I.R.B. 45152 (CANLII) at para. 6
Unlike either the United States and, to some degree, Canada, the European Court of Human Rights has directly addressed many of the looming issues surrounding the expulsion of HIV-positive foreign nationals. The ECHR has made a conscious effort to develop a doctrine to help its ratifying States determine when HIV-positive persons may be removed to their home countries without violating Article 3 of the European Convention on Human Rights.

The May 1997 case *D v. the United Kingdom* is the first in this line of jurisprudence.\(^{115}\) In a groundbreaking opinion, the Commission\(^{116}\) unanimously found that D’s removal to St. Kitts would violate article 3 prohibiting torture or inhuman or degrading treatment or punishment. The judgment sets two notable precedents.

First, *D v. United Kingdom* extends the reach of article 3, which before this case had been principally applied when a deportation or expulsion would result in ill-treatment that can be attributed either directly to public authorities or where the government has failed in its responsibility to protect.\(^{117}\) The Commission departed from this rule stating that, “the Court must reserve to itself sufficient flexibility to address the application of that Article (art. 3) in other contexts which might arise…To limit the application of Article 3 in this manner would be to undermine the absolute character of its protection.”\(^{118}\) The Commission emphasized that, despite

\(^{116}\) The European Court on Human Rights did not replace the European Commission on Human Rights until November 1998. The petitioner was a citizen of St. Kitts who had been arrested at Gatwick Airport trying to enter the UK in possession of a substantial quantity of cocaine. After pleading guilty on drug charges, D served 32 months in prison during which time he was diagnosed with HIV. Upon his release in January 1996, D requested permission from the Secretary of State to remain in the UK on compassionate grounds in consideration of his HIV status and inability to access treatment in St. Kitts. When his request was denied, D lodged a complaint with the ECHR.
\(^{117}\) D v. United Kingdom, para 49, supra n. 115.
\(^{118}\) Id. at para. 49.
the States’ right to control the entry, residence and expulsions, Article 3 applies in all circumstances. “Article 3 prohibits in absolute terms torture or inhuman or degrading treatment or punishment and…its guarantees apply irrespective of the reprehensible nature of the conduct of the person in question.” [emphasis added]119

Second, *D v. United Kingdom* established the “exceptional circumstances” test to which all other subsequent ECHR cases on the issue refer. What exactly constitute “exceptional circumstances” grave enough to find that expulsion of the petitioner would violate Article 3 is debatable. The *D v. United Kingdom* opinion emphasizes that D’s AIDS had reached a critical stage and he was at the end of his life. The Commission also cited factors including that in St. Kitts, D had no close friends or relatives to care for him, that the treatment he was receiving at the time in the UK was not available in St. Kitts, and that he had nowhere to live and no financial resources. The Court argued that in removing D to St. Kitts, “his death would…not only be further accelerated, it would also come about in conditions which would be inhuman and degrading.”120

The finding that D should not be removed from the UK based solely on his HIV status was a huge step forward in improving the human rights protections extended to HIV+ persons in ECHR member states. However, since *D v. United Kingdom*, the ECHR has never ruled another proposed expulsion of a foreign national petitioner in violation of Article 3. Subsequent opinions have distinguished the facts of their cases from those in *D*, establishing and hardening the elements of the “exceptional circumstances” test.

120 Id. at para. 40.
In March 1998, *BB v. France* suggested a more expansive “exceptional circumstances” test.121 Interestingly, BB was not yet critically ill and was in fact in reasonably good health thanks to the medical care he had been receiving. The Commission concluded by a vote of twenty-two to two that deporting BB would amount to a violation of Article 3.122 The fact that the Commission still found a violation of Article 3 represents a significant departure from the facts in *D v. United Kingdom* in which the petitioner had little time left to live. The Commission opinion did not explicitly say that BB’s circumstances were exceptional and later opinions sought to distinguish the facts of *BB* in order to cabin them more into the “exceptional circumstances” category. For example, in *SCC v. Sweden*, the Court describes the facts in BB: “the infection had already reached an advanced stage necessitating repeated hospital stays and where the care facilities in the receiving country were precarious.”123 Although BB’s illness was not yet in the terminal stage and had stabilized as a result of antiretroviral treatment, it was more advanced than in subsequent cases.

Seemingly in order to prevent *BB* from over-expanding the exceptional circumstances test set out in *D*, the next several cases following *BB* saw the ECHR define the limits of “exceptional circumstances” more concretely and more narrowly.

121 *B.B. c. France*, 47/1998/950/1165, Council of Europe: European Court of Human Rights, 7 September 1998, available at: http://www.unhcr.org/refworld/docid/3ae6b6f420.html (accessed 20 March 2010). The petitioner, a Congolese man who had arrived in France in 1983, had applied for political asylum but was rejected. In 1995, he was convicted on drug charges, sentenced to two years imprisonment, and permanent expulsion from France. While imprisoned, he began HIV treatment that stabilized his poor health significantly. Upon his release, BB filed an Article 3 complaint with the ECHR to protest his imminent removal back to the Democratic Republic of Congo.

122 There was, however, no official ruling on whether BB’s expulsion would have constituted a violation of Article 3. The case was struck from the Commission’s list in September 1998 after the French Government agreed not to deport BB.

In May 1998, the Commission in *Karara v. Finland* found that the petitioner’s expulsion would not violate Article 3 because infection had been stabilized and he had not yet developed full blown AIDS. The Commission distinguished the facts of the case from *D*, in which the petitioner was at the end of his life, and *BB*, in which the petitioner had reached a more advanced stage of his illness, necessitating more rigorous treatment and recurring hospital stays.\(^{124}\) In February 2000, the Court in *SCC v. Sweden* found that the petitioner’s circumstances did not meet the threshold of the “exceptional circumstances” test established in *D*. The Court again distinguished this case from both *D* and *BB*, ruling *SCC’s* claim inadmissible because the same treatment was available in Zambia, albeit at considerable cost, and because her children and other family members lived there.\(^{125}\) The Court also deemed reasonable the Swedish National Board of Health and Welfare’s assertion that, “when assessing the humanitarian aspects of a case like this, an overall evaluation of the HIV infected alien’s state of health should be made rather than letting the HIV diagnosis in itself be decisive.”\(^{126}\) The Court ruled along similar lines in June 2003 in *Henao v. The Netherlands* that the petitioner’s Article 3 claim was inadmissible: “In these circumstances the court considers that, unlike the situation in the above-cited case of *D* v. *United Kingdom* or in the case of *BB v. France*…, it does not appear that the applicant’s illness has attained an advanced or terminal stage, or that he has no prospect of medical care or family support in his country of origin.”\(^{127}\) The Court issued a number of other decisions along the same lines in following years.\(^{128}\)

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\(^{124}\) This case does not appear to have been published, but was described in *N v.Secretary of State for the Home Department*, para 39 and *N v. United Kingdom*, para 36.

\(^{125}\) *SCC v. Sweden*, supra n. 123, p. 8

\(^{126}\) Id. at p. 8

\(^{127}\) Cited in *N v. Secretary of State for the Home Department*, para 45. Could not find the full text of *Henao v. The Netherlands* published online, including at the ECHR case law database.

\(^{128}\) See also *Ndangoya v. Sweden*, 17868/03, Council of Europe: European Court of Human Rights, 22 June 2004, available at:
The Court’s opinion in May 2008 in *N v. the United Kingdom* is notable for the amount of analysis of the issues surrounding HIV/AIDS as a basis for Article 3 protection, but not for its outcome. After an exhaustive discussion of all of the cases described above, the Court found that it could not distinguish the HIV-positive Ugandan petitioner’s claim from *SCC*, *Henao*, *Ndangoya*, and *Amegnigan*. N’s circumstances were “not exceptional” because he was not

http://www.unhcr.org/refworld/docid/414d8b2b4.html (accessed 20 March 2010) (in which the Tanzanian petitioner contested a deportation order resulting from an aggravated assault conviction for having engaged in sexual contact without informing partners of his HIV status. Following the Court in *SCC*, the *Ndangoya* Court looked to his current state of health—the petitioner’s own doctor had stated that the treatment had been so successful that the HIV levels in the applicant’s blood were no longer detectable. In finding *Ndangoya*’s claim inadmissible, the Court relied on the his health at that moment, despite the doctor’s further statement that *Ndangoya* would develop AIDS within one to two years if treatment was discontinued. The Court again followed the test that was well-established by this point, holding that his circumstances were not “exceptional” enough to warrant Article 3 protection because “it does not appear that the applicant’s illness has attained an advanced or terminal stage, or that he has no prospect of medical care or family support in his country of origin.”); *Amegnigan v. The Netherlands*, 25629/04, Council of Europe: European Court of Human Rights, 25 November 2004, available at: http://www.unhcr.org/refworld/docid/42d25cf44.html (accessed 20 March 2010) (following the same pattern as *SCC*, *Henao*, and *Ndangoya*. The Court cited all three cases in justifying its assessment in light of the petitioner’s health at the time of the case. The petitioner, a national of Togo, was denied relief under Article 3 because the Court reasoned, “it does not appear that the applicant’s illness has attained an advanced or terminal stage, or that he has no prospect of medical care or family support in Togo where his mother and a younger brother are residing.”); *Ahmed v. Sweden*, 9886/05, Council of Europe: European Court of Human Rights, 16 May 2006, available at: http://www.unhcr.org/refworld/docid/45cc9e4a2.html (accessed 20 March 2010) (in which the petitioner disputed the government’s arguments both that he had not provided evidence that his illness had progressed to full blown AIDS and that antiretroviral treatment is available in Kenya, albeit at a certain cost. The Government was clearly reflecting back to the Court the elements of the “exceptional circumstances” test that had been established in the aforementioned cases. However, Ahmed disputed all of the facts presented by the government – asserting that his illness was progressing rapidly and that he was very vulnerable to HIV-related infections; that it was unlikely he would have access to the special medications needed to treat his particular drug-resistant strain of HIV; and that he had no family members at home who could care for him. In light of the disputed issues of both law and fact, the Court found that Ahmed had an admissible complaint without judging the merits of the case. As in BB, the Swedish government granted Ahmed a temporary residence permit several months after this decision and, at Ahmed’s request, the case was struck from the court’s docket. Although the case reached a decidedly more satisfying conclusion for the petitioner, it did not diverge from the “exceptional circumstances” test set out by preceding cases.)
critically ill at the time of the case, would have some measure of access to treatment in Uganda, and had family members there.\footnote{129}{N. v. The United Kingdom, Appl. No. 26565/05, Council of Europe: European Court of Human Rights, 27 May 2008, available at: http://www.unhcr.org/refworld/docid/483d0d542.html (accessed 19 April 2010), paras 50-51}\footnote{130}{N v. United Kingdom, Dissent, para 3.}

The dissenting opinion, however, makes a strong argument that the Court should have found that the petitioner met the “exceptional circumstances” test and granted him Article 3 protection.\footnote{131}{N v. United Kingdom, Majority, para 43, “…given that in such cases the alleged future harm would emanate not from the intentional acts or omissions of public authorities or non-State bodies, but instead from a naturally occurring illness and the lack of adequate resources to deal with it in the receiving country…”}

\footnote{132}{Pretty v. the United Kingdom, no. 2346/02, ECHR 2002-III. 52. As regards the types of “treatment” which fall within the scope of Article 3 of the Convention, the Court’s case-law refers to “ill-treatment” that attains a minimum level of severity and involves actual bodily injury or intense physical or mental suffering (see Ireland v. the United Kingdom, cited above, p. 66, § 167; V. v. the United Kingdom (GC), no. 24888/94, § 71, ECHR 1999-IX). Where treatment humiliates or debases an individual, showing a lack of respect for, or diminishing, his or her human dignity, or arouses feelings of fear, anguish or inferiority capable of breaking an individual’s moral and physical resistance, it may be characterised as degrading and also fall within the prohibition of Article 3 (see amongst recent authorities, Price v. the United Kingdom, no. 33394/96, §§ 24-30, ECHR 2001-VII, and Valašinas v. Lithuania, no. 44558/98, § 117, ECHR 2001-VIII). The suffering which flows from naturally occurring illness, physical or mental, may be covered by Article 3, where it is, or risks being, exacerbated by treatment, whether flowing from conditions of detention, expulsion or other measures, for which the authorities can be held responsible (see D. v. the United Kingdom and Keenan, both cited above, and Bensaid v. the United Kingdom, no. 44599/98, ECHR 2000-I).” (emphasis added) Cited in N v. United Kingdom, Dissent, para 5.}
Convention is meant to protect civil and political rather than economic and social rights.\textsuperscript{133}

Although the dissenting judges argue that the facts of N’s case do in fact implicate civil rights, they also emphasize that economic and social rights can also draw Article 3 protection.\textsuperscript{134} Third, the dissent addresses the majority’s characterization of the Convention as requiring the balancing of collective and individual rights.\textsuperscript{135} The dissent argues that this balancing is inappropriate in the context of Article 3, which the court has recognized time and time again is permits no derogation for any reason. The dissent’s fourth point is very similar, dismissing the majority’s concern that granting Article 3 protection for harms stemming from illness would “place an obligation on the Contracting State to alleviate ... such disparities through the provision of free and unlimited health care to all aliens without a right to stay within its jurisdiction.”\textsuperscript{136} The dissent once again points out the non-derogable nature of Article 3, countering that “the very

\textsuperscript{133} N v. United Kingdom, Majority, para 24, “The Convention was intended primarily to protect civil and political, rather than economic and social, rights. The protection provided by Article 3 was absolute and fundamental, whereas provisions on health care contained in international instruments such as the European Social Charter and the International Covenant on Economic, Social and Cultural Rights were merely aspirational in character and did not provide the individual with a directly enforceable right. To enable an applicant to claim access to health care by the “back door” of Article 3 would leave the State with no margin of appreciation and would be entirely impractical and contrary to the intention behind the Convention.”

\textsuperscript{134} Airey v. Ireland, judgment of 9 October 1979, Series A no. 32. “Whilst the Convention sets forth what are essentially civil and political rights, many of them have implications of a social or economic nature. The Court therefore considers, like the Commission, that the mere fact that an interpretation of the Convention may extend into the sphere of social and economic rights should not be a decisive factor against such an interpretation; there is no water-tight division separating that sphere from the field covered by the Convention.” (emphasis added) Cited in N v. United Kingdom, Dissent, para 6.

\textsuperscript{135} N v. United Kingdom, Majority, para 44, “inherent in the whole of the Convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual’s fundamental rights (see Soering v. the United Kingdom, judgment of 7 July 1989, Series A no. 161, § 89). Advances in medical science, together with social and economic differences between countries, entail that the level of treatment available in the Contracting State and the country of origin may vary considerably. While it is necessary, given the fundamental importance of Article 3 in the Convention system, for the Court to retain a degree of flexibility to prevent expulsion in very exceptional cases, Article 3 does not place an obligation on the Contracting State to alleviate such disparities through the provision of free and unlimited health care to all aliens without a right to stay within its jurisdiction. A finding to the contrary would place too great a burden on the Contracting States.”

\textsuperscript{136} N v. United Kingdom, Majority, para 44.
nature of the rights guaranteed by the Convention that would be completely negated if their 
enjoyment were to be restricted on the basis of policy considerations such as budgetary 
constraints"\(^{137}\) and presenting data that the flood of sick petitioners feared by the majority is in 
fact a canard.\(^{138}\)

The cases following \textit{N v. United Kingdom} have continued down the path of upholding the 
principle that certain HIV-positive petitioners should be granted Article 3 protection while 
simultaneously finding that the petitioners in the case at hand fail to demonstrate the 
“exceptional circumstances” meriting protection.\(^{139}\)

\textbf{“Exceptional circumstances, revised”}

Canada and the ECHR have taken important steps towards protecting persons with 
HIV/AIDS under Article 97 of the Canada Immigration and Refugee Protection Act and Article 
3 of the European Convention on Human Rights. At the same time, however, both jurisdictions 
have also bowed to political exigency, creating tests with extremely high thresholds to limit the 
numbers of persons eligible for such protection.

\(^{137}\) \textit{N v. United Kingdom}, Dissent, para 8.  
\(^{138}\) \textit{Id.}  
\(^{139}\) See, \textit{e.g.}, \textit{M. v. United Kingdom}, Appl. No. 25087/06, Council of Europe: European Court of 
Human Rights, 24 June 2008, available at:  
http://www.unhcr.org/refworld/docid/48a54bc02.html (accessed 20 March 2010); \textit{JA (Ivory 
Coast) v. Secretary of State for the Home Department; ES (Tanzania) v. Secretary of State for the 
Home Department}, (2009) EWCA Civ 1353, United Kingdom: Court of Appeal (England and 
Wales), 14 December 2009, available at:  
http://www.unhcr.org/refworld/docid/4b2f6f3e2.html (in which the Secretary of State for the Home Department denied petitioners leave to remain in the UK 
because they did not meet the \textit{D v. United Kingdom} exceptional circumstances test. This case 
demonstrates how the ECHR jurisprudence is being adopted domestically by CoE member 
states.)
Canada has put forth a tentative test that would grant “person in need of protection” status to HIV-positive petitioners coming from countries lacking adequate medical treatment because the government was unwilling but not unable to provide it. The court articulated this test in Covarrubias and first applied it in X (Re), 2008 CanLII 45152 (I.R.B.), finding that Zimbabwe was unwilling rather than unable to provide the HIV-positive petitioner in question with adequate medical treatment and granting him “person in need of protection” status. However, X (Re), 2008 CanLII 45152 (I.R.B.) is the only case in which the court has ruled the requirements of the test met thus far. Canada is still early on in this line of jurisprudence and it remains to be seen how the “unwilling rather than unable” test is refined and applied in the years to come.

In contrast to the “unwilling rather than unable” test, the ECHR has rejected the proposition that removal proceedings should only be stayed in cases in which the government is responsible for the lack of medical treatment. The ECHR has instead focused on the specific circumstances of the applicant in question. If the applicant can show “exceptional circumstances” with respect to his current state of health or medical hardship, the Court will find under Article 3 that his expulsion would be impermissible. Despite what is on its face a very progressive policy, the “exceptional circumstances” test is far from straightforward and the ECHR has struggled to define its parameters in light of concerns about generating a glut of petitioners with serious illnesses.

The three elements of the “exceptional circumstances” test that have emerged from the jurisprudence are (a) the status of petitioner’s health at the time of the case; (b) whether treatment is available in the country of removal, regardless of the cost; (c) whether the petitioner has friends or family members in the country of removal who might care for him. The ECHR seems to emphasize the first element in its decision making, holding that only a petitioner who is
at the end of her life is eligible for protection.\textsuperscript{140} As in Canada, only one ECHR case, \textit{D v. United Kingdom}, has successfully satisfied the extremely high bar of the Court’s current interpretation of “exceptional circumstances.”

With only one successful protection case brought by and HIV-positive petitioner in the ECHR and one in Canada, it can hardly be said that either is paragon of generosity when it comes to immigration status for persons with HIV/AIDS. However, both jurisdictions are leaps and bounds ahead of the United States, which denies both asylum and CAT protection to HIV-positive petitioners and has been virtually silent on the issue.

It is difficult to say whether Canada and the ECHR are in the nascent stages of granting protected status to petitioners with HIV/AIDS and are moving towards increasing protection in such cases. It is equally likely that after the groundbreaking cases of \textit{D v. United Kingdom} and \textit{X (Re), 2008 CanLII 45152 (I.R.B.)} the courts realized that there was little political will behind extending protection to foreign nationals with HIV/AIDS and are going out of their way to distinguish the facts in these cases from all others in order to avoid granting protection and reinforcing the precedent. In either event, it seems that the “unwilling rather than unable” and “exceptional circumstances” tests are here to stay. Even if Canada and the ECHR, or any other jurisdiction, decide to grant protective status to HIV-positive petitioners, it is inconceivable that they will do so without some kind of limiting principle. Despite the occasional hard-line stance such that taken by the \textit{N} dissent arguing that resource considerations should be irrelevant, it is

\textsuperscript{140} \textit{S.C.C. v. Sweden}, Appl. No. 46553/99, Council of Europe: European Court of Human Rights, 15 February 2000, available at: http://www.unhcr.org/refworld/docid/47fdfacbd.html (accessed 15 February 2010), p. 7: “The Court is not prevented from scrutinising an applicant’s claim under Article 3 where the source of the risk of proscribed treatment in the receiving country stems from factors which cannot engage either directly or indirectly the responsibility of the public authorities of that country, or which, taken alone, do not in themselves infringe the standards of that Article. In any such contexts the Court must subject all the circumstances surrounding the case to a rigorous scrutiny, especially the applicant’s personal situation in the deporting State...”
unlikely that the courts will embrace a stance so far afield from the predominant political position. In light of the overwhelming popular concern about over-admitting foreign nationals, limitations must be placed on protection from deportation on the basis of HIV status in order for it to be politically (and potentially economically\textsuperscript{141}) feasible.

In reality, the risk of skyrocketing numbers of asylum applications on the basis of HIV status seems slim. The research for this note did not uncover a single case in which the petitioners specifically immigrated in order to improve their access to antiretroviral medications, or at least no case in which a petitioner admitted to the court that she had done so. It would seem that the danger of a never-ending stream of HIV+ immigrants might in fact be remote. In \textit{N v. United Kingdom}, the Dissent critiques the Majority’s “implicit acceptance by the majority of the allegation that finding a breach of Article 3 in the present case would open up the floodgates to medical immigration and make Europe vulnerable to becoming the “sick-bay” of the world. A glance at the Court’s Rule 39 statistics concerning the United Kingdom shows that, when one compares the total number of requests received as against the number of HIV cases, the so-called “floodgate” argument is totally misconceived.”\textsuperscript{142}

\textsuperscript{141} The actual economic ramifications of granting protective status to foreign nationals with HIV/AIDS are beyond the scope of this paper. As there is currently no country that freely admits persons on the basis of their HIV status, it is difficult to estimate the number of people who would be eligible for and would seek such protection. After all, all of the proposed systems still limit protection to persons who have already made it into the country, no easy feat. Moreover, HIV treatments are becoming increasingly less expensive and more readily available. In light of these factors, it is not clear that treating foreign nationals with HIV/AIDS would be an overly burdensome task if countries were to be more liberal in granting them protected status.

\textsuperscript{142} The footnote to this comment shows that since 2005, when \textit{N} first claimed protection from deportation in the UK, the numbers of accepted cases have not increased dramatically. In fact, from January 2007 to April 2008 only 13 HIV cases were accepted.

Footnote reproduced:
June to December 2005
15 requested : 13 refused, 1 accepted (N. v UK itself).
- 2006
88 requested: 83 refused, 5 accepted (two of these five were HIV cases).
Rather than advocating for either the “unwilling rather than unable” or “exceptional circumstances” tests, this paper proposes that a better test is one that considers only the conditions that the specific petitioner would face upon removal. This test is effectively a different interpretation of the ECHR’s “exceptional circumstances” test, referred to hereinafter as “exceptional circumstances, revised.”

This test would enable courts in each country to establish a standard for the circumstances under which HIV-positive petitioners should be granted protection under the national torture statute. The inquiry would focus solely on the conditions that the specific petitioner would face if deported. It would not look at the petitioner’s health status at the time of the claim in the country, the government’s intent in not providing adequate medical treatment, or the general availability of antiretroviral treatment in the petitioner’s home country. In developing its own “exceptional circumstances, revised” standard, courts might look at factors including whether the petitioner’s specific medicines are available; whether the petitioner will actually be able to access treatment (including the petitioner’s ability to pay or whether medicines are only accessible to a specific sector of the population); whether the petitioner has friends and family to

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**- 2007**

951 requests of which 217 refused, 182 accepted (19 were HIV cases, 14 accepted, 0 refused; in one of the cases, the Rule 39 indication was lifted and the applicant has withdrawn her application because of fresh domestic proceedings).

**- 1 January 2007 to 22 April 2008**

969 requests of which 174 refused, 176 accepted (19 were HIV cases, 13 accepted and 0 refused).

Those statistics beg the following explanation. The system now records all cases where interim measures are requested, whether a decision is taken by a judge or not. This explains why there is a large disparity between the fact that there are 969 recorded requests for January - April 2008 but only 176 times when Rule 39 has been applied and 174 times when it has been refused. The rest would be either out of scope or not submitted because there were no documents. For the HIV cases there are a number of explanations which may account for the fact that 19 were registered as HIV cases in each year but only 14 and 13 decisions were taken each year to apply Rule 39. For example, the Government have given undertakings in some cases and in others the applicants may have withdrawn their applications because they have been given leave to remain on other grounds.
care for her at home; and the likely state of the petitioner’s health if returned home. Different jurisdictions could establish different standards meriting protection, allowing them to adapt the test to their own immigration preferences and, realistically, to the level of resources available to provide medical treatment to non-citizens.

One example of an “exceptional circumstances, revised” standard might be withholding of deportation for petitioners who would more likely than not lack access to medical treatment preventing them from deteriorating and dying within two years. Most of the petitioners in the cases discussed in this paper would meet this standard and thus be entitled to protection. This result does not mean, however, that the standard is overly inclusive. First, the cases discussed in this paper are notable because they involve petitioners who are on the cusp of meriting protection even for the jurisdictions in which they were tried. No doubt there are many other HIV-positive non-citizens who would not meet the standard. Second, the proposed standard seeks to protect those who truly have a humanitarian claim – those for whom removal is equivalent to a death sentence in a manner that most would agree is cruel and inhuman. Thus, if the proposed standard would extend protection to petitioners who would otherwise be denied it under the “unwilling rather than unable” or “exceptional circumstances” test, it is simply an indication that the “revised” test more effectively implements the underlying purpose of torture protection. Countries that wish to further limit the number of petitioners with a right to protection might include a second element to their “exceptional circumstances, revised” standard such as that the petitioner must also have a well-founded fear of social ostracism due to his HIV status.

The following sections evaluate the “unwilling rather than unable,” “exceptional circumstances,” and “exceptional circumstances, revised” tests in a few key areas, with an eye towards arguing that the “revised” test should prevail.
(a) Blanket categorization

The “unwilling rather than unable” test seems to lend itself to establishing blanket conclusions about specific countries. For example, after X (Re), 2008 CanLII 45152 (I.R.B.), the Zimbabwean government has now been determined to be “unwilling rather than unable” to provide HIV/AIDS treatment. To the extent that subsequent Canadian courts choose to follow this decision, any HIV-positive petitioners from Zimbabwe would seem eligible for an automatic grant of protected status, assuming that circumstances remain unaltered in Zimbabwe. On one hand, this creates a potentially dangerous precedent, removing the court’s ability to reason through the individual circumstances of the case. On the other hand, this categorization of countries as “unwilling rather than unable” or vice versa might be a useful way of streamlining the immigration status determination process.

In contrast, analysis of the individual facts of a given case is at the heart of the “exceptional circumstances” test. The court is called upon to examine the health of the petitioner at the time of the case as well as the treatment and support that he is likely to have available in the country to which he would be removed. While this test is far more individually tailored, perhaps this is not necessarily the hallmark of a good test. The test has thus far been satisfied only in one case (D v. United Kingdom). The court has suggested in other cases (BB v. France) that the petitioner’s situation might constitute “exceptional circumstances,” but has gone on to deny protection to very similar petitioners (Karara, SCC, Henao, Amegnigan, N). As the ECHR has applied it, the “exceptional circumstances” test seems at best arbitrary and at worst useless, in the event that no petitioner can actually satisfy it.
Like its ECHR predecessor, the “exceptional circumstances, revised” test would tend towards not creating blanket categorizations, as it turns on what would likely happen to the specific petitioner if returned home. That said, it would be possible under the “revised” test for the court to conclude that all petitioners returned to a certain country, such as Zimbabwe, would face conditions that would meet the standard meriting protection.

(b) Consideration of conditions in home country

The tests also differ on the extent to which they consider the conditions in the country to which the petitioner would be removed. For the “unwilling rather than unable” test, this factor is determinative of whether the petitioner should be granted protection. Once the petitioner has shown that she will face a dearth of HIV/AIDS medicine in the country of removal, the bulk of the court’s analysis consists of evaluating the reasons why this is so. If a country has the resources to provide at least the same level of treatment as similarly-situated countries in the region but is choosing to divert them towards unjustifiable purposes, the petitioner has a valid protection claim. The court in X (Re), 2008 CanLII 45152 (I.R.B.) distinguishes Zimbabwe from India and Mexico:

…the claims were against countries (India and Mexico) which were not alleged to be withholding medical treatment for any reason other than access based on cost. In this case [referring to Zimbabwe], medical and health care is not only inadequate for those without funds, but is unavailable because the government authorities have chosen, for reasons which are not justifiable, to create a situation within the country whereby medical care is unavailable to most citizens other than those with government connections.

To some degree, the “exceptional circumstances” test considers the conditions in the country to which the petitioner would be removed, but this is just one factor in the analysis. The
ECHR has emphasized the first prong of the test, the petitioner’s health status at the time of the claim, but also considers the second and third prongs – whether treatment is available in the country to which the petitioner would be removed and whether the petitioner has friends or family to care for him at home. With respect to medical treatment, the ECHR has seemingly adopted a rule excluding from protection petitioners whose home countries offer any measure of treatment, even if extremely costly and unavailable to all but a portion of the population. The Court assumes that if medications are available at all, the country has satisfied its obligation to provide some kind of opportunity for its citizens to access treatment.

The one exception may be for petitioners who are taking medicines tailored to their individual strain of HIV that are not available in the countries to which they would be removed. In \textit{D v. United Kingdom}, the sole case to pass the “exceptional circumstances” test in the ECHR, the specific medications that the petitioner was receiving were completely unavailable in St. Kitts.\textsuperscript{143} Similarly, in \textit{Ahmed}, the petitioner argued that because his HIV infection was highly drug-resistant, he was dependent on the particular medicines he was receiving in Sweden at the time of the case and that he would not be able to access them at all in Kenya or Somalia. The Court ruled the case admissible, though it never actually went to trial since Sweden agreed not to deport the petitioner.\textsuperscript{144} 145


As discussed above, the “exceptional circumstances, revised” test is solely concerned with what would happen to the specific petitioner if removed, which to a large extent implicates the conditions in the home country. However, in contrast to the “exceptional circumstances” test, the “revised” test is not concerned with the extent to which medical treatment is available generally, but looks only at whether medical treatment is likely to be accessible to the petitioner in question. The “revised” test might also look at other conditions in the home country that would be ignored under the ECHR “exceptional circumstances” test such as whether the petitioner will face social ostracism and harassment on account of her HIV status.

(c) Intent behind inadequate provision of medical treatment

Although the emphasis of the “unwilling rather than unable” test on the conditions in the petitioner’s home country is quite defensible, its reliance on intent seems morally unjustifiable. Although it provides a functional limitation on protection for HIV-positive petitioners, there is no principled or legal reason for extending protection to a person from a country with an irresponsible and uncaring government who chooses not to provide treatment over another who is simply from an extremely poor country that lacks the resources for antiretroviral therapy. Both petitioners would face equally dire straits if returned to their home countries. Furthermore, Article 97(b) conferring “person in need of protection” status does not require government responsibility or even intentionality but simply requires “a risk to life or risk of cruel and unusual treatment or punishment.”

2010); N. v. The United Kingdom, Appl. No. 26565/05, Council of Europe: European Court of Human Rights, 27 May 2008, available at: http://www.unhcr.org/refworld/docid/483d0d542.html (accessed 21 March 2010) (denying Article 3 protection to the petitioners, who did not argue that the specific treatments they needed were unavailable in the countries of removal (Tanzania, Togo, and Uganda, respectively), but only that necessary HIV medicines were difficult to obtain or extremely costly.)

146 Canada Immigration and Refugee Protection Act, supra n. 93.
In contrast, the “exceptional circumstances” test allows for more consideration of the specific situation of each individual. In theory, the court may grant protected status to any HIV-positive petitioner whose circumstances are judged to be exceptionally worse than that of other persons with HIV/AIDS seeking to thwart a removal order. Article 3 does not require government responsibility for creating the conditions that would amount to cruel or inhuman treatment. In *D v. the United Kingdom*, the ECHR did not allege that St. Kitts was responsible for inability to provide sufficient HIV/AIDS treatment to the petitioner but still found a violation of Article 3. The intent of the country in not providing sufficient access to HIV/AIDS medication is irrelevant under the “exceptional circumstances” test. The “exceptional circumstances, revised” test takes the same stance.

(d) Adaptability

The “unwilling rather than unable” test is very flexible in that it turns on the intent of the country in question in providing adequate antiretroviral therapy options to its citizens. The standard of what constitutes “adequate treatment” can adapt with changing medical advancements and increasingly widespread access to HIV/AIDS drugs. And the core of the test – whether the country is unwilling or unable to meet this standard – is applicable no matter what medical developments have occurred.

As interpreted by the ECHR to date, the “exceptional circumstances” test has become virtually ineffectual due to its lack of adaptability. Today, HIV/AIDS treatments are so effective that most persons receiving treatment are in stable health, making it impossible for them to meet the first prong of the “exceptional circumstances” test, that is that they be terminally ill or at the

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147 *D v. the United Kingdom,*
end of their lives. Discussing this concern, Lord Hope in *N v. Secretary of State for the Home Department* comments, “it appears to be somewhat disingenuous for the court to concentrate on the applicant’s state of health which, on the true analysis of the facts, is due entirely to the treatment whose continuation is so much at risk.”

The “exceptional circumstances, revised” test avoids this stumbling block by abandoning the petitioner’s health at the time of the claim entirely. In this respect, the “revised” test is certainly more adaptable than its predecessor. However, the courts would need to keep adaptability in mind when formulating the standard for petitioners meriting protection under the “revised test,” as any test that involves articulating a precise standard risks a certain degree of rigidity. The courts should take a lesson from the stymieing of the ECHR’s “exceptional circumstances” test and be prepared to amend the “revised” standard as needed to keep up with changing norms.

(e) Implications for extension to other contexts

Aside from the immediate concern about creating an influx of claims by HIV-positive petitioners, it is also possible that establishing standards for persons with HIV/AIDS to avoid deportation will open countries up to other kinds of claims. Indeed, the jurisprudence does seem to create ample opportunity for application to analogous situations such as petitioners suffering

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148 *N v. Secretary of State for the Home Department*, para 49
149 I recognize that it is far easier to defend my theoretical “exceptional circumstances, revised” test against the other two since it has not been implemented in practice. If countries actually implemented the “revised” test and allowed the courts to interpret and set its parameters, it is likely that it would be come just as rigid and difficult to meet as its non-theoretical counterparts.
150 Consider, for example, a hypothetical world in which a standard cocktail of medicines prolonging life by 30 years becomes truly universal. A more advanced regime of drugs is developed prolonging life by 50 years and is widely available in all countries except state X. Even if a petitioner from X could be guaranteed the standard cocktail if returned to X, it is possible that countries may want to amend their “exceptional circumstances, revised” standard to grant the petitioner withholding of deportation.
from other illnesses or who have been subject to economic and social rights violations. The courts could cabin their extension of torture protections to HIV-positive petitioners by explicitly stating that national policy makers have seen fit to carve out special protections for persons with HIV/AIDS. For example, Congress specifically legislated on both FGM and forced sterilization. If Congress were to legislate in a manner that indicated its particular concern for HIV-positive immigrants, it would be more justifiable for the courts to limit any test developed to persons with HIV/AIDS. However, this is an issue that is equally implicated by all three tests, so does not favor the selection of one over another in this regard.

Article 97 of the Canada Immigration and Refugee Protection Act specifically sets out the health and medical exception to the granting of person in need of protection status but is silent as to other economic and social rights. It would therefore seem even easier to justify granting protection to persons under Article 97 claiming “a risk to their life or to a risk of cruel and unusual treatment or punishment” stemming from other sources such as lack of food, water, or housing. As in X (Re), 2008 CanLII 45152 (I.R.B.), petitioners who would be returned to Zimbabwe could argue that the government is unwilling rather than unable to provide them with adequate amounts of food and that a slow death from malnutrition and starvation would certainly constitute a risk to life or a risk of cruel and unusual treatment or punishment.\footnote{In fact, Matthew Price argues that Zimbabweans suffering from famine in 2005 should have been eligible for asylum because the government was intentionally funneling limited food supplies only to areas that were expected to play a swing role in the elections. Matthew Price, \textit{Rethinking Asylum: History, Purpose, and Limits}, 135 (Cambridge University Press, 2009).}

Both the “exceptional circumstances” and the “exceptional circumstances, revised” tests could also be applied to extend protection in the same scenario. The court would be called upon to develop of a set of factors that could distinguish “exceptional circumstances” of extreme food
deprivation compared to your more run-of-the-mill food shortages, whatever that may be, to determine which petitioners should be granted protection from deportation. Although it would necessitate the creation of a myriad of additional standards for each medical condition or rights violation that implicates a risk of torture, it would be difficult for the court to justify not doing so once it had accepted HIV/AIDS as a grounds for protection. The ECHR has explicitly stated both that the same reasoning it has used to determine that HIV/AIDS can trigger an Article 3 violation applies to other mental and physical illnesses. More generally, the ECHR has clarified that Article 3 protection is not limited only to suffering from physical or mental illness, but also encompasses a wider array of dignitary harms.

The courts have thus opened the door to extending torture protections to other illnesses and even other economic and social rights violations.

Conclusion

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152 N v. United Kingdom, para 45, (arguing that “the same principles must apply in relation to the expulsion of any person afflicted with any serious, naturally occurring physical or mental illness which may cause suffering, pain and reduced life expectancy and require specialised medical treatment which may not be so readily available in the applicant’s country of origin or which may be available only at substantial cost.”)

153 See Bensaid v. The United Kingdom, Appl. No. 44599/98, Council of Europe: European Court of Human Rights, 6 May 2001, available at: http://www.unhcr.org/refworld/docid/3deb8a1e4.html (accessed 22 March 2010) (in which the ECHR explicitly applied the reasoning from the HIV cases to mental illness. Although the Court found that the facts of the petitioner’s case did not meet the high threshold of the “exceptional circumstances” test, it was not because the test was misapplied as to mental illness and certainly did not rule out the possibility of a successful Article 3 claim on these grounds. The Court’s analysis in Bensaid thus leaves the door open for expansion of the Article 3 jurisprudence to at least mental illness and possibly other scenarios.)

154 See Price v. United Kingdom, no. 33394/96, §§ 24-30, ECHR 2001-VII and Valasinas v. Lithuania, no. 44558/98, § 117, ECHR 2001-VIII. Cited in N v. United Kingdom Dissent, para 5. (“Where treatment humiliates or debases an individual, showing a lack of respect for, or diminishing, his or her human dignity, or arouses feelings of fear, anguish or inferiority capable of breaking and individual’s moral and physical resistance, it may be characterised as degrading and also fall within the prohibition of Article 3.”)
Some question whether HIV/AIDS should ever be grounds for granting immigration protection. The reasoning likely shared by many who hold this opinion is summed up by Lord Hope in *N v. Secretary of State for the Home Department*. Lord Hope argues that it is not a sustainable solution to the global HIV/AIDS epidemic to encourage foreign nationals to undertake the physically and financially arduous journey to countries with superior medical treatment and less social stigma. He suggests that instead the resources necessary to treat HIV-positive foreign nationals should be used towards furthering universal access to antiretroviral therapy.\(^{155}\)

To begin with, this characterization of HIV/AIDS resource allocation as interchangeable is mere prevarication. It seems unlikely that deporting HIV-positive petitioners en masse would actually lead to a significant increase in funding for global AIDS relief. Furthermore, while universal access is indisputably a worthwhile objective, the exclusive emphasis on funding medical research and development essentially ignores the rights of the individuals who are suffering today. This paper is not meant to suggest that immigration is a panacea for the global AIDS epidemic, but simply seeks to assert both the moral and legal duty to offer relief to HIV-positive petitioners facing deportation. It is all well and good to work towards a long-term

\(^{155}\) *N v. Secretary of State for the Home Department*, (2003) EWCA Civ 1369, United Kingdom: Court of Appeal (England and Wales), 16 October 2003, available at: http://www.unhcr.org/refworld/docid/4162a48f4.html (accessed 19 April 2010), (noting that granting withholding of deportation because of inadequate medical treatment “would risk drawing into the United Kingdom large numbers of people already suffering from HIV in the hope that they too could remain here indefinitely so that they could take the benefit of the great medical resources that are available in this country. This would result in a very great and no doubt unquantifiable commitment of resources which it is, to say the least, highly questionable the State Parties to the Convention would ever have agreed to. The better course, one might have thought, would be for States to continue to concentrate their efforts on the steps which are currently being taken, with the assistance of the drug companies, to make the necessary medical care universally and freely available in the countries of the third world which are still suffering so much from the relentless scourge of HIV/AIDS.”

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solution for improving the treatment of HIV/AIDS worldwide, but doing so does not absolve
countries of the obligation to help those who face a present threat to their lives and dignity.

Nevertheless, this principle is far easier to assert in theory than to implement in practice.
It must be acknowledged that there is no easy answer to determining exactly how HIV status
should come to bear on removal proceedings. As frequently noted in the case law, living with
HIV/AIDS is, unfortunately, not in and of itself an exceptional circumstance. 156 Countries in
which antiretroviral therapy is more readily available are apprehensive about setting precedents
that would obligate them to provide long-term treatment for more foreign nationals than they are
able or willing to support. On the other hand, it seems monstrous to interpret the law so narrowly
as to require the blanket deportation of all petitioners who cannot prove the more traditional civil
and political grounds for persecution, knowing that their removal all but guarantees their rapid
deterioration and death in conditions of squalor and indignity.

The discussion of the three tests above demonstrates that it is possible to create principled
limitations to protection for HIV-positive petitioners. Through such tests, the courts can balance
the protection of those most in need with concerns about over-admitting foreign nationals. Once
the courts have developed a workable structure for HIV/AIDS as grounds for immigration relief,
it could then be adapted and translated to other contexts. HIV/AIDS cases should be just the
beginning of a larger trend towards extending the reach of torture and asylum law to victims of
social and economic rights violations who have thus far been categorically excluded from
protection.

156 Avert estimated in November 2009 that there were an estimated 34 million people living with