



International Covenant on Civil and Political Rights

Distr.: General
3 May 2016

Original: English

Human Rights Committee

Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2060/2011*, **

<i>Communication submitted by:</i>	W.M.G. (represented by counsel, Carole Simone Dahan)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Canada
<i>Date of communication:</i>	10 May 2011 (initial submission)
<i>Document references:</i>	Decision taken pursuant to rule 97 of the Committee's rules of procedure, transmitted to the State party on 12 May 2011 (not issued in document form)
<i>Date of adoption of Views:</i>	11 March 2016
<i>Subject matter:</i>	Deportation to Zimbabwe of a person who is HIV-positive
<i>Procedural issues:</i>	Exhaustion of domestic remedies, <i>ratione materiae</i> ; failure to sufficiently substantiate allegations
<i>Substantive issues:</i>	Right to an effective remedy; right to life; torture or cruel, inhuman or degrading treatment or punishment; fair trial; right to privacy, family and reputation; protection of the family
<i>Articles of the Covenant:</i>	2 (3), 6 (1), 7, 14 (1) (2) and (3) (c), 17 and 23 (1)
<i>Articles of the Optional Protocol:</i>	2, 3 and 5 (2) (b)

* Adopted by the Committee at its 116th session (7-31 March 2016).

** The following members of the Committee participated in the examination of the present communication: Yadh Ben Achour, Ladhari Bouzid, Sarah Cleveland, Yuji Iwasawa, Ivana Jelić, Duncan Laki Muhumuza, Mauro Politi, Sir Nigel Rodley, Víctor Manuel Rodríguez-Rescia, Fabián Omar Salvio, Anja Seibert-Fohr, Yuval Shany, Konstantine Vardzelashvili and Margo Waterval.



1.1 The author of the communication is W.M.G., a national of Zimbabwe born on 29 June 1970. He claims that his return to Zimbabwe would constitute a violation of his rights under articles 2 (3), 6 (1), 7, 14 (1) (2) and (3) (c), 17 and 23 (1) of the Covenant.¹ The Optional Protocol to the Covenant entered into force for the State party on 19 August 1976. The author is represented by counsel, Carole Simone Dahan.

1.2 On 12 May 2011, pursuant to rule 92 of the Committee's rules of procedure, the Committee, acting through its Special Rapporteur on new communications and interim measures, requested the State party to refrain from removing the author to Zimbabwe while the communication was under consideration by the Committee. On 16 May 2011, the State party informed the Committee that, in accordance with the Committee's request, the author would not be removed.

1.3 On 19 August 2011, the Committee, acting through its Special Rapporteur on new communications and interim measures, decided to grant the State party's request to lift interim measures. On 19 October 2011, the author's counsel informed the Committee that the author had been removed from the State party.

Factual background

2.1 On 15 September 1990, the author married L.S., also a national of Zimbabwe. They have seven children. Two children, born in Zimbabwe in 1991 and 1997, are also nationals of Zimbabwe; one child was born in the United States of America on 22 December 1998 and is a national of that country and the other four children were born in Canada in May 2002, April 2003, February 2006 and August 2007, respectively, and are nationals of Canada. In addition, the author has a child with B.N., in the United States, who was born on 14 May 2001, and another child with A.M., in Canada, who was born in November 2002. In total, the author has three children from extramarital relationships with two women.

2.2 On 20 April 1998, the author left Zimbabwe, together with his wife and children. They went to the United States where they lived for four years as legal immigrants. The author completed his pastoral studies, which allowed him to become a minister. He also studied for a masters degree in business administration, with a specialty in banking and finance, at a university in North Carolina. On 18 January 2001, the author was convicted by a court in North Carolina of attempting to obtain property by false pretences. His prison sentence for that offence was suspended on condition that he leave the United States and pay restitution in the amount of \$900. The author claims that he paid that amount.

2.3 On 29 July 2001, the author, together with his wife and three children, arrived in Canada. The author claims that B.N and their child also moved to Canada at the same time. They were permitted to enter the country as visitors for a period of six months. On 26 September 2001, they filed a claim for refugee protection with the Immigration and Refugee Board, claiming that the author would be at risk of persecution in Zimbabwe by members of the War Veterans Association and by the Zimbabwe African National Union Patriotic Front party, which was then in power. In addition, he claims that once in Canada, he and other persons created a branch of the Movement for Democratic Change, which opposed the Government of Zimbabwe.

2.4 When the authorities of the State party learned of the author's conviction in the United States, the Immigration Division of the Immigration and Refugee Board determined that the author was not admissible in Canada on the grounds of criminality, pursuant to

¹ The author's claims under article 14 (1) (2) and (3) (c) were submitted to the Committee in his comments of 16 February 2012 on the State party's observations on admissibility and the merits (see para. 5.6).

section 36 (2) (b) of the Immigration and Refugee Protection Act. At the conclusion of a hearing held on 19 December 2002, a deportation order was issued against him.

2.5 In 2002 and 2003, the author was charged with 12 counts of assault against B.N. and A.M., but the charges were later withdrawn. In this context, on 19 February 2004, he was the subject of a peace bond, which required that he have no contact with B.N. or A.M. for one year.

2.6 On 8 December 2003, the Immigration and Refugee Board rejected the author's request for refugee protection, stating that the author had failed to provide any evidence concerning his allegations of persecution by the War Veterans Association and that he had failed to correct or explain the inconsistencies between his testimony at the hearing and the allegations contained in his Personal Information Form, notably with respect to the timing of his refugee claim and allegations concerning the persecution of his family in Zimbabwe. As to his affiliation with the Movement for Democratic Change in Canada, the Board noted that he had joined the Movement a few months after claiming refugee protection and that he had not offered evidence concerning his alleged activities as a fundraiser for that organization.

2.7 On 31 May 2004, the author filed an application for a pre-removal risk assessment (PRRA) with Citizenship and Immigration Canada, alleging essentially the same risks of persecution as contained in his application for refugee protection.

2.8 On 12 July 2004, the author pleaded guilty before a court in Ontario to charges of fraud in an amount that exceeded Can\$ 5,000 and failure to comply with a condition of recognizance, in violation of sections 380 (1) and 145 (3) of the Criminal Code of Canada, respectively. He was sentenced to one day in jail on each charge (to be served concurrently, in addition to the 18 days of pretrial custody he had served) and restitution of Can\$ 7,340, which he performed.

2.9 On 18 October 2004, a negative decision on his PRRA application was issued as the author had failed to establish that he would be at risk of persecution upon his return to Zimbabwe. The PRRA officer found, inter alia, that the author's statements and the evidence submitted by him in support of his case had either been fabricated or was unreliable; that he had not provided evidence of his alleged activities for the Canada Branch of the Movement for Democratic Change or that he had been in the past or would be perceived as an opponent of the Government of Zimbabwe, nor had he demonstrated that the authorities of Zimbabwe had been aware of any Movement activities in which he participated. Furthermore, the country's poor human rights record was not sufficient to conclude that he could be at risk of persecution if deported. At the end of the pre-removal refugee assessment PRRA proceedings, the author informed the Canada Border Services Agency that he was unable to attend the interview to receive his PRRA decision as he had relocated from Mississauga to Calgary. In February 2005, he also failed to report to the Agency in Calgary to receive his PRRA decision. A warrant for his arrest was issued. In April 2005, the author was arrested and subsequently released on a cash bond. In August 2005, the author returned to Mississauga.

2.10 On 9 December 2005, the author was convicted of impersonating with intent in a matter dealing with a mortgage application, in violation of section 403 (a) of the Criminal Code. He received a suspended sentence and 18 months' probation.

2.11 On 1 February 2007, the author was charged with issuing forged documents, fraud in an amount that did not exceed Can\$ 5,000, failure to comply with a probation order, unauthorized use of a credit card, conspiracy to commit fraud, fraud in an amount that exceeded Can\$ 5000, possession of property obtained by crime with a value of over Can\$ 5,000 and selling a counterfeit mark. He was imprisoned on the same day. On 5 April, he pleaded guilty and was sentenced to 100 days' imprisonment on each charge, to be served

concurrently, and 65 days' presentence custody. In June 2007, upon completion of his sentence, the author was placed in immigration detention ("immigration hold") while the Canada Border Services Agency made arrangements for his removal. While in detention, in late July and August 2007, the author was informed by the prison's doctor that he had tested positive for HIV; his results for the Mantoux test for tuberculosis were also positive. His wife and the child born in 2003 were also diagnosed as being HIV-positive.

2.12 On 15 November 2007, the author and his wife submitted an application for permanent residence on humanitarian and compassionate (H&C) grounds. They alleged that the author, his wife and the daughter who was HIV-positive would not be able to obtain or to afford medical care and antiretroviral medications in Zimbabwe; that the political and socioeconomic situation in Zimbabwe was very poor, including the human rights situation; that as failed asylum seekers they would be severely mistreated; and that it was in the best interest of their seven children that they remain together as a family in Canada.

2.13 On 19 November 2007, the author requested deferral of his removal from Canada until his humanitarian and compassionate application had been determined. On 5 December, the Canada Border Services Agency enforcement officer denied the request. The officer noted that a medical doctor had determined that the author's immune system was fully functional despite his HIV-positive status and that he had not yet started taking antiretroviral medications, and that according to documents submitted by the author, those medications were available in Zimbabwe and he could therefore access them, despite their cost. The officer also noted that the author had made no submissions regarding his involvement in the upbringing of his children, and that the children were under the care of their mother and under the supervision of the Durham Children's Aid Society, by order of the Ontario Superior Court of Justice. Furthermore, his removal would only maintain the status quo given that he had been separated from his family since 10 February 2007 as a result of his incarceration. His removal was scheduled for 8 January 2008.

2.14 On 12 December 2007, the author submitted to the Federal Court an application for leave and judicial review of the decision not to defer his removal, pending the humanitarian and compassionate application. As a result, his removal was stayed by the Federal Court. In March 2008, the author was released from detention. He claimed that he had had regular telephone contact with his wife and children while in detention. On 7 July, the Federal Court dismissed the author's application for judicial review. It found no reviewable error in the enforcement officer's decision that the author should be removed.

2.15 On 13 August 2008, another removal order was issued by the Canada Border Services Agency. On 26 August, an Agency enforcement officer denied his request to defer removal. On 29 August, the author submitted to the Federal Court another application for leave and judicial review of the decision not to defer his removal to his country of origin, pending the humanitarian and compassionate application. On 29 January 2009, the author was again detained. On 17 February, the Federal Court set aside the enforcement officer's decision and the author's removal was stayed until a decision had been reached on his humanitarian and compassionate application. In October, the author was released from detention upon payment of a cash bond.

2.16 On 27 November 2009, Citizenship and Immigration Canada decided to grant a residence permit on humanitarian and compassionate grounds to the author's wife and their three non-Canadian children; however, the author's humanitarian and compassionate application was denied. The agency maintained that although the author's removal would cause the author to be permanently separated from his wife and seven children, his application was inadmissible on the ground of serious criminality, pursuant to subsection 25 (1) of the Immigration and Refugee Protection Act. Notably, the author had a history of committing fraud-related crimes both in Canada and in the United States; there was no evidence that he had made any rehabilitative efforts; his behaviour showed a pattern of

dishonest dealings; and his position of trust based on his work as evangelical minister and organizer/fundraiser for his own charitable organization was an aggravating factor. In addition, he had been involved in more than one extramarital relationship which had ended his signing a peace bond preventing him from contacting the women in question. Furthermore, he had flouted the immigration laws on more than one occasion by the manner in which he had entered the State party and by failing to comply with various Canada Border Services Agency removal orders as well as the terms and conditions of release imposed upon him.

2.17 As to the author's allegations about the difficulty of accessing antiretroviral medications in Zimbabwe, Citizenship and Immigration Canada stated that according to information provided by medical practitioners in Zimbabwe designated by Canada, such medications were available at pharmacies in the main cities; it was not difficult to have them delivered to the rural areas; their average price was US\$ 30 per month; and a number of institutions offered the medication for free. It also pointed out that as the author was an able-bodied, educated person, he should be able to access the treatment he needed in Zimbabwe. Finally, it highlighted that the author had not yet taken any antiretroviral medications so that there would be no adverse effect to his health owing to removal from Canada and interruption of a medication regime.

2.18 Citizenship and Immigration Canada acknowledged that the separation of the author from his wife and children would be a significant hardship for him and his family in Canada. However, given his periods of incarceration and immigration detention and his temporary relocation to Calgary in 2004/05 and periods of detention there, he had been separated from his children for fairly lengthy periods of time, particularly in the three years prior to its decision. Thus, any subsequent involuntary separation from them would be a continuation of the current state of affairs. It further noted that as a result of the author's and his wife's incarceration, the Durham Children's Aid Society had removed their children and placed them in foster care; that in September 2007 the children were returned to his wife's care, under the supervision of the Society; and that she had raised the children on her own and was able to gain the Society's confidence, which indicated that she had the requisite abilities to care for her children as a single parent.

2.19 As to the situation in Zimbabwe, Citizenship and Immigration Canada noted that according to recent information in the public domain, the humanitarian and economic crises in Zimbabwe were under control and drawing to a close;² that the author had not explained why he could be subject to mistreatment because of his status as a failed asylum seeker and being HIV-positive; that no recent information indicated that failed asylum seekers could face problems upon return to Zimbabwe;³ and that although HIV/AIDS continued to carry a stigma which might lead to discrimination in Zimbabwe, that did not mean that HIV-positive persons would be mistreated.⁴

2.20 On 6 January 2010, the author submitted an application for leave and judicial review of the refusal of his humanitarian and compassionate application before the Federal Court, which was dismissed on 4 May 2010.

² International Crisis Group, "Zimbabwe: engaging the inclusive Government", Africa Briefing No. 59, 20 April 2009; and Human Rights Watch, "False dawn: the Zimbabwe power-sharing Government's failure to deliver human rights improvements", 31 August 2009.

³ United Kingdom Home Office, *Country of Origin Information Report: Zimbabwe*, 20 July 2009.

⁴ "Treatment of HIV positive persons in Zimbabwe", Refugee Documentation Centre (Ireland), 25 September 2009.

The complaint

3.1 The author claimed that his removal to Zimbabwe would constitute a violation of his rights under articles 2 (3), 6 (1), 7, 17 and 23 (1), of the Covenant.

3.2 The author claimed that his life would be at risk and that he would be subjected to torture or other cruel, inhuman or degrading treatment or punishment if he were returned to his country of origin, in violation of articles 6 (1) and 7 of the Covenant. He is HIV and Mantoux positive. According to a letter from a doctor dated 27 April 2011, in Canada the author would receive medical treatment for HIV immediately whereas in Zimbabwe, he would not receive any treatment until the virus was at a later stage. He would also receive treatment for tuberculosis, which was difficult to access in Zimbabwe. He further claimed that he would not be able to access or afford the antiretroviral treatment he needed. He would not have any governmental or family support, would likely be unemployed, and would not have access to basic needs, including food. Against this background, the author claimed that his life would be at serious risk if he were returned to Zimbabwe.

3.3 The HIV/AIDS rate in Zimbabwe is one of the highest in the world; the country has more people living with AIDS without access to treatment than any other country.⁵ By the end of 2009, less than 50 per cent of people living with HIV who require antiretroviral therapy had access to it.⁶ Access to the treatment is often affected by corruption. Since antiretroviral drug supplies are irregular, physicians switch patients on established antiretroviral regimens to other regimens on the basis not of clinical need, but on drug availability.⁷ Health facilities have severe shortages of laboratory supplies and equipment that are essential for the provision of quality HIV/AIDS service.⁸ There is little support for persons who are HIV-positive in terms of counselling and social support. Likewise, there is no adequate support for these persons in terms of nutrition, access to clean water and other relevant health factors. Because of their high price, most people in Zimbabwe cannot access HIV treatment through private institutions, since that would cost at least US\$ 100 a month.

3.4 The author claimed that he would be perceived as an opponent of the Government and thus be targeted by the authorities in Zimbabwe. He argued that he would be interrogated by the authorities upon arrival and that members of the security forces and the former ruling party, Zimbabwe African National Union Patriotic Front, would continue to commit human rights violations, including arbitrary arrest, torture and killing, against members and supporters of former opposition parties such as the Movement for Democratic Change and those critical of Front.⁹

3.5 His removal to Zimbabwe would also constitute an arbitrary or unlawful interference in his family and a violation of his rights under articles 17 and 23 of the Covenant as he would be separated from his wife and children, who would remain in Canada. That situation would cause him great anguish. He claimed that he had been actively involved as a husband and father and that his family needed his presence. Since he and his wife were

⁵ United Kingdom House of Commons, International Development Committee, *DFID's Assistance to Zimbabwe*, Eighth Report of Session 2009-10, vol. I (London, 2010), para. 116.

⁶ Food and Agriculture Organization of the United Nations/World Food Programme, *FAO/WFP Crop and Food Security Assessment Mission to Zimbabwe* (Rome, 2010).

⁷ *Physicians for Human Rights, Health in Ruins: A Man-Made Disaster in Zimbabwe* (Cambridge, Massachusetts, 2009).

⁸ Government of Zimbabwe, United Nations General Assembly Special Session Report on HIV and AIDS: Follow-Up to the Declaration of Commitment on HIV and AIDS - Zimbabwe Country Report. Reporting Period: January 2008 to December 2009.

⁹ Human Rights Watch, *Perpetual Fear: Impunity and Cycles of Violence in Zimbabwe* (8 March 2011).

HIV-positive and their future health conditions were uncertain, their children needed them to provide a greater possibility of stable parenting, in particular if one of them became ill or died. Further, since his wife and one daughter were also HIV-positive, they would need to remain in Canada to receive medical treatment. Therefore, it was unlikely that his wife and children would visit him in Zimbabwe. Finally, he claimed that his criminal convictions were all for non-violent crimes and that the longest sentence was 100 days. Against that background, the decision to remove the author to his country of origin was disproportionate to the State party's aim of preventing criminal offences.¹⁰

State party's observations on admissibility and the merits

4.1 In a note verbale dated 16 August 2011, the State party provided its observations on the admissibility and merits of the communication. It maintains that the communication should be declared inadmissible on the grounds that it was incompatible with the Covenant, the allegations had not been substantiated that domestic remedies had not been exhausted. Should the Committee declare the communication admissible, the State party maintains that the author's removal to his country of origin would not be a violation of the Covenant.

4.2 The State party points out that since his arrival in Canada, the author has been convicted of 11 criminal offences and was charged with many more; many charges laid against him over the years for violent and non-violent offences (14 fraud-related charges and 8 assault charges) were subsequently withdrawn by the prosecuting attorneys and did not go to trial. While not proven in court, these charges illustrate the extent to which the author came into conflict with the law. In particular, his assault charges were serious enough to result in a court order prohibiting him from having any contact with his alleged victims, namely his two extramarital partners, B.N. and A.M., for a period of one year. He was also prohibited from possessing any weapons during that period. A.M. was visibly pregnant with the author's child when one of the alleged assaults took place. On 30 May 2011, the author was charged with two more counts of assault, of which the alleged victim was his wife. At the time the State party's observations were submitted to the Committee, the author was in detention awaiting trial on four outstanding fraud-related criminal charges (three counts of fraudulent use of credit card data and one count of fraud in an amount exceeding Can\$ 5,000). The State party further notes that the author involved his wife and B.N. in his criminal activities. Both women were arrested in connection with crimes committed with him. This resulted in his children being placed in foster care while he and his wife were incarcerated.

4.3 The author had also displayed a complete disregard for the law by violating almost all the court orders and immigration conditions imposed on him. Most significantly, he violated the peace bond of 19 February 2004 requiring him to have no contact with B.N and A.M.

4.4 The State party maintains that the author's allegations under article 2 (3) of the Covenant should be declared inadmissible pursuant to article 3 of the Optional Protocol, since they are incompatible *ratione materiae* with the provisions of the Covenant. The author invoked article 2 (3) as the basis of a free-standing right to an effective legal remedy. In the alternative, the alleged violation of article 2 (3) is not sufficiently substantiated for the purposes of admissibility.

4.5 As to the author's claims of violation of articles 6 (1) and 7 in connection with his allegations that he would be at risk of political persecution in Zimbabwe, whether as a failed asylum seeker or otherwise, the State party maintains that they are inadmissible on

¹⁰ See communication No. 1792/2008, *Dauphin v. Canada*, Views adopted on 28 July 2009.

the ground of non-exhaustion of domestic remedies because the author did not avail himself of the opportunity to seek judicial review before the Federal Court of the negative decision of the Immigration and Refugee Board concerning his request for refugee protection or of the negative PRRA decision, both of which were concerned with such risks.¹¹ Given the author's failure to exhaust available and effective domestic remedies on two separate occasions, the Committee should declare his allegation that he would be at risk of persecution as a failed asylum seeker inadmissible.

4.6 In addition, the State party submits that the author's allegations under article 6 (1) and 7 of the Covenant are not substantiated. There was also no evidence to suggest that the author would be identified and personally targeted in Zimbabwe for any reason whatsoever. The author relies on a report dated 8 March 2011 in which Human Rights Watch stated that human rights violations continued to be committed in Zimbabwe against members and supporters of the Movement for Democratic Change and those critical of the Zimbabwe African National Union Patriotic Front. However, the report made no reference to failed asylum seekers returning to Zimbabwe. The State party notes that there is also no evidence that failed asylum seekers are perceived as opponents of ZANU-PF.

4.7 As to the author's allegations that antiretroviral medications are unavailable or unaffordable in Zimbabwe, the State party points out that its authorities based their decisions on open-source information and medical opinions from doctors practising in Zimbabwe; that such medications can be purchased at pharmacies in Zimbabwe for about US\$ 30 per month or can be obtained for free at several institutions; that other more recent reports confirm the availability of those medications in Zimbabwe;¹² and that the author had family in Zimbabwe on whose support he could rely. It also states that since his detention on 30 May 2011, the author has refused to undergo any blood tests that would have allowed the State party to ascertain his current CD4 cell count. At the time its observations were submitted to the Committee, the author was not taking any medications.

4.8 The State party maintains that the author would in all likelihood be able to purchase antiretroviral medications for most of his life in Zimbabwe and would not be a stranger to the social/health system; that he was, by his own account, highly educated and a successful businessman; that his health appears to be good despite his HIV-positive status; and that he has family in Zimbabwe. All these factors suggest that the author would be in a better position than the vast majority of Zimbabweans to obtain or create for himself gainful employment such as to afford private antiretroviral treatment if necessary.

4.9 The State party submits that the author's claim that he has no family in Zimbabwe was unsubstantiated and not credible. Firstly, he alleges that his parents are deceased and that he has only four siblings, none of whom reside in Zimbabwe. However, in the context of his PRRA application, he stated that he had six siblings, of whom five were still alive. He also alleges that one of his brothers had written to him from Zimbabwe. In his humanitarian and compassionate application of November 2007, he indicated that he had three nephews in Zimbabwe. He also told Canadian immigration officials that his mother-in-law and sister-in-law, who live 60 miles north of Harare, would meet him on arrival in

¹¹ See communications No. 1580/2007, *F.M. v. Canada*, decision of inadmissibility adopted on 30 October 2008, para. 6.3; No. 1578/2007, *Dastgir v. Canada*, decision of inadmissibility adopted on 30 October 2008, para. 6.2; and No. 939/2000, *Dupuy v. Canada*, decision of inadmissibility adopted on 18 March 2005, para. 7.3. The State party also refers to Federal Court of Canada, *Ndhlovu v. Canada (Minister of Citizenship and Immigration)*, decision on application for judicial review of 30 November 2003.

¹² United Kingdom Home Office, *Zimbabwe: County of Origin Information (COI) Report*, 25 March 2011, para. 25.07.

Zimbabwe should he be removed. Against this background, he can be expected to benefit from family support, including for the purposes of obtaining antiretroviral treatment, if he were removed to Zimbabwe.

4.10 With regard to the author's allegations under article 17 (1) and 23 of the Covenant, the State party maintains that they should be declared inadmissible for failure to sufficiently substantiate his claims. The author's removal from the State party would interfere with his family relations insofar as his wife and children would in all likelihood choose to remain in Canada. However, the impact of this measure has been assessed in a thorough and effective fashion by the authorities in the context of his humanitarian and compassionate application and his request to defer removal. In this regard, the decision to remove the author despite his family connections in Canada was motivated by several considerations, including his history of separation from his family since arriving in Canada, his wife's demonstrated ability to care for her children as a single mother, the lack of any evidence of the author's involvement in his children's upbringing and the lack of any submissions regarding his three other children with his two other partners. Accordingly, the author's removal cannot be considered either unlawful or arbitrary for the purposes of articles 17 and 23. The charges against the author for assault on his wife give additional support to the conclusion reached by the State party authorities. These charges, while not yet proven in court, are consistent with previous charges of domestic violence laid against the author in the context of two other relationships.

4.11 The author's removal would, in the circumstances, constitute a reasonable interference in his family life and would be a proportionate means of achieving legitimate purposes under the Covenant. The author cannot claim to ever have had any expectation of maintaining a family life in Canada since he never obtained any legal status in the State party which could have led him to expect that he would remain in the country.¹³ Furthermore, he failed to submit relevant and sufficient evidence showing that he is actively involved in his family as husband and father. On the contrary, available evidence shows that the author's criminal activities have had a negative impact on his children's lives. In particular, his and his wife's arrests in 2007 and convictions for fraud resulted in their children being placed in foster care for a period of six months and remaining under the protection of the Children's Aid Society until March 2009. According to the Society, the family had a history of concerns including transiency, not following through with medical appointments and medications prescribed for the children and the father having been involved in fraud-related charges.¹⁴ The fact that his children's health was neglected in this way is inconsistent with the presence of a father figure that plays an active part in his children's lives. In the context of the domestic proceedings, the author never expressed any interest in the children from his extramarital relationships and never submitted any evidence to suggest that he contributed in any way to their care and upbringing.

4.12 In these circumstances, the author's removal to Zimbabwe would constitute a reasonable interference in his family life and would be a proportionate means of achieving legitimate purposes under the Covenant, namely protecting society from the author and ensuring the integrity of the immigration system of the State party. The effects of this interference on the author would not be excessive in relation to the harm sought to be prevented by his removal. He would be likely to reoffend if he were allowed to remain in the State party, with the result that he would face ever-longer periods of incarceration and separation from his family. This would impose an unreasonable burden on the justice system, while contributing only marginally, if at all, to his family life.

¹³ See *Dauphin v. Canada*, para. 8.4.

¹⁴ The State party provides a copy of the Durham Children's Aid Society's service contract dated 13 June 2008 and letter dated 27 March 2009.

Author's comments on the State party's observations

5.1 In a letter dated 16 February 2012, the author submitted, through his counsel, his comments on the State party's observations on admissibility and the merits. The counsel informed the Committee that despite prior arrangements with the author, she was unable to contact him after his removal to Zimbabwe. He reiterated the allegations submitted in the original communication.

5.2 The counsel submits that the author exhausted all effective and domestic remedies. The application for judicial review to the Federal Court against the decision of the Immigration and Refugee Board in relation to his application for refugee protection is not an effective remedy since there is no reasonable prospect of success. The Federal Court's competence on judicial review is very limited. Access to judicial review of decisions under immigration legislation is subject to a leave requirement that is interpreted inconsistently by the Court, leading to arbitrariness. Furthermore, leave for judicial review is granted in about 10 per cent of applications and only 0.4 per cent of the Board's decisions are overturned by the Federal Court.¹⁵ The competence of the Federal Court in examining a judicial review is limited to gross errors such as errors of jurisdiction, failure to observe a principle of natural justice or other procedure required by law, errors of law and findings of fact made in a perverse or capricious manner or without regard for the material before the Board.

5.3 Regarding PRRA, it is argued that such an application in itself should not be considered an effective remedy since it is rarely successful. In the alternative, the application for judicial review to the Federal Court is not an available remedy against a negative PRRA decision. In the author's case, the PRRA evaluation in itself was not an effective remedy since the authorities that considered his PRRA application did not conduct a thorough and adequate investigation. Therefore, the evaluation carried out by the authorities within the context of the PRRA decision amounted to an arbitrary evaluation and a denial of justice.

5.4 The deportation of the author to Zimbabwe created a real and foreseeable risk of irreparable harm, in violation of his rights under articles 6 (1) and 7 of the Covenant, as submitted in his original communication. The political situation in Zimbabwe remains fragile and the State party itself recognizes this situation, for example by having a moratorium on deportations and banning the export of arms and related material to Zimbabwe.

5.5 The author will not be able to access or afford antiretroviral medications in Zimbabwe. Having lived outside Zimbabwe for more than 14 years, and in the light of his health condition, it is unlikely that he will be able to get a job or set up a business. According to the World Bank, the per capita gross national income in Zimbabwe is just over US\$ 38. Therefore, it cannot be assumed that a person can earn a sufficient wage to be able to afford the monthly cost of antiretroviral medications as indicated by the State party (US\$ 30). In addition, the author has no immediate family in Zimbabwe.

5.6 The State party also violated the author's rights under article 14 (1) (2) and (3) (c) of the Covenant. It failed to provide a reasonable or objective ground for its decision to deport the author prior to giving him a fair and public trial in regard to the charges laid against him on 30 May 2011 for assault related to alleged domestic violence against his wife. Therefore, the State party did not provide the author with a fair trial by a competent, independent and impartial tribunal, in violation of his rights under article 14 (1). The State party relies on unproven charges against the author, despite the fact that there was no determination

¹⁵ Treasury Board of Canada Secretariat, *Immigration and Refugee Board: Performance Report for the Period Ending March 31, 2010*, p. 6.

concerning those charges. In the light of the right to be presumed innocent enshrined in article 14 (2), the fact that the author was charged with assault against his wife should not be considered by the Committee in deciding the case. Regarding article 14 (3) (c), it is argued that the author's removal to Zimbabwe has caused an undue delay in the proceedings in which he was charged with assault. He was unable to defend himself and to appear in court in person.

5.7 Regarding the author's claims under articles 17 and 23 (1), it is argued that the State party relied heavily on the charges of assault against the author, in which the alleged victim is his wife. However, at the time the author's comments were submitted to the Committee, he had not been convicted of any new criminal offence. It is further claimed that the State party did not have a relevant State's interest in the author's deportation since he had not been convicted of a violent offence and that, on the other hand, owing to the permanent nature of the measure, the author's family would be dramatically affected.¹⁶ Therefore, the author's deportation should be considered a disproportionate measure, in particular owing to the fact that he will be permanently separated from his children and wife and that he has no close relatives or strong ties in Zimbabwe. In Zimbabwe he will not be able to keep a close relationship with his children, owing to practical obstacles such as the poor quality of telephone and Internet services and high telephone fees. In addition, in the light of his wife's and daughter's need for HIV treatment, the fact that five of his children attend school in Canada, the cost of a family visit to Zimbabwe and the political situation in Zimbabwe, it would be unlikely that the family could visit him in Zimbabwe.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claims contained in a communication, the Committee must decide, in accordance with rule 93 of its rules of procedure, whether the communication is admissible under the Optional Protocol.

6.2 The Committee has ascertained, as required under article 5 (2) (a) of the Optional Protocol, that the same matter is not being examined under any other procedure of international investigation or settlement.

6.3 With regard to the author's claim under article 2 (3) of the Covenant regarding the decision to remove him to Zimbabwe, the Committee recalls that this provision cannot be invoked independently¹⁷ and therefore considers this part of the communication to be inadmissible *ratione materiae* under article 3 of the Optional Protocol.

6.4 The Committee takes note of the author's allegations under article 14 (1), (2) and (3) (c) of the Covenant. The Committee considers, however, that these allegations were submitted to it at a late stage in the proceedings and are unrelated to the claims which constitute the main gist of the communication, and are unsubstantiated. Accordingly, the Committee finds these allegations inadmissible under article 2 of the Optional Protocol.

6.5 The Committee takes note of the State party's argument that the author has failed to exhaust domestic remedies regarding his claims, under articles 6 (1) and 7 of the Covenant, that he would be at risk of persecution if deported to Zimbabwe owing to his alleged political activities in Canada and his status as a failed asylum seeker, since he failed to file

¹⁶ The author provides a letter issued by the Hospital for Sick Children in Toronto.

¹⁷ See communications No.2284/2013, *F.M. v. Canada*, Views adopted on 5 November 2015, para. 8.4; No. 2176/2012, *M. v. Belgium*, decision of inadmissibility adopted on 30 March 2015, para. 6.5; and No. 1544/2007, *Hamida v. Canada*, Views adopted on 18 March 2010, para. 7.3.

an application for leave and judicial review against the negative decisions within the proceedings for refugee protection before the Immigration and Refugee Board and the PRRA procedure. The Committee also takes note of the author's allegation that judicial review of these decisions is not an effective remedy since it has a very low prospect of success. The Committee recalls its jurisprudence to the effect that authors must avail themselves of all judicial remedies in order to fulfil the requirement of article 5 (2) (b) of the Optional Protocol, insofar as such remedies appear to be effective in the given case and are de facto available to the author,¹⁸ and that mere doubts about the effectiveness of domestic remedies do not relieve the author of a communication from the duty to exhaust them.¹⁹ The Committee considers that the author has thus failed to exhaust domestic remedies regarding his claims of violation of articles 6 (1) and 7 of the Covenant concerning his risk of persecution if deported to Zimbabwe. Accordingly, this part of communication is inadmissible under article 5 (2) (b) of the Optional Protocol.

6.6 The Committee observes that the State party has not challenged the exhaustion of domestic remedies in relation to the author's claims under articles 6 (1) and 7 regarding the risk he would face if deported owing to his HIV-positive status as well as articles 17 and 23(1) in connection with his separation from his family. The Committee observes that the author raised these claims within the humanitarian and compassionate proceedings that concluded on 4 May 2010 with the Federal Court's dismissal of his application for leave and judicial review. Therefore, the Committee considers that these claims meet the admissibility requirement under article 5 (2) (b) of the Optional Protocol. Furthermore, the Committee considers that such claims are sufficiently substantiated for purposes of admissibility and that they should be considered on their merits.

6.7 The Committee therefore concludes that the author's communication is admissible insofar as it raises issues under articles 6 (1) and 7 in relation to the alleged risk he would face in Zimbabwe as a person who is HIV-positive and under articles 17 and 23 (1) of the Covenant in connection with the interference with his family.

Consideration of the merits

7.1 The Committee has considered the communication in the light of all the information made available to it by the parties, in accordance with article 5 (1) of the Optional Protocol.

7.2 The Committee notes the author's claim that his removal from Canada to Zimbabwe has exposed him to a violation of his rights under articles 6 (1) and 7 of the Covenant since he would not be able to access the medical treatment that he requires as a result of his HIV and Mantoux status or to afford antiretroviral medication, which puts his life and health at serious risk. The Committee also takes note of the State party's argument that its authorities had gathered information that indicated that antiretroviral medications are available in pharmacies in Zimbabwe for about US\$ 30 per month or can be obtained for free at several institutions; that the author has family in Zimbabwe on whose support he can rely; that he was not taking any antiretroviral medications during his stay in the State party, by his own choice; that he would be able to purchase those medications privately in Zimbabwe; and that in the light of his business/work experience and education, he is better placed than the

¹⁸ See communications No. 1003/2001, *P.L. v. Germany*, decision of inadmissibility adopted on 22 October 2003, para. 6.5; and No. 433/1990, *A.P.A. v. Spain*, decision of inadmissibility adopted on 25 March 1994, para. 6.2.

¹⁹ See communication No. 1580/2007, *F.M. v. Canada*, para. 6.3; No. 397/1990, *P.S. v. Denmark*, decision of inadmissibility adopted on 22 July 1992, para. 5.4; No. 420/1990, *G.T. v. Canada*, decision of inadmissibility adopted on 23 October 1992, para. 6.3; and No. 550/1993, *Faurisson v. France*, Views adopted on 8 November 1996, para. 6.1.

vast majority of Zimbabweans to obtain or create for himself gainful employment such as to be able to afford private antiretroviral treatment if necessary.

7.3 The Committee recalls that in its general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, in which it refers to the obligation of States parties not to extradite, deport, expel or otherwise remove a person from their territory when there are substantial grounds for believing that there is a real risk of irreparable harm such as that contemplated by articles 6 and 7 of the Covenant. The Committee has also indicated that the risk must be personal²⁰ and that there is a high threshold for providing substantial grounds to establish that a real risk of irreparable harm exists.²¹ Thus, all relevant facts and circumstances must be considered, including the general human rights situation in the author's country of origin.²² The Committee recalls that it is generally for the organs of States parties to examine the facts and evidence of the case in order to determine whether such a risk exists, unless it can be established that the assessment was arbitrary or amounted to a manifest error or denial of justice.²³

7.4 As to the author's allegation that his life would be at risk upon return to Zimbabwe owing to his HIV-positive status and the alleged lack of access to medical care and medication, the Committee observes that it is not disputed that medical treatment for persons who are HIV-positive and antiretroviral medications are available in Zimbabwe, through public services or private entities. Nevertheless, the author claims that the services offered are insufficient to address all persons in need of them and that there is a very long waiting list, that the medications are not affordable and that there is little public social support for persons who are HIV-positive. Against this background, the author alleges that he will not be able to obtain immediate access to antiretroviral medications in Zimbabwe or afford to pay for them by himself, since he will be unemployed, and that he has no close relatives in Zimbabwe on whose support he can rely. The Committee observes, however, that the author has provided mainly general information about the economic situation in the country and the difficulties in getting access to medical treatment for HIV and has provided inconsistent information about his family in Zimbabwe, which does not allow it to ascertain the extent to which he can count on family support. Furthermore, he decided, by his own choice, not to undergo any antiretroviral treatment available in the State party until his migration status had become clear. In the light of the foregoing, the Committee considers that the author has not shown that his life or physical and mental integrity are at imminent and direct risk as a result of his removal to Zimbabwe and that the State party's authorities took his health situation into consideration and made the necessary inquiries before implementing the expulsion decision. Accordingly, the Committee considers that the author's removal to Zimbabwe did not constitute a violation of his rights under articles 6 (1) and 7 of the Covenant.

7.5 The Committee takes note of the author's allegation that his removal to Zimbabwe constituted an arbitrary interference with his family life in violation of articles 17 and 23 (1) of the Covenant. In this regard, the Committee recalls that there may be cases in which a

²⁰ See communications No. 2007/2010, *X. v. Denmark*, Views adopted on 26 March 2014, para. 9.2 and No. 692/1996, *A.R.J. v. Australia*, Views adopted on 28 July 1997, para. 6.6; and Committee against Torture, communications No. 282/2005, *S.P.A. v. Canada*, decision adopted on 7 November 2006; No. 333/2007, *T.I. v. Canada*, decision adopted on 15 November 2010; and No. 344/2008, *A.M.A. v. Switzerland*, decision adopted on 12 November 2010.

²¹ See *X. v. Denmark*, para. 9.2 and *X. v. Sweden*, para. 5.18.

²² See, inter alia, communications No. 2474/2014, *X. v. Norway*, Views adopted on 5 November 2015, para. 7.3 and No. 2366/2014, Views adopted on 5 November 2015, para. 9.3.

²³ See, inter alia, communication No. 2393/2014, *K. v. Denmark*, Views adopted on 16 July 2015, para. 7.4.

State party's refusal to allow one member of a family to remain on its territory would involve interference in that person's family life. However, the mere fact that certain members of the family are entitled to remain on the territory of a State party does not necessarily mean that requiring other members of the family to leave involves such interference.²⁴ It also recalls that the separation of a person from his family by means of expulsion could be regarded as an arbitrary interference with the family and a violation of article 17 if, in the circumstances of the case, the separation of the author from his family and its effects on him were disproportionate to the objectives of the removal.²⁵

7.6 In the present case, the Committee observes that the author's deportation to Zimbabwe constituted an interference with his family relations in Canada. Thus, it must examine if the said interference can be considered either arbitrary or unlawful. The relevant criteria for assessing whether the specific interference with family life can be objectively justified must be considered, on the one hand, in the light of the significance of the State party's reasons for the removal of the person concerned and, on the other, the degree of hardship the family and its members would encounter as a consequence of such removal. In this regard, the Committee observes that it is not disputed that in the present case the interference had a legitimate purpose, namely the protection of the State party's society and the prevention of other criminal offences by the author. During his stay in Canada the author was convicted of 11 criminal offences (see, for instance, paras. 2.8, 2.10 and 2.12) and he failed to comply with judicial orders and immigration conditions that were imposed on him. Although eight other charges of assault were subsequently withdrawn, they were serious enough to result in a court order prohibiting him from having any contact with his two extramarital partners — the alleged victims — for a period of one year. Further, at the time the author was deported to Zimbabwe he faced two outstanding assault charges in which the alleged victim was his wife. The Committee also observes that the author was born and lived in Zimbabwe for almost 28 years; that he studied, worked, married, and had his first two children there; that during his 10-year stay in Canada he was never legally entitled to reside there; that owing to his long absence from the family home his wife was mainly in charge of the upbringing and care of their children; that there is no indication as to whether he had provided for his children's needs; and that the information provided by the author is vague and does not allow the Committee to assess the kind of ties he kept with his wife and children. Even if his wife and children stay in Canada, the Committee observes that there is no legal obstacle that would prevent them from visiting the author in Zimbabwe at any time. Accordingly, the Committee considers that, in the circumstances of the case, the interference with the author's family life has not been shown to be disproportionate to the legitimate aim of preventing the commission of further crimes. The Committee therefore concludes that the author's removal to Zimbabwe did not constitute a violation of his rights under articles 17 and 23 (1) of the Covenant.

8. The Human Rights Committee, acting under article 5 (4) of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the author's removal to Zimbabwe did not violate his rights under the Covenant.

²⁴ See communications No.1959/2010, *Warsame v. Canada*, Views adopted on 21 July 2011, para. 8.7; No. 930/2000, *Winata v. Australia*, Views adopted on 26 July 2001, para. 7.1; No. 1011/2001, *Madafferi v. Australia*, Views adopted on 26 July 2004, para. 9.7; and No. 1222/2003, *Byahuranga v. Denmark*, Views adopted on 1 November 2004, para. 11.5; and *Dauphin v. Canada*, para. 8.1.

²⁵ See communication No. 558/1993, *Canepa v. Canada*, Views adopted on 3 April 1997, para. 11.4.