

Joint Submission to Standing Committee on Citizenship and Immigration

Re: Study on Federal Government Policies and Guidelines Regarding Medical Inadmissibility of Immigrants: Section 38(1)(c) of the Immigration and Refugee Protection Act

OCASI – Ontario Council of Agencies Serving Immigrants
Chinese and Southeast Asian Legal Clinic
South Asian Legal Clinic of Ontario

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I. Introduction

OCASI - Ontario Council of Agencies Serving Immigrants is the umbrella organization for immigrant and refugee-serving organizations in Ontario. The Council was formed in 1978, OCASI has 220 member organizations across the province of Ontario. As the collective voice of the immigrant and refugee-serving sector in the province, OCASI advocates for equality, access and full participation for immigrants and refugees in every aspect of Canadian life. OCASI is a frequent contributor to studies undertaken by the Standing Committee on Citizenship and Immigration, both by appearing as a witness before the Committee and sending written submissions.

The Chinese and Southeast Asian Legal Clinic (CSALC) – formerly known as Metro Toronto Chinese & Southeast Asian Legal Clinic - is a not-for-profit community based organization which provides free legal services to low income, non-English speaking members of the Chinese and Southeast Asian communities in the Greater Toronto Area. Established in 1987, CSALC is mandated to provide free legal services, conduct public education activities, and engage in law reform advocacy in order to advance the interests and rights of our constituent communities. CSALC has appeared before the Standing Committee on Citizenship and Immigration, other Parliamentary Committees as well as Senate Committees on numerous occasions to present on issues that affect immigrants, refugees and racialized communities.

The South Asian Legal Clinic of Ontario (SALCO) is a not-for-profit legal clinic, funded by Legal Aid Ontario, to serve low-income South Asian communities in Ontario. SALCO practices poverty law, which includes immigration law. Over 50% of SALCO's casework is in immigration sponsorship and humanitarian and compassionate cases. SALCO's expertise in immigration law and how it impacts on the communities it serves has been recognized by all levels of government. SALCO is frequently consulted on various policy issues affecting the South Asian communities.

We welcome the Committee's study on Federal Government Policies and Guidelines Regarding Medical Inadmissibility of Immigrants, section 38(1)(c) of the *Immigration and Refugee Protection Act (IRPA)*.

II. Concerns Regarding s.38(1)(c)

As community organizations working with immigrants, refugees, and people with precarious status, particularly those who are racialized, we know firsthand the impact – intended or otherwise – of the excessive demand requirement on our client communities. In this joint submission, we will highlight some of our key concerns.

The provision discriminates against applicants with disabilities and health conditions

The *Canadian Human Rights Code* and Section 15 of the *Canadian Charter of Rights and Freedoms* (the *Charter*) prohibit discrimination against persons with disabilities. In 2010 Canada ratified the UN Convention on the Rights of Persons with Disabilities. As a result of public education and advocacy efforts by disability rights advocates, community organizations and allies, awareness and understanding of disability rights and rejection of discrimination against persons with disabilities has been growing across Canada. These sentiments have been echoed by political leaders, including the Minister of Immigration.

Yet time and again, s.38(1)(c) has been used by immigration officers to deny entrance to individuals because of their disability, regardless of whether or not personal or environmental factors or their health condition would in fact cause excessive demand on Canadian health care system.

More fundamentally, the application of the excessive demand rules under health inadmissibility reduces the applicant to a disability or a health condition and does not consider the person's full potential and value to society. It is not in line with Canada's human rights principles and values, and is a direct violation of the *Human Rights Code* and the *Charter*.

As a matter of practice, counsel who represent such individuals would often raise the spectre of *Charter* argument when their clients are at the cusp of being deemed medically inadmissible. When faced with a potential lawsuit, Immigration, Refugees and Citizenship Canada (IRCC) would often settle the case and find the person admissible. However, not all applicants are represented by legal counsel, and not all legal counsel would employ *Charter* arguments in their submissions. In effect, the excessive demand determination is most likely being used only against applicants who are unrepresented (likely because they lack resources) or are not represented by competent counsel.

Inconsistent and incorrect applications of Excessive Demand

Both CSALC and SALCO have represented applicants before the Federal Court where the Court has found an immigration officer's determination of a condition causing "excessive demand" to be unreasonable and referred the matter back for re-determination. Often, the Court has also returned a matter due to the officer's failure to take into account humanitarian factors that would justify a waiver of the excessive demand provision. Once again, not all applicants are represented by counsel and only those who have the benefit of counsel will challenge unreasonable decisions made by immigration officers.

In addition, waivers from medical ineligibility are granted on a case by case basis without any consistency. This inconsistency leads to positive outcomes for some and negative outcomes for others in similar circumstances without any rhyme or reason.

The provision discriminates against applicants with limited financial resources

The procedural fairness process pursuant to s.38(1)(c) allows applicants an opportunity to challenge the assessment of excessive demand. But often applicants must spend thousands of dollars to provide additional information including paying for expensive medical tests and or additional legal advice or representation, as well as endure lengthy wait times.

As a result of the Supreme Court decision in *Hilewitz* applicants can submit an individualized plan to cover potential future costs, however this option is not feasible for those with limited financial resources. Among those who are disproportionately excluded are caregivers – who are predominantly women - who typically would not have the financial resources required to cover the cost of medical and social services.

Some applicants discover they are medically inadmissible only after completing the required medical assessment. At that point they have been waiting for years and have already spent thousands of dollars which cannot be recovered – a major financial blow for those with limited resources.

The provision regards health conditions as static and unchanging

There is confusion around what conditions should be included under s.38(1)(c). In many cases the conditions being considered are treatable and often have good prognosis for the future. Yet the point-in-time assessment required by s.38(1)(c) means officers will not have to take into account the long term prognosis, should proper treatment be made accessible to the applicant in question.

This is especially true for health conditions such as HIV/AIDS and many other health conditions which with the advance of medical science, are now considered manageable. Yet applicants with these conditions are still automatically deemed to be medically inadmissible.

Delay in Immigration Processing Leads to Deterioration of Medical Conditions

The lengthy processing of immigration application may in some cases lead to deterioration of pre-existing medical conditions. For instance, at CSALC, we have seen many clients who may have treatable conditions like diabetes, high blood pressure or kidney problems that become worse over time as the clients await the final determination of their humanitarian and compassionate (H&C) applications. While waiting for the H&C decisions, many do not have access to basic health care services due to their immigration status. By the time they receive the stage-one approval of their H&C applications, their conditions have deteriorated to such an extent that they will be deemed medically inadmissible.

In fact, this was the case for Juana Tejada and Edna Aldovino, two live-in caregivers who died of cancer after years of toiling for their employer and seeing their dream of becoming a landed immigrant perish. At least the Government has recognized the cruelty and injustice of it all and agreed to exempt caregivers from the second medical examination requirement in honour of Ms. Tejada.

The Provision has an adverse impact on Vulnerable Groups

The excessive demand provision adversely affects certain populations in specific ways.

SALCO works with a large population of clients facing issues of gender-based violence. In many cases, those clients have precarious immigration status. SALCO supports those clients by assisting in applications for permanent residence based on H&C grounds. In these cases, immigration officers often approve H&C applications in principal based on the horrific violence and abuse faced by the client. However, in some of those same cases, the applicant is then refused for landing based on medical ineligibility for both mental health and physical conditions that were caused by the abuse and violence at the heart of their H&C application. Through advocacy (and applications to the federal court), SALCO has been able to reverse some of these negative decisions.

However, the impact of medical inadmissibility in these types of cases is tantamount to state sanctioned abuse against victims of violence. There can be no justification for why a victim of violence, who is granted humanitarian and compassionate relief by immigration, should then be turned down for permanent residence on grounds of medical ineligibility.

Both SALCO and CSALC have worked with many clients hoping to sponsor parents / grandparents to Canada. The communities these clinics represent are among the largest users of the PGP sponsorship program.

For many racialized communities, family reunification for parents and grandparents is of equal priority to spousal/child sponsorship – something that they had envisioned in their immigration journey to Canada. However, unlike spousal/child sponsorship, parents and grandparents are subject to the medical inadmissibility provision of s. 38(1)(c).

The refusal of PGP sponsorship applications on medical grounds has had a disproportionate impact on the racialized communities. That inability to reunite with parents and grandparents because of medical ineligibility has a devastating impact on families in Canada. One of the primary objectives of the *Immigration and Refugee Protection Act* is to see that families are reunited in Canada. Medical inadmissibility clearly contradicts the objective of family reunification.

As noted above, migrant workers who are employed as caregivers are typically in low-wage work, since employers are not expected to pay more than minimum wage. Caregivers endure years of poverty wages, difficult work conditions, isolation, and risk

abuse and exploitation for the promise of permanent residence. Despite their hard work and sacrifice, they can be denied permanent residence as a result of Section 38(1)(c) including when it is applied to a dependent child who is included in their application. Submitting an H&C application would typically require paying for legal representation, which is not affordable for most, particularly after working in a low-wage job in Canada. Given the low H&C acceptance rates few caregivers will succeed in having the determination over-turned.

Finally, applying medical ineligibility to children is a contradiction of the legislated requirements to consider the Best Interests of the Child, and is contrary to the UN Convention on the Rights of the Child to which Canada has signed on.

Select exemptions of excessive demand

Interestingly, not all categories of immigrant applicants are subject to the excessive demand requirements. In addition to sponsored spouse and dependent children, others who are exempt include Convention Refugees and Protected Persons. In addition, certain individuals including members of armed forces are exempted from medical examination requirement completely.

The fact that there are so many groups exempt from the excessive demand requirement calls into question the utility of the requirement in the first place.

III. Recommendation

In view of the discriminatory impact of the excessive demand provision on various groups, the inconsistent applications of the provision, and the existence of numerous exemptions from this provision, OCASI, SALCO and CSALC call on the Standing Committee to recommend that s.38(1)(c) be repealed.

At the very least, we ask the Committee to urge the Government to expand the groups that are exempted from the excessive demand provision to include:

- Caregivers and other migrant workers with pathway to permanent residence status
- Applicants under the H&C application processes; and
- Sponsored parents and grandparents

It is time to end the discrimination against people with disabilities and people with medical conditions.