Returned to Risk

Deportation of HIV-Positive Migrants

- VIH/Sida - PVVIH -

Andrea Mortlock was 15 in 1979 when she arrived in New York from Jamaica, leaving behind the abusive household where she had lived since her mother, years earlier, had left for work in the United States. In 1987, she was convicted of selling cocaine and served a year in prison. A legal permanent resident of the United States with a US-citizen daughter and son, Ms. Mortlock was ordered deported in absentia in 1995 based on her criminal conviction. However, Ms. Mortlock was HIV-positive, and required a complicated medical regime that was unavailable in Jamaica in order to survive. In 2005, despite US federal authorities' claims that her illness had no bearing on her immigration proceedings, Ms. Mortlock and her attorneys filed a petition with the Inter-American Commission on Human Rights in a last-ditch effort to halt her deportation. Ms. Mortlock argued that deporting her to Jamaica would be equivalent to a death sentence because of the absence of adequate AIDS treatment and because of the severe discrimination she would face in that country.

Recommending that the United States refrain from deporting Ms. Mortlock, the Inter-American Commission set out its test for prohibiting deportation of HIV-positive individuals. That test considers whether deportation would create extraordinary hardship to the deportee and his or her family based on two principal considerations : (1) the availability of medical care in the receiving country and (2) the availability of social services and support, in particular the presence of close relatives, in the receiving country. Again at the regional level, the European Court of Human Rights (ECtHR) has also grappled with the issue of deportation of people living with HIV and AIDS to places where anti-retroviral therapy (ART) and individual support networks are not readily available, developing case law that narrowly considers (1) the applicant's present medical condition, and whether it is at an advanced or terminal stage, (2) the availability of family and friend support in the country of origin, and (3) the availability of medical care in the country of origin.

The principle of non-refoulement, applied in the Inter-American Commission and ECtHR cases, has long been established in international human rights and refugee law. In human rights law it has created an absolute prohibition on the deportation of a person to another state where there are substantial grounds for believing that the person would be in danger of being subjected to torture or other cruel, inhuman, or degrading treatment or punishment. International refugee law prohibits the return of refugees to a territory where the refugee's life or freedom may be threatened. Additionally, in some states, a form of protection from removal known as "complementary" protection exists, which can govern categories of people who claim that they cannot be returned to their country of origin based on human rights or humanitarian law principles but do not fit into traditional refugee definitions, according a wider range of eligibility.

National protections against refoulement, however, are often insufficient or underdeveloped to protect the rights of people living with HIV against unlawful return. Furthermore, from a policy perspective, post-deportation continuity of treatment mechanisms often are non-existent or grossly inadequate to protect deportees' health, and may lead to illness, premature death, or the development of drug resistance. In South Korea, as in many other countries with HIV-related restrictions on entry, stay, and residence, non-citizens are deported upon discovery of their illness because of their very HIV status, without consideration of the possibility of refoulement. In Gulf States including Saudi Arabia and the United Arab Emirates, individuals found to be HIV-positive are detained sometimes for months on end with no access to treatment, then summarily deported without any provision for continuity of care. South Africa, while having in place constitutional provisions and case law that could be used to prohibit refoulement, has not yet done so for people living with HIV facing lack of treatment in their country of origin, and has compromised the health of migrants by deporting individuals without any referral to treatment. The United States, despite having strict HIV-related restrictions on entry, stay and residence, has granted asylum to some HIV-positive individuals where the person faces persecution in his or her country of origin based on HIV status ; however, when HIV-positive individuals are deported, adequate systems are often not in place to ensure that treatment is not interrupted or discontinued.

In order to meet international human rights law protections of detainees' and deportees' rights to life, health, and to be free from torture and cruel, inhuman and degrading treatment, states worldwide should begin or continue to

provide ART to HIV-positive individuals in detention awaiting deportation and should reexamine deportation of HIV-positive individuals to countries where treatment and social support structures are inadequate.

As a matter of good practice, states should also make provision for continuing deportees' treatment when deportation does take place. Specifically, Human Rights Watch, Deutsche AIDS-Hilfe, the European AIDS Treatment Group, and the African HIV Policy Network recommend that states :

— Publish comprehensive information about HIV-positive individuals deported, including the numbers of individuals removed, grounds for removal, and countries to which they are deported.
— Review national standards on deportation of people living with HIV to ensure compliance with international prohibitions on refoulement.
— Where feasible, contact health authorities and anticipated providers in each deportee's country of origin, devise a plan for continuing to assure care without interruption, and possibly provide a temporary medication supply if necessary.
— Together with international agencies and donors, work to harmonize regional standards of care.

International agencies and donors, as well, have an opportunity to improve deportees' access to adequate treatment. Crucial steps toward improving the health of deportees may be made by international donors and organizations by :

— Supporting and supplementing states' efforts to provide cross-border continuity of care for individuals undergoing deportation, including ensuring the existence of confidential medical record transfer systems, cross-border health care registration, uniform regional standards of care, and local support networks in deportees' countries of origin.
— Placing the deportation of HIV-positive individuals on their research agenda, and collecting and providing better data on this practice, as well as more detailed, accurate, and up-to-date information on the availability of treatment in receiving countries.