Further Submission to the Senate Standing Committee On Legal And Constitutional Affairs
Review of the Australian Citizenship Amendment (Citizenship Test Review and Other measures) Bill 2009

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I am grateful to the Senate Standing Committee on Legal and Constitutional Affairs for giving me the opportunity to appear before it at its hearing last Thursday in Melbourne.

At the end of my appearance I offered to send the Committee some further information regarding my suggestion that amendments could be made to the current policy regarding s 21(5) relating to children, to ensure that decision making under the current section is both lawful (in light of the wording in s 21(5) as it currently stands) and fulfilled the aims of the legislative change proposed.

I have also read the Hansard transcript of the DIAC appearance after mine last Thursday and I would also like to add some further material in light of statements made about this amendment relating to children.

1. Policy

The current policy guidelines for the Australian Citizenship Act 2007 are found in the *Australian Citizenship Instructions (ACI's)* which are available on the Departments' website at http://www.citizenship.gov.au/law-and-policy/policy.htm

Those currently on the web are stated as being valid as at 1 July 2009. I have attached to this submission excerpts relevant to my comments.

Policy regarding s 21(5) can be found both in Chapters 4 (Adopted Children) and Chapter 5 (Citizenship by Conferral).

For instance, at page 35 of the Instructions there is a reference in the column (Other Adoptions) Generally Offshore that s 21(5) can be used to make an application for such an adoption and that the policy is that the child hold a permanent visa. Further, in the same chapter on p 38 there is a reference to children who were adopted without an adoption compliance certificate being able to apply for citizenship through s 21(5). This proposed legislative change will mandate that the continued use of this section for those children will be conditional upon them having a permanent visa. Once again it would be important to ask the Department how many adopted children have used this provision in the past without having a permanent visa.

But the more central policy statements to my submission on Thursday are under Chapter 5 of the Guidelines, in particular at page 51 under the heading Person Aged Under 18 Years (s 21(5)).

See in particular pages51-53 where there are essentially two pages setting out the policy requirements which in effect mirror the legislative requirements in the general eligibility section (which are **not** legislatively required in s 21(5).

In my view it would be better to first state:

> "Section 21(5) only requires that a child be under the age of 18 to be eligible to become an Australian citizen.
>
> Unlike the general eligibility provisions in s 21 it does not refer to residence in Australia or other factors such as knowledge of English or the rights and privileges of Australian citizenship.
>
> If, however, a child under the age of 18 would otherwise fulfill the s 21 general eligibility provisions, save for the age requirement, then as a matter of policy such an application would be successful.
>
> *Power to refuse an application*
> The Act also provides in s 24(2) the Minister power to refuse an applicant becoming an Australian citizen despite being eligible under the Act. Therefore, just because a child in Australia is under 18 years of age does not mean he/she must be approved under s 21(5).
>
> In order to make the decision whether to approve a child's application the following matters are relevant to the exercise of the discretion:
>
> *Other relevant sections of the Act*
> Section 12 (1)(a) does not allow birth on its own to provide for automatic citizenship – ie there is a link to the child's parents that is relevant to an application
>
> Section 12 (1)(b) provides that if a child lives in Australia continually for 10 years they become a citizen at that time – ie length of residence is relevant to membership.
>
> Therefore, consideration of the parents' status together with the length of time that the child has been present in Australia are two considerations relevant to the exercise of the discretion.
>
> *Parents' status*
> Generally, the principle that a child should have the same status as their parents will suggest that the child remain in the care of the parents. If the grant of citizenship to the child without citizen or permanent resident parents means that the child won't have any care in Australia without the parents having to also stay in Australia, and the parent's don't have visas to enable them to stay in Australia,

then this will be a factor against the child being granted citizenship. This is relevant to the integrity of the Migration program in Australia – as the application of a child for citizenship should not solely be for the purpose of obtaining residency for the parents and family if they are not otherwise entitled through the Act.

Length of residence
In addition to the question of the parents, another factor relevant is the length of time the child has been in Australia and their absorption into the Australian community. This is clearly relevant to the question of the applicant's connection to the Australian community, which is relevant to any conferral decision.

International obligations
As Australia is a party to the Convention on the Rights of the Child, any decision regarding children should take into account the best interests of the child. With those factors referred to above regarding the status of the parents and the length of time in Australia the other matters relevant to the decision are the consequences to the child in not being granted Australian citizenship.

Material such as the consequences for the child not being granted citizenship are relevant at this point in the decision."

In the decision of SNMX and Minister For Immigration and Citizenship [2009] AATA 539 factors relevant to the decision granting citizenship in that case were:

. The parents' consent to the application
. The child's ability to stay with the Australian citizen grandmother if the parents were not granted residence rights in Australia.
. Psychiatrist reports regarding the well being of the child in being separated from the parents if the need arose
. Length of time the child had spent in Australia.
. Consequences in not being granted Australian citizenship (ie severe hardship on living in Sri Lanka)

Ultimately the decision maker must make a decision on the merits of the individual case. As there are no legislated requirements other than being under the age of 18, the decision maker must consider all factors relevant to a decision that is in the best interests of the child, at the same time as being a decision about whether the child should be an Australian citizen in light of the Act's overall objectives of determining who should be recognized as an Australian citizen."

I urge the Committee to recommend the Minister review the policy rather than amend the legislation regarding children under the Act.

2. Responses to the evidence provided by DIAC on Thursday 27th August:

I would specifically like to address this part of the transcript,towards the end of the hearing:

That does not trouble me, so long as they can qualify some other way.

Ms Forster—Through some other pathway.

Mr Moroney—I think that the implication might have been drawn that the shutter then comes down completely on the child.

Senator FEENEY—That is how I understood the evidence.

Mr Moroney—There are pathways through the Migration Act to assist that child to get permanent residency. In the case of SNMX, as I understood the judgement as read, the parents were applicants for a protection visa and were unsuccessful and they went through to merits review. As a matter of migration law, they have a section 48A bar if they are not the holders of a substantive visa. If the child was not an applicant under the—

Senator FEENEY—That is right.

Mr Moroney—Then there is no section 48A bar in relation to that child. The child is free to make an application for a protection visa in his own right. I am not saying that he would succeed, but the pathway to the RRT and then to 417 is available to the child. That is not the only way that the child could get ministerial intervention. If the child made an application for any other substantive visa onshore and was unsuccessful—

Senator FEENEY—But the child was a Sri Lankan citizen, I think, technically.

Mr Moroney—Yes, that is right.

Senator FEENEY—That does not change your evidence?

Mr Moroney—No, because we are talking about the Migration Act now.

Senator FEENEY—I am just saying he is not a stateless person. I would think that would cut certain routes.

Mr Moroney—No. The child would have, depending on the circumstances, no statutory bar in relation to making a substantive visa application—

Senator FEENEY—In their own right.

Mr Moroney—in their own right. Then, in the case of unsuccessful application, they go through to the MRT. Let's make the assumption that the MRT refuses—then there is a further discretion to the minister under section 351 of the act. Let's assume all of it goes wrong and the child is now an unlawful noncitizen and the child and the parents are in immigration detention under section 189. The minister has a non-compellable power to grant any visa, permanent, temporary or bridging, to any person in immigration detention. All of those public interest powers that I have just mentioned, 417, 351 and 195A, are non-compellable—that is true. It is personal to the minister—that is true. It is also in the public interest. To extrapolate that the child would not have a pathway to potential citizenship is, with the greatest respect, incorrect. However, it is undoubtedly true, as Professor Rubenstein stated, that, until the child got to permanent resident status and then satisfied the eligibility criteria for citizenship in his own right, as a permanent visa holder—let us make an assumption that the powers have been exercised in the child's favour—in this country, with the right to permanent visa status, the child would be on the pathway eventually to citizenship, in a normal course. So, while Professor Rubenstein is undoubtedly correct in relation to shutting down immediacy in that case, the pathway is not shut off.

I would like to stress to the Committee, with the greatest respect to the Department, that I don't think the Department's evidence is correct on the point that the child in SNMX, or indeed any other child in that situation, would have had any other visa avenue available under the Migration Act on which they could have applied to then seek the Minister's intervention.

The child in SNMX did not have a refugee application. Nor did he have any other visa that he could apply in his own right. His case was not only one that would not succeed if s 21(5) was repealed in an immediate sense, but also long term. That is because the section in the Australian Citizenship Act is broader in its purpose than the Migration Act's purpose.

As stated above the factors relevant to the decision by the AAT in this case were:

. The parents' consent to the application
. The child's ability to stay with the **Australian citizen grandmother** if the parents were not granted residence rights in Australia.
. Psychiatrist reports regarding the well being of the child in being separated from the parents if the need arose
. Length of time the child had spent in Australia.
. Consequences in not being granted Australian citizenship (ie severe hardship on living in Sri Lanka)

These are not factors in the current Migration Act framework that would have been relevant to any substantive visa application.

That is the statement above: "To extrapolate that the child would not have a pathway to potential citizenship is, with the greatest respect, incorrect.": Is with the greatest respect **not correct**.

This child would no longer have a pathway to **potential** citizenship either. Children are, largely dependant upon the parent's claim under the Migration Act. SNMX showed very clearly that there are instances where the child's claim is independent of the parent's claim and this section enabled the Minister to make a determination in the best interest of that child. This was and would not be under the current Migration Act an avenue available to the child, as the Act currently stands.

If the Minister is sincere about the desire to enable children like those in SNMX the opportunity through the Migration Act to get permanent residence as a step to citizenship, then amendments would need to be made in the Migration Act enabling a broad visa status for children enabling them to apply in their own right, regardless of their parent's status. Perhaps this could be entitled the "Best Interests of the Child" visa in which a child could make an application in his/her own right.

I stress to Senator Feeney and to all members of Parliament voting on this Bill that the rights of the child should be a paramount concern in making a decision regarding s 21(5).

I would be happy to come and explain this further – or suggest that the Committee seek legal advice from the Department to be sure that they are making a decision based on correct evidence.

Kim Rubenstein
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