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HUMAN RIGHTS

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Joint Standing Committee on Migration
By email: jscm@aph.gov.au

22 October 2009

Dear Secretary

ALHR submission to the inquiry into the migration treatment of disability

Please find attached a submission by Australian Lawyers for Human Rights for the consideration of the Committee.

The authors of the submission are ALHR members Paul Harpur, Annabelle Craft, Matthew Zagor, Mary Anne Kenny and myself.

Kind regards

Dr Susan Harris Rimmer
President, Australian Lawyers for Human Rights

Australian Lawyers for Human Rights
Submission to the Joint Standing Committee on Migration
Inquiry into the migration treatment of disability

Introduction

1. Australian Lawyers for Human Rights (ALHR) welcomes the opportunity to make a submission on the issue of the migration treatment of disability. We congratulate the Minister for Immigration on calling for this inquiry, because it is an important social issue which is well over-due for reconsideration by the Parliament. Having said that, ALHR believes that the terms of reference for this inquiry are unduly technical and narrow, and would have benefited from an explicit reference to Australia's obligations under international treaties, as discussed below.

2. ALHR will specifically address the terms of reference that relate to

- whether the balance between the economic and social benefits of the entry and stay of an individual with a disability, and the costs and use of services by that individual, should be a factor in a visa decision; and
- how the balance between costs and benefits might be determined and the appropriate criteria for making a decision based on that assessment.

3. We also address the questions the Committee has asked submissions to consider the following questions when addressing the terms of reference for this inquiry: Is the current process for assessing a visa applicant against the health requirement fair and transparent? What types of contributions and costs should be considered? How do we measure these? Are there additional factors that should be considered? Do you have personal experience of this? What principles should apply to the assessment of visa applications against the health requirement? Should there be exceptions?

4. ALHR proposes that the Australia needs to open a space for values and narratives which cannot be expressed in economic terms, such as the quality of a person's life and relationships and their contribution to Australian society. The Health Requirement seeks to apply 'Public Interest Criteria' that focus solely on the economic worth to Australia's labour market of migrants and refugees. ALHR proposes that this is contrary to the social model of disability as reflected in the *Convention on the Rights of Persons With Disabilities* (the *Disability Convention*) which emphasises the holistic contribution of a person which a disability, their inherent equality and their human worth beyond an economic assessment of the cost of their disability.¹

5. ALHR submits that the current operation of the health requirement discriminates against children with a disability in particular. We focus our analysis on the administrative decisions of Australia's Department of Immigration and Citizenship (DIAC) to deny temporary and permanent residence visas to children living with a disability. These decisions are made with reference to the 'health requirement' found within Schedule 4 to the Migration Regulations 1994 (Regulations), which specifies the applicant must free from any disease or condition that constitutes a threat to public health or the community or is likely to require health care or community services. Children living with a disability may be denied a visa on the basis of their potential demands on the health care and/or community services system calculated over their lifetime.

6. We present two case studies in support of this argument. In November 2008, the Minister for Immigration used his discretionary power to waive the health requirement and offer permanent residency to Dr Bernhard Moeller's 13 year old son, Lukas, who has Downs Syndrome. In contrast, in April 2001, a previous Minister refused to exercise his waiver to grant permanent residency to Amun, the daughter of Pakistani refugee Mr Shuharyar Kiyani, on the basis that her cerebral palsy would cost too much to support. Mr Kiyani died after dousing himself with petrol and setting himself alight outside Parliament House in protest.

¹ Convention on the Rights of Persons with Disabilities. Opened for signature 30 March 2007, 189 UNTS 137 (entered into force 3 May 2008).

7. The way that the 'public interest' is formulated in regard to the Health Requirement must be reformulated in order for Australia to meet its international human rights obligations, especially the *Convention on the Rights of Persons with Disability*, the *Convention of the Rights of the Child* and the *1951 Refugee Convention*.

Key Recommendations

- That the Health Requirement be abolished. In the alternative, that the Health Requirement should be reformulated in order to bring it in line with the social model of disability reflected in the *Convention on the Rights of Persons with Disability* and Australia's other human rights obligations.
- Acknowledgment that children with a disability are particularly disadvantaged by the current policy and given positive treatment by DIAC to rectify this discriminatory operation of the legislation.
- That the exemption of the *Migration Act 1958 (Cth)* to the *Disability Discrimination Act 1992 (Cth)* be reformulated and narrowed.
- That Australia should lift its reservation to the *Convention on the Rights of Persons with Disabilities* regarding the Health Requirement.
- That Australia reformulate how the Health Requirement is applied to its refugee and humanitarian programme applicants, both onshore and offshore.
- That the health requirement be analysed to comply with the social inclusion policy framework, as set out in the AusAID disability policy and the National Disability Strategy

About ALHR

8. Australian Lawyers for Human Rights (ALHR) was established in 1993, and incorporated as an association in NSW in 1998 (ABN 76 329 114 323).
9. ALHR is a network of Australian lawyers active in practising and promoting awareness of international human rights standards in Australia. ALHR has a national membership of about 1200 lawyers, with active National, State and Territory committees.
10. Through training, information, submissions and networking, ALHR promotes the practice of human rights law in Australia. ALHR has extensive experience and expertise in the principles and practice of international law, and human rights law in Australia.
11. ALHR has been a strong advocate of Australia becoming a party to the UN Convention of the Rights of Persons with a Disability and the Optional Protocol.

Terms of reference flawed

12. The terms of reference of this inquiry into immigration treatment of disability requires the Committee to, inter alia, "report on the options to properly assess the economic and social contribution of people with a disability and their families seeking to migrate to Australia." This term of reference assumes that persons with disabilities contribute less to society than persons without disabilities. While all visas have a criteria to assess suitability, to add an additional criteria simply because the person has a disability operates on the basis persons with disabilities do not contribute to society to the same level as people without disabilities.
13. ALHR submits that this underlying assumption is wrong. Persons with disabilities around the world contribute substantially to society. For example, one of Australia's leading academics and former Dean of the University of Sydney

Law Faculty, Professor Ron McCallum, is blind, Professor Des Butler from the Queensland University of Technology uses an electric wheel chair, Professor Michael Stein from Harvard University is in a wheelchair, the Governor of New York, David Paterson, is legally blind and the billionaire chairman of the Virgin Group Ltd, Sir Richard Branson, is dyslexic. Within Australia there are a large number of academics, lawyers, bankers, teachers and parents who have disabilities and who contribute to society.

14. The recent case of Siyat Hillow Abdi, the first person blind person to be registered as a teacher with the South Australian Teachers Registration Board and having completed his PhD in disability studies at Flinders University, again highlights the inadequacies of the Health Requirement's application.² Mr. Abdi has been told he will not meet the requirements for skilled migrant visa and faces deportation unless Senator Evans uses his ministerial discretion to intervene.³ Again, the application of the Health Requirement constrains the MoC and DIAC from considering mitigating factors, such as Mr. Abdi's clear contributions, both social and economic, to the Australian community.

15. The logic of this term of reference is also flawed. If the committee desired to assess the potential contribution of a potential migrant with a disability then presumably it would be first necessary to assess the contributions of persons with disabilities already in Australia. After all, if a person is applying to migrate to Australia and the Government wants to assess the impact of that migrant's disability, then this assessment would be impossible without first assessing the level of contribution of Australians with the same disability.

16. How should Australia develop criteria to judge the value of the social and economic contributions of persons with a disability? Should this assessment simply focus upon economic value? If an economic criterion was adopted, does this mean a primary school teacher with paraplegia would be rated lower than a

2 Michael Owen, 'First blind teacher out faces deportation' The Australian (Sydney) 12 May 2009.

3 Karen Barlow, Blind Academic fights to stay in Australia (May 12 2009) Australian Broadcasting Corporation <<http://www.abc.net.au/news/stories/2009/05/12/2567851.htm>> at 31 May 2009.

Note: Mr. Abdi has been in Australia on a study visa since June 2004.

barrister with sight impairment simply because high school teachers are paid less? If the assessment is extended to social contributions how would the assessment factor in parental responsibilities, volunteer work or community service? Would a person who volunteered at a homeless shelter be valued more or less than a person who represented their country in sport and performed unpaid charity keynote speaking? Even if it is possible to develop a criterion, how often would this assessment have to be updated to take into consideration the rapid advances of technology and the reduction in societal barriers? If significant resources are not devoted to developing the criteria then migrants will be judged against inaccurate standards and injustice will occur.

17. It is submitted that attempting to value the economic and social worth of migrants with disabilities will result in a flawed and demeaning process. Rather than attempting to create new criteria it is submitted that Australia should simply adopt the criteria it agreed to comply with when it ratified the Convention on the Rights of Persons with Disabilities (CRPD) on 17 July 2008.

18. The CRPD adopts non-discriminatory criteria in relation to the migration of persons with disabilities. Article 18 provides:

States Parties shall recognize the rights of persons with disabilities to liberty of movement, to freedom to choose their residence and to a nationality, on an equal basis with others, including by ensuring that persons with disabilities:

- (a) Have the right to acquire and change a nationality and are not deprived of their nationality arbitrarily or on the basis of disability;
- (b) Are not deprived, on the basis of disability, of their ability to obtain, possess and utilize documentation of their nationality or other documentation of identification, or to utilize relevant processes such as immigration proceedings, that may be needed to facilitate exercise of the right to liberty of movement;
- (c) Are free to leave any country, including their own;
- (d) Are not deprived, arbitrarily or on the basis of disability, of the right to enter their own country.

19. Persons with a disability have a right to be treated the same as other people when they seek to migrate. Rather than attempting to estimate the social

and economic worth of a person with a disability, it is submitted Australia should simply apply the same criteria it uses for migrants without disabilities. It may wish to go further, to proactively set quota or targets to make sure people with disabilities are expressly considered for positions in the migration program.

20. If Australia is concerned that migrants with disabilities may not be able to contribute socially or economically in Australia, then perhaps Australia needs to evaluate what barriers confront persons with disabilities within Australia. Rather than attempting to block people from migrating, it is submitted Australia should devote increased resources towards removing social barriers and embracing universal design.

Recommendation

That the Health Requirement be abolished. In the alternative, that the Health Requirement should be reformulated in order to bring it in line with the social model of disability reflected in the *Convention on the Rights of Persons with Disability* and Australia's other human rights obligations.

Australia's health requirement: The legal and policy framework

21. The Health Requirement allows the Minister to grant or refuse a visa if she or he considers the health criteria to have been satisfied, and applies to all visitors to Australia.⁴ Section 60 of the *Migration Act 1958 (Cth)* allows for the Minister to require the applicant to 'visit, be examined by, a specified person, being a person qualified to determine the applicant's health, physical condition or mental condition...'⁵ These are the only references in the Act.

22. The Health Requirement is principally governed the *Migration Regulations 1994 (Cth)* and the Department of Immigration and Citizenship (DIAC)

⁴ Migration Act 1958 (Cth) s65.

⁵ Migration Act 1958 (Cth) s60. See also: Migration Regulations 1994 (Cth) Part 2.25A (Referral to Medical Officers of the Commonwealth).

Procedures Advice Manual 3.⁶ These determine when and how the Health Requirement operates, the criteria upon which a decision under it must be made, and the policy which should ordinarily be followed, including consideration of the waiver. The Health Requirement is justified as protecting the public health and safety of the Australian community, containing public expenditure on health and community services and ensuring the priority of Australian residents in access to those services.⁷

23. All applicants for a permanent or temporary visa for Australia are screened against the 'health requirement'. An applicant may have to undergo a health check if 'screened in' according to the 'health matrix' which is based on the risk posed by the applicant's country of origin and likely activities in Australia. Under the Migration Regulations 1994 (Regulations), the relevant sections states all applicants for an Australian visa must meet Australia's 'public interest', articulated as follows:

be free from tuberculosis; and free from a disease or condition that is or may result in the applicant being a threat to public health or the Australian community; and

not have a disease or condition which: is likely to require health care or community services; or is likely to meet the medical criteria for the provision of a community service; during the period of the applicant's proposed stay in Australia; and

not have a disease or condition where provision of the health care or community services would be likely to result in a significant cost to the Australian community in the areas of health care and community services; or prejudice the access of an Australian citizen or permanent resident to health care or community services; regardless of whether the health care or community services will actually be used in connection with the applicant... (Items 4005, 4006A and 4007 – emphasis added)

24. A 'disease or condition' considered significant is any medical issue which would require a threshold value of \$20,000 over five years to treat. These

6 Migration Act 1958 (Cth) s60(1); Migration Regulations 1994 (Cth) reg. 2.25A; Department of Immigration and Citizenship, *Procedures Advice Manual 3* (14/04/2009) Sch4/4005-4007 – The Health Requirement [4].

7 Department of Immigration and Citizenship, *Fact Sheet 22: The Health Requirement* (Commonwealth of Australia, 26 May 2009); Department of Immigration and Citizenship, *Procedure Advice Manual 3, Schedule 4/4005-4007 – The Health Requirement*.

regulations have been used in the administrative decisions of Australia's Immigration and Citizenship (DIAC) to deny temporary and permanent residence visas to children living with a disability, on the basis of their potential demands on the health care system and/ or community services, presumably at the expense of Australian children living with a disability. For some visa categories a waiver of the health requirement is available at the Departmental level or on review to the Migration Review Tribunal if the cost would not be considered 'undue'. The Minister can also exercise his or her discretion in such cases once reviews have been exhausted to grant or substitute a visa.

25. The requirement applies to all visa applicants, but in effect only a small percentage is asked to undergo health examinations. In 2007-2008, almost 600 000 people were asked to undergo a medical examination and 1532 were refused on health grounds. Generally people are screened in according to their country of origin risk rating, which in turn is loosely based on WHO information about tuberculosis. There is no such assessment of 'lifestyle diseases'.

26. For most visa subclasses, the criteria prescribed in Schedule 2 to the Migration Regulations 1994 (Cth) require applicants, and sometimes their non-migrating family members, to meet one of the three health-related Public Interest Criteria (PIC) which appear in Schedule 4: PIC 4005, PIC 4006A and PIC 4007. The main difference between these PIC is the existence in the latter two of a 'health waiver'.

27. An opinion as to whether the health requirement is met is ordinarily given by a Medical Officer of the Commonwealth (MoC) who, pursuant to regulation 2.25A, assesses the applicant against the relevant PIC. Their opinion must be taken to be correct.⁸ It is here that the need for the MoC to make an economic assessment of the applicant's condition becomes apparent. The MoC does not, however, exercise the health waiver under PIC 4006A(2) or 4007(2).

28. PIC 4005 of Schedule 4 states that an application must be free from tuberculosis and any 'disease or condition that is, or may result in the applicant

⁸ Migration Regulation 1994 (Cth) 2.25A

being, a threat to public health in Australia or a danger to the Australian community.⁹ Criterion 4005(c)(ii) requires the MoC to consider whether the provision of health care or community services would be likely to:

(A) result in a significant cost to the Australian community in the areas of health and community services; or

(B) prejudice the access of an Australian citizen or permanent resident to health care or community services;

regardless of whether the health care or community services will actually be used in connection with the applicant...¹⁰

29. PIC 4007 of Schedule 5 is in similar terms to the PIC 4005, but provides for a 'health waiver' to be exercised by the Minister (or his or her delegate) with respect to PIC 4007(1)(c), which concerns the cost of health care and a finding that access to health care or services would be prejudiced, where:

(a) the applicant satisfies all other criteria for the grant of the visa applied for; and

(b) the Minister is satisfied that the granting of the visa would be unlikely to result in:

(i) undue cost to the Australian community; or

(ii) undue prejudice to the access to health care or community services of an Australian citizen or permanent resident.

30. The Health Requirement has been interpreted by the courts as not requiring a consideration of the particular applicant's circumstances, but rather a consideration of 'a person' who has that disease or condition.¹¹ As Siopis J stated in *Robinson v Minister for Immigration and Multicultural Affairs* (the *Robinson* case), the public interest criterion in 4005 requires the MoC to 'ascertain the form or level of condition suffered by the applicant in question and then apply the statutory criteria by reference to a hypothetical person who suffers

9 Migration Regulations 1994 (Cth) Schedule 4, Part 1, 4005 (a) – (c).

10 Migration Regulations 1994 (Cth) Schedule 4, Part 1, 4005 (c)(ii)(A)-(B).

11 *Robinson v Minister for Immigration* 148 FCR 182; *JP1 & Ors v Minister for Immigration & Anor* [2008] FMCA 970 (22 August 2008) [44]. In the *JP1 & Ors* case, the *Robinson* case was interpreted in regards to an applicant who had a Stage 2 HIV infection that was currently asymptomatic. In that case, the judge noted that 'there is no requirement to consider other details of a particular applicant's circumstances. The legislation is not cast in terms of the particular applicant's circumstances. It cast in terms of what "a person" who has the disease or condition suffered by the applicant would be likely to need.' [44].

from that form or level of the condition.¹² Also some interesting jurisprudence on applicants rejected on grounds of high cost of anti-retrovirals for HIV/AIDS, who have raised the behaviour of pharmaceutical companies and lack of generic drugs.

31. Further, the *DIAC Procedures Advice Manual 3* gives some guidance as to how the MoC is to assess what is considered a significant cost under 4005(c)(ii)(A).¹³ 'Significant cost' is currently set at \$21,000 and the MoC is to be guided by the annual per capita health and welfare expenditure for Australians.¹⁴

32. The *Procedures Advice Manual 3* also provides guidance as to how the health waiver is to be exercised. In particular, officers are to consider the following in making this assessment:

- • the opinion of the MOC
- • any compassionate or compelling circumstances
- • whether the applicant has met all other visa criteria
- • the ability or potential for the applicant and their supporters to mitigate costs
- • the degree of care required, and the private care and support that is available
- • other relevant factors such as education, skills, job prospects, assets and income, whether minor children will be affected, location of family members and sponsors, the merits of the case, and the applicant's immigration history

33. The PAM 3 further provides with respect to the waiver that 'officers should also take into account the information regarding costs and prejudice to access.'

12 *Robinson v Minister for Immigration* 148 FCR 182 (Siopis J) [42]; see also: *Applicant Y v Minister for Immigration & Anor* [2007] FMCA 468 (11 April 2007) [53].

13 Department of Immigration and Citizenship, *Procedure Advice Manual 3*, Schedule 4/4005-4007 – The Health Requirement.

14 Department of Immigration and Citizenship, *Procedure Advice Manual 3*, Schedule 4/4005-4007 – The Health Requirement [56.2]

Where a health waiver is available and has been considered, before a decision is made, the delegate must consult Health Integrity Projects Section in those cases where the MOC's opinion is such that the estimated costs are AUD 200 000 or more or the MOC has indicated that "prejudice to access" involved will be substantial or extensive.

34. Merits review of the decision can be heard by the Migration Review Tribunal. However, the discretion to exercise the 'health waiver' in PIC 4007 is weighted heavily against any applicant whose estimated health costs exceed AUD 200 000. This is apparent from the many Migration Review Tribunal decisions to remit applications to the Department for reconsideration where it is clear that the Minister's delegate has failed adequately to consider the detailed factors in PAM3, relying instead upon the MoC health-related estimate which has not considered an individual's potential contribution either economically or socially to the Australian community. An appeal lies to the High Court in its original jurisdiction. There is also the ability, as with all visa decisions, to request Ministerial intervention, which is non-compellable and non-reviewable.

Children with a disability

35. This submission explores legal and conceptual basis for, and implications of, the Regulations and decisions by focusing on the decisions of Dr Bernhard Moeller and Mr Shuharyar Kiyani. In the first case, German citizen Dr Moeller moved with his family to rural Victoria in 2006 to help fill a doctor shortage. Dr Moeller was denied permanent residency because the department believed his 13-year-old son Lukas who has Downs Syndrome would be a drain on the health system. The Minister for Immigration Senator Chris Evans used his discretionary power to waive the health requirement in November 2008.¹⁵

36. In contrast, in April 2001, Pakistani refugee Mr Kiyani died after dousing himself with petrol and setting himself alight outside Parliament House in a protest at years of delays in bringing his wife and three daughters to Australia. His daughter had cerebral palsy. Then Immigration Minister Philip Ruddock had

¹⁵ Evans, C. Question on Notice, Senate 26 November 2008

refused to exercise the waiver, stating: "It's complicated because the child in this case has very severe disabilities and the matter that's being assessed is the potential cost to the Australian community if the application were to proceed. Those costs (for medical treatment) go to many hundreds of thousands of dollars".¹⁶

37. Disabled children are disproportionately impacted by the operation of this seemingly objective legal scheme because the health requirement asks the MoC to calculate costs including education and carer pension costs over a person's lifetime and thus children are more likely to cross the \$200 000 barrier than adults. Children are not usually the primary applicant so their particular situation or prospects are not considered at any stage in the process, unlike applicant adults. The health requirement is designed so that if one fails, all fails, and so we know that the operation of this policy has often resulted in children with a disability being left behind while other members of the family migrate, especially in refugee cases. We do not know the extent of this issue due to lack of data. This is at odds with the popular conception of the priceless child, the investment in our future.

A Tale of Two Families

Amun Kiyani

38. In 2001, Shuharyar Kiyani died after dousing himself with petrol and setting himself alight outside Parliament because he was distraught at the Government's decision that his disabled daughter did not meet the Health Requirement.¹⁷ Then Minister for Immigration, Phillip Ruddock, justified the decision to reject Mr. Kiyani's wife and children on the basis that the cost of Amun's medical treatment for the condition of cerebral palsy and other related conditions would be excessive.

¹⁶Man sets himself on fire in immigration protest, *The Independent UK*, 3 April 2001, available at <http://www.independent.co.uk/news/world/australasia/man-sets-himself-on-fire-in-immigration-protest-753126.html>, accessed 21 July 2009.

¹⁷'Man sets himself on fire in immigration protest', *The Independent (London)*, 3 April 2001.

39. Mr Shahraz Kiane was discovered working illegally on a North Queensland tobacco farm in 1988 and deported. After travelling alone to visit family in Canberra in 1996, he was accepted as a refugee by DIAC (then DIMA) and granted an onshore Protection Visa on 21 October 1996. Included in his application were his wife, Ms Yasmin, and their three children: Asma, Anum and Afia. A month later Yasmin lodged an application at the post in Islamabad for a Refugee and Humanitarian visa, proposed by her husband and supported by the ACT Torture Rehabilitation Service in Canberra. The family was rejected without interview, and so began a long four year saga of applications and rejection, which can be seen in full in the Commonwealth Ombudsman 2001 investigation of this complaint.¹⁸

40. In short, Ms Yasmin applied again in 1998, this time using the new split family provisions.¹⁹ This time she was interviewed on 19 August 1998 and asked to undertake medical and police checks. On 16 November 1998 the post received an opinion from the Medical Officer of the Commonwealth (MOC) which stated that one of the children, eight years old Anum, failed to meet the health requirements due to a range of medical problems, including cerebral palsy. A Waiver Opinion was also provided. Under the heading "Cost to the Australian Community", the MOC stated:

In my opinion, the likely cost to the Australian community of health care or community services is \$430,745 (in special education, sheltered employment and residential care).²⁰

41. The post duly wrote to Ms Yasmin to advise that Anum did not meet the health requirements, and therefore the whole family had failed in their

18 Commonwealth Ombudsman, Report on the Investigation into a Complaint about the Processing and Refusal of a Subclass 202 (Split Family) Humanitarian Visa Application Report under section 35A of the Ombudsman Act 1976 August 2001. Available at [http://www.ombudsman.gov.au/commonwealth/publish.nsf/AttachmentsByTitle/reports_2001_dim_a_visa.pdf/\\$FILE/DIMA-Kiane-aug01.pdf](http://www.ombudsman.gov.au/commonwealth/publish.nsf/AttachmentsByTitle/reports_2001_dim_a_visa.pdf/$FILE/DIMA-Kiane-aug01.pdf)

19 The criteria for a Subclass 202 visa was amended in 2008 to include a 'split family provision' which allows Protection Visa holders to propose for entry to Australia their immediate family members. The new regulations, which came into effect on 1 July 1997, were introduced to overcome an anomaly which previously compelled immediate family members separated from the humanitarian or refugee visa holder to apply under the migration program.

20 Commonwealth Ombudsman, op cit.

application. The decision-maker indicated that he wished to consider whether there was a basis to waive the health criterion and offered Ms Yasmin the opportunity to provide comments on whether the child would cause an undue cost to the Australian community or undue prejudice to the access of Australians to health care.

42. Ms Yasmin advised in reply that Anum's epilepsy was under control with the use of medication and that she has learnt to provide physiotherapy to her daughter. Ms Yasmin also stated that her sister-in-law, an Australian citizen, worked with young disabled people and would be able to provide assistance and respite care. Nevertheless, the post again rejected the family in July 1999.²¹

43. In September 2000, Ms Yasmin tried applying again, this time the application was referred to HQ in Canberra for processing after intervention from the Ombudsman but still experienced delays. The family's medical assessments had expired and they underwent a fresh round of testing, and this time the family was advised that Amun's projected health care costs had increased to \$750 000. Around this time Mr Kiane also returned for three months to Pakistan after his family's home was burgled, which he claimed he felt was linked to his refugee claim. He also left his employment due to stress about his family. On 7 March, DIAC advised that the matter was ready for decision but there was then a further delay while the Department inquired into Kiane's employment status.

44. On 2 April 2001 Mr Kiane set himself on fire in front of Parliament House in Canberra. His brother later informed the Ombudsman and the media that, after hearing of further delays and additional requirements being imposed, Mr Kiane appeared to lose hope of being reunited with his family in Australia. On 26 May 2001 Mr Kiane died from massive infection resulting from the burns suffered.

45. The response from the Minister has been analysed by several disability studies scholars, notably Goggin and Newell, who claim then Minister Ruddock went to great lengths to dehumanise Mr Kiane and not refer to him by name. On 7:30 Report Minister Ruddock states "I don't like to speak ill of the dead, but

²¹ Commonwealth Ombudsman, *ibid.*

we're dealing with a person who came to Australia unlawfully, remained here for a period of time, was located, removed".²²

46. The Kiane case received some media attention, and some comment that the Kiane case was starkly at odds with Howard Government's rhetoric at the time of helping the world's 'most vulnerable' through the offshore programme and the importance of families.²³ Responding to Minister Ruddock's comment that Kayani's act was 'not something we are used to or experienced with' (linked in the public mind to the children overboard and self-harm incidents in detention centres), Tony Birch wrote biting in an essay in the UTS Review: 'This man had done something very "unAustralian". He had publicly expressed his grief and anguish at his treatment at the hands of Australian government officials'.²⁴

47. The case has also received some academic analysis within disability studies. Jakubowicz and Meekohsa, Soldatic and Fiske, and Gothard, who also point out the complete invisibility of Amun, so much so, there is no image of her available.

48. The Ombudsman's report was scathing, and described the case as a history of 'administrative ineptitude and broken promises' (Sydney Morning Herald Aug 23, 2001). But the government did not accept its recommendations about speeding up processing of split family applications and the case does not seem to have made a lasting impact on national psyche. Ms Yasmin has since been accepted, but as far as we could ascertain, not Amun.

Lukas Moeller

49. 13 year old Lukas has Down Syndrome. His father, Dr. Bernhard Moeller, was the only specialist physician in the small Victorian town of Horsham, sponsored by the Victorian government on a 457 Temporary Working Visa. The Moeller family was screened into the health matrix due to Dr Moeller's profession and the family were initially rejected permanent residency on the basis that

22 <http://www.abc.net.au/7.30/content/2001/s351588.htm>

23 Eg <http://www.safecom.org.au/familymen.htm>

24 Birch, Tony (2001) 'The Last Refuge of the "UnAustralian"', The UTS Review 7.1: 17-22.

Lukas's disability would place an undue burden on the Australian taxpayer. Lukas would cost over \$450 000. The waiver is not available for this category of visa (Permanent Skilled) and so the Department and Migration Review tribunal duly rejected the family's request for the waiver to be exercised.

50. The Department's first refusal in October was quickly picked up by the media, and then by Federal and Victorian Opposition members.²⁵ The Minister was forced to defend the process in Parliament. On 10 November Minister Evans stated:

Dr Moeller currently holds a temporary business visa valid until 2010, so there is no suggestion of him having to leave the country in the short term. He and his family are not being forced to leave Australia. The department recognises the need for and contribution of skilled professionals such as doctors in rural areas, but it has an obligation to apply the relevant laws and regulations to all visa applicants.

Australia's immigration laws do not preclude persons with Down syndrome visiting or migrating to Australia. Any health issue with significant cost implications is likely to lead to the health requirement not being met and a visa being refused. This is not just in terms of disabilities; it might be to do with cancer, kidney disease, cardiac conditions et cetera.

...Dr Moeller applied for a permanent skilled visa, and a waiver to that health requirement is not available for skilled migration visas.

51. The MRT duly refused the application on 25 November 2008. The decision extracts material from Dr Moeller stating he feels 'betrayed' by Australia. Minister for Immigration Senator Chris Evans used his discretionary power to waive the health requirement on 26 November 2008.²⁶ He reported to Parliament, also on the same day:

Senator CHRIS EVANS (Western Australia) (Minister for Immigration and Citizenship) —I thank Senator Collins for her interest in this case and for her representations to me. I was advised last night that Dr Moeller's appeal to the Migration Review Tribunal had been unsuccessful. By law the minister cannot intervene until such time as a

25 See, for example: Stephen Lunn, 'Chorus of demands to let Doctor Bernhard Moeller stay', *The Australian* (Sydney), November 1 2008; Mark Dunn and Mike Edmunds, 'Doctor told to get out because of son with Down Syndrome', *The Herald Sun* (Melbourne), 31 October 2008.

26 Senator Chris Evans, 'Statement by Senator Evans on Dr. Bernhard Moeller' (Media Release, 26 November 2008).

tribunal or court upholds the Department of Immigration and Citizenship's decision to refuse a visa. This morning I received a request from Dr Moeller that I intervene in the family's case. A short time ago my office contacted Dr Moeller to advise him that I have granted permanent visas to the family.

Dr Moeller and his family are a compelling case. ...

As minister, I can take into account all the circumstances, and it was clear to me that Dr Moeller and his family are making a very valuable contribution to their local community. Dr Moeller is providing a much needed service in the area. The family have integrated very well and they have substantial community support, including of course from the Victorian Premier, their local member, Mr Forrest, and a range of parliamentarians. Their continued presence and contribution to Australia will be beneficial to our society and I am pleased that they have chosen to call Australia home. I wish to express my regret at the distress this has caused Dr Moeller and his family and I look forward to them becoming citizens. (Time expired)

52. There are some interesting aspects to this case, not least the speed of the process, and the way it has engendered reform proposals. In fact, the application of the Health Requirement has similarly affected other 'sympathetic' families, such as academic Sharon Ford and her two children Cailan and Lucas who also faced tremendous trouble receiving permanent residency. Like Lukas Moeller, Cailan has Down Syndrome. Like Lukas, she has well-educated and relatively wealthy parents willing to jump through the excessive bureaucratic loops and appeal the decision. In both cases, the parents are capable of making valuable contributions to the Australian community, and the media interest has focused on the parents worth, not on Lukas and Cailan themselves. The Ford family were also successful in their appeal, after supplying over 14 extra reports on Cailan, statements from research professionals into Down Syndrome, statements of support from professional colleagues, support from two State Down Syndrome Associations, waiting 18 months and paying in excess of \$5500.²⁷ The attention and ease of this case must be due on part to the popular appeal and community need of foreign rural doctors.

²⁷ Ford, Sharon. Gothard, Jan. 'Discrimination and Immigration: An Australian (Bad) Example' (paper presented at the 8th World Down Syndrome Congress, Singapore, April 2004).

53. In terms of reform, Minister Evans has launched an appeal to the States and Territories to add a waiver to the Permanent Skilled category for critical areas of need. This was also announced on 26 November 2008:

I have also sought to encourage state and territory leaders to support an amendment to the migration regulations that will allow for a possible waiver of the health requirement for permanent visa applicants in areas of demonstrated need. If the states and territories agree, a waiver will be available for onshore applicants and their dependents who do not meet the health requirement. The regulations will enable the department to waive the health requirement after seeking input from the states and territories. The regulations have been drafted and require the agreement of the states and territories because there are state related costs such as special educational needs, assisted accommodation and community care.

54. The Australian Capital Territory and Victoria signed up to the new State health waiver arrangements in March 2009. West Australia signed up to them earlier in May 2009.

Recommendation

Acknowledgment that children with a disability are particularly disadvantaged by the current policy and given positive treatment by DIAC to rectify this discriminatory operation of the legislation.

Violations of international human rights law

55. The current operation of the health requirement violates Australia's international obligations under human rights treaties such as the new Convention on the Rights of People with Disabilities, the Convention on the Rights of the Child and the 1951 Refugee Convention.

The Disability Convention

56. As ALHR previously noted in our submission to the Joint Standing Committee on Treaties in regards to ratification of the Disability Convention, the Convention represents an attitudinal paradigm shift from a medical welfare model

to a social justice human rights model, which seeks to remove barriers that prevent people from full inclusion into society.²⁸ The Health Requirement's focus on a person's economic cost to the Australian community ignores the positive contributions that people with a disability can make.²⁹ Historian Jan Gothard sees the Health Requirement as failing to take account of a larger and more contemporary understanding of public interest, 'framed in terms of social inclusion and diversity, as well as the social and yes, economic contributions made by individuals with disability...'³⁰

57. In 2007, the Australian National Audit Office released a report on the administration of the Health Requirement, which noted key issues in its facilitation.³¹ In 2008, Senator Evans made public statements that the Immigration Department needed greater discretion to assess the particular circumstances of each case and less reliance should be put on Ministerial discretion.³² In 2009, the Joint Standing Committee on Treaties recommended the ratification of the Optional Protocol to the *Disability Convention* which would

28 Paul David Harpur (Australian Lawyers for Human Rights), Submission to the Joint Standing Committee on Treaties in their consideration of the Convention on the Rights of Persons With Disabilities (16 June 2008) 2-3. See also: Lee Ann Bassar, 'Disentangling Disability and Health' in Belinda Bennett, Terry Carney, Isabel Karpin (Eds.). *Brave New World Of Health* (The Federation Press, 2008) 218, 220;

Byrnes, Andrew. Conte, Alex. Gonnto, Jean-Pierre. Larsson, Linda. Schindlmayr, Thomas. Shepard, Nicola. Walker, Simon. Zarraluqui, Adriana. *From Exclusion to Equality: Realizing the Rights of Persons with Disabilities – a Handbook for Parliamentarians on the Convention on the Rights of Persons with Disability and its Optional Protocol* (United Nations, 2007).

29 National Association of People Living With HIV/Aids (NAPWA), Submission to the Productivity Commission Inquiry into the Disability Discrimination Act 1992(Cth) (2003) 2340.

30 Jan Gothard and Charlie Fox, 'Consign Disability Discrimination to the Bin' *The Australian* (Sydney) 17 November 2008.

³¹ Australian National Audit Office, *Administration of the Health Requirement of the Migration Act 1958, Audit Report No. 37* (Commonwealth of Australia, 2007).

³² Paul Lampathakis, 'WA Nurse wins reprieve over Down Syndrome Child', *The Australian* (Sydney), November 12 2008. For discussion of ministerial discretion in immigration matters, see: Elizabeth Proust, *Report to the Minister for Immigration and Citizenship on the Appropriate Use of Ministerial under the Migration and Citizenship Acts and Migration Regulations* (31 January 2008) Recommendation 5, 13; Mary Crock, 'Judging Refugees: the Clash of Power and Institutions in the Development of Australian Refugee Law' (2004) 26 *Sydney Law Review* 51-73, 54; Committee Against Torture, *Concluding Observations of the Committee Against Torture: Australia CAT/C/AUS/CO/3* (22 May 2008) 4.

'further promote the inclusion and participation of people living with disabilities in all aspects of life and the law within Australia.'³³

58. The Senate and Constitutional Affairs Committee also published their report on the *Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008* in February 2009, which specifically addressed the Health Requirement and its impact on disabled migrants and refugees.³⁴ They noted that the issue of disability and discrimination has caused significant public debate about the Health Requirement.³⁵ There is momentum for reform.

Recommendations

That the exemption of the *Migration Act 1958 (Cth)* to the *Disability Discrimination Act 1992 (Cth)* be reformulated and narrowed.

That Australia should lift its reservation to the *Convention on the Rights of Persons with Disabilities* regarding the Health Requirement.

The Convention on the Rights of the Child

59. The policy is discriminatory in situations where the applicant is a child, or a family who have a child with a disability. Children often fail the Health Requirement as the amount is calculated over their lifetime. The current regime follows a 'one fails-all fails policy', whereby a whole family fails the assessment if a secondary applicant (such as the applicant's child) does not satisfy the Health Requirement. As the Moeller and Ford family examples show, assessing a child's economic worth without considering the contributions of the family as a whole, can lead to unjust decisions. Under the *Convention on the Rights of the Child*,

33 Joint Standing Committee on Treaties, Report 99: Treaties Tabled on 3 December 2008 and 3 February 2009 (Optional Protocol to the Convention On the Rights of Persons With Disabilities) (Commonwealth of Australia, March 2009) 6.

34 Senate Legal and Constitutional Affairs Committee, *Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008* (Commonwealth of Australia, February 2009).

35 Senate Legal and Constitutional Affairs Committee, *Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008* (Commonwealth of Australia, February 2009) 36.

decision-makers must give primary consideration to the rights of the child.³⁶ In regards to the Health Requirement, the current inflexibility to consider a child's potential rather than economic value, nor consideration of the family's capabilities as a whole can lead to clearly unjust and inconsistent decisions by DIAC.

The 1951 Convention Relating to the Status of Refugees

60. The application of the Health Requirement to those seeking refugee or humanitarian visas also requires significant reform. Refugees and asylum seekers are more likely to suffer from particular health problems, often related to physical and psychological trauma, poor nutrition and developmental delay in children.³⁷ Although refugees do not have to pay for the cost of the Health Requirement, they are still subject to the same criteria as voluntary migrants.

61. The complicated and seemingly arbitrary application of the Health Requirement can be particularly distressing for those who have sought Australia's protection. In 2001, Shuharyar Kiyani died after dousing himself with petrol and setting himself alight outside Parliament because he was distraught at the Government's decision that his disabled daughter did not meet the Health Requirement.³⁸ Then Minister for Immigration, Phillip Ruddock, justified the decision to reject Mr. Kiyani's wife and children on the basis that the cost of the girl's medical treatment for the condition of cystic fibrosis would be excessive. This was starkly at odds with Australia's rhetoric of helping the world's 'most vulnerable' through the offshore programme.

62. Although there has been a change of government since this tragic event, and DIAC has indicated that ministerial discretion can be used to mitigate such unfair decisions, a more consistent and equitable approach is still needed to

36 Convention on the Rights of the Child. Opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) Article 3; Minister for Immigration and Ethnic Affairs v Teoh (1995) 183 CLR 273; Productivity Commission, Inquiry Report, Report No. 30: Review of the Disability Discrimination Act 1992 (Cth) (Commonwealth of Australia, 30 April 2004) 360.

37 Royal Australian College of General Practitioners, Health Care for Refugees and Asylum Seekers (17 July 2002) 1; Victorian Refugee Health Network, Background paper: initial health assessment & ongoing care (Melbourne, 2008) 2-3.

38 'Man sets himself on fire in immigration protest', The Independent (London), 3 April 2001.

ensure that such a tragedy does not occur again. A discretionary system is not appropriate to upholding Australia's refugee and human rights obligations, especially that of family reunion.³⁹ Reform is required to ensure that specific regulations or guidelines regarding refugees and other humanitarian applicants exist, where the default position is a waiver of the strict cost assessment by DIAC when the result would be clearly unjust.

Recommendation

That Australia reformulate how the Health Requirement is applied to its refugee and humanitarian programme applicants, both onshore and offshore.

Consistency with Australian policy

63. There are a number of current initiatives on disability rights in Australia. Migration reform should be seen in this context and be informed by the same principles. For example, Australia is formulating a national action plan on disability, coordinated by FAHCSIA. The National Disability Strategy will be informed by the views in the Report, *Shut Out: The Experience of People with Disabilities and their Families in Australia* from the NPWDACC to government, delivered in August 2009.

64. Australia has recognised through the AusAID Disability policy *Development For All* released in December 2008 that there are serious problems with disability rights and access to development assistance in some developing states in our region. The policy pledges Australia to support national governments' efforts towards disability-inclusive development, assist Disabled People's Organisations to strengthen their capacity to become effective advocates in inclusive development, and build on existing investments in the

39 The family is acknowledged in human rights instruments as the natural and fundamental group unit of society. See further UNHCR EXCOM Conclusions 9(XXVII)-1977; 24 (XXXII) – 1981 and 88(L)-1999, and the Submission by United Nations High Commissioner for Refugees to the Senate Legal and Constitutional References Committee Inquiry into the Administration and Operation of the Migration Act 1958, 28 July 2005, available at <http://www.unhcr.org.au/pdfs/AdministrationandOperationMigAct.pdf>, pp. 6-7.

education and infrastructure sectors of Australia's aid program towards improved access to education and the built environment, as well as providing assistance for harms such as avoidable blindness. ALHR believes that Australia can also make a significant difference to people with disabilities through the migration program, which in some cases will empower people to return home and make a difference, or generally promote change in their country of origin.

Recommendation

That the health requirement be analysed to comply with the social inclusion policy framework, as set out in the AusAID disability policy and the National Disability Strategy

Conclusion

65. ALHR propose that a more equitable and tailored approach must be taken in administering the Health Requirement, with a shift from an economic assessment of a disabled person's value without consideration of that individuals personal capabilities or needs, to one with a greater focus on their participation in the decision, and that the value and contributions to a diverse and progressive society should be considered. This reform in the criteria and application of the Health Requirement should aim to bring Australia into line with its international obligations, with particular regard to the Disability Convention and the Convention on the Rights of the Child.

66. As a signatory to the Disability Convention, Australia has committed to take 'all appropriate legislative, administrative and other measures of implementation' to ensure the protection of the rights of the disabled.⁴⁰ Reliance

⁴⁰ Convention on the Rights of Persons with Disabilities. Opened for signature 30 March 2007, 189 UNTS 137 (entered into force 3 May 2008) Article 4(1)(a), Article 5 – Equality and Non-Discrimination. It is the eighth core human rights treaty on the international level and includes also an Additional Protocol, which was adopted by the General Assembly on the same day. Both the Convention and its Protocol were opened for states signatures and ratification in March 2007, and entered into force on May 3, 2008. As of 6 May 2008, 128 states signed the convention, and 25 states ratified it; 71 states signed the Additional Protocol and ratified it. The text of the Convention is available at <http://www.un.org/disabilities/convention/conventionfull.shtml>. For more

on ministerial discretion to act as a 'catch-all' for cases such as the Moeller family does not ensure the rights of the disabled. It is simply remedying a process that can systemically lead to discriminatory results.⁴¹

67. The terms of reference put to the Joint Standing Committee on Migration seek to re-formulate the balance between the economic concerns that underpin the Health Requirement, and the need for a more tailored approach based on both the social and economic benefits an individual with a disability may contribute. ALHR hopes that the Parliament goes further to consider that some values cannot be expressed in economic terms, such as the quality of a person's life and relationships and their contribution to Australian society. The Health Requirement seeks to apply 'Public Interest Criteria' that focus on the economic worth of migrants and refugees. ALHR wishes to see the concept of Australia's 'public interest' be reformulated in order to reflect the social model of disability put forth in the Convention on the Rights of Persons with Disabilities.

information on the Disability Convention see
<http://www.un.org/disabilities/convention/signature.shtml>.

⁴¹ United Nations High Commissioner for Refugees, Submission to the Senate Select Committee on Ministerial Discretion in Migration Matters: Inquiry into Ministerial Discretion in Migration Matters (United Nations, March 2004).

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Disabled Peoples' International (DPI) – www.dpi.org

DPI Implementation Toolkit - <http://www.icrpd.net/implementation/en/index.htm>

Harvard Law School Project on Disability - <http://www.hpod.org/publications/academic>

International Disability Rights Monitor - <http://idrmnet.org>

Multicultural Disability Advocacy Association of Australia – <http://www.mdaa.org.au/>

United Nations *Enable* - <http://www.un.org/disabilities>

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