Freehills

Ms Sharon Bryant
Committee Secretary
Joint Standing Committee on Migration
jscm@aph.gov.au

29 October 2009
Matter 80359197
By email

Dear Ms Bryant

Submissions to Joint Standing Committee on Migration - Treatment of people with a disability (Committee)

Thank you for your letter dated 17 August 2009 inviting us to provide a submission to the Committee.

Freehills' recent experience with the Migration Regulations

Freehills recently acted on a pro bono basis for the Robinson family, an English family who were experiencing difficulties with their application for permanent residency in Australia due to one of the children, David, being mildly affected by Down Syndrome. The Department[1] had refused the Robinson family's application for permanent residency on the basis that David did not meet one of the public interest criteria set by the *Migration Regulations 1994* (Cth)[2] (**Migration Regulations**), more specifically PIC 4005[3].

Freehills agreed to act for the Robinsons due to our belief that a serious injustice would be suffered by the family if they were not granted permanent residency due to the manner in which the Department had assessed David. In particular, it was clear to us that in assessing David against the criteria of PIC 4005, the Department had not undertaken any meaningful subjective assessment of David – looking at his actual skills and abilities - but rather had applied a generalised notion of a person suffering from Down Syndrome.

The challenge to the Department's assessment of David against PIC 4005 in *Robinson v MIMIA* [2005] FCA 1626 (a copy of which is annexed as Annexure A) was successful. In his Honour's Reasons for Decision, Justice Siopis of the Federal Court of Australia held that the Department had to assess the specific nature and extent of David's condition, and then apply the criteria of PIC 4005 against a hypothetical person having that specific condition. The Department could not, as it had done, simply apply a generic notion of Down Syndrome against PIC 4005.

As a result of the decision in Robinson v MIMIA, our initial concern with the way in which the Department applied PIC 4005 was resolved. However, when the Robinson's application was referred back to the Department for reassessment (as a result of the initial assessment being quashed), it came to our attention that there were other aspects of PIC 4005 that were being incorrectly applied by the Department.

---

[1] The Department of Immigration and Multicultural and Indigenous Affairs, which later became the Department of Immigration and Citizenship

[2] The MRT case number was W02/07844

[3] Specifically Public Interest Criteria 4005 as contained in Part 1 of Schedule 4 of the Regulations, which each member of the Robinson family was required to meet by reason of Regulation 855.225.

QV.1 Building 250 St Georges Terrace Perth WA 6000 Australia
GPO Box U1942 Perth WA 6845 Australia
Telephone +61 8 9211 7777 Facsimile +61 8 9211 7878
www.frechills.com DX 104 Perth
Sydney Melbourne Perth Brisbane Singapore
Correspondent offices in Hanoi Ho Chi Minh City Jakarta

The Department's reconsideration of the matter

When the Robinson's application for permanent residency was subsequently referred back to the Department for reassessment, the views of the Review Medical Officer of the Commonwealth (RMO) amounted to this:

> *"In summary therefore, although the intellectual disability's described as mild in the psychologist report above (18/02/07), the intellectual disability is of a severity which requires ongoing special schooling. Educational assistance would be expected to continue until he completes high school.*
>
> *A hypothetical person with mild intellectual impairment requires special schooling and ongoing educational support. This will be a significant cost to the Australian community. Also, taking into consideration the period of the applicant's proposed stay in Australia (i.e permanent) a hypothetical person with mild intellectual impairment would place a significant burden on community services as they would qualify for social security benefits, allowance or pension during their lifetime. This additionally would be a significant cost to Australian community.*
>
> *This disease or condition is a disease or condition to which paragraphs 4005(c)(2)(A) – new in Schedule 4 of the Migration Regulations 1994 apply, regardless of whether or not health care or community services will actually be used in connection with the applicant during the period of the applicant's proposed stay in Australia. A person with such a disease or condition would be likely to require health care or community services or be likely to meet the medical criteria for the provisions of a community service and provision of such health care or community services relating to the disease or condition would be likely to result in the significant cost to the Australian community in the areas of health care and community services, or prejudice the access of Australian citizens or permanent residence to, health care and community services".*

The conclusion therefore was that PIC 4005 was not satisfied.

In our opinion, the Department's approach was flawed for the following reasons:

- PIC 4005 requires not only a determination as to whether or not a hypothetical person with the applicant's impairment would require the provision of health care or community services during the period of the Applicant's proposed stay in Australia, but further that the provision of the health care or committee services "would be likely to":
  - (A) result in a significant cost to the Australian community in the areas of health care and community services; or
  - (B) prejudice the access of an Australian citizen or permanent resident to health care or community services."
- the RMO's approach amounted to no more than a simple conclusion that a person with a mild intellectual impairment will require special schooling and ongoing educational support and that such "will be a significant cost to the Australian community" *per se*. That is incorrect: the latter does not necessarily follow from the former; a proposition which is apparent from a simple reading of PIC 4005.
- the RMO's approach amounted to no more than a simple conclusion that a person with a mild intellectual impairment would qualify for health care or community services and that such would "prejudice the access of Australian Citzens or permanent residents to health care and community services" *per se*.

Again that is incorrect: the latter does not necessarily follow from the former, a proposition which is also apparent from a simple reading of PIC 4005

- alternatively, if, contrary to what appears to be the case, the RMO did in fact consider whether the particular special schooling and ongoing educational support requirements would likely be at a significant cost to the Australian community or prejudice the access of an Australian citizen or permanent resident to health care or community services, the report does not disclose any reasoning (let alone empirical basis) for that conclusion.

Resolution of the Robinson's application

In November 2008 Senator Chris Evans, the Minister for Immigration and Citizenship, responded to our request to intervene in the case and awarded the Robinson family permanent residency using his public interest power under Section 351 of the *Migration Act 1958* (Cth).

Had the Minister not intervened, a challenge to the further refusal of the Robinson's application would have been made to a Federal Magistrate.

A need for reform

We submit the following reform should occur (at a minimum):

- PIC 4005 is, both in its terms in the manner in which it is being applied by the Department, far too restrictive: the Robinson case is an good example of where PIC 4005 and/or the manner in which it is applied by the Department, operated to prevent a family, one member of which had a mild disability, from gaining permanent residency. In other words, the "bar" is set too high and ought be lowered;
- wherever the "bar" is set, the criteria for eligibility needs to be more clearly articulated so that it is more easily understood by applicants and those administering the Migration Regulations. In particular, the Migration Regulations should, to the full extent possible, avoid subjective criteria and favour the specification of criteria which are clearly expressed and which readily lend themselves to objective determination; and
- the regulations ought require the RMO's opinion to disclose (so that it can be properly scrutinised by the Tribunal and the Courts) every aspect of the RMO's reasoning and all of the information relied upon so that if the opinion does not disclose all such matters so as to justify, on its face, the conclusions reached, it will be invalid.

Thank you for extending to us the opportunity to make these submissions.

We look forward to reading the Committee's report in due course.

Yours sincerely

Steven Penglis
Partner
Freehills

Jeremy Quan-Sing
Senior Associate
Freehills