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**Submission to the Joint Standing Committee on  
Migration 'Inquiry into the migration treatment  
of disability'**

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Submission No 49

## **Submission to the Joint Standing Committee on Migration 'Inquiry into the migration treatment of disability'**

Thank you for providing an opportunity for submission to the 'inquiry into the migration treatment of people with a disability'. This submission is a personal experience and focuses on the issues of children and also about disability acquired during stay in Australia.

### **Is the current process for assessing a visa applicant against the health requirement fair and transparent?**

It is difficult to comment on fairness if the process is not transparent. People who understand the process would agree that the criteria for health assessment are not always straightforward and this may be a difficult issue to resolve. Each individual and each issue is different.

Health of an individual is a dynamic process and while it may be possible to filter some of the issues by screening, it is always possible that individuals will develop certain conditions in their life after settling in Australia or while people are staying in Australia on work visa. The stay on certain work visas counts towards citizenship as well. But if one develops disability during such a stay in Australia, he/she can be denied residency. How justified are we in saying that while working in Australia if one develops a medical condition that now you are not eligible for further stay due to health criteria?

One can understand the requirement for health assessment with respect to infectious diseases which can spread to the community and these issues may be dealt with in consultation with Department of Health.

Medical officers of Commonwealth have the power to make decisions about the eligibility of immigrants, even though doctors simply are not in any position to accurately assess how a specific disability will be responsible for a particular economic outcome. They may not be well equipped to make decisions about the community and other needs of the person in question. They are certainly not competent to come to a conclusion regarding economic balance of the decision based on contributions and costs. DIAC officers may be in much better position to make these decisions based on assessments by medical officers.

The application of the health criteria for people who are already in Australia needs to be different and this may be due to humanitarian issues or due to obligations under human rights issues. There is an attempt to look at this aspect by introducing health waivers which are available for certain visa categories. Most states and territories have agreed to be part of this process except NSW and South Australia according to available information.

### **What types of contributions and costs should be considered?**

The contributions are always as a family unit as the visa allows the whole family to settle in Australia. So if the criteria apply then it should be collective one and not 'one fails all fail'. A recent decision by the Supreme Court of Canada in *Hilewitz v. Canada* (available at <http://csc.lexum.umontreal.ca/en/2005/2005scc57/2005scc57.html>) is relevant to the issue of costs and contributions. In that case, the Supreme Court of Canada has instructed immigration authorities to look at the family circumstances of disabled children of immigrants, including financial resources and community supports. In other words, immigrants who would normally be excluded because of their disabled children can now come to Canada if they can show they have financial and other resources to support their children without posing an "excessive burden on social services."

This decision is helpful in that it undermines what would otherwise be the almost automatic exclusion of people with disabilities in Australia. One can argue that this may favour people who can financially support their families. But cost is at the core of this argument.

Currently, the contributions and support are not taken into consideration. I am not aware of the information to the contrary.

How is one to measure the contribution by accompanying and to be born children?

### **How do we measure these?**

It depends on what we define as current and potential contributions and costs.

If one has to measure the cost and if this needs to be a dollar figure, then this may need some calculations. These equations need to include potential contributions by the family: economic, cultural and social. And then calculate costs based on some justifiable calculations – cost

of healthcare and other support services required. Just because a person would qualify for support, it is not appropriate to add that figure in calculations.

How can you measure the cost of reputation of the country? We have seen that in the Indian Students cases where cost to Australian Education Industries could be huge.

Imagine that if same criteria would have been applied to Professor Ian Fraser who invented HPV vaccine and if he was denied a visa to enter Australia. There will be many more such examples. How would you measure cost in such situations?

If one has to include potential costs then one also needs to look at potential contributions.

### **Are there additional factors that should be considered?**

There may be several factors – health related, individual factors, ethical factors, obligations of the Nation states to various international conventions. I have listed some of these issues related to children and migrants. Experts in the field law, migration and human rights may be able to list more appropriate conventions and international obligations.

### ***Rights under the 'Convention on the Rights of the Child'***

**Guiding principles:** *The guiding principles of the Convention include non-discrimination; adherence to the **best interests of the child**; the **right to life, survival and development**; and the right to participate. They represent the underlying requirements for any and all rights to be realized.*

**Survival and Developmental Rights:** *These are rights to the resources, skills and contributions necessary for the **survival and full development of the child**. They include rights to adequate food, shelter, clean water, formal education, primary health care, leisure and recreation, cultural activities and information about their rights. These rights require not only the existence of the means to fulfil the rights but also access to them. Specific articles address the needs of child refugees, **children with disabilities and children of minority or indigenous groups**.*

### **Human rights provisions**

- *Non-discrimination (Article 2)*
- *Right to life (Article 6)*
- *Right to health and health services (Article 24) found in Article 12 of the ICESCR*
- *Right to education (Article 28): found in Article 13 of the ICESCR*

Other UN conventions which may be relevant to this issue include

- **Rights of Persons with Disabilities** – this is at the core of all the discussion
- **International convention on the protection of the rights of all migrant workers and members of their families**

**Do you have personal experience of this?**

Yes. I have described what our family is going through. There will be more that we may go through in future but I have not included that in this submission.

Our story: **"They will look after her"**

**Journey begins:**

We, I and my wife and our son, arrived in Australia in early 2006 on a temporary resident visa. In late 2007, an angel, our daughter, arrived in our life. The birth of the child is a very happy occasion for any family and we were no different. This is especially as we had to go through a lot during pregnancy with interventions to protect our baby from delivering prematurely. During one of those procedures a nurse at the hospital reassured us **"They will look after her"**

During pregnancy there was a discussion about going back to our country for the delivery as we would have more family support there. But after discussing, we thought that we have made a decision to live here and this is now our new home, so we should stay here for the delivery.

All the screening and tests conducted (triple test and Ultrasounds) for the baby came back as normal and we were ready for our daughter to arrive in this world. And then our little angel was born and she was lovely. Started to feed immediately after birth in a bid to survive in this world and to grow with us. The next day pediatrician came and told us everything is fine but he would like to have another look and he did come back on day 3 to have a look and suggested a blood test to rule out a condition which according to him at the time was not clinically very clear. Baby was behaving as all babies do – feed-sleep-feed. One of the nurses on the maternity ward said to us don't worry **"They will look after her"**

## **Our first encounter with law and reality:**

Some background is essential to state here to understand the implications of the health criteria for migration.

She was born in Australia but has nationality of her parents. This is due to the law that children born in Australia do not get Australian citizenship but have to have nationality of their parents unless one of the parents have Australian citizenship or permanent resident status. This is in existence since 1986 when the Australian parliament changed the citizenship law. The law states that if the child is ordinarily resident of Australia for 10 years after birth then he/she may get citizenship. Ironically one of the reasons this was done was to prevent parents from applying permanent visa based on the citizenship of the child born in Australia.

Our son once asked us an innocent question that he is citizen of X country as he was born in that country then how can his sister who is born in Australia not be the citizen of this country? People who live in Australia may not even know this fact.

Just before the birth of our daughter, our visa for next 2 years was approved and my new job was to start soon. I informed the immigration office and was told to register the birth, get her passport and then get the visa stamped.

In the meantime the blood results came back, and we were informed that the baby is born with an extra chromosome - **Trisomy 21 or Down syndrome** as the world knows this condition as. But syndrome is a symptom complex as we knew it and our baby showed hardly anything to have that label. It later turned out that she has no heart abnormality, her thyroids are normal and her hearing and eyes are fine. She is a smart and alert child and we do not find her any different from our son except for the low muscle tone, which means she will reach her physical milestones late. Many normal children may also be late in development for no reason. We don't know what the future holds for our daughter and no one can predict this. We just have to take one day at a time and tick all the boxes as we have been doing. I do not want to describe our thoughts about our baby and family and future as this may not be directly relevant to this inquiry.

We now had one more problem, in addition to what every parent who has child with disability (not that I like to use the term) goes through. We may be deported! The 457 visa requires everyone in the family to

have to satisfy health criteria. And this little angel who is now home in the safe hands of her parents is a threat to Australian public health.

Following is the copied information from DIAC website regarding health criteria:

**"Background: The health requirement is designed to:**

- *minimise public health and safety risks to the Australian community*
- *contain public expenditure on health and community services, including Australian social security benefits, allowances and pensions and*
- *maintain access of Australian residents to health and other community services.*

*In line with **Australia's global non-discriminatory immigration policy**, the health requirement applies equally to all applicants from all countries, although the extent of testing will vary according to the circumstances of each applicant."*

But we had made a very critical decision to have our baby in born Australia as we had decided to live here. And that meant that the **MIGRATION ACT 1958 - SECT 78** applies to our case and that she already has the same visa as all of us.

**(What if our daughter was born overseas?)**

This meant that we had 2 years to decide whether we can call Australia home. This also meant we will be spending these 2 years in a state of great uncertainty about our future which we are currently going through. This brings some of issues to mind what if I have an accident and lose my leg or hand while working in Australia would I be denied permanent residency because I will fail the health test? It is difficult to describe what a family goes through when they have to deal with health issues, insurance issues, and uncertain future. It is very difficult to keep the morale up and the drive flowing to keep the family atmosphere positive. One needs to understand that when you leave your country of origin for few years with the intention of permanent stay in the new country, it may get difficult to revive your chances of going back to the life you once had in that country due to variety of reasons. I think there should be a way to make this less painful for families. If we apply for permanent visa now, then the process currently involves possible initial rejection of visa as DIAC may be

bound to do so due to health criteria. This may then involve a review and a possible ministerial intervention. There are too many 'ifs and buts' involved in this process.

**What principles should apply to the assessment of visa applications against the health requirement? Should there be exceptions?**

Health requirement is not necessary other than risk to public health – infectious diseases. The number of people we are talking about according to what I have read is not likely to impact the health and other services to the extent that we all think it does. I would like this information be made available to the public when we are discussing costs and contributions. And if such small numbers do impact our health and other services, then we need to seriously look at improving these resources for people living with disability already in this country.

If this is required by law then **children should be excluded** from the health requirement and if they have an infectious disease then this should be appropriately managed.

**Disability acquired during a valid stay** (Australian resident for tax purpose or any similar criteria) in Australia should be excluded. These individuals are already a part of Australian community and are paying taxes, having ties to the community.

I do think that we need to provide better environment for our children whether citizens or non-citizens who are living in this country.

Following as extract from the **National Disability Strategy - Community consultations and submissions report 2009** which, I think is very important for everyone involved in this process to understand.

**SHUT OUT: The Experience of People with Disabilities and their Families in Australia (available at [http://www.fahcsia.gov.au/SA/DISABILITY/PUBS/POLICY/COMMUNITY\\_CONSULT/Pages/2\\_2\\_excluded\\_ignored.aspx](http://www.fahcsia.gov.au/SA/DISABILITY/PUBS/POLICY/COMMUNITY_CONSULT/Pages/2_2_excluded_ignored.aspx))**

*There are still widespread misconceptions and stereotypes about people with a disability. These include that they are a **danger, a burden, and a threat**. It is not uncommon to hear people express the view that people with a disability would be better off in institutions with people of their own kind.*

There also appears to be a common belief that people with a disability are **not able to make a significant contribution to the community**, and that they are **somehow not of equal value as human beings and members of the community**. Many people have low expectations of people with a disability, believing that they cannot learn or are not able to do anything useful. They are often **denied opportunities to experience life**, to explore their potential and achieve success, because it is assumed that their potential is limited.

It is often stated that people with a disability are tolerated in the community, but tolerance is not acceptance and genuine inclusion.

In a society where the values that predominate are power and wealth, physical prowess and beauty, intelligence, competition, autonomy and self-control, many people with a disability are **marginalised and devalued**. It could well be that many people are fearful about engaging with and including people who live with a disability as a result of **a lack of knowledge**, and that people with a disability are treated as **'the other'** rather than involved.

If I lived in a society where being in a wheelchair was no more remarkable than wearing glasses, and if the community was completely accepting and accessible, my disability would be an inconvenience and not much more than that. It is society which handicaps me, far more seriously and completely than the fact that I have Spina Bifida.

**The greatest barrier facing people with Down Syndrome is not their intellectual disability but confronting negative attitudes, overcoming outdated stereotypes and challenging the limitations placed on them by others. What they lack is not ability but opportunity.**

Mention of the Spina bifida above brings me to talk about a case filed at UN against Australia about a child who was denied visa due to spina bifida and I have mentioned some of the statements by the State (Australia) from that case which are relevant to the issues I would like to raise regarding health criteria. The details are as below:

**Communication No. 978/2001 : Australia. 28/04/2003. CCPR/C/77/D/978/2001. (Jurisprudence) available at <http://www.unhchr.ch/tbs/doc.nsf/0/59e90bf4e7d7ad23c1256d2600313ca7?Opendocument>**

*The State party's observations on the admissibility and merits of the communication*

**4.2** The State party first submits that the communication is inadmissible because, at the time when it was submitted to the Committee, **the author, his wife and daughter, were neither on Australia's territory nor under its jurisdiction as required by article 2, paragraph 1, of the Covenant**. Although the State party accepts that in some cases, a liberal interpretation should be given to the above-mentioned provision, citing the jurisprudence of the Committee in *Lichtensztejn v. Uruguay (1)* and *Vidal Martins v. Uruguay, (2)* the author's communication may be distinguished from these cases since he and his family were nationals of another

State applying to migrate to Australia. They had **no previous connection with Australia** and, referring to General Comment No. 15 of the Committee, (3) they had no right under international law to reside permanently in Australia. The State party stresses that, according to **the travaux préparatoires of the Covenant, the insertion of the dual requirement that a person be both in the territory and subject to the jurisdiction of the State** was quite deliberate and to suggest that the Covenant might apply to non-citizens, residing in another country, whose only connection with Australia is an application for a particular class of visa, is to extend the scope of the Covenant far beyond the intention of the drafters and would render the wording of article 2, paragraph 1, redundant.

**6.2** Regarding the issue of jurisdiction, the State party argues that the term **"jurisdiction" means that the State has rights "to control or interfere with a particular person or object"**, that the issuing or refusal of a visa does not fall into that category and that the Australian migration law does therefore not confer any sovereign authority to the State party over the author.

**I think it is important that we all get this right or we will create more "broken families" and few decades down the line, people will remember us as society who had a chance to correct a wrong but did not do enough. In whatever way we may justify these decisions today.**

I would like to conclude by saying that I still remember the words **"They will look after her"**. These words keep coming back to us from members of the Australian community and these are people who are not even aware about our daughter's condition. What we have experienced in last few years in Australia is open mind, friendliness, all around help from individuals and society. We have also noticed a look in their eyes when they are not able to help due to administrative issues and even in such situations it is comforting to know that they care and **"They will look after her"**

Thank you everyone for making this possible and for the Joint Standing Committee for providing opportunity to share some of our experiences.