



Castan Centre for Human Rights Law

&

Rethinking Mental Health Laws Federation Fellowship

Faculty of Law

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Submission to the Commonwealth Parliament

Inquiry into Migration and Disability

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1. SUMMARY AND RECOMMENDATIONS

A. Summary

We recognise that Australia must be able to carry out health screening of applicants for entry into Australia as a means of protecting Australia from public health threats. We recognise that health screening includes the power to consider the anticipated health costs of a visa applicant. However, we believe economic costs in relation to health should **not** be a consideration in relation to offshore refugee and humanitarian applications (including family reunification applications from holders of refugee and humanitarian visas). In relation to applications for other visas, we submit that Australia has an obligation¹ to ensure that the decision-making process on the entry and stay of an applicant with a disability or medical condition does not simply consider the anticipated use and costs of health services. Rather, decision-makers should be obliged to also consider the economic and social benefits that an applicant (or his family) may bring to Australia, relevant compelling circumstances, and

¹ This obligation derives in particular from Australia having ratified the UN *Convention on the Rights of Persons with Disabilities* (the 'CRPD'), 189 UNTS 137. Australia signed the treaty when it opened for signature on 30 March 2007. The Convention entered into force 3 May 2008. We note that Australia has made a interpretative declaration as to immigration in relation to the *CRPD*. However, we argue that this does not affect Australia's obligations under international law in relation to that treaty.

Australia's obligations under the relevant international human rights treaties to which it is a party. In particular, we believe that the Migration Regulations need to be updated to reflect the increased recognition of the needs of persons with disabilities, as reflected in Australia's ratification of the *Convention on the Rights of Persons with Disabilities*.

B. Recommendations

We recommend that the current Public Interest Criteria under Items 4005, 4006A and 4007 of the Migration Regulations be amended as follows:

Recommendation 1

A separate public health criterion for refugee and humanitarian applicants be inserted into the Migration Regulations (via a new Item 4007) which contains no health cost criterion.

Recommendation 2

Item 4005 of the Migration Regulations be amended to include considerations relating to the economic and social contributions that an applicant is likely to make to Australia, relevant compelling circumstances and Australia's international human rights obligations

Recommendation 3

Item 4006A of the Migration Regulations be amended to require an undertaking to contribute 'significant costs' rather than full costs in relation to health costs.

Recommendation 4

That decisions made pursuant to the revised Items 4005-4007 be judicially reviewable.

Note: for ease of reference our proposed new Items 4005-4007, which are discussed separately in the text of this submission, are also replicated (together) in Appendix 1 to this submission.

2. SUBMISSION

A. TERMS OF REFERENCE

The terms of reference refers to ‘people seeking to migrate’ to Australia. In our submission we have discussed all visas which are subject to the health criterion. As offshore refugee and humanitarian applicants are subject to the health criterion pursuant to paragraphs 200-204 of the Migration Regulations, we have included that category of applicants in our analysis.

B. BACKGROUND - CURRENT AUSTRALIAN LAW

The Migration Act 1958

Section 65 of the *Migration Act* enables the Minister to grant or refuse a visa depending on whether he or she is satisfied that the applicant meets the health criteria. This power is delegable pursuant to Section 496 of the Act.² Section 60 of the *Migration Act* also enables the Minister to require a visa applicant to visit, and be examined by, a ‘person qualified to determine the applicant’s health’. In many cases, a Medical Officer of the Commonwealth will provide an opinion that an applicant meets the health criterion. The departmental delegate making a decision under section 65 of the *Migration Act* is then required to use this opinion to decide the relevant visa application.

The Migration Regulations 1994

Items 4005-4007 of Schedule 4 to the *Migration Regulations* 1994 set out health-related public interest criteria for the granting of visas. These must be read with s.65 of the *Migration Act* and the criteria of the particular visa being sought. The ‘standard’ health requirement is provided for at Item 4005. This applies to the majority of permanent skilled visa classes. Item 4005 provides as follows:

² Section 486 of the Migration Act enables the Minister to delegate the power to consider and decide whether an applicant meets the health criterion - and to delegate to another person the power to consider and decide all other aspects of the application.

4005. The applicant:

- (a) is free from tuberculosis; and
- (b) is free from a disease or condition that is, or may result in the applicant being, a threat to public health in Australia or a danger to the Australian community; and
- (c) is not a person who has a disease or condition to which the following subparagraphs apply:
 - (i) the disease or condition is such that a person who has it would be likely to:
 - (A) require health care or community services; or
 - (B) meet the medical criteria for the provision of a community service;during the period of the applicant's proposed stay in Australia;
 - (ii) provision of the health care or community services relating to the disease or condition 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;regardless of whether the health care or community services will actually be used in connection with the applicant; and
- (d) if the applicant is a person from whom a Medical Officer of the Commonwealth has requested a signed undertaking to present himself or herself to a health authority in the State or Territory of intended residence in Australia for a follow-up medical assessment, the applicant has provided such an undertaking.

It is significant that Item 4005 contains **no waiver**.

Items 4006A and 4007 of the Migration Regulations contains identical health requirements as Item 4005, however, these **do** contain a waiver. The Minister for Immigration (or his delegate) has the power to waive the health requirement in two circumstances:

- under Reg. 4006A, where the relevant employer has given the Minister a written undertaking that the relevant employer will meet 'all costs' related to the disease or condition that causes the application to fail to meet the requirements of the health test (Reg. 4006A(2)); and
- under Reg. 4007 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’³

The Procedures Advice Manual (‘PAM3’) of the Department of Immigration and Citizenship also sets out very detailed guidance as to how decisions are to be made under the health criteria. In relation to Item 4007, PAM3 sets out considerations such as compelling circumstances and mitigation of health costs, even though no such considerations are set out as relevant considerations either in the *Migration Act* or *Migration Regulations*. For instance, paragraph 97.1 of PAM 3 provides in relation to Item 4007 that:

Under policy, officers should 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 (see PIC 4007(2)(a))
- 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 (see section 97.2 Care required) and
- other relevant factors (see section 97.3).⁴

The list of ‘other factors’ under para. 97.3 of PAM3 re: Item 4007 is quite extensive:

97.3 Other factors

Other factors that should be taken into account include (but are not limited to):

- the education and occupational needs of, skills, qualifications and employment prospects for, the applicant in Australia
- any assets and income or other support which may assist in mitigating costs
- factors preventing the sponsor from joining the applicant in the applicant's own country (for example, whether the couple are able to relocate to either the applicant's home country or a third country)
- whether there are minor Australian children who would be adversely affected by a decision not to waive

³ Item 4007(2), Schedule 4 to the *Migration Regulations* 1994.

⁴ Department of Immigration and Citizenship, Procedures Advice Manual (PAM3), available via LEGENDcom.

- whether the parties involved have established links to Australia (for example through family or from extended periods of residence creating community or economic ties)
- the location and circumstances of family members of the applicant and the sponsor
- the merits of the case (for example, the strength of any humanitarian, compelling or compassionate factors)
- the immigration history of the applicant and sponsor, including, for example, compliance to date with immigration requirements and any undertakings. Note: Where possible the health waiver should not be assessed until, if but for failing health, the application is decision ready
- if the applicant is a non-migrating dependant, what arrangements are in place for their care and welfare, and the likelihood of their future migration
- particularly in refugee and humanitarian cases where it may be more difficult to assess prospective employment, any skills, previous occupations, language capacity, potential community contribution, any family or other links to or support in Australia, and any substantial compelling and compassionate circumstances (other than those that make them eligible for a refugee or humanitarian visa) and
- where appropriate (subclass 846, 855, 856 and 857 only), the opinion of the relevant participating state or territory should be obtained - see section 100 The PIC 4007 health waiver for certain onshore permanent skilled visas.⁵

Under para. 97.4 of PAM3, decision makers are advised in relation to Item 4007 to:

‘. . . assess whether the likely cost to the community and the level of prejudice to access is 'undue' or 'not undue' when weighed against the underlying purpose of the visa subclass sought and the 'merits of the case' (that is, the individual compassionate and compelling circumstances of the applicant).’⁶

Ministerial waiver under Section 417

It is significant to note that, even if there is no waiver provision under the Migration Regulations (as in Item 4005) or an applicant has special claims that fall outside the existing waivers (which for Items 4006A and 4007 are very restricted), s/he can ask the Minister for Immigration to use his/her discretionary powers under Section 417 of

⁵ PAM3, above n4.

⁶ PAM 3, above n4.

the Migration Act to grant the visa. However, the use of such a discretionary power is problematic and has been criticised by many non-governmental agencies.⁷

C. PROBLEMS WITH THE CURRENT LAW AND RECOMMENDATIONS

(1) Refugee and Humanitarian visa applicants

Currently the health requirements set out in Items 4005-4007 of the Migration Regulations are not considered in relation to an application for a protection visa in which is made *onshore* (Subclass 866 visas).⁸ However, the criterion *is* set out in the Regulations governing *offshore* refugee and humanitarian visas, that is:

- Subclass 200 Refugee
- Subclass 201 In-country Special Humanitarian
- Subclass 202 Global Special Humanitarian
- Subclass 203 Emergency Rescue.
- Subclass 204 Woman at Risk.

This has caused some problems in the past in relation to families of refugees. The case of Mr Kiane, which was the subject of an Ombudsman report in 2001 illustrates some of these problems. Mr Kiane was a recognised refugee who attempted to bring his wife and children to Australia. Mr Kiane had been recognised as a refugee by DIAC in 1996 and his wife made a total of three applications for a visa under various provisions of Australia's humanitarian programme.⁹ The first application was rejected on the basis that Mr Kiane's wife (Ms Yasmin) was found not to meet the criteria for a Refugee and Humanitarian Class BA visa. The second application was rejected on the basis that one of the children failed to meet the health requirements due to a range of medical problems, including cerebral palsy. The relevant officer from the Department of Immigration wrote to Ms Yasmin in December 1998 advising her of these findings and invited her to provide comments on the waiver of

⁷ See eg Australian Lawyers for Human Rights, *Discussion Paper: A Human's Worth: Putting a Price on Disability in Migration Matters*, 1 June 2009, paras 26-27, at www.alhr.asn.au/activities/2009/06/01/discussion-paper-a-human-s-worth-putting-a-price-on-disability-in-migration-matters.html (accessed 19 October 2009).

⁸ see Item 866 of the Migration Regulations 1994.

⁹ See <http://www.immi.gov.au/visas/humanitarian/offshore/immediate-family.htm#b>

the health criterion. In her reply of January 1999, Ms Yasmin advised that the daughter's epilepsy was under control with the use of medication, that she had learnt to provide physiotherapy to her daughter and that her sister-in-law (an Australian citizen) worked with young disabled people and would be able to provide assistance and respite care.¹⁰ Despite these submissions, the application was rejected in July 1999. As at 2001, Mr Kiane was awaiting the outcome of his wife's third application to join him in Australia. In a tragic outcome, Mr Kiane set himself on fire in front of Parliament House in Canberra on 2 April 2001 and died on 26 May 2001 from massive infection resulting from the burns suffered.

This case was the subject of a detailed report by the Commonwealth Ombudsman in 2001.¹¹ In that report, the Ombudsman queries whether applicants in the humanitarian program category should be subject to the health requirement at all.¹² He noted that refusal of a family reunion application on health grounds where the proposer has been granted refugee status can lead to inconsistent and unfair outcomes, for instance, when compared to the situation if the whole family travels to Australia and makes an onshore application for a refugee visa (Subclass 866), in which case public interest criterion 4007 is not applied.¹³ He recommended that:

‘In my opinion, the issues discussed in this report point to a need for regulatory changes to the processing of family reunion cases under the Humanitarian Program. I consider that the grant of a refugee based visa should carry with it an expectation that the refugee's immediate family members would normally be permitted to settle in Australia unless there were exceptional circumstances to the contrary. Introduction of cost factors to outweigh the compassionate considerations involved would seem to be at odds with the basic objectives of the Humanitarian Program. The current arrangements, as they stand, appear to leave open the possibility for unfair and oppressive outcomes.’¹⁴

Unfortunately this recommendation from 2001 was not implemented by the then Commonwealth Government and remains unimplemented.

¹⁰ 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 ('Ombudsman report Kiane'), p.7.

¹¹ Ombudsman report Kiane, above n10.

¹² Ombudsman report Kiane, above n10, p.22.

¹³ Ombudsman report Kiane, above n10, p.23.

¹⁴ Ombudsman report Kiane, above n10, p. 24

Why should offshore and onshore refugee/humanitarian applicants be treated differently in relation to the health requirement?

The current government has changed key aspects of the migration regime maintained by the Howard Government by, for instance, abolishing TPV's, and changed detention laws and policies. It has stated that it intends to take a more humane approach to refugee issues. The current Minister for Immigration, Chris Evans has stated 'The Rudd Labor Government brings a different approach to refugee and humanitarian issues.'¹⁵ It has also taken moves to clarify and improve aspects of the Migration Act, by introducing a Complementary Protection Bill into Parliament¹⁶ and clarifying the application of s.501 character decisions.¹⁷ However, not all parts of Migration law in Australia have been amended to reflect this new policy direction, including the health criterion (particularly as it applies to refugees and humanitarian applicants).

The stated rationale for the humanitarian visa stream

In order to properly discuss the application of the health criterion to refugee and humanitarian applicants, it is necessary to refer to the rationale behind the offshore humanitarian visa stream. It has repeatedly been stated that the purpose of the humanitarian stream is to assist those most in need of Australia's protection and assistance. For instance, the then Minister for Immigration, Philip Ruddock stated the following about the aim of the offshore humanitarian programme:

'Australia must contribute its fair share to the resettlement of those in the greatest humanitarian need. This principle is served largely through the off-shore Humanitarian Programme, which devotes very considerable resources to helping identify those most in need of resettlement and supporting them after they arrive in Australia',¹⁸

¹⁵ Chris Evans, Minister for Immigration, at <http://www.chrisevans.alp.org.au/news/0608/immispeeches20-01.php> (accessed 22 October 2009).

¹⁶ *Migration Amendment (Complementary Protection) Bill 2009*, at [http://www.comlaw.gov.au/ComLaw/Legislation/Bills1.nsf/0/B971E3B47D352DA0CA25762C001F3B84/\\$file/r4197b.pdf](http://www.comlaw.gov.au/ComLaw/Legislation/Bills1.nsf/0/B971E3B47D352DA0CA25762C001F3B84/$file/r4197b.pdf) (accessed 23 October 2009).

¹⁷ *Via Direction No 41 – Visa Refusal and Cancellation under s501*, Ministerial Direction under s.499 by Minister for Immigration and Citizenship, 3 June 2009.

¹⁸ Philip Ruddock, 'The Principles of Australian Migration', (2003) 28 *New Zealand International Review*, p.12.

The current government has maintained the granting of priority to offshore humanitarian applicants.

We make three comments about the offshore humanitarian programme here. Firstly, if the rationale for the offshore humanitarian programme is to give resettlement to those most in need, surely refugees and other persons with humanitarian needs living offshore from Australia (eg in refugee camps in Africa) who have *disabilities* qualify as the most in need? One could argue that they are doubly disadvantaged and doubly vulnerable as not only are they refugees, but they are refugees with a disability (see further discussion under ‘Special Needs’, below at p12).

Secondly, if the offshore refugee and humanitarian applicants are those in utmost need, surely they should be treated at least the same as onshore protection visa applications? Whilst we understand the rationale for not applying the health requirement to onshore applicants (as if successful in their refugee claim they cannot be sent back to their country of origin even if they do have a medical condition or disability), we submit that this rationale should also be applied to offshore refugee and humanitarian applicants who also cannot return to their country of origin.

Thirdly, DIAC differentiates between the onshore and offshore programs by stating that Australia is fulfilling its obligations under the 1951 Refugees Convention when considering onshore applications, but that the approval of offshore refugee and humanitarian applications is a discretionary, humanitarian act that is not in direct fulfilment of any international obligations.¹⁹ However, the criteria for the offshore refugee and humanitarian visas (Subclass 200-204) are understood to cover ‘refugee like’ situations and explicitly refer to ‘persecution’.²⁰ Thus, we submit that the same rule in relation to the health cost criterion should apply to both onshore and offshore applicants. This will also be in line with Australia’s move towards introducing

¹⁹ see eg Department of Immigration and Citizenship, ‘Overview of the Offshore Humanitarian Program’, at <http://www.immi.gov.au/visas/humanitarian/offshore/> (accessed 25 October 2009): ‘These categories go beyond our international obligations and have been introduced to enhance our assistance to those in need’.

²⁰ Eg; the requirements for subclass 203 Emergency Rescue visa include that the applicant ‘is subject to persecution in the applicant's home country, whether the applicant is living in the applicant's home country or in another country . . .’: Migration Regulations, para 203.211 (1)(a).

complementary protection into Australian law (via introduction of the *Complementary Protection Bill*²¹), which will give protection to those who may not meet the refugee definition in the 1951 Refugees Convention but who are otherwise in need of Australia's protection (because, for instance, they face torture upon return to their country of origin).²² Equalising the health requirements for onshore and offshore refugee/humanitarian applicants further develops this welcome move to clarify and codify the Migration Act.

We also note that even if currently DIAC²³ or the Minister for Immigration²⁴ is using their discretion to waive the health cost criteria in relation to offshore refugee and humanitarian applicants (with the effect that the health criterion is not usually applied to this category of applicants), then this practice should be clarified and codified via abolition of the health cost requirement for these applicants.

Our submission in relation to refugees and humanitarian applicants has been echoed in the writings of international commentators on health and immigration. Two leading Canadian scholars have, for instance, stated that 'refugees should never be excluded on the grounds of medical inadmissibility'.²⁵

Special needs of disabled refugees and humanitarian applicants

The fact that the health cost criteria is applied to offshore refugee and humanitarian applicants is of concern given the particular vulnerabilities of those applicants who have a disability. Various UN High Commissioners for Refugees have noted the particular needs of such applicants. The current UN High Commissioner for Refugees, António Guterres, has stated:

²¹ *Migration Amendment (Complementary Protection) Bill* 2009, above n17.

²² Please see the definitional sections of the Bill (which are quite complex) for the specific requirements of the proposed visas.

²³ Pursuant to Item 4007, Migration Regulations (even though the discretion is stated there to only apply to considerations of 'undue cost' and 'undue prejudice'). For instance, we note that in PAM3 at para 64.1, DIAC states that: 'In considering the exercise of the health waiver in Class XB cases, officers should consider the closeness of the applicant's links to Australia. As a matter of policy, health waivers are supported in the majority of split family cases. Unless exceptional circumstances exist waiver is not normally supported for applicants without close links to Australia.'

²⁴ Pursuant to s.417 of the Migration Act.

²⁵ Margaret A. Somerville and Sarah Wilson 'Crossing Boundaries: Travel, Immigration, Human Rights and AIDS', (1998) 43 *McGill Law Journal*, 781 at 781.

‘. . . refugees with disabilities are among the most isolated, socially excluded and marginalized of all displaced populations. Too often invisible, too often forgotten and too often overlooked, refugees with disabilities are among the most isolated, socially excluded and marginalized of all displaced populations.’²⁶

The former UN High Commissioner for Refugees, Sadako Ogata, also made similar comments:

“Disabled refugees face a double vulnerability—often the last to receive food, water and care...and, in many situations, viewed as a burden to be left behind.”²⁷

A report by the Women’s Refugee Commission notes that displaced persons with disabilities face serious protection risks in refugee camps:

‘Displaced persons with disabilities also face serious protection risks in camps and urban settings, including exploitation, physical and sexual abuse, harassment, ridicule, discrimination and neglect. Women, children and older persons with disabilities are often the most at risk. Displaced women with physical and mental disabilities are triply marginalized by their status, disability and gender.’²⁸

Recommendation in relation to refugees and other humanitarian applicants

We therefore submit that the likely health costs of an applicant should *not* be a consideration in relation to an application for refugee or humanitarian visa - whether made onshore or offshore. It is important that offshore applications for refugee and

²⁶ António Guterres, UN High Commissioner for Refugees, in Women’s Commission for Refugee Women and Children, *Disabilities among Refugees and Conflict-Affected Populations*, June 2008 at: http://www.womensrefugeecommission.org/docs/disab_fulll_report.pdf (accessed 21 October 2009), p.1 (preface).

²⁷ Sadako Ogata, former UN High Commissioner for Refugees, as cited in Women’s Refugee Commission, *Women’s Commission for Refugee Women and Children, Disabilities among Refugees and Conflict-Affected Populations*, June 2008 at: http://www.womensrefugeecommission.org/docs/disab_fulll_report.pdf (accessed 21 October 2009), at p.6.

²⁸ Women’s Commission for Refugee Women and Children, *Disabilities among Refugees and Conflict-Affected Populations*, June 2008 at: http://www.womensrefugeecommission.org/docs/disab_fulll_report.pdf (accessed 21 October 2009), pp. 6-7.

humanitarian visas be brought in line with onshore refugee visa applications in this respect.

This approach should also apply in relation to family reunification or ‘split family’ visa applications by a recognised refugee or humanitarian visa holder). The reason for this is to recognise the particular vulnerabilities of refugees and humanitarian visa applicants, who come from situations of persecution, torture, ill-treatment and armed conflict. Notably, they are more likely to have injuries and/or disabilities arising from these past experiences. It also recognises that refugees and humanitarian visa holders (who face persecution or other ill-treatment or dangers in their country of origin) cannot return to their country of origin and therefore must be given family reunification rights to enable their families to migrate to Australia.

To this end, we propose splitting the public interest health criteria into three separate categories as follows:

- Revised Item 4005 for migration applications
- Revised Item 4006A for employer-sponsored applications
- New Item 4007 for refugee and humanitarian Categories.

Para 4007 would retain the current public health criterion (relating to tuberculosis and threats to public health in Australia) but should be amended to exclude considerations relating to ‘undue’ health costs. The revised 4007 provision would read as follows:

Migration Regulations Schedule 4

Item 4007 Public Interest Criteria for Applicants for Refugee and Humanitarian Visas (applying to visa Subclasses 200-204)

1. The applicant:

(a) is free from tuberculosis; and

(b) is free from a disease or condition that is, or may result in the applicant being, a threat to public health in Australia or a danger to the Australian community.

2. If the applicant is a person from whom a Medical Officer of the Commonwealth has requested a signed undertaking to present himself or herself to a health authority in the State or Territory of intended

residence in Australia for a follow-up medical assessment, the applicant has provided such an undertaking.

This revised public interest criteria should apply to the following subclasses of visas:

- Subclass 200 Refugee
- Subclass 201 In-country Special Humanitarian
- Subclass 202 Global Special Humanitarian
- Subclass 203 Emergency Rescue.
- Subclass 204 Woman at Risk
- And any other related refugee and humanitarian visa class.

The effect of this new provision will be that offshore applicants will be subject to a health check but, given the humanitarian nature of these visas, the anticipated costs of any medical treatment will not be a factor in the decision to grant the visa. We submit that the health ‘waiver’ outlined in our proposed Reg. 4005 should **not** be applied to refugee and humanitarian-related applications as this would result in unfairness to those applicants. This is because such applicants will, by definition, have great difficulty satisfying many of the economic contribution factors – in particular, education, prospective employment, and assets and income.

(2) Introduction of health waiver for all visa applications (apart from refugee and humanitarian visas)

The current Migration Regulations (Items 4005-07) do not set out provisions requiring decision-makers to consider the social and economic contributions that an applicant with a disability or medical condition may make to Australia. This has caused unfairness in a number of cases.²⁹

Indeed, Dr Mary Crock, writing in 2002, critiqued the health criterion in the Migration Act and Regulations on the basis that they ‘draw no distinction between

²⁹ Eg *Minister for Immigration and Multicultural Affairs v Seligman* 85 FCR 115, 164 ALR 173; *Robinson v Minister for Immigration and Multicultural Affairs* [2005] FCA 1626; *Blair v Minister for Immigration and Multicultural Affairs* [2001] FCA 1014.

disease and disability and allow no kind of balancing process or cost-benefit analysis for persons in either category'.³⁰

We therefore propose that the social and economic contribution of an applicant or an applicant's relative be included as a relevant consideration in the health criteria for all migration visa applications (apart from refugee and humanitarian-related applications, which, as we have recommended above, should be dealt with separately).

The factors to be considered would encompass some of the types of considerations already outlined in the Department of Immigration and Citizenship's Procedurals Manual (PAM3) relating to the health waiver under Item 4007 of the Migration Regulations. However, we propose some additional considerations such as relevant compelling circumstances and Australia's obligations under the various international human rights treaties to which it is a party, including the UN *Convention on the Rights of Persons with Disabilities (CRPD)*, the 1951 *Convention and Protocol relating to the Status of Refugees* (the '*Refugees Convention*'), the *Convention on the Rights of the Child (CROC)*, the *International Covenant on Civil and Political Rights (ICCPR)*; the *International Convention on Economic, Social and Cultural Rights (ICESR)*; and the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)*. We discuss Australia's international human rights obligations in detail below at p.21 onwards. However, we note that the current Items 4005 and 4006A of the Migration Regulations set out rigid criteria which **do not permit flexibility** in relation to the individual circumstances of a particular applicant. We note in this regard that the *CRPD* calls for **flexibility** in decision-making so as to consider the individual circumstances of a person with disability.³¹ We also submit that the decision-making process under the current Regulations is unbalanced to a point that it constitutes unjustified discrimination against people with disabilities (contrary to the *CRPD*).

³⁰ Dr Mary Crock, 'Skilled Migration and the Dictates of Politics and Ideology', in M. Crock (ed), *Nation Skilling: Migration, Labour and the Law in Australia, Canada, New Zealand and the United States*, Asia Pacific Migration Research Network Working Paper 11, Desert Pea Press, 2002 at p.63.

³¹ Article 2 of the *CRPD* "where needed in a particular case".

These changes should be done by amending the *Migration Regulations* 1994 (Cth) or set out in a Ministerial Direction pursuant to s.499 of the *Migration Act* (Cth).³² We believe amendment of the *Migration Regulations* is preferable for reasons of legal clarity, certainty and transparency.

We therefore propose that current Item 4005 of the *Migration Regulations* be repealed and a new Item 4005 be inserted. In formulating this new Item we have utilised, amongst other things, existing Item 4007 guidance from PAM3, Australia's international human rights obligations and the need for flexibility in decision-making in this area. The new Item 4005 we propose is as follows:

Migration Regulations Schedule 4

Item 4005 Public Interest Criteria

The applicant (including any secondary applicant or dependent):

1. *(a) is free from tuberculosis; and*
(b) is free from a disease or condition that is, or may result in the applicant being, a threat to public health in Australia or a danger to the Australian community; and
(c) subject to sub-clause 4005(2) the applicant is not a person who has a disease or condition to which the following subparagraphs apply:
 - (i) the disease or condition is such that a person who has it would be likely to:*
 - (A) require health care or community services; or*
 - (B) meet the medical criteria for the provision of a community service;**during the period of the applicant's proposed stay in Australia;*
 - (ii) provision of the health care or community services relating to the disease or condition 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;**regardless of whether the health care or community services will actually be used in connection with the applicant; and*

³² Section 499(1) of the *Migration Act* empowers the Minister to give to a person or body having functions or powers under the Act written directions not inconsistent with the Act or the Regulations, in accordance with which the person or body shall perform those functions and exercise those powers. The person or body must comply with the Direction. Such a direction has been made, for instance, in relation to the character test under s.510 of the *Migration Act* (Direction no. 41 – Visa Refusal and cancellation under s501', 3 June 2009).

(d) If the applicant is a person from whom a Medical Officer of the Commonwealth has requested a signed undertaking to present himself or herself to a health authority in the State or Territory of intended residence in Australia for a follow-up medical assessment, the applicant has provided such an undertaking.

2. In making a decision under para 1(c) of this Item, the decision maker must make a fair and reasonable decision and take the following considerations into account:

(a) the economic and social contributions that the applicant and/or the applicant's dependents³³ ('the applicants') are likely to make to Australia. This can include:

- (i) educational and trade qualifications;*
- (ii) the applicants' capacity to earn (and pay taxes);*
- (iii) the employment prospects for the applicants in Australia;*
- (iv) the nature of the work that the applicants undertake and whether there is an unmet need for this in Australia³⁴*
- (v) any cultural benefits that the applicants may bring to Australia;³⁵*
- (vi) any voluntary work that the applicants have done in the past or is likely to do in the future;*

(b) the merits of the case (for example, the strength of any humanitarian, compelling or compassionate factors);

(c) whether treatment for the applicant's medical condition or disability is available in their country of nationality;³⁶

(d) the ability of the applicant to limit or defray the anticipated health costs associated with his or her medical condition or

³³ This would cover the Moeller-type situation where the applicant is a parent and the visa is refused on the basis that the applicant's child has a disability. As the Committee would be aware, Dr Moeller application for permanent residency was rejected by the Department of Immigration in 2008 after a Commonwealth medical officer assessed that Dr Moeller's 13-year-old son Lukas would incur significant public health and community care costs due to his Down Syndrome. See discussion in 'Statement by Senator Evans on Dr Bernhard Moeller', Media Release, 26 November 2008, at <http://www.chrisevans.alp.org.au/news/1108/immimediarelease26-01.php>.

³⁴ This is intended to cover the Moeller-type situation where the applicant was satisfying an unmet demand in Australia - working as a doctor in a rural community.

³⁵ For instance, the cultural benefits that an outstanding musician with disabilities may bring to Australia.

³⁶ This is taken from DIAC's Procedurals Manual 'PAM3', para 97.3 and para 99(23). Para 99 sub-para 23 notes that, in considering the merits of a case involving family and humanitarian cases, the decision-maker may discuss 'Treatment not available overseas, although note that Australia is not obligated to treat all patients from countries where there are lesser health facilities'. See also *Direction No 41 – Visa Refusal and Cancellation under s501*, Ministerial Direction under s.499 by Minister for Immigration and Citizenship, 3 June 2009, para 11(c)(i)(A). For a discussion of this issue in relation to international human rights law, see discussion below under 'Australia's International Human Rights Obligations'.

- disability, including a willingness or ability to pay health insurance;*³⁷
- (e) *the degree of care required and the private care and support that is available;*³⁸
 - (f) *any assets and income or other support which may assist in mitigating costs;*
 - (g) *whether the parties involved have established links to Australia (for example through family or from extended periods of residence creating community or economic ties);*
 - (h) *the immigration history of the applicant and sponsor, including, for example, compliance to date with immigration requirements and any undertakings;*
 - (i) *if the applicant is a non-migrating dependant, what arrangements are in place for their care and welfare, and the likelihood of their future migration;*
 - (j) *and any other factors the decision-maker considers relevant.*
3. *In making a decision under this paragraph of the Migration Regulations, the decision-maker must consider Australia's obligations under the international human rights instruments to which it is a party, including (but not limited to):*
- (a) *the Convention on the Rights of Persons with Disabilities (CRPD);*
 - (b) *the non-refoulement obligations contained in the Convention and Protocol relating to the Status of Refugees (the Refugees Convention);*
 - (c) *the best interests of the child, as described in the Convention on the Rights of the Child (CROC);*
 - (c) *the International Covenant on Civil and Political Rights (ICCPR);*
 - (d) *the International Convention on Economic, Social and Cultural Rights (ICESR); and*
 - (e) *the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).*³⁹

³⁷ If desired, payment of health insurance could be made a condition of a grant of a visa. For an example of this, see Subclass 457 visas: from 14 September 2009, under visa Condition 8501, all new Subclass 457 visa holders are responsible for all health costs for themselves and their family. They will be required by law to maintain adequate insurance for these health costs for the length of their visa. Applicants for Subclass 457 visas will need to provide evidence that they have obtained adequate insurance before their visa can be granted. For jurisprudence on the ability of a family to pay for social services, see the Canadian case: *Hilewitz v Canada (Minister of Citizenship and Immigration)*, 2003 FCA 420, 234 D.L.R. (4th) 439, 9 Admin. L.R. (4th) 79, 245 F.T.R. 319, [2004] 1 F.C.R. 696, 312 N.R. 201.

³⁸ This is taken from PAM3 para 97.1. Para 97.2 of PAM3 notes that 'Officers should take into account the willingness and ability of a sponsor, family member or other person or body to provide care and support at no public cost. Such private care cannot, however, be at a level the community would find unacceptable. No person requiring care in Australia should be expected to accept a lesser standard of food, accommodation, work environment or social interaction'.

³⁹ We note that similar considerations are set out as Primary Considerations in para. 10 of *Direction No 41 – Visa Refusal and Cancellation under s501*, Ministerial Direction under s.499 by Minister for Immigration and Citizenship, 3 June 2009.

(3) Employer undertakings as to costs under Item 4006A Migration Regulations

Currently under Item 4006A of the Migration Regulations the Minister may waive the health criteria under para. 1(c) if the relevant employer has given the Minister a written undertaking that he/she will meet **all costs** relating to the disease or condition.

Item 4006A provides:

‘(2) The Minister may waive the requirements of paragraph (1) (c) if the relevant employer has given the Minister a written undertaking that the relevant employer will meet **all costs** related to the disease or condition that causes the applicant to fail to meet the requirements of that paragraph.

(3) In subclause (2), *relevant employer* means the proposed employer (within the meaning of the relevant Part of Schedule 2) in Australia:

(a) of the applicant (if the applicant is an applicant to whom the primary criteria apply); or

(b) if the applicant is an applicant to whom the secondary criteria apply -- of the person:

(i) who meets the primary criteria; and

(ii) of whose family unit the applicant is a member.’

We believe the threshold of ‘all costs’ is too high and suggest amending Reg 4006A (2) to considering whether the employer would meet all **significant costs** related to the disease or condition of the applicant.

Item 4006A should also be amended to include the health requirement ‘waiver’ provisions we have proposed in relation to all visas under Item 4005.

3. AUSTRALIA'S INTERNATIONAL HUMAN RIGHTS OBLIGATIONS

(a) UN Convention on the Rights of Persons with Disabilities (CRPD)

Australia has been a strong supporter of the *CRPD*. It had been actively involved in the drafting process of the Convention before it immediately signed and swiftly ratified it.⁴⁰ Australia has also acceded to the *Optional Protocol to the Convention on the Rights of Persons with Disabilities*.⁴¹

By signing the CRPD, Australia has committed to take 'all appropriate legislative, administrative and other measures of implementation' to ensure the protection of the rights of the disabled.⁴² In particular, we note that the CRPD sets out obligations of States Parties in relation to protection and safety of persons with disabilities in situations of risk (Art. 11); liberty of movement and residence (Art. 18) and obligations in relation to family life (Art. 23).

Article 11 of the Convention provides that:

'States Parties shall take, in accordance with their obligations under international law, including international humanitarian law and international human rights law, all necessary measures to ensure the protection and safety of persons with disabilities in situations of risk, including situations of armed conflict, humanitarian emergencies and the occurrence of natural disasters.'

Article 18(1) provides that:

'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. . .'

⁴⁰ Australia signed the *CRPD* on 30 March 2007, on the day it opened for signature, and ratified it on 17 July 2008.

⁴¹ Australia acceded to the *Optional Protocol to the CRPD* on 21 August 2009.

⁴² *CRPD*, Art. 4(1)(a): 'States Parties undertake to ensure and promote the full realization of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on the basis of disability. To this end, States Parties undertake: (a) To adopt all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the present Convention . . .'. See also Art.5(1): 'States Parties recognize that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law'.

Article 23 provides:

‘3. States Parties shall ensure that children with disabilities have equal rights with respect to family life. With a view to realizing these rights, and to prevent concealment, abandonment, neglect and segregation of children with disabilities, States Parties shall undertake to provide early and comprehensive information, services and support to children with disabilities and their families.

4. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. In no case shall a child be separated from parents on the basis of a disability of either the child or one or both of the parents.’

Australia’s Declaration to the CRPD

In an unfortunate move, Australia has issued an interpretative declaration to the *CRPD* in relation to immigration which states:

‘Australia recognises the rights of persons with disability to liberty of movement, to freedom to choose their residence and to a nationality, on an equal basis with others. Australia further declares its understanding that the Convention does not create a right for a person to enter or remain in a country of which he or she is not a national, nor impact on Australia’s health requirements for non-nationals seeking to enter or remain in Australia, where these requirements are based on legitimate, objective and reasonable criteria.’⁴³

However, this Interpretative Declaration (unlike a Reservation) does not affect Australia’s obligations under international law.

The health criterion and the CRPD

As stated above, the main criticism in regards to Australia’s current treatment of migrants with disabilities is that the decision-making process under the *Migration*

⁴³ Australia’s Declaration to the Convention on the Rights of Persons with Disabilities, 30 march 2007, at www.un.org/disabilities/default.asp?id=475. See discussion of this at www.aph.gov.au/house/committee/jsct/4june2008/report1/chapter2.pdf.

Regulations is unbalanced to a point that it constitutes as unjustified discrimination against people with disabilities.

The *CRPD* clearly prohibits discrimination based on disability.⁴⁴ A provision that differentiates applicants based on whether they have a disease or condition is a distinction on the basis of disability.⁴⁵ It impairs those visa applicants who have disabilities from obtaining immigration status on an equal basis with others, as they have to meet additional criteria that are inherently hard to meet for a majority of people with long-term impairments. According to the *CRPD* this constitutes discrimination.⁴⁶ The *CRPD* has refrained from naming any exclusions or limitations to its provisions on non-discrimination. However, within the application and interpretation of UN human rights treaties, measures that are reasonably and objectively justifiable have been considered not to be discriminatory.⁴⁷

Considerations as to whether potential migrants with disabilities are likely to cause significant costs to domestic health care and community services can be objectively and reasonably justifiable public interests considerations. However, the *CRPD* clarifies that the denial of reasonable accommodation is discrimination and increases scrutiny as to what is objectively and reasonably justifiable.⁴⁸ Reasonable accommodation means that state parties have to (proactively) modify and adjust all those state practices that are necessary and reasonable to realising the human rights of people with disabilities, unless doing so would impose a disproportionate or undue burden.⁴⁹ This will require Australia allocating increased resources to adjust services, products, environments and programmes – typically, hierarchically targeted to citizens, residents, immigrants and aliens. The concept of reasonable accommodation acknowledges that state parties have limited resources available. However, it also

⁴⁴ Article 4 and 5 of the *CRPD*.

⁴⁵ Article 1 of the *CRPD* includes a broad description of disability.

⁴⁶ Article 2 of the *CRPD*. In line with Committee on Economic, Social and Cultural Rights, General Comment No. 5, at para 15; General Comment No. 20, at para 7.

⁴⁷ Committee on Economic, Social and Cultural Rights, General Comment No. 20, E/C.12/GC/20 at para 13.

⁴⁸ Article 2 of the *CRPD*. The Committee on Economic, Social and Cultural Rights, already clarified that denial of reasonable accommodation constitutes discrimination (General Comment No. 5, at para 15).

⁴⁹ Article 2 of the *CRPD*.

calls for **flexibility** to considering the individual circumstances of a person with disability.⁵⁰

However, Australia's current migration law **does not allow for sufficient flexibility** in decision-making to properly assess whether it is reasonable to deny a visa in the individual circumstances for the following reasons.

1. *The initial decision-making criteria is unbalanced*

Under the current Items 4005-07, the assessment of a person's visa application is limited to cost-considerations (with their implicit effects on domestic care and services). While costs under public interests criteria are valid considerations, they should not be the only considerations.

One problem with the current law is that the initial decision-making is based on low threshold requirements: the focus is on the applicant's classification with a disease or condition, the likeliness that the applicant will use domestic care or services and the likeliness that he or she will inflict *significant costs* to domestic care and services. However, a characteristic of disabilities is that impairments are long-term impairments.⁵¹ For a majority of persons with disabilities the decision-making is currently open to rest too readily on the assumption that people with long-term impairments are likely to use health services (because they have long-term impairments they are likely to use services in future) and that they are likely to cause significant costs (because they have long-term impairments they are likely to use services frequently over extended periods of time). However, some kinds of impairment may *not* result in significant costs, may be covered by private funds or may be outweighed by other considerations.

Australian migration law must therefore improve the means by which the likeliness of costs is assessed. The assessment must identify upon what grounds it estimates the different kinds of disability-related costs and base that estimation on reliable data. As stated earlier in this submission, it must also allow for thorough assessment of the individual circumstances not only in

⁵⁰ Article 2 of the *CRPD* "where needed in a particular case".

⁵¹ Article 1 of the *CRPD*.

regards to costs but also in regards to other compelling criteria, including considerations as to whether there are other means to accommodate for the costs arising and whether the burden to health care and community services is outweighed by other compelling reasons.

The Inquiry should also note that current lack of reasonable accommodation contributes to people with disabilities not accessing certain positions in life, such as employment.

2. *The ministerial discretion is limited and imposes a high threshold*

The ministerial discretion in the current Item 4007(2) of the Migration Regulations (dealing with ‘undue cost’ and ‘undue prejudice’) only applies to certain categories of visas. Other visa applicants must rely on applying to the Minister for the exercise of his/her discretion under s.417 of the Migration Act. Under the ‘undue burden’ and ‘undue prejudice’ requirements in current Item 4007(2), the scope of reconsideration is limited to cost considerations and the threshold is high as it requires that there is no undue burden or prejudice in relation to existing care and services. We note that many people with long-term impairments require frequent use of health care and community services and are liable to be systematically excluded under this criterion.

We also make the following general comments about the *CRPD* and the Australian health criterion:

(i) Reasonable accommodation

The concept of reasonable accommodation is not a new concept in the international human rights framework. However, it has significantly gained importance by being explicitly included in the text of the *CRPD* as one of its central underlying principles. Given Australia’s commitment to improving access to facilities for persons with disabilities, the interpretation of migration law should be open to Australia’s concurrent standard on integrating people with disabilities. For example, if Australia has significantly improved access to employment for people with disabilities, this

consideration should be taken into account for the question whether an applicant with disabilities will be likely to be employed.

(ii) Children with disabilities and family unity

In considering Australia's commitment to the UN *Convention on the Rights of the Child* and the UN *Convention on the Rights of Persons with Disabilities*,⁵² the revision of the current regulations should respect Australia's obligation to protect children with disabilities and to respect home and the family. Family members or spouses of applicants with disabilities should not be systematically excluded from immigration status based on an assessment solely focused on costs. The conditions of the family, e. g. whether they are highly skilled migrants or have funds to cover excessive costs should be considered. It is important to point out that such considerations will not necessarily be covered if the Migration law is simply amended to set out factors relating to the social and economical contributions of the applicant.

(iii) Cause and degree of disability

It is important to point out that regardless of the question whether non-citizens can claim equal treatment under the application of Australian law, Australia has committed itself to free its laws of discrimination against people with disabilities. It must also allow flexibility to consider the cause and degree of the disability: If the health status of refugees resulted in disability due to extreme conditions in detention under Australian authority, Australia should not exclude them from gaining migration status because of that disability.⁵³

⁵² Article 7 of the *CRPD*.

⁵³ See also discussion of the UN Human Rights Committee decision in *C v Australia* below at p.26.

(b) The ICCPR and CAT - Inadequate health care in country of nationality as inhuman and degrading treatment

Article 7 of the *ICCPR* provides that ‘No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. . .’.⁵⁴ Article 3 of *CAT* sets out a specific obligation in relation to return of a person to torture:

‘No State Party shall expel, return (refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture’.⁵⁵

A situation may arise where a person comes to Australia on a student or business visa, and once in Australia, applies for a residence visa. During his or her stay in Australia, an applicant may contract an illness or develop a disability and be liable to be sent home on the basis of the health criterion. In such cases, there may be an argument that the health treatment that can be provided to the applicant in their country of origin is so unsatisfactory that it amounts to ill-treatment under *CAT* or the *ICCPR*. It is therefore very important for decision-makers to consider this factor when deciding whether to refuse a visa and return someone with a serious illness to a country where they will not get treatment for that illness.⁵⁶

In *C v Australia*⁵⁷ the UN Human Rights Committee considered the case of C. who was an Iranian national who had been imprisoned in Australia, had suffered serious psychological problems whilst incarcerated and was subject to a deportation order. The Human Rights Committee held that on the facts deporting C. to Iran would breach Article 7 of the *ICCPR*. In doing so they noted that it had been accepted by the Australian Administrative Tribunal that it was unlikely that the only effective medication for the complainant (Clozaril) and back-up treatment would be available in Iran. It attached weight to the fact that the author was originally granted refugee

⁵⁴ *International Covenant on Civil and Political Rights* (16 December 1966) 999 UNTS 171, entered into force 23 March 1976 (‘*ICCPR*’): Article 7.

⁵⁵ *UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Art. 3.

⁵⁶ See our proposed new Item 4005 discussed above.

⁵⁷ *C v Australia*, UN Human Rights Committee, Communication No. 900/1999, CCPR/C/76/D/900/1999, 13 November 2002, (2002) 10 IHRR 364, at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/f8755fbb0a55e15ac1256c7f002f17bd?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/f8755fbb0a55e15ac1256c7f002f17bd?Opendocument) (accessed 25 October 2009).

status on the basis of a well-founded fear of persecution as an Assyrian Christian and the likely consequences of a return of his illness.⁵⁸ Thus the Committee held:

In circumstances where the State party has recognized a protection obligation towards the author, the Committee considers that deportation of the author to a country where it is unlikely that he would receive the treatment necessary for the illness caused, in whole or in part, because of the State party's violation of the author's rights would amount to a violation of article 7 of the Covenant.⁵⁹

The Committee stated that Australia should refrain from deporting C. to Iran and also noted that Australia was under an obligation to avoid similar violations in the future.⁶⁰

Guidance on the meaning of inhuman treatment in the health area can also be obtained from jurisprudence of the European Court of Human Rights. Article 3 of the *European Convention on Human Rights (ECHR)*⁶¹ sets out a similar provision to the *ICCPR*, providing that 'no one shall be subjected to torture or to inhuman or degrading treatment or punishment'. The leading case on the issue of return of a person to inadequate health treatment is *D. v. the United Kingdom*.⁶² In that case, the Court found that the deportation of a drug trafficker with HIV/AIDS to St Kitts, where it was agreed that health facilities were inadequate⁶³, would breach Article 3 of the ECHR. Significantly, D had been receiving treatment and counselling in the UK for four years. The majority of the European Court of Human Rights held that removal to St Kitts 'will hasten his death' and that:

'There is a serious danger that the conditions which await him in St Kitts will further reduce his already limited life expectancy and subject him to acute mental and physical suffering'.⁶⁴

The Court held that his removal would expose him to a real risk of dying under most distressing circumstances and would thus amount to inhuman treatment.⁶⁵

⁵⁸ *C v Australia*, above n58 at para 8.5.

⁵⁹ *C v Australia*, above n58 at para 8.5.

⁶⁰ *C v Australia*, above n58 at para 10.

⁶¹ *European Convention for the Protection of Human Rights and Fundamental Freedoms and its protocols*, Rome, 4 November 1950, in force 3 September 1953, ETS 5, 213 UNTS 221 ('ECHR').

⁶² *D v United Kingdom*, Application No. 30240/96, 2 May 1997 (1997) 24 EHRR 423.

⁶³ There was evidence from various bodies that the medical facilities in St Kitts did not have the capacity to provide the medical treatment that the applicant would require.

⁶⁴ *D v United Kingdom*, above n63 at 425.

The reasoning of the Court means that a case must be exceptional and very serious in order to meet this very high threshold. Later decisions have highlighted this.⁶⁶ Essentially, two conditions must be satisfied for a foreign national with HIV or other similarly serious illness to resist removal to their country of origin. Firstly, only people in an ‘advanced or terminal’ stage of a ‘terminal and incurable’ illness will qualify. Secondly, there must be an absolute (not relative) lack of effective treatment in the person’s country of origin. Speculative evidence of lack of treatment will not be enough to resist removal.⁶⁷

4. A COMPARATIVE ANALYSIS OF SIMILAR MIGRANT RECEIVING COUNTRIES

For the purpose of this Inquiry, the authors conducted extensive research of similar migrant receiving countries, including the UK, Canada, New Zealand and the USA.

United Kingdom

In the UK, the requirements as to health are set out in the *Immigration Rules*, which provide the following:

36. A person who intends to remain in the United Kingdom for more than 6 months should normally be referred to the Medical Inspector for examination. If he produces a medical certificate he should be advised to

⁶⁵ *D v United Kingdom*, above n63 at 425.

⁶⁶ The high threshold required by *D v UK* was noted by the UK House of Lords in *N v Secretary of State for the Home Department* [2005] UKHL 31. The House of Lords concluded that difficulty in obtaining suitable medication in Uganda which would result in a drastically reduced life expectancy for a woman with HIV/AIDS was not exceptional enough to reach the very high threshold required to establish a breach of Article 3 of the ECHR. This approach was confirmed on appeal to the European Court of Human Rights which held that expulsion would *not* cause a violation of Article 3. The Court set out the principles which apply in cases of expulsion of severely ill persons: (1) the seriousness and stage of the illness; (2) the availability of adequate treatment in the country of destination; (3) the availability of support by one's relatives. It held that such expulsion would violate Article 3 only in ‘very exceptional cases’: see *N v UK*, App. No. 26565/05, Grand Chamber Judgment of 27 May 2008.

⁶⁷ This issue was also considered in the ECHR case *Bensaid v UK*. [2001] 33 EHRR 10. In this case the European Court of Human Rights confirmed that the question was whether there was an *absolute*, not a *relative*, lack of effective treatment in the applicant’s country of nationality. That is, they held, a lower quality of medical treatment in the foreign national’s country of origin, compared to the quality of UK treatment, would not be sufficient to resist removal.

hand it to the Medical Inspector. Any person seeking entry who mentions health or medical treatment as a reason for his visit, or who appears not to be in good mental or physical health, should also be referred to the Medical Inspector; and the Immigration Officer has discretion, which should be exercised sparingly, to refer for examination in any other case.

37. Where the Medical Inspector advises that a person seeking entry is suffering from a specified disease or condition which may interfere with his ability to support himself or his dependants, the Immigration Officer should take account of this, in conjunction with other factors, in deciding whether to admit that person. The Immigration Officer should also take account of the Medical Inspector's assessment of the likely course of treatment in deciding whether a person seeking entry for private medical treatment has sufficient means at his disposal.

38. A returning resident should not be refused leave to enter or have existing leave to enter or remain cancelled on medical grounds. But where a person would be refused leave to enter or have existing leave to enter or remain cancelled on medical grounds if he were not a returning resident or in any case where it is decided on compassionate grounds not to exercise the power to refuse leave to enter or to cancel existing leave to enter or remain, or in any other case where the Medical Inspector so recommends, the Immigration Officer should give the person concerned a notice requiring him to report to the Medical Officer of Environmental Health designated by the Medical Inspector with a view to further examination and any necessary treatment.

Under Immigration Rule 320(7) a person can be refused leave to enter the UK where the Medical Inspector has confirmed that, for medical reasons, it is 'undesirable' to admit that person. There are two exceptions to this: (a) a person settled in the UK and (b) where the Immigration Officer is satisfied that there are 'strong compassionate reasons justifying admission'.

Applicants who claim that they have a medical condition or disability for which they will receive inadequate medical care in their country of origin may apply for discretionary leave to remain in the UK. In order for this to be approved, the case must meet the requirements of Art. 3 of the *ECHR*.⁶⁸

⁶⁸ See discussion above under 'International Human Rights Obligations'.

Canada

Under Canadian law the test utilised in relation to health requirements for immigrants is whether the applicant will cause ‘excessive demand’ on health services. Section 38 of the *Immigration and Refugee Protection Act* provides:

38. (1) A foreign national is inadmissible on health grounds if their health condition

- (a) is likely to be a danger to public health;
- (b) is likely to be a danger to public safety; or
- (c) might reasonably be expected to cause excessive demand on health or social services.⁶⁹

Section 38(2) then exempts certain persons from the ‘excessive demand’ health requirement:

Section 38 (2)
Paragraph (1)(c) does not apply in the case of a foreign national who

- (a) has been determined to be a member of the family class and to be the spouse, common-law partner or child of a sponsor within the meaning of the regulations;
- (b) has applied for a permanent resident visa as a Convention refugee or a person in similar circumstances;
- (c) is a protected person; or
- (d) is, where prescribed by the regulations, the spouse, common-law partner, child or other family member of a foreign national referred to in any of paragraphs (a) to (c).

Thus, like Australia, Canada does not impose a health cost requirement for onshore refugee applicants or ‘protected persons’.⁷⁰ Unlike Australia, Canada has an exception to the health cost requirement for:

- a spouse, common law partner or child of a Canadian sponsor

⁶⁹ For further information on the procedure used in Canada to determine whether an individual is likely to cause an excessive demand, see Canadian Migration Institute, ‘Excessive Demand Cost Threshold’, at https://www.cmi-icm.ca/content/Excessive_Demand; and Department of Citizenship and Immigration Canada, ‘Designated Medical Practitioner Handbook’, at <http://www.cic.gc.ca/english/resources/publications/dmp-handbook/index.asp>.

⁷⁰ ‘Protected persons’ are those onshore applicants who would be subject to, inter alia, torture upon return to their country of nationality, that is, what is known as ‘complementary protection’: see s97 of the Immigration and Refugee Protection Act, Canada, at http://laws.justice.gc.ca/en/showdoc/cs/I-2.5/bo-ga:1_2/20091021/en#anchorbo-ga:1_2.

- a spouse, common law partner or child of an onshore refugee or protected persons applicant.

Like Australia, Canadian law does not appear to take account of the economic and social contributions that a particular applicant may make to the country when considering the ‘excessive demand’ health cost requirement. However, decisions of the courts do appear to allow for consideration of compassionate or humanitarian circumstances.⁷¹

It is significant that a Canadian report on migration *Not Just Numbers: A Canadian Framework for Future Immigration*⁷² held that close relatives of a sponsor (spouses and dependent children) should be exempted from the Canadian health cost requirement.⁷³ It held:

‘While the Canadian public must clearly continue to be protected from contagious disease, the excessive cost provision applied to spouses and dependent children is, in our view, inhumane, slow and expensive to administer. . . few Canadians should accept that the government separate them permanently from their new wife or new husband, or their six-year old child, on the grounds that they are deaf and mute, or developed cancer or a heart condition’.⁷⁴

For further detail about the way in which the Canadian law operates in this area, we refer the Committee to jurisprudence on the issue⁷⁵ and some useful journal articles.⁷⁶

⁷¹ See eg *Bahsous v Canada (Minister of Citizenship and Immigration)*, 10 Imm. L.R.(3d) 194 involving a family group who were stateless and had disabilities. The court held there were sufficient compassionate or humanitarian considerations to warrant granting of special relief.

⁷² Canada: Minister of Employment and Immigration, *Not Just Numbers: A Canadian Framework for Future Immigration* (Ottawa: Minister of Public Works and Government Services, 1997)

⁷³ Under Canadian law, applicants for visas can be deemed inadmissible if it is decided that a disability will cause ‘excessive cost’ to Canada.

⁷⁴ Canada: Minister of Employment and Immigration, *Not Just Numbers: A Canadian Framework for Future Immigration* (Ottawa: Minister of Public Works and Government Services, 1997), p50

⁷⁵ see eg *Deol v Canada (Minister of Employment and Immigration)*, 18 Imm. L.R. (2d) 1, 145 N.R. 156, 1992 (Fed CA); *Hilewitz v Canada (Minister of Citizenship and Immigration)*, 2003 FCA 420, 234 D.L.R. (4th) 439, 9 Admin. L.R. (4th) 79, 245 F.T.R. 319, [2004] 1 F.C.R. 696, 312 N.R. 201; *Colaco v Canada (Minister of Citizenship and Immigration)*, 2006 FC 896, 55 Imm. L. R. (3d) 192, 297 FTR 254; *Alli v Canada (Minister of Citizenship and Immigration)*, 200, 10 Imm. L.R. (3d) 184; *Bahsous v Canada (Minister of Citizenship and Immigration)*, 10 Imm. L.R.(3d) 194.

⁷⁶ Mosoff, J. ‘Excessive Demand on the Canadian Conscience: Disability, Family and Immigration’ (1998-1999) 26 *Manitoba Law Journal* 149; Bellissimo, M., ‘Medical Inadmissibility: A Dollar a

New Zealand

New Zealand structures its health criterion in a similar fashion to that of Australia. Its 'Government Residence Policy' in its Operations Manual provides that applicants for residence visas and permits must have an 'acceptable standard of health unless they have been granted a medical waiver'.⁷⁷ Certain categories of persons are able to argue medical waiver.⁷⁸ The criteria for a medical waiver are set out in Pt A4.70 of the NZ Operations Manual as follows:

A4.70 Determination of whether a medical waiver should be granted (residence and temporary entry)

See [A4](#) (before 28/11/2005)

- a. Any decision to grant a medical waiver must be made by an officer with schedule 1 delegations (see [A15.4](#)).
- b. When determining whether a medical waiver should be granted, visa and immigration officers must consider the circumstances of the applicant to decide whether they are compelling enough to justify allowing entry to, and/or a stay in New Zealand.
- c. Factors that officers may take into account in making their decision include, but are not limited to, the following:
 - i. the objectives of Health requirements policy (see [A4.1](#)) and the objectives of the policy or category under which the application has been made;
 - ii. the degree to which the applicant would impose significant costs and/or demands on New Zealand's health or education services;
 - iii. whether the applicant has immediate family lawfully and permanently* (see [F4.5.1](#)) resident in New Zealand and the circumstances and duration of that residence (unless the limitations on the grant of medical waivers set out at [A4.60\(c\)](#) apply);
 - iv. whether the applicant's potential contribution to New Zealand will be significant;
 - v. the length of intended stay (including whether a person proposes to enter New Zealand permanently or temporarily).
- d. An applicant who is the partner* or dependent child* of a New Zealand citizen or resident, may generally be granted a medical waiver unless there are specific reasons for not granting such a waiver or the limitations on the grant of medical waivers to such persons set out at [A4.60](#) (c) apply.

Day May Keep Canada Away!', (2008) 70 *Immigration Law Reporter* (3rd Series) 184. Note: both articles are available via the Westlaw database.

⁷⁷ NZ Government Residence policy AA4.10.

⁷⁸ See NZ Operations Manual A4.60 etc, at http://www.immigration.govt.nz/NZIS/operations_manual.

e. Officers should consider any advice provided by an Immigration New Zealand medical assessor on medical matters pertaining to the grant of a waiver, such as the prognosis of the applicant.

f. Officers must record decisions to approve or decline a medical waiver, and the full reasons for such a decision.⁷⁹

There are a number of cases decided by the New Zealand Residence Review Board which illustrate the way in which this medical waiver is applied in practice.⁸⁰ In particular, we refer to the decision in *Residence Appeal 16148*.⁸¹

We also refer to Committee to an informative, recent conference paper on the use of medical waivers in New Zealand which may be of interest.⁸²

We feel that the New Zealand medical waiver criteria provide a good example of the factors which should be included in Australian law. However, we would propose additional factors specifically relating to Australia's international human rights obligations.

USA

Section 212(a)(1)(a) of the US *Immigration and Nationality Act* sets out the grounds for ineligibility for a visa on health-related grounds. The provisions very much centre on threats to public health, with the requirements covering a communicable disease of public health significance, vaccination requirements and physical or mental disorders that may pose certain threats.

More specifically, Section 212 provides

⁷⁹ http://www.immigration.govt.nz/NZIS/operations_manual/7580.htm

⁸⁰ see eg Decision of the NZ Residence Review Board in Residence Appeal No. 16098, 29 June 2009; Decision of the NZ Residence Review Board in Residence Appeal No. 16219, 6 July 2009; and Decision of the NZ Residence Review Board in Residence Appeal No. 16148, 31 July 2009; all available at [www. Residencereviewboard.govt.nz](http://www.Residencereviewboard.govt.nz).

⁸¹ Residence Review Board of New Zealand, Residence Appeal 16148, 31 July 2009, at http://www.residencereviewboard.govt.nz/PDFs/res_20090731_16148a.pdf.

⁸² 'Medical Waivers', LexisNexis Conference, Auckland, 16 July 2009, at [http://www.rykenlaw.co.nz/docfiles/Medical%20Waivers%20\(July%202009\)%20Part%201.pdf](http://www.rykenlaw.co.nz/docfiles/Medical%20Waivers%20(July%202009)%20Part%201.pdf)

Section 212. [8 U.S.C. 1182]

(a) Classes of Aliens Ineligible for Visas or Admission.-Except as otherwise provided in this Act, aliens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States:

(1) Health-related grounds.-

(A) In general.-Any alien-

(i) who is determined (in accordance with regulations prescribed by the Secretary of Health and Human Services) to have a communicable disease of public health significance;

(ii) except as provided in subparagraph (C) seeks admission as an immigrant, or who seeks adjustment of status to the status of an alien lawfully admitted for permanent residence, and who has failed to present documentation of having received vaccination against vaccine-preventable diseases, which shall include at least the following diseases: mumps, measles, rubella, polio, tetanus and diphtheria toxoids, pertussis, influenza type B and hepatitis B, and any other vaccinations against vaccine-preventable diseases recommended by the Advisory Committee for Immunization Practices,

(iii) who is determined (in accordance with regulations prescribed by the Secretary of Health and Human Services in consultation with the Attorney General)-

(I) to have a physical or mental disorder and behavior associated with the disorder that may pose, or has posed, a threat to the property, safety, or welfare of the alien or others, or

(II) to have had a physical or mental disorder and a history of behavior associated with the disorder, which behavior has posed a threat to the property, safety, or welfare of the alien or others and which behavior is likely to recur or to lead to other harmful behavior, or

(iv) who is determined (in accordance with regulations prescribed by the Secretary of Health and Human Services) to be a drug abuser or addict, is inadmissible.

(B) Waiver authorized.-For provision authorizing waiver of certain clauses of subparagraph (A), see subsection (g).

Section 212(g) of the US *Immigration and Nationality Act* sets out circumstances where the above requirement can be waived. A section 212(g) waiver is available only

to applicants with a qualifying family member (i.e. a U.S. citizen or lawful permanent resident spouse, son, daughter, or parent):

Section 212(g):

‘The Attorney General may waive the application of (1) subsection (a)(1)(A)(i) in the case of any alien who:

(A) is the spouse or the unmarried son or daughter, or the minor unmarried lawfully adopted child, of a United States citizen, or of an alien lawfully admitted for permanent residence, or of an alien who has been issued an immigrant visa,

(B) has a son or daughter who is a United States citizen, or an alien lawfully admitted for permanent residence, or an alien who has been issued an immigrant visa; in accordance with such terms, conditions, and controls, if any, including the giving of bond, as the Attorney General, in the discretion of the Attorney General after consultation with the Secretary of Health and Human Services, may by regulation prescribe; or

(C) qualifies for classification under clause (iii) or (iv) of section 204(a)(1)(A) or classification under clause (ii) or (iii) of section 204(a)(1)(B). . .⁸³

In proceedings for application of the waiver under section 212(g), the burden of proving eligibility rests with the applicant.⁸⁴

The US has a particular policy in relation to applications involving persons with HIV status. For instance, a waiver of inadmissibility may be made in relation to certain classes of visas where the applicant has made arrangements for medical care in the US and the cost of any medical services will not be borne by any US agency, without the consent of that agency.⁸⁵

⁸³ Section 204 of the *US Immigration and Nationality Act* 8 U.S.C. 1361.

⁸⁴ See Section 291 of the *US Immigration and Nationality Act*, 8 U.S.C. 1361.

⁸⁵ see US Citizenship and Immigration Services Interoffice Memo, 2 November 2004, at: <http://www.docstoc.com/docs/1068727/Exception-to-Nonimmigrant-HIV-Waiver-Policy-for-K-and-V-Nonimmigrants-Adjudicator-s-Field-Manual-Update> (accessed 22 October 2009).

5. CONCLUSIONS

We believe that the Migration Regulations need to be updated to reflect the increased recognition of the needs of persons with disabilities, as reflected in Australia's ratification of the *Convention on the Rights of Persons with Disabilities*. In light of this, the health criterion in Items 4005 and 4006A of the *Migration Regulations* should be amended to take account of the economic and social contributions of persons with disabilities, and Australia's international human rights obligations.

Moreover, the health criterion for offshore refugee and humanitarian applicants needs to be brought in line with onshore applications so that decisions on these categories of applicants are based on humanitarian need, rather than on the health costs associated with any disability or medical condition. The current use of ministerial discretion in relation to these applicants is not satisfactory in this regard.

Thus, in conclusion we reiterate our recommendations to the Inquiry Committee:

Recommendations

We recommend that the current Public Interest Criteria under Items 4005, 4006A and 4007 of the Migration Regulations be amended as follows:

Recommendation 1

A separate public health criterion for refugee and humanitarian applicants be inserted into the Migration Regulations (via a new Item 4007) which contains no health cost criterion.

Recommendation 2

Item 4005 of the Migration Regulations be amended to include considerations relating to the economic and social contributions that an applicant is likely to make to Australia, relevant compelling circumstances and Australia's international human rights obligations

Recommendation 3

Item 4006A of the Migration Regulations be amended to require an undertaking to contribute 'significant costs' rather than full costs.

Recommendation 4

That decisions made pursuant to the revised Items 4005-4007 be judicially reviewable.

CONTACT DETAILS FOR SUBMISSION WRITERS

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Other

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APPENDIX 1

SUMMARY OF AMENDMENTS TO THE MIGRATION REGULATIONS PROPOSED BY SUBMISSION

Migration Regulations Schedule 4

Item 4005 Public Interest Criteria

The applicant (including any secondary applicant or dependent):

1. (a) is free from tuberculosis; and
(b) is free from a disease or condition that is, or may result in the applicant being, a threat to public health in Australia or a danger to the Australian community; and
(c) subject to sub-clause 4005(2) the applicant is not a person who has a disease or condition to which the following subparagraphs apply:
 - (i) the disease or condition is such that a person who has it would be likely to:
 - (A) require health care or community services; or
 - (B) meet the medical criteria for the provision of a community service;during the period of the applicant's proposed stay in Australia;
 - (ii) provision of the health care or community services relating to the disease or condition 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;regardless of whether the health care or community services will actually be used in connection with the applicant; and
 - (d) If the applicant is a person from whom a Medical Officer of the Commonwealth has requested a signed undertaking to present himself or herself to a health authority in the State or Territory of intended residence in Australia for a follow-up medical assessment, the applicant has provided such an undertaking.
-
2. In making a decision under para 1(c) of this Item, the decision maker must make a fair and reasonable decision and take the following considerations into account:
 - (a) the economic and social contributions that the applicant and/or the applicant's dependents ('the applicants') are likely to make to Australia. This can include:
 - (i) educational and trade qualifications;
 - (ii) the applicants' capacity to earn (and pay taxes);
 - (iii) the employment prospects for the applicants in Australia;
 - (iv) the nature of the work that the applicants undertake and whether there is an unmet need for this in Australia;

- (v) any cultural benefits that the applicants may bring to Australia;⁸⁶
 - (vi) any voluntary work that the applicants have done in the past or is likely to do in the future;
- (b) the merits of the case (for example, the strength of any humanitarian, compelling or compassionate factors);
 - (c) whether treatment for the applicant's medical condition or disability is available in their country of nationality;
 - (d) the ability of the applicant to limit or defray the anticipated health costs associated with his or her medical condition or disability, including a willingness or ability to pay health insurance;
 - (e) the degree of care required and the private care and support that is available;
 - (f) any assets and income or other support which may assist in mitigating costs;
 - (g) whether the parties involved have established links to Australia (for example through family or from extended periods of residence creating community or economic ties);
 - (h) the immigration history of the applicant and sponsor, including, for example, compliance to date with immigration requirements and any undertakings;
 - (i) if the applicant is a non-migrating dependant, what arrangements are in place for their care and welfare, and the likelihood of their future migration;
 - (j) and any other factors the decision-maker considers relevant.
3. In making a decision under this paragraph of the Migration Regulations, the decision-maker must consider Australia's obligations under the international human rights instruments to which it is a party, including (but not limited to):
- (a) the Convention on the Rights of Persons with Disabilities (CRPD);
 - (b) the non-refoulement obligations contained in the Convention and Protocol relating to the Status of Refugees (the Refugees Convention);
 - (c) the best interests of the child, as described in the Convention on the Rights of the Child (CROC);
 - (c) the International Covenant on Civil and Political Rights (ICCPR);
 - (d) the International Convention on Economic, Social and Cultural Rights (ICESR); and
 - (e) the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).

⁸⁶ For instance, the cultural benefits that an outstanding musician with disabilities may bring to Australia.

Item 4006A Employer Sponsorship

The applicant (including any secondary applicant or dependent):

1. (a) is free from tuberculosis; and
(b) is free from a disease or condition that is, or may result in the applicant being, a threat to public health in Australia or a danger to the Australian community; and
(c) subject to sub-clause 4005(2) the applicant is not a person who has a disease or condition to which the following subparagraphs apply:
 - (i) the disease or condition is such that a person who has it would be likely to:
 - (A) require health care or community services; or
 - (B) meet the medical criteria for the provision of a community service;during the period of the applicant's proposed stay in Australia;
 - (ii) provision of the health care or community services relating to the disease or condition 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;regardless of whether the health care or community services will actually be used in connection with the applicant; and
 - (d) If the applicant is a person from whom a Medical Officer of the Commonwealth has requested a signed undertaking to present himself or herself to a health authority in the State or Territory of intended residence in Australia for a follow-up medical assessment, the applicant has provided such an undertaking.
2. The Minister may waive the requirements of paragraph (1)(c) if the relevant employer has given the Minister a written undertaking that the relevant employer will meet **all significant costs** related to the disease or condition that causes the applicant to fail to meet the requirements of that paragraph.
3. In subclause (2), *relevant employer* means the proposed employer (within the meaning of the relevant Part of Schedule 2) in Australia:
 - (a) of the applicant (if the applicant is an applicant to whom the primary criteria apply); or
 - (b) if the applicant is an applicant to whom the secondary criteria apply -- of the person:
 - (i) who meets the primary criteria; and
 - (ii) of whose family unit the applicant is a member.'
4. [insert health waiver provisions set out under Item 4005] In making a decision under para 1(c) of this Item, the decision maker must make a fair and reasonable decision and take the following considerations into account:
 - (a) the economic and social contributions that the applicant and/or the applicant's dependents ('the applicants') are likely to make to Australia. . . . [see Item 4005 above]

Item 4007 Public Interest Criteria for Applicants for Refugee and Humanitarian Visas (applying to visa Subclasses 200-204)

1. The applicant:

(a) is free from tuberculosis; and

(b) is free from a disease or condition that is, or may result in the applicant being, a threat to public health in Australia or a danger to the Australian community.

2. If the applicant is a person from whom a Medical Officer of the Commonwealth has requested a signed undertaking to present himself or herself to a health authority in the State or Territory of intended residence in Australia for a follow-up medical assessment, the applicant has provided such an undertaking.