

Submission No 14

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**Submission to the Inquiry into the migration treatment
of disability**

October 2009

**A parents view and personal experience of being rejected a visa
due to the migration treatment of disability.**

By

Dermot Hogan

This submission will detail my personal experiences of the migration process adopted in Australia and how the current procedure on the treatment of people with a disability affects those who have been directly impacted by it. It will attempt to focus on the terms of reference for this inquiry, in particular, the third term of reference - *report on whether the balance between the economic and social benefits of the entry and stay of an individual with a disability, and the costs and use of services by that individual, should be a factor in a visa decision.*

I will give an account of what happened during my visa application, my opinion on the outcome of this application and the processes involved, and on whether the current process of assessing a visa applicant against the health requirement is fair and transparent. This submission will conclude with my recommendations in relation to the treatment of people with disabilities for migration, with the aim of highlighting to the inquiry committee the effect the current process has on those directly impacted.

Background

In February 2009 I was successful in gaining employment with a large Australian company, who employ more than 30000 people. The job offer included a 457 visa application for me and my family to relocate to Sydney, which would have allowed me to work for the company for 4 years. A migration agent was appointed by the company to facilitate the visa application. The visa application (TRN: egns3cxe) included my partner, her son and I. My partners son, Jake, is 8 years old and diagnosed with Down Syndrome. Jake has a mild to moderate level of Down Syndrome, and is in perfect health with no need for any ongoing medications or medical attention. He is developing very well in all elements of his education and is a perfectly fit, healthy and active 8 year old who contributes so much to everyone who meets him. He attends a special needs school instead of a mainstream school at this stage which is out of our choice due to the standard of mainstream schools within our area.

For our visa application we were required to undertake a medical for Jake, which was done by a panel doctor here in the UK. As part of the medical, the panel doctor requested that we send him Jakes statement of special needs and details of his medical history. A statement of special needs in the UK is very much a focus on the areas of a child's development that need the attention, so it is not a very positive outlook at them when read in isolation and not knowing the child. It does not detail what attributes they are succeeding in and without knowing this it makes it difficult to have a rounded view on the child.

Our visa application was submitted in March 2009. We were informed around mid June 2009 by the agent employed by the potential employers that the visa was rejected as Jake had failed the health requirements and the sponsors were unwilling to give an undertaking to cover the costs quoted within the Form 884. The costs quoted were \$50000 for the period of the visa, which were above the threshold level.

Observations

I obtained a copy of the Health Waiver Costing Advice and form 884 – opinion of a medical officer of the Commonwealth, so I could try to fully understand the reasons behind the visa rejection. The \$50000 costs were attributed to the likely provision of community services relating to special schooling and that the costs were deemed significant. It stated that *“the applicant attended a school for children with special needs. The applicants learning problems often require one – one support in the classroom. These community services will be a significant cost”*. Yes, it is true that Jake attends a school for children with special needs, out of our choice, but he does not get any extra one – one tuition that any other pupil would. He does not have a dedicated teaching resource purely for his one – one teaching. The class teacher will spend some time with him, as any teacher in any level school would with any child, to ensure he understands what is being taught. To say his special schooling would be a significant cost doesn’t add up as if Jake had of enrolled in a school in Australia he would be taught in the same way as any other student, without having to employ a one – one resource purely for him. So it was a frustration that such costs were calculated, and also that we had no way to challenge the costing or to have a human conversation with the Medical Officer of the Commonwealth (MOC) about this. Once they calculated this cost, incorrectly in my opinion, then it was an immediate visa rejection. We had no way to provide any input into it.

A key issue in relation to this is the lack of transparency of the entire health assessment and how all rules and regulations seem to be locked away, where the applicant cannot understand why such a decision has been made and where the actual costing figures have come from. Also, one must question the entire process where the opinion of the MOC seems like it cannot be challenged or questioned by anyone, no matter what level.

The form quotes that the cost is ‘consistent with the health care and community services that would be provided to a hypothetical person with the same form and level of the condition suffered by the applicant’. The hypothetical person test seems a very unfair and unjust process. Why are those with a disability treated as

a hypothetical person when each person is different and their needs and potential costs varied? Ultimately the applicant is seen as nothing more than a cost to the state, where their benefits to the state are never considered. The migration policy in place displays a view, in my opinion, that if you have a disability you have no potential to be of any use to state?

The 457 visa is an extremely restrictive visa, which, I believe, offered no risk at all to Australia. I would have been filling a job gap in the Australian market, paying taxes and not having access to any care allowances or benefits for Jake, and also have to cover all medical costs and ensure I had private medical insurance. Our visa application was rejected on the grounds of a cost for special schooling, where under the 457 visa conditions I would have had to pay costs for schooling in NSW, and I had no problems covering any such costs and any further costs for Jakes schooling if required. The medical officer also stated that Jake would not have prejudiced the access to health care or community services of any Australian citizen or permanent resident, so why reject someone on the basis of a potential, and in my opinion an incorrect, cost (which is not a true reflection of the persons situation due to the hypothetical test) and a cost which is not causing any prejudice? By adopting a hypothetical test it does not take the actual reality of the applicant's situation into account and provides a block to their chances of obtaining a visa. In reality, Jake has minimal costs, no more or less than any 8 year old child, however because of his disability he is treated as a hypothetical person for the migration process and he was never allowed the chance to be viewed as he actually is. Every person is different, so why must the migration process view all disabled applicants under this hypothetical scenario? Disability or not, every person has a right to be treated fairly and have the opportunities available to them. The health requirements of the Migration Act may not openly through its wording exclude applicants with disabilities, but it does provide huge obstacles to obtain a visa if you have a disability which is not an equal opportunity for the applicant.

The threshold level of \$21k also caused irritation as it seemed such a low figure, and one must question this level as even someone without a disability has a high possibility of accumulating costs of over \$21k relating to health and community services. This threshold level seemed very out of date with current medical and community costs and a very unfair level.

One also must query the migration guidelines in relation to the health requirements. Cases have been fought and won in the courts, such as Robinson v Minister for Immigration and Multicultural and Indigenous Affairs 2005, so why

is the migration process still discriminatory (or indirectly discriminatory) towards disability migrant applicants?

The ANAO 2007 (see reference 2) states of the Robinson V MMIA 2005 case *'In the Robinson case, the Robinson family was refused a permanent residence visa on grounds that 'the applicant's 8 year old son....had Down's Syndrome, and, granting him permanent residency would be likely to result in a significant cost to the Australian community'. The MRT affirmed the delegate's decision. The case went to the Federal Court, which found in the Robinson's favour. The Court commented that the 'MOC is not to proceed to make the assessment at a higher level of generality by reference to a generic form of the condition'. This court ruling and comment does not seem evident in the current process adopted, and also in the understanding of senior officials. Senator Chris Evans is quoted as saying "Effectively, it is not an individual assessment. That is the key issue. I do not think we ought focus on Dr Moeller all the time. When they make an assessment about somebody, it is more a generic costs argument rather than saying, 'We have examined person A and we think they're going to cost \$300,000 because they'll need this, this and this.' It is more of a generic assessment which is applied against that person, and that is where the \$21,000 threshold kicks in". (See reference 3). This indicates that the MOC does not provide a costing based on the actual condition of the actual applicant but that the MOC relies on a generic costing instead. The court in the Robinson case clearly stated that this notion applies the wrong legal test to the facts. One must wonder why such cases which have been won are not acknowledged in the current process.*

The Disability Discrimination Act is in place for a purpose, and why the Migration Act is exempt from this is farcical. The current migration process in relation to those with disabilities is discriminating, be it directly or indirectly, as it treats the applicant less favorably than others and sees them purely as a cost. If the applicant exceeds a threshold level they are subsequently seen to have failed the health requirements. At no point are the disabled persons actual benefits considered or what they may offer to society. This limits the rights of a person with a disability and clearly displays that those with a disability are not treated on an equal basis as others in relation to migration. They are viewed as a hypothetical cost to Australia, and little else. From a parents point of view this causes extreme frustration and disappointment, that our child is not given the same opportunities as everyone else, is socially excluded due to a disability, when in reality the process should be in place to include those with disabilities in society.

We do everything possible to ensure Jake leads a normal life as best possible, that every door is open for him to do what is best for him and that he is given every opportunity to grow, develop and succeed. It is heartbreaking for a parent to know that processes and policies still exist where he is denied the opportunity to be treated on an equal level, particularly from a nation of the standing of Australia. We viewed the move to Australia as huge opportunity for us as a family, and a chance for Jake to experience new cultures and for his social development. Also it would have given him a chance to form relationships with his relatives (aunts, uncles and cousins) who live in Australia and rarely sees.

For the migration process to focus so much on costs, and how those with a disability are rejected a visa if they are calculated to cost the economy too much (based on a hypothetical person), then it is clear that the policy makers are very removed from how much the process actually costs the applicant. The emotional costs on a family are huge, knowing that a nation rejects your child because hypothetically they cost too much, knowing that your child is not seen as equal when it comes to freedom to move, knowing that doors are closed to him automatically which are opened to others, knowing that he is going to have to live a life where he will meet barriers preventing him experiencing all the opportunities that others may have. Calculate how much this emotional stress has on us as applicants?

Then there are the physical costs, the stress involved in hearing that your child is not allowed experience living in another country because he has a disability, discovering that an opportunity of a lifetime is taken away from him because he has a disability. Finally there is the economic cost for us too, the visa process is not cheap to undertake either and a fair process should be in place for those who do apply whereas the current process is set in a way to limit the opportunities of those with a disability or a family member with a disability. For a nation like Australia to have such a process in place that socially excludes someone on the grounds of a disability is disgraceful in my opinion.

Recommendations

I don't believe the current process for assessing a visa applicant against the health requirement is fair and transparent. I feel the entire process should be amended where it allows those with a disability the same chances to enter into the country as of those without. The existing process is extremely flawed and rigid. There is a black and white process and nothing deviates from this. A person with a disability is treated as a cost and nothing else. The entire family are rejected the visa despite of what they can offer in term of skills. My personal experience of the migration treatment of disability is not a very positive one.

The migration process should treat applicants fairly and on an equal level. The hypothetical test should be abolished so that the applicants true self can be assessed and evaluated. From my experience of the current process, our visa was rejected because the decision makers have a strict set of rules and no way of applying a logical approach to their medical assessment and evaluation. I believe they misinterpreted Jakes schooling requirements and calculated a cost against it as the rules they followed required them to undertake a hypothetical test. When we undertook the medical with a panel doctor in the UK, the feedback was nothing but positive. The doctor commented on how energetic, active and healthy Jake was, as well as acknowledging his advance development. He did not see a huge obstacle in us obtaining our visa. However, when the MOC have a file in front of them, with no consideration to the real person and a strict set of rules to follow and calculations to make, then there is no chance for the applicant to be considered on a personal level, no chance for their benefits to be seen. The inevitable is that the vast majority of applicants with some form of disability will be rejected, when this really should not be the case. There should be a method in which a logical engagement with decision makers can be made by the applicant, so as to allow them to have a clear and realistic view of the applicant. The decision makers should have the powers to adopt a logical view, and not a set of guidelines set in such a way that the vast majority of applicants with a disability are rejected.

The process should measure the contributions of all family members in the application, and just because someone has a disability should not make it a reason for the entire application to be rejected. The current rules are set in way which offers no chance for a human approach to be taken where a decision to grant a visa is accepted. The benefits a family can bring, and the skills they may possess are irrelevant in the current policy. If you have a disability or a family member with a disability who exceeds the threshold then all benefits we can offer are disregarded immediately. If an applicant has a job on the skilled

occupation list and meets the required points to enter Australia, then they should be treated as an applicant who can offer benefit to the country, and not calculated as purely a cost.

Conclusion

Finally, I would like to thank the inquiry for giving me the opportunity to make a submission. Following our visa rejection it has been an extremely difficult and frustrating time and this inquiry has given me a chance to let my experiences get heard and a chance for the policy makers of Australia to hear firsthand about the limitations of their migration process and how unfair it is to those with disabilities. The inquiry has given me some hope that changes will be made to provide a chance for those with disabilities to be treated equally and have a much greater opportunity of migrating to Australia one day.

Dermot Hogan 23/10/09

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