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Disability and Australian Migration Law: In Contravention of the Convention?

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A family excluded from a country because the young son has Down’s syndrome and a man setting himself on fire in desperation ...

Both of these situations have been borne out of Australia’s migration policy. In a country that prides itself on equality and a ‘fair go’, the health requirements for people applying for visas to enter and remain in Australia discriminate against people with a disability and their families. In light of the introduction of the UN Convention on the Rights of Persons with Disabilities, a renewed examination of Australia’s handling of visa applications is now in order.

An analysis of the current legislation shows that Australia has exempted the *Migration Act 1958* and any legislative instruments made under that Act from its disability discrimination legislation. Further scrutiny reveals that if Australia really wants to implement and abide by the objectives of the Convention then its health criteria for visa applicants will need to be amended. Australia cannot claim to be upholding the Convention when it is on an international stage denying a right to freedom of mobility and equality on the basis of disability. A shift in attitude in the way people with a disability are viewed and treated will be necessary in order to move away from the categorising of people as a ‘cost or burden to the community’ but to see the positive attributes and benefits they can bring. This shift is paramount because at present Australia is in contravention of the Convention.

The Convention

In July 2008, the Australian Government ratified the UN Convention on the Rights of Persons with Disabilities (the Convention). The Convention contains principles largely focussed on non-discrimination, equality and the human rights of people with a disability. Article 1 defines disability as including “those who have long-term physical, mental, intellectual or sensory impairments”. Article 2 defines discrimination on the basis of disability as “any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights...” The Australian Government has now also signed and ratified the Optional Protocol, allowing individual complaints for breaches of the treaty to be made to the Committee on the Rights of People with Disabilities. This is an important avenue for redress, which can be accessed once all national remedies have been exhausted and “permits international scrutiny of our laws and practices”.³⁹

Article 18 of the Convention refers to liberty of movement and nationality by recognising 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”. However, Australia has sought exemption from Article 18 through a declaration on the basis of its migration laws. When signing the Convention, Australia stated that the Convention does not

³⁹ Robert McClelland (Attorney-General), *Speech to the Disability and Age Discrimination Law Reform Summit*. Sydney, 30 July 2009.

create a general right of entering and remaining in Australia nor does it impact on Australia's health requirements for non-nationals seeking entrance to Australia.⁴⁰ This raises the question of whether this declaration is inconsistent with the principles of the Convention. Furthermore, it highlights Australia's continued view of migration law as separate from the rest of domestic law, and requiring certain practice that may be classified as discriminatory. Are Australia's migration laws and case law therefore in contravention of the Convention?

Disability Discrimination Law

In 1992, Australia passed the *Disability Discrimination Act*. It defines discrimination, at section 5, as treating or proposing to treat the aggrieved person because of their disability less favourably than they would treat a person without the disability. This includes not only direct but also indirect discrimination, which can occur when a condition that is applied to everyone has an unfair effect on a particular group or person with a disability.⁴¹ The objects of the Act highlight the importance of ensuring that people with a disability have the same rights to equality before the law as everyone else. Section 29 purports to make it unlawful for any Commonwealth law, program or administrator to "discriminate against another person on the ground of the other person's disability". However, according to the Act at section 52, Australia's migration program is subject to certain exceptions in terms of disability discrimination. This section states that Divisions 1 (discrimination in work), 2 (discrimination in other areas) and 2A (disability standards) do not:

- (a) affect discriminatory provisions in:
 - i. the *Migration Act 1958*; or
 - ii. a legislative instrument made under that Act; or
- (b) render unlawful anything that is permitted or required to be done that Act or instrument.

Australia has implemented domestic legislation firmly against disability discrimination, yet the exemption in terms of migration law appears to be flagrantly contrary to the objectives.

Migration Law

The *Migration Act 1958* (Cth) regulates the entrance and presence of non-citizens in Australia. Along with the regulations, it provides for all the visa categories and the application criteria, which include passing health and character tests as part of the public interest criteria.⁴² The applicant is assessed by a medical practitioner appointed by the minister / Commonwealth (MOC). If the applicant satisfies the relevant criteria, depending upon their visa class, and the Department of Immigration and Citizenship (DIAC) is satisfied the rest of the application is valid, then a visa is granted.⁴³ If the application is refused on health grounds, then the applicant has the right to have the decision reviewed by the Migration Review Tribunal (MRT).⁴⁴

All applicants for permanent or provisional visas are required to satisfy item 4005 in Schedule 4 of the Regulations (with some concession for certain visas). The health requirements are satisfied if the applicant:

- is free from tuberculosis; and

⁴⁰ Cynthia Banham, 'Australia to sign UN Disability protocol' *The Age* (30 July 2009).

⁴¹ *Disability Discrimination Act 1992* s6.

⁴² Robert Guthrie and Elizabeth Waldeck, 'Disability and Immigration in Australia' (2007) 83 *Precedent* 33.

⁴³ *Migration Act 1958* s65.

⁴⁴ Robert Guthrie and Elizabeth Waldeck, 'Disability and Immigration in Australia' (2007) 83 *Precedent* 33.

- does not suffer from a disease or condition that is or may result in the applicant being a threat to the Australian health system or public; and
- does not suffer from a disease or condition that is such that a person who has it would likely to:
 - require health care or community services, the provision of which would be likely to result in a significant cost to the Australian community, or
 - prejudice the access of an Australian citizen or permanent resident, regardless of whether the healthcare or community services will actually be used in connection with the applicant.⁴⁵

In *Inguanti v Minister for Immigration and Multicultural Affairs*⁴⁶ the question was whether 4005 of the regulations was illogical and therefore invalid. It was argued that it was unreasonable to assess the likely costs regardless of whether the applicant would actually use these services.⁴⁷ Heerey J dismissed this claim and said it was reasonable to assess the condition and the seriousness in terms of future possible expenses. He also said it was unreasonable for the MOC to be required to assess the financial circumstances of a particular applicant.⁴⁸ This is an important point as it was raised in circumstances of an Italian-born American citizen with an intellectual disability. His condition was assessed as severe enough to render him eligible for government assistance, programs and possibly a nursing home, and therefore a 'significant cost to the community'. The MOC as per 4005 considered it irrelevant that the applicant and his family which cared for him had sufficient funds so as not to be a 'burden'.

Heerey J applied the same sort of reasoning in *Imad v Minister for Immigration and Multicultural Affairs*⁴⁹ where he clarified the test for applying the 4005 criteria. He said the 'person' referred to was not the applicant but a hypothetical person who suffered from the same disease or condition. By applying this objective test, it may be argued that people with a disability such as the applicant in *Inguanti* are unfairly treated, as it is on the basis of their disability that they are excluded. Article 2 of the Convention specifically identifies exclusion on the basis of disability as discrimination. By also not taking into account financial means, there is no way an applicant can overcome the hurdle of proving there will be no resulting burden on the state. This is an assumption not made for people without a disability.

Medical Assessment and Significant Cost

The implementation of the health criteria is largely focussed on how the MOC assess the applicant. This means that any implementation of the Convention will have to review the processes in this assessment regime. Determining what is actually a disease or condition under the criteria is contentious. There has been some leeway in past cases where the MRT has intervened and not activated the health provisions, such as in *Re Nguyen*.⁵⁰ In this case, the Tribunal found the MOC had wrongly diagnosed her and that the distinction in

⁴⁵ *Migration Regulations 1994*, Schedule 4, 4005.

⁴⁶ [2001] FCA 1046.

⁴⁷ Robert Guthrie and Elizabeth Waldeck, 'Disability and Immigration in Australia' (2007) 83 *Precedent* 33.

⁴⁸ *Inguanti v Minister for Immigration and Multicultural Affairs* [2001] FCA 1046.

⁴⁹ [2001] FCA 1011.

⁵⁰ (IRT 5667, 30 June 1995).

classification was important to her assessment, resulting in her not being found to suffer from a disease or condition.⁵¹

The case of *Robinson v Minister for Immigration and Multicultural and Indigenous Affairs*⁵² concerned the young son, David, of a visa applicant.⁵³ David suffered from a mild form of Down's syndrome and was assessed as not meeting the health criteria because he would incur a significant cost to the Australian community. In the Federal Court, it was ruled that the medical assessments were unlawful because rather than determining David's precise level of Down's syndrome, the MOC had just applied a general test that anyone with Down's syndrome would be a burden and therefore not qualify for a visa. Ultimately it took six years for the Robinson family to secure a resolution to their case,⁵⁴ highlighting the difficult process facing a person or a family member with a disability and receiving an unfavourable health assessment.

A further difficulty is assessing what actually is a 'significant cost to the community'. This task is placed in the hands of the MOC which is guided by average annual per capita health and welfare expenditure.⁵⁵ *Seligman v Minister for Immigration and Multicultural Affairs*⁵⁶ is an example where there was a dispute over the cost to the community of the 22 year old son, Gregory, of the Seligman family. Gregory had borderline intellectual functioning and despite his circumstances of support from his family, an employment offer and positive specialist reports, the family visa was refused based on the perceived cost to the community. The case was decided in favour of the Seligman's as the MOC was found to have applied the wrong criteria, and should have considered the actual likelihood of significant cost requiring appropriate evidence.

Significant cost is especially difficult for HIV and AIDS sufferers who are assumed to need significant treatment and services. In *X v Minister for Immigration and Multicultural Affairs*⁵⁷ counsel for the applicant argued that he was infected with HIV but was

"a healthy man on combination treatment for which he pays and will continue to pay while he is the holder of a temporary residence visa...the costs...borne by the Australian healthcare system for the period of the visa he seeks, that being a period of only four years... is a totally insignificant cost..."⁵⁸

However, the court on appeal followed *Inguanti* and agreed that 4005 required a focus on a hypothetical person who suffers from HIV, not the general condition of the applicant. The court found that merely adding the cost of antiretroviral treatments and monthly monitoring costs was acceptable and not in error of law. When looking at the purpose of the Convention to "promote, protect and ensure the full and equal enjoyment of all human rights"⁵⁹ by persons with disabilities, it is difficult to reconcile the principles in situations such as these. When decisions are made about whether a person should be allowed to enter the country by

⁵¹ See also *Re Henry* (IRT 4935, 22 February 1995).

⁵² (2005) 148 FCR 182.

⁵³ Subclass 855 (Labour Agreement) visa.

⁵⁴ Jan Gothard and Charlie Fox, 'Consign disability discrimination to the bin', *The Australian* (17 November 2008).

⁵⁵ Robert Guthrie and Elizabeth Waldeck, 'Disability and Immigration in Australia' (2007) 83 *Precedent* 33.

⁵⁶ (1999) 85 FCR 115.

⁵⁷ [2005] FCA 429.

⁵⁸ *X v Minister for Immigration and Multicultural Affairs* [2005] FCA 429 at 11.

⁵⁹ *UN Convention on the Rights of Persons with Disabilities*, article 1.

categorising worth in relation to health and judging that illness or disability is a ‘cost’ to the community, then that is hardly promoting the “respect for their inherent dignity.”⁶⁰

The meaning of ‘community service’ within the cost criteria of 4005 has also needed clarification. In *Seligman* the court emphasised the words ‘in the areas of’ and took a broad application. The regulations now state that it includes the provision of an Australian social security benefit, allowance or pension.⁶¹ This requirement also links to s94 of the *Social Security Act 1991* (Cth), outlining the criteria necessary for a disability support pension. It is interesting that while it is this criterion in the disability support pension that can help determine the health assessment of a person, this very same pension has a ten year waiting period. So while a person may be assessed according to it, access to it will be restricted. Furthermore, carers of newly arrived people with a disability also have to wait ten years before they can access income support.⁶² This could be argued as interfering with an adequate standard of living and to social protection under the Convention article 28 and the right to health under article 25. It may also be contrary to article 15 of the Convention in regard to inhuman and degrading treatment provisions, violating human rights.⁶³

Humanitarian Visas

A highly controversial case involved an asylum seeker, Sharaz Kiane, who was granted a protection visa as a refugee. He then attempted to bring his family into Australia under the ‘split family’ provisions.⁶⁴ His wife’s visa was denied on the basis that his daughter had cerebral palsy and thus would be a significant cost to the community. As this humanitarian application was made offshore, the merits of the application and health criteria were applied to the whole family as a single unit. Therefore, because the daughter had failed the health assessment, the whole family under the same visa was denied. After four and a half years of trying to sponsor his family and gain them entrance to Australia, Mr Kiane in desperation set fire to himself outside of Parliament House and died from his injuries.⁶⁵

In this case, the difference between applying onshore and applying offshore in relation to protection visas is significant. If Mr Kiane’s family had been onshore then the health requirement would not have been a criterion because “Australia has an obligation to provide protection to persons, irrespective of their health status, who have been found to engage Australia’s protection obligations onshore.”⁶⁶ It therefore seems strange that where one family member has activated the protection provisions, the rest of the family is denied based on a disability, not to mention their geography. Once again, this contravenes article 18 of the Convention as well as article 5 relating to equality and non-discrimination.

⁶⁰ Ibid.

⁶¹ *Migration Regulations 1994* 1.03.

⁶² The Multicultural Disability Advocacy Association of NSW and The National Ethnic Disability Alliance, ‘Joint Submission to the Senate Inquiry into the Administration and Operation of the Migration Act 1958’ (2005).

⁶³ Australian Federation of AIDS Organisations Inc, ‘United Nations Convention on the Rights of Persons with Disabilities’ *Briefing Paper* (22 August 2008).

⁶⁴ Subclass 202 (Global Special Humanitarian) visa.

⁶⁵ Commonwealth Ombudsman, ‘Report on the Investigation into a Complaint about the Processing and Refusal of a Subclass 202 (Split Family) Humanitarian Visa Application’ (August 2001).

⁶⁶ Id at 3.

The recent case of Bernard Moeller, the German Doctor, who was refused permanent residency because he had a son with Down's syndrome, attracted much publicity.⁶⁷ It was claimed by DIAC that the treatment of Mr Moeller's family was not discriminatory because it applied the same treatment to everyone.⁶⁸ However, as the Convention recognises, people with a disability face difficulties "which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others." So when they are already coming from a position of disadvantage, applying the same criteria does not create equality. While the health criterion applies to all, the impact is felt only on those with a disability for reasons they can not change as "impairment is a fact of life".⁶⁹ Furthermore, while DIAC has claimed it was not discriminatory, the *Disability Discrimination Act* clearly recognises that it is by providing an exemption for migration as discussed earlier. If it was not discriminatory, it would not need an exemption and would fall into line with the Disability Act.

Social Attitudes

An issue of equality may be raised when looking at assurances of support, which are sometimes discretionary, but also sometimes mandatory.⁷⁰ These are maintenance guarantees that must be accepted by the Minister and involve the lodgement of bonds and the upfront payment of a health services charge.⁷¹ This places people who can access funds in a better position than those who cannot, perhaps revealing a level of inequality through a reliance on finances. The philosophy behind this focus on financial support, along with the health requirements and potential cost to the community, is that of national interest and undue burden on the community. The question could be asked: is it in the national interest to keep out individuals who could bring skills and qualities needed because that person or a family member has a disability? Moreover, is disability such a bad thing? There has been debate over people *choosing* disability, such as a deaf couple wanting to use pre-implantation genetic diagnosis to choose a deaf child.⁷²

The Joint Standing Committee on Migration Regulations recommended that there should be a balanced approach between the benefits an individual could bring and the assessment of burden to the community.⁷³ The Convention also marks "a paradigm shift by utilising a social model of disability".⁷⁴ This looks at disability as an evolving concept between those with impairments and the social / environmental factors that affect them. Parliamentary Secretary for International Development Assistance, Bob McMullan, has highlighted how in light of the Convention it is important to shift the attitudes of the Australian people in regard to how people with a disability are viewed and treated.⁷⁵ He has stated that Australia is developing a National Disability Strategy to implement the

⁶⁷ Cynthia Banham, 'Australia to sign UN Disability protocol' *The Age* (30 July 2009).

⁶⁸ Jan Gothard and Charlie Fox, 'Consign disability discrimination to the bin', *The Australian* (17 November 2008).

⁶⁹ Mr Bill Shorten, 'Implementing and Monitoring the Convention on the Rights of Persons with Disabilities (CRPD) in the Australian Social and Legal Context – Keynote Address' Parliament House (20/08/2008)

⁷⁰ *Migration Regulations 1994* 2.7.

⁷¹ *Id* at 2.39 and 5.41.

⁷² Isabel Karpin, 'Choosing Disability: Preimplantation Genetic Diagnosis and Negative Enhancement' (2007) 15 *Journal of Law and Medicine* 89.

⁷³ Joint Standing Committee on Migration Regulations

⁷⁴ Australian Federation of AIDS Organisations Inc, 'United Nations Convention on the Rights of Persons with Disabilities' *Briefing Paper* (22 August 2008).

⁷⁵ Bob McMullan, 'Second Conference on the States Parties to the Convention on the Rights of Persons with Disabilities' (3 September 2009).

Convention. This should include a review of the migration legislation, as at present it is not in line with the Convention.

Conclusion

Australia has implemented disability discrimination legislation on a federal level as evident in the *Disability Discrimination Act 1992*. The act aims to eliminate discrimination to ensure equality and the protection of fundamental rights.⁷⁶ However, section 52 of the Act provides certain exemptions for migration laws, revealing that discrimination is present and regarded as acceptable in this area. This discrimination manifests itself largely in the public interest criteria, specifically the health conditions, for people wishing to enter and remain in Australia. The introduction of the *UN Convention on the Rights of Persons with Disabilities* has provided a renewed focus on these issues.

In light of the Convention and its purpose and provisions, an examination of the Australian process of health screening reveals that discrimination is inherent in the system. By requiring applicants to submit to health criteria, applied on an objective basis, to determine if any illness or disability will be a financial 'cost' to the community, puts people with a disability on an unequal footing against those who are not disabled. This specifically violates article 18 of the Convention by restricting a person's liberty of movement for reasons of disability. The Australian cases also reveal a tendency to devalue the contribution of a person with a disability by only seeing a *possible* financial taxpayer burden and discriminating on the basis of a child having, for instance, Down's syndrome. A repositioning of the social and political attitudes of how people and their families with a disability are viewed should coincide with an effort to implement the Convention in relation to migration.

The migration laws should be changed to conform with the Convention by:

- Removing section 52 from the *Disability Discrimination Act 1992* and
- Changing the health assessment criteria under Schedule 4 of the Regulations so that people with a disability are not assessed according to the cost to the community. It should not be used to restrict people with a disability but rather a greater emphasis should be placed on the benefit brought to the community, therefore acknowledging that disability is not a criterion for exclusion.

Such changes to the legislation alongside efforts to educate the community on disability and changing social attitudes are vitally important – both in themselves, and also because Australia is in Contravention of the Convention.

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