Law Institute Victoria

Submission No 88.1

Inquiry into the migration treatment of disability – question on notice

To: Joint Standing Committee on Migration

25 March 2010

Queries regarding this submission should be directed to:
Contact persons
Ph
Email

Table of Contents

Introduction

At the public hearing in Melbourne on 18 February 2010, Law Institute of Victoria (LIV) representatives Jo Knight and Peter Papadopoulos took a question on notice in relation to our views about whether current migration arrangements satisfy Article 5 of the United Nations *Convention on the Rights of Persons with Disabilities* (the Convention) (Senator Bilyk, Proof Hansard, p20). This submission provides a response to this question on notice and is supplementary to our written submission made on 4 November 2009 and oral submissions made by our representatives on 18 February.

The LIV does not consider that the current health requirements in Schedule 4 of the Migration Regulations 1994 are compatible with the Convention, for the reasons set out in this submission.

Australia's Declaration on Article 18

As you are aware, the Joint Standing Committee on Treaties (JSCOT) recommended a review of the relevant provisions of the *Migration Act* 1958 (Cth) (Migration Act) and migration policy, to remove any direct or indirect discrimination against persons with disabilities in contravention of the Convention.

JSCOT made this recommendation despite the Australian government National Interest Analysis of the UN Disabilities Convention, which states that Australia's immigration processes comply with the relevant articles of the Convention on the basis that the processes apply to all applicants, are based on legitimate, objective and reasonable criteria, and would not constitute discrimination under international law.[1] On the basis of this assessment, the Australian government made the following Declaration upon ratification of the UN Disabilities Convention in relation to Article 18 (Liberty of movement and nationality):

> Australia recognizes 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 (emphasis added).[2]

The LIV notes that international law does not confer on non-citizens a general right to enter a foreign country and Article 18 of the UN Disabilities Convention does not confer any such right. A country is therefore entitled to refuse entry to non-citizens on the basis of legitimate, objective and reasonable criteria. Obligations under Article 5 of the Convention are relevant when establishing whether criteria for entry are legitimate, objective and reasonable.

Article 5 and the right to non-discrimination

Article 5 provides that:

(a) 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.
(b) States Parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds.

[1] National Interest Analysis [2008] ATNIA 18
[2] http://treaties.un.org/doc/publication/mtdsg/volume%20i/chapter%20iv/iv-15.en.pdf

Article 5 is based on Article 26 of the *International Covenant on Civil and Political Rights*, which prohibits direct or indirect discrimination by the government or public authorities, in law or in practice.[3] Article 5 is therefore concerned with "the obligations imposed on States parties in regard to their legislation and the application thereof" and is not limited to the principle of non-discrimination in respect of rights contained in the Convention.[4]

While the Convention does not expressly set out permissible limitations of Article 5, international law generally recognises that not all differential treatment will constitute discrimination, so long as criteria for differentiation are reasonable and objective and the limitation aims to achieve a legitimate purpose.[5] This is often referred to as a proportionality test, which involves a balancing exercise between protecting people with disabilities from discrimination and pursuit of a policy which might limit the enjoyment of the right to non-discrimination for some other legitimate purpose. In the context of the health requirement, this involves balancing the right to non-discrimination with aims to protect the Australian community from public health risks; to contain public expenditure on health care and community services; and to safeguard access for Australians to health services in short supply.[6]

We note two relevant decisions in Canada, in which the courts have accepted that immigration health requirements either do not involve prima facie differential treatment of people with a disability (*Deol v Minister of Citizenship and Immigration*),[7] or that differential treatment may be justified to meet the health needs of society (*Anvari v Canada Employment and Immigration Commission*).[8]

Blanket or inflexible requirements which purport to create general exemptions will not be compatible with Article 5 where they do not allow for individual circumstances to be weighed in order to determine whether restriction on entry of a particular person is reasonable, necessary and proportionate. Evidence is also required to show that a limitation is demonstrably justified and this evidence must be assessed on a case by case basis.

Is the current health requirement based on legitimate, objective and reasonable criteria?

The LIV is concerned that the current health requirement is not compatible with Article 5 of the Convention. In our view, aspects of the health requirement are particularly problematic in relation to compatibility with Article 5, including:

- The health requirement does not allow for consideration of the individual circumstances of the applicant, but is based on a hypothetical person with a generic form of the disease or condition that the applicant has been diagnosed with. In our experience, the hypothetical person test has led to "worst case scenario" health cost estimates that do not take account of alternative medical evidence of prognosis and do not use discounted cost modelling where an applicant is seeking a long term visa. This means that the impact of the current health requirement is disproportionate to the legitimate aim to contain public expenditure on health care and community services where cost estimates are not based on demonstrated evidence.

- There is a lack of transparency and consistency in decision-making relation to cost-estimate calculations, so that decision-making appears arbitrary and potentially unsupported by demonstrated evidence. For example, Notes for Guidance, used by Medical Officers of the Commonwealth when assessing whether a person has a disease or condition under Schedule 4, are not publically available and are not up to date.

---

[3] See Brocks v The Netherlands, UN Human Rights Committee, 172/84, para 12.3; see also UNHRC, General Comment 18, para 12.

[4] UNHRC, General Comment 18, para 12.

[5] UN Human Rights Committee, General Comment 18, para 13.

[6] See e.g. Productivity Commission, Review of the Disability Discrimination Act *1992* (2004), 343-4..

[7] (2000) CanLII 21099 (IRB), Canadian Immigration and Refugee Board (Appeal Division), W97-00037, 22 February 2000.

[8] D 18/ 88, 14 December 1988; see legal advice provided by Dr Ben Saul, in submission from NEDA, available at http://www.aph.gov.au/house/committee/mig/disability/subs/sub001.pdf

- Health waiver is available only in a limited number of visa subclasses, so that many applicants (including general skilled migration, student and tourist visa applicants) are unable to seek waiver of an adverse health finding, even where they have strong evidence to show that they are unlikely to present an 'undue' cost burden. This means that the projected cost burden of a person's condition (which is already problematic, as identified above), is not balanced by the positive contributions a person might make to Australia.

- The rigidity of the current system means it is difficult to challenge an adverse health assessment - under Migration Regulation 2.25(A) officers deciding visa applications and the Tribunal must accept the opinion of the MOC on whether an applicant meets the health requirement.

Recommendations to ensure compatibility with the UN Disabilities Convention

In our submission of 4 November 2009, we make recommendations to increase safeguards for people with a disability to ensure that the health requirement is not applied in an indiscriminate or blanket way and so that migration policy objectives are balanced proportionately against the right to equal treatment. For example, we recommend that:

- Health waiver is available for all visa subclasses.

- The concept of the hypothetical person be removed so that the health requirement refers to 'the person' or 'the visa applicant' and their disease, rather than 'a person' with the visa applicant's condition'.

- Primary decision makers should make an actual cost assessment of a person's disease or condition based, as a minimum, on factors such as applicant's age; eligibility for a Disability Support Pension or other income support; past employment history and future work prospects; ability to participate in the community, with family and community support; and prospects for receiving care and / or support from their family, community or other organization such that reliance upon Australian health care and community services would be lessened.

- Ministerial intervention should continue to be available as an additional safeguard for people with disabilities.

- Cost-estimate calculations should be completed by persons qualified to make this assessment, such as a health economist or actuary, and not a medical officer. Discounted cost modeling should be applied in costs estimate calculations, particularly where estimates are being made in relation to persons seeking visas authorizing them to remain in Australia for periods greater than 12 months.

- A second specialist medical opinion should be obtained by the Department of Immigration and Citizenship in cases where a person is found not to meet the health requirement.

Conclusion

The LIV believes that our recommendations (of 4 November 2009 and 18 February 2010) will ensure that the health requirement operates to achieve its legitimate purpose in a way that is objective and reasonable. The LIV has sought to put forward practical solutions drawing on the expertise of our members in the practical application of health issues in the migration legal framework.

The LIV urges the government to reform the health requirement to ensure that it does not operate to disproportionately impact visa applicants who have a disability or have a family member with a disability and so ensure that it is compatible with the UN Disabilities Convention.