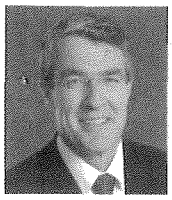

Mark Dreyfus MP
FEDERAL MEMBER FOR ISAACS

Submission No 109

PARLIAMENT OF AUSTRALIA
HOUSE OF REPRESENTATIVES

10 May 2010

Michael Danby MP
Chair of the Joint Standing Committee on Migration
Department of the House of Representatives
PO Box 6021
Parliament House
Canberra ACT 2600

Dear ~~Mr~~ Michael Danby,

Submission to the Joint Standing Committee on Migration
Migration Treatment of Disability

I wish to make a submission to the Committee's inquiry into the Migration Treatment of Disability, with particular regard to the circumstances of an immigrant, whose situation was referred to me by one of my constituents. I have removed all identifying details to protect the immigrant's privacy, and refer to the immigrant as "JP1", the pseudonym used in the Federal Magistrates Court proceeding concerning the immigrant.

JP1 initially came to Australia in 1996 on a tourist visa and when conditions in JP1's home country meant JP1 could not return, JP1 was granted a three-month extension. JP1 was then granted a bridging visa and eventually a 457 visa to work at **** under the sponsorship of the owner, Mr. ****. JP1 managed the owner's enterprise for twelve years, during which time JP1's spouse and **** children arrived from **** under three year 457 visas.

On 30 April 2002, an application for a subclass 857 visa was lodged by **** on behalf of JP1 under the Regional Sponsored Migration Scheme (RSMS). The visa application was refused on 14 June 2003 on the grounds that JP1 did not satisfy the Public Interest Criterion (PIC) 4005 because JP1 was found to be HIV-positive.

A review application was lodged with the Melbourne Registry of the Migration Review Tribunal (MRT) on 30 June 2003, which was refused on 29 October 2007 on the grounds that it was obliged to accept the opinion of the Review Medical Officer of the Commonwealth (RMOC) that JP1 was unable to satisfy PIC 4005 because JP1 was HIV-positive and likely to impose a significant cost to the Australian

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community, even though there is no legislative definition of 'significant cost.' This absence of a clear legislative definition, based on quantifiable and up to date data, may subject visa applicants to inconsistent treatment depending on the RMOC who accesses their case. This inconsistency and a lack of transparency in decision- making were criticised in the ANAO report - The *Administration of the Health Requirement of the Migration Act 1958,* tabled in Federal Parliament on 17 May 2007.

The lack of clarity surrounding the 'significant cost' requirement was particularly evident in the processing of JP1's application, given that according to Professor ****, JP1's treating specialist and an internationally recognised authority in HIV/AIDS medicine, JP1's prognosis was excellent and JP1 was not likely to require antiretroviral treatment before 2021, if ever.

An application for judicial review of the MRT's decision was lodged at the Melbourne Registry of the Federal Magistrates Court on 3 December 2007 challenging the legal validity of the RMOC's decision and the MRT's failure to use its inquisitorial power to obtain further information about the basis for the opinion. Riley FM dismissed the application on 22 August 2008 (*JP1 & Ors v Minister for Immigration & Anor* [2008] FMCA 970) on the grounds that an RMOC is entitled to issue opinions on the costs of treating certain medical conditions, even in the absence of clear medical guidelines, and that the MRT is not obliged to investigate these opinions.

The issue was finally resolved on 19 June 2009 when, after representations from me and lawyers acting for JP1, Senator the Hon. Chris Evans, Minister for Immigration and Citizenship exercised ministerial discretion pursuant to section 351 of the *Migration Act 1958* (Cth), granting JP1 and JP1's family a Subclass 835 (Remaining Relative) permanent visa.

JP1's situation highlights the lack of flexibility in current regulations and guidelines, particularly in relation to migrants who are HIV-positive. It is unfortunate that the applicable health criterion in this instance, PIC 4005, does not include a waiver provision that would give decision-makers the discretion to waive the requirement as is the case with other visa subclasses. Although there is now a provision for waiver of the health criterion for onshore applicants for subclass 856 (ENS) and 857 (RSMS) visas, this is dependant upon the state in which the applicant lives certifying that it will accept the costs associated with the health condition, and remains unavailable for applicants applying for these visas outside of Australia. Such a waiver, if made available for all permanent subclasses, could have been appropriately utilised in JP1's case, given JP1's ability to significantly contribute to the Australian community by being an employed, tax-paying resident who is working for a regional employer and passing JP1's skills to local workers.

In addition, there were strong compassionate reasons for granting JP1 and JP1's family permanent residency, given that JP1 contracted HIV from undergoing dental treatment on a visit to JP1's country of origin where inadequately sterilised equipment was used. Further, JP1's children were educated and raised in Australia.

JP1 and JP1's family were fortunate enough to gain permanent residency, thanks to the commitment of JP1's sponsors and legal counsel, and the intervention of Senator Evans. The rigidity of the current system makes such exceptions a rarity, preventing individuals with a disability (such as being HIV-positive) from gaining residency in Australia, regardless of their ability to contribute to Australian society.

I hope this information is useful, and look forward to the findings of your inquiry into the Migration Treatment of Disability.

Yours sincerely

Mark Dreyfus QC, MP
Federal Member for Isaacs