ANNEXURE A

FEDERAL COURT OF AUSTRALIA

Robinson v Minister for Immigration and Multicultural and Indigenous Affairs

[2005] FCA 1626

MIGRATION – visa application – Public Interest Criterion 4005 in Schedule 4 of the Migration Regulations 1994 (Cth) – whether health criteria satisfied – provision of opinion by Medical Officer of the Commonwealth to the Migration Review Tribunal – Minister required by reg 2.25A(3) to take opinion to be 'correct' in deciding whether person satisfies the criteria – whether Migration Review Tribunal erred in taking opinion to be correct – application allowed

Migration Act 1958 (Cth), ss 29, 31, 31(3), 60, 65

Migration Regulations 1994 (Cth), reg 2.25A, reg 2.25A(3), Sched 2 Item 855.225, Sched 4 Public Interest Criterions 4005, 4005(a), 4005(c)

SAAP v Minister for Immigration and Multicultural and Indigenous Affairs (2005) 215 ALR 162, [2005] HCA 24 applied
Weinberg, Ferrez [1999] MRTA 731 cited
Minister for Immigration and Multicultural Affairs v Seligman (1999) 85 FCR 115 followed
X v Minister for Immigration and Multicultural and Indigenous Affairs [2005] FCA 429 not followed
Imad v Minister for Immigration and Multicultural Affairs [2001] FCA 1011 cited
Inguanti v Minister for Immigration and Multicultural Affairs [2001] FCA 1046 cited
Blair v Minister for Immigration and Multicultural Affairs [2001] FCA 1014 cited
Re Refugee Tribunal; Ex parte Aala (2004) 204 CLR 82 applied
Stead v State Government Insurance Commission (1986) 161 CLR 141 cited
Lu v Minister for Immigration and Multicultural and Indigenous Affairs [2004] FCAFC 340 applied
VAAD v Minister for Immigration and Multicultural and Indigenous Affairs [2005] FCAFC 117 applied

TRACEY ANN ROBINSON v MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS and MIGRATION REVIEW TRIBUNAL
WAD 293 OF 2004

SIOPIS J
10 NOVEMBER 2005
PERTH

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA

WESTERN AUSTRALIA DISTRICT REGISTRY **WAD 293 OF 2004**

BETWEEN:	**TRACEY ANN ROBINSON** **APPLICANT**
AND:	**MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS** **FIRST RESPONDENT**
	MIGRATION REVIEW TRIBUNAL **SECOND RESPONDENT**

JUDGE:	**SIOPIS J**
DATE OF ORDER:	**10 NOVEMBER 2005**
WHERE MADE:	**PERTH**

THE COURT ORDERS THAT:

1. The Migration Review Tribunal be joined as the second respondent.

2. An order in the nature of certiorari is granted quashing the decision of the second respondent dated 17 November 2004.

3. An order in the nature of mandamus is made requiring the second respondent to reconsider the applicant's application according to law.

4. The first respondent is to pay the applicant's costs of the application.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA
WESTERN AUSTRALIA DISTRICT REGISTRY **WAD 293 OF 2004**

BETWEEN:	**TRACEY ANN ROBINSON** **APPLICANT**
AND:	**MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS** **FIRST RESPONDENT**
	MIGRATION REVIEW TRIBUNAL **SECOND RESPONDENT**
JUDGE:	**SIOPIS J**
DATE:	**10 NOVEMBER 2005**
PLACE:	**PERTH**

REASONS FOR JUDGMENT

1 The applicant entered Australia on 13 August 2001 as the holder of a valid temporary business entry visa. Her husband and three children accompanied her. One of her young sons, David, has Down's Syndrome in a form described as 'mild'. The applicant and each member of her family are nationals of the United Kingdom. The applicant is a registered midwife. In January 2002 the applicant secured an offer of permanent employment with the Joondalup Health Campus ('the Campus'). Under the sponsorship of the Campus, the applicant applied in June 2002 for a Labour Agreement (Residence) (Class BV) (Subclass 855) Visa ('permanent residency visa') on behalf of herself and her family. On 3 October 2002 the delegate of the Minister for Immigration and Multicultural and Indigenous Affairs ('the delegate') refused to grant a permanent residency visa to the Robinson family on the grounds that the applicant's eight year old son, David, had Down's Syndrome and, therefore, granting him permanent residency would be likely to result in a significant cost to the Australian community. The delegate said that the Robinson family had accordingly failed to meet a mandatory health requirement for the grant of a permanent residency visa.

2 On 28 October 2002 the applicant applied to the Migration Review Tribunal ('the Tribunal') for a review of the delegate's decision. On 17 November 2004, the Tribunal advised the applicant that it had decided to affirm the delegate's decision.

3 The applicant now seeks judicial review in this Court of the decision of the Tribunal. For the reasons which follow, the decision of the Tribunal should be set aside.

4 In accordance with the decision in the case of *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 215 ALR 162, [2005] HCA 24; the Tribunal has been joined as the second respondent.

Statutory Framework

5 The power of the first respondent to grant visas is conferred by s 29 of the *Migration Act 1958* (Cth) ('the Act'). Section 31 of the Act provides for prescribed classes of visas. Section 31(3) of the Act provides that the Migration Regulations 1994 (Cth) ('the Regulations') may prescribe criteria for visas of specified classes. Section 60 of the Act provides for a medical examination in relation to an applicant's health, physical condition or mental condition. Section 65 relevantly provides that if, after considering a valid application, the first respondent is satisfied that the health criteria for it (if any) have been satisfied and the other criteria for it prescribed by the Act or the Regulations have been satisfied he or she is to grant the visa or if not so satisfied, is to refuse to grant the visa.

6 Regulation 2.25A of the Regulations provides:

> *'(1) In determining whether an applicant satisfies the criteria for the grant of a visa, the Minister must seek the opinion of a Medical Officer of the Commonwealth on whether a person (whether the applicant or another person) meets the requirements of paragraph 4005(a), 4005(b), 4005(c), 4006A(1)(a), 4006A(1)(b), 4006A(1)(c), 4007(1)(a), 4007(1)(b) or 4007(1)(c) of Schedule 4 unless:*
>
> *(a) the application is for a temporary visa and there is no information known to Immigration (either through the application or otherwise) to the effect that the person may not meet any of those requirements; or*
>
> *(b) the application is for a permanent visa that is made from a country (whether Australia or a foreign country) specified by*

Gazette Notice for the purposes of this paragraph and there is no information known to Immigration (either through the application or otherwise) to the effect that the person may not meet any of those requirements.

(2) ...

(3) *The Minister is to take the opinion of the Medical Officer of the Commonwealth on a matter referred to in subregulation (1) or (2) to be correct for the purposes of deciding whether a person meets a requirement or satisfies a criterion.'*

7 Item 855.225 in Schedule 2 of the Regulations provides relevantly that each member of the family unit of an applicant for a Subclass 855 visa must satisfy Public Interest Criterion 4005 in Schedule 4 of the Regulations.

8 Public Interest Criterion 4005 of the Regulations requires that:

'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.'

The application for a permanent residency visa

9 On 17 January 2002 the Campus applied to the Department of Immigration and Multicultural and Indigenous Affairs ('the Department') for the nomination of the applicant to the position of a Specialist Registered Nurse-Midwifery. By letter dated 24 January 2002, the Department informed the Campus that the nomination was accepted. In May 2002, the applicant and the other members of her family, including her son, David, underwent medical examinations as part of the visa application process.

10 On 28 June 2002 the applicant lodged an application for a permanent residency visa. Under Pt H of the form titled 'Health and Character', the applicant ticked 'yes' to the question:

'Have you, or any other person in this application ever had or currently have tuberculosis or any other serious disease (including mental illness), condition or disability?'

The applicant then gave the following details:

'My youngest son has Down's Syndrome. He attends Joondalup Primary School which has a special Ed unit attached. He is a bright boy with good communication skills and would be able to work when he is older.'

11 By a letter dated 9 July 2002, a representative of the Department informed the applicant that her son, David, did not meet the health requirements for the grant of resident status and that therefore her 'application is one for refusal'. However, the letter also said that prior to a final decision being made, the applicant could comment on the opinion of the Medical Officer of the Commonwealth ('MOC') and could provide further evidence to the MOC by 13 August 2002. The letter went on to say that if any substantive information was provided it would be forwarded to the MOC for an opinion or further assessment.

12 The opinion of the MOC referred to in the letter was an opinion dated 30 May 2002 which stated:

> '...
>
> [David] *is a person with Down's Syndrome and associated VSD and PDA corrected surgically. In 1995 he was diagnosed with leukaemia and had a successful bone marrow transplant. He is currently in a mainstream school with an education support centre. He is likely to require an ongoing special education program as well as supported employment/income support... The above regulations apply to a person with this condition; ie such a person would require health care or community services during the period of the proposed stay in Australia. Provision of health care or community services in a case such as this would be likely to result in a significant cost to the Australian community in the areas of health care and community services, regardless of whether or not the health care or community services will actually be used... Therefore the applicant does not meet Public Interest Criterion 4005...'*

13 In response to the Department's invitation, the applicant provided additional information. The additional information included a letter dated 5 August 2002 from registered psychologist and Associate Professor of Special Education at Edith Cowan University, Dr Robert Jackson. The letter stated:

> *'My experience with children with a diagnosis similar to David extends over 3 decades. With his personality and social skills and his capacity to learn, David can achieve well academically and in other life areas. His mother has indicated that she is working on his skills at home and she is eager to extend this to teaching. In such an environment David can learn rapidly, and gain normal levels of independence and competence.*
>
> *Many children similar to David are in main stream education with limited support and progressing well. Similarly, many children similar to David grow up to take on full time work in open employment and contribute along with other citizens. I would envisage such an outcome for David.'*

14 There were also letters from David's consultant paediatrician and David's school principal. This information was forwarded by the Department to another MOC. On 6 September 2002 a second MOC provided an opinion which read as follows:

> [David] *is a person with Down's Syndrome. He was diagnosed at birth with a Ventricular Septal Defect and Patent Ductus Arteriosus, both of which required surgical intervention. In 1995 he was diagnosed with leukaemia and had a Bone Marrow Transplant. He has intellectual impairment and a speech disorder. He is currently attending supported education, in a mainstream*

school. He is likely to require ongoing supported education, as well as supported employment and income support. He is unlikely to live independently... The above regulations apply to a person with this condition; ie such a person would require health care or community services during the period of the proposed stay in Australia. Provision of health care or community services in a case such as this would be likely to result in a significant cost to the Australian community in the areas of health care and community services, regardless of whether or not the health care or community services will actually be used... Therefore the applicant does not meet Public Interest Criterion 4005...'

15 By a letter dated 3 October 2002, the delegate advised the applicant that her visa application was refused. The delegate relied upon the opinion of the MOC dated 6 September 2002 to conclude that David did not meet the health requirement under Public Interest Criterion 4005(c) of the Regulations and refused the visa application on that ground.

Proceedings before the Tribunal

16 On 28 October 2002, the applicant filed an application with the Tribunal for review of the delegate's decision.

17 In a letter dated 1 December 2003, a Tribunal officer invited the applicant to provide the Tribunal with updated medical documentation in regard to her son's health and to arrange for further medical examinations of her son to be undertaken at Health Services Australia. These medical examinations were undertaken on 27 January 2004. The applicant filed two medical documents at the Tribunal. The first document (Form 26A) is titled 'Medical Examination for an Australian Visa'. In this document the examining doctor noted that David's cardiovascular system was abnormal and his intelligence was abnormal - the details given were 'Down's Syndrome, attends special classes'. The doctor recorded David's mental state as 'normal'. Question 21 in that same form asked whether there are any physical or mental conditions which would prevent the person from gaining full employment and living independently. The doctor answered 'Yes' giving details as 'has Down's Syndrome'. The second document (Form 160A) is titled 'Specialist report on chest x-ray of an applicant for an Australian visa'. The radiologist found no abnormalities.

18 The Tribunal by letter dated 3 February 2004 sought a further opinion from a Review Medical Officer of the Commonwealth ('RMOC'). In an opinion dated 9 February 2004, the RMOC found that David did not meet Public Interest Criterion 4005(c) of the Regulations. The opinion stated:

> '[David] *is a 10 year old boy with Down's Syndrome. He attends a special education centre and will continue to require ongoing educational and medical support. ...* [David] *is currently medically stable, however he will require ongoing special education during his schooling years and he will be eligible for supported employment/income support in later years. This will be at a significant cost to the Australian community.*
>
> *This disease or condition is a disease or condition to which paragraphs 4005(c)(ii)(A) - new in Schedule 4 of the Migration Regulations 1994 apply, regardless of whether or not health care or community services will actually be used in connection with the applicant during the period of the applicant's proposed stay in Australia. A person with such a disease or condition would be likely to require health care or community services or would be likely to meet the medical criteria for the provisions of a community service and provision of such health care or community services relating to the disease or condition would be likely to result in a significant cost to the Australian community in the areas of health care and community services, or prejudice the access of Australian citizens or permanent residents to, health care and community services.'*

19 On 1 April 2004, the Tribunal invited the applicant to a telephone hearing for the purpose of giving evidence and presenting arguments in relation to her application for review. That hearing took place on 10 May 2004. At the hearing the presiding member indicated that the applicant should have been invited to comment on the opinion of the RMOC and the hearing was, accordingly, adjourned. On 8 June 2004 the Tribunal provided the applicant with a copy of the RMOC's opinion of 9 February 2004 and invited the applicant to comment thereon.

20 In response to the Tribunal's invitation, the pro bono solicitors for the applicant sent a letter and attachments to the Tribunal dated 6 July 2004. The attachments included:

- A letter dated 11 April 2002 from Dr Desiree Silva, David's consultant paediatrician. In the letter Dr Silva said that she diagnosed David as having a speech difficulty. His communication was excellent considering his condition. She said that she was delighted with his development. He did not appear to be requiring any specific services. Dr Silva also said that David should progress in the current school system

although his parents could consider speech therapy. Dr Silva could see no reason for David requiring extra medical services. Dr Silva also said that David had integrated well into the school system.

- A letter dated 25 June 2002 from Pam Coman, principal of the Joondalup Education Support Centre, in which she stated that David attended the centre which was for students with special needs, and that at various times in the week he was integrated into mainstream classes at the centre's partner primary school. The letter also said that when David leaves school he should have the skills to undertake productive work, albeit in a supportive environment, and participate with a reasonable level of independence in the community.

- A further letter dated 17 May 2003, from Dr Silva, who by that time also held the position of chair of the Royal Australian College of Physicians, Division of Paediatrics. Dr Silva said in that letter:

> *'I have had regular contact with David Robinson who is* [the applicants'] *delightful 8 yr old son who was diagnosed with Down's Syndrome. He can be described as mild in his category as he is an intelligent boy who appears to be progressing academically. He is currently in the Special Education Support Unit at Joondalup and making great progress. Recently, he was engaged in a Reading Program where his reading age has improved by one year over a three month period. There is further potential for him. He was diagnosed with acute myeloid leukaemia which was treated... and has no evidence of any residual disease. ... His cardiovascular status is entirely normal and he is gaining weight well.*
>
> ...
>
> *David's condition will not deteriorate and he is making extremely good progress.'*

- A letter dated 1 October 2003 from Professor Fiona Stanley AC, Director of the Telethon Institute for Child Health Research and a Professor at the School of Paediatrics and Child Health in the University of Western Australia. In the letter Dr Stanley noted that David did not require occupational therapy or physiotherapy, and said that it was not likely that a child making progress at this early age would face the level of dependency predicted by the Department.

21 The applicant's solicitors' letter also referred the Tribunal to the case of *Weinberg, Ferrez* [1999] MRTA 731 *('Weinberg')* which was a case where a MOC came to the opinion that a child suffering from a mild form of Down's Syndrome satisfied Public Interest Criterion 4005(c) of the Regulations, and the Tribunal had granted a visa.

22 The applicant's solicitors' letter requested that the RMOC review her opinion.

23 Following the receipt of the letter from the applicant's solicitors, the Tribunal wrote the following letter dated 2 August 2004 to the RMOC:

> *'Re: APPLICATION FOR REVIEW OF A DECISION TO REFUSE A VISA ON HEALTH GROUNDS*
>
> *Visa Applicant:* ***Master David ROBINSON***
> *Date of Birth:* ***21 September 1993***
> *Visa Class:* ***Labour Agreement (Residence) (Class BV) Visa, Subclass 855 (Labour Agreement)***
>
> ***Previous medical opinions:***
>
> *On 9 February 2004, Dr Clea Anagnostopolou, a Medical Officer of the Commonwealth (MOC) from the Health Assessment Service, expressed an opinion that the above visa applicant had not meet* [sic] *the health requirements of Public Interest Criteria 4005(c) contained in Schedule 4 of the Migration Regulations.*
>
> *Since then the Tribunal has received the following facsimile documents from the visa applicant's migration agent, Mr Steven Penglis:*
>
> - *a submission dated 6 July 2004 from Mr Penglis;*
> - *an extract from a Tribunal decision in the case of* Weinberg, Ferrez *[1999] MRTA 731 (19 November 1999);*
> - *a medical report dated 1 October 2003 from Professor Fiona Stanley;*
> - *medical reports dated 11 April 2002 and 17 May 2003 from Dr Desiree Silva;*
> - *a letter dated 25 June 2002 from Ms Pam Coman, the Principal of the Joondalup Education Support Centre;*
> - *a medical report dated 18 February 2003 from Mr Nick Gottardo, Fellow in Paediatric Oncology/haematology; and*
> - *an article entitled* Functional status of school-aged children with Down syndrome [sic].
>
> *Would you please provide a further medical opinion about whether or not you consider that the visa applicant satisfies Public Interest Criterion 4005 of Schedule 4 of the Migration Regulations 1994. In expressing your opinion, can you please identify which material that you considered in your assessment*

and any reasons why you disagree with this information (if applicable).

Please quote our reference number when replying to this letter.

An early reply would be appreciated.'

24 In a response to the Tribunal's letter, a second RMOC provided a further medical report on David dated 5 August 2004. The letter read as follows:

'My opinion is based on available medical and radiological reports and the proposed duration of stay sought in Australia.

I have assessed the applicant against the Regulation set out at Schedule 4 of the Migration Regulations:

Regulation and Narrative
4005(c)(ii)(A) – new
the applicant is not a person who has a disease or condition to which the following subparagraphs apply:
(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;
regardless of whether the health care or community services will actually be used in connection with the applicant;

The applicant is a person intellectual impairment (sic) and speech disorder associated with Down's syndrome. He currently requires special eduction support and is likely to require further special education and allied therapies support in future. It is considered unlikely that he would be capable of open employment as an adult, and thus would be likely to be eligible for use of income and community support services.

This disease or condition is a disease or condition to which paragraphs 4005(c)(ii)(A) - new in Schedule 4 of the Migration Regulations 1994 apply, regardless of whether or not health care or community services will actually be used in connection with the applicant during the period of the applicant's proposed stay in Australia. A person with such a disease or condition would be likely to require health care or community services or would be likely to meet the medical criteria for the provision of a community service and provision of such health care or community services relating to the disease or condition would be likely to result in a significant cost to the Australian community in the areas of health care and community services, or prejudice the access of Australian citizens or permanent residents to, health care and community services.

Therefore the applicant does not meet Public Interest Criterion(s):
4005

Serial Code(s) and Narrative:
99 Does not meet health requirement. Form 884 follows.

MOC Comments 801
NB. Case could be considered for referral for Ministerial intervention.'

25 By letter dated 13 August 2004 the Tribunal invited the applicant, to comment on this opinion of the RMOC.

26 In response to that letter from the Tribunal, solicitors for the applicant sought a hearing. At the hearing on 11 October 2004 the applicant was represented by pro bono counsel. The gravamen of the counsel's submissions was that the Tribunal was not bound to accept the opinion of the RMOC as correct under reg 2.25A(3) of the Regulations because that opinion was not one authorised by the Regulations.

27 Counsel for the applicant argued that, on the proper construction of the Regulations, and in particular Public Interest Criterion 4005, a MOC had to assess the specific nature and the extent of David's condition and then apply the statutory criteria to a hypothetical person having that specific condition. Counsel submitted that in considering whether to accept the RMOC's opinion as correct within the meaning of reg 2.25A(3) of the Regulations, the Tribunal was obliged to assess the RMOC's opinion by reference to that test. On the application of that test to the RMOC's opinion, the Tribunal should find that the RMOC had misconceived his task, and had not applied the proper test but had assessed David's position on the basis of a person suffering from Down's Syndrome generally.

28 Counsel also referred to the *Weinberg* case as an instance where the MOC had adopted the correct approach and had made an assessment of the application of Public Interest Criterion 4005(c) of the Regulations by reference to a person that had the actual form or level of the condition of Down's Syndrome which the child in question had. In that case the MOC, before making an assessment of the application of Public Interest Criterion 4005(c) of the Regulations to the child's condition, had called for reports as to the child's IQ, current capabilities and her potential to develop into an independent adult.

The Tribunal decision

29 In its decision delivered on 17 November 2004, the Tribunal affirmed the

delegate's decision under review and found that the applicant and her family were not entitled to the grant of permanent residency visas.

30 The Tribunal rejected the applicant's arguments and found that it was bound to take the opinion of the RMOC of 5 August 2004 as correct under reg 2.25A of the Regulations.

31 In its reasons the Tribunal said:

> *'The Tribunal has considered the submissions which has been made on the applicant's behalf. However it is clear that both on the face of the legislation and from the relevant Federal Court case law that the Tribunal is unable to overturn the opinion of an MOC. In particular, the Tribunal has had reference to the judgment of Carr J in* Blair v Minister for Immigration and Multicultural Affairs *[2001] FCA 1014... In that case, Carr J considered arguments similar to those which have been submitted on the visa applicant's behalf and found that the MOC had not erred in making his opinion, nor had the Tribunal erred in taking that opinion to be correct.'*

32 The Tribunal further stated:

> *'The submissions in this case also referred to a previous Tribunal decision in* Re Weinberg *[Tribunal ref A99/3170]. The Tribunal obtained the files relevant to those proceedings. It is clear from those files that the matter of* Weinberg *differed from the present case in the crucial respect that in the* Weinberg *matter, the secondary visa applicant has subsequently been found to meet criterion 4005 by an MOC.'*

Application for judicial review

33 An amended application for judicial review was made on 14 April 2005. The grounds of review are as follows:

> *'The* [Tribunal] *Decision involved narrow jurisdictional error due to error of law.*
>
> ***Particulars***
>
> *(1) The* [Tribunal] *incorrectly considered that the assessments of the Medical Officers of the Commonwealth (**MOC**) and Review Medical Officer of the Commonwealth (**RMOC**) were binding, despite the fact that these decisions involved errors of law for the following reasons:*
>
> *(A) The MOC and RMOC misinterpreted or alternatively misapplied the relevant test provided by PIC 4005 (**Test**) in that;*
>
> *(i) The Test requires them to look at the disease or condition actually suffered by a person when assessing whether they*

meet the Test;

(ii) The MOC and RMOC both incorrectly applied a general notion of Down's Syndrome when assessing David against the Test; and

(iii) The MOC and RMOC failed to consider whether David's particular condition, being a mild form of Down's Syndrome, met the Test as it was required to do by the Act;

(B) Further, or in the alternative, the MOC and RMOC failed to take into account or alternatively gave insufficient weight to material relevant to the assessment of whether David met PIC 4005 in that:

(i) both were provided with the written opinions of medical and education specialists who have had personal experience with David. These opinions all supported a contention that David satisfies PIC 4005; and

(ii) Despite this substantial body of evidence to the contrary the MOC and RMOC found that David did not meet PIC 4005;

(C) Further, or in the alternative, the MOC and RMOC took into account irrelevant considerations... in that;

(i) The MOC considered a general notion of "Down's Syndrome" when assessing whether David met PIC 4005;

(2) The [Tribunal] *Decision was contrary to Public Policy in that it is based upon or alternatively promotes the premise that all persons with "Down's Syndrome" are:*

(A) of similarly [sic] *ability; and*

(B) necessarily a burden on the community'.

The applicant's submissions

34 Counsel for the applicant submitted that the case of *Minister for Immigration and Multicultural Affairs v Seligman* (1999) 85 FCR 115 *('Seligman')* was authority for the proposition that the Tribunal was only able to treat the MOC's opinion as correct if it was an opinion which was given under the Regulations. Counsel submitted that there was really only one 'crisp point' in the application, namely: What was the appropriate test to be applied by an MOC in assessing whether the statutory criteria in Public Interest Criterion 4005(c) applied to the applicant in question?

35 Counsel argued that, in determining whether to treat the MOC's opinion as correct, it was incumbent on the Tribunal to assess the opinion by reference to whether the MOC had applied the appropriate test in giving his or her opinion. If the Tribunal misapprehended or misconstrued that test, the Tribunal would ask itself the wrong question in relation to whether to treat the MOC's opinion as correct, and would thereby commit jurisdictional error.

36 Counsel for the applicant further submitted that, on the proper construction of Public Interest Criterion 4005, a MOC had to assess the specific nature and extent of the applicant's actual condition and then apply the statutory criteria to a hypothetical person having that specific condition. It was not sufficient to make the assessment by reference to a hypothetical person with a generalised notion of the condition.

37 Counsel submitted that the Tribunal was wrong to distinguish *Weinberg* on the basis that the applicant's daughter in that case had subsequently been found to meet Public Interest Criterion 4005 of the Regulations by an MOC. This is not a distinguishing point.

The respondent's submissions

38 Counsel for the respondent accepted that even though *Seligman* was decided before the privative clause provisions were introduced to the Act, the nature of the error identified by the Full Court in that case would be a jurisdictional error.

39 Counsel for the respondent argued that the appropriate test to be applied was not to identify the specific form of the condition suffered by the applicant in question and then apply the criteria of Public Interest Criterion 4005(c) to a hypothetical person with that condition. Counsel relied upon the following observations of Finkelstein J in *X v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCA 429 at [14]-[15]*('X')*:

> *'Ground (d) assumes that the assessment required by the clause is not of an* ***entirely*** *hypothetical person with a certain disease, but "involve[s] consideration of the condition or disease* ***of the nature or kind*** *suffered by the applicant". The prosecutor says that the terms of sub-para 4005(c)(i), in particular "****the*** *disease or condition is* ***such that****..." (*[original] *emphasis added), indicate that the decision-maker is required to take into account the nature and extent of the particular symptoms suffered by the prosecutor. In the prosecutor's submission, this would be the only sensible reading of the provisions, being that "[t]here is obviously a wide range of symptomology and different levels of functioning for HIV sufferers". In my view, however,*

the respondent is correct in saying that para 4005(c) only requires the RMOC to focus upon the position of "a hypothetical person who suffers from HIV" since the terms of the provision focus upon the "disease or condition" generally, not upon the condition of a particular applicant or class of applicants. All the Medical Officer need do is provide an opinion about the likelihood of a hypothetical person with "the disease or condition" requiring health care or community services during the time of the prosecutor's stay in Australia, and about whether the likely cost to the community of those services would be "significant". The terms and purpose of the condition mandate no finer distinctions.'

40 Counsel for the respondent also submitted that, in any event, even if the appropriate test was that contended for by the applicant, relief should be refused. This was because the MOC stated that his opinion was based on available medical and radiological reports. Further, counsel submitted that there was evidence to support the findings about the applicant's speech disorder, current requirements for education support and likely further requirements for support in the future, and capacity for open employment. Counsel also referred to the fact that the RMOC had recommended the case be considered for referral for Ministerial intervention as indicative of the fact that the RMOC had applied the appropriate test.

Reasoning

41 In *Seligman* the Full Court at 130, at [66] said:

'... The delegate is only entitled and obliged to take [the medical officer's] *opinion as correct if it is an opinion of a kind authorised by the regulations and, it may be added, validly so authorised. If it is not or if it travels beyond the limits of what is authorised, then to act upon it as though it is binding is to act upon a wrong view of the law and to err in the interpretation of the law or its application, a ground of review for which s 476 of the Act provides.'*

42 The disposition of the application therefore, depends upon three issues:

(a) a construction of the Regulations to determine the proper test by which a MOC is to assess the matters referred to in Public Interest Criterion 4005(c) of the Regulations;

(b) whether the Tribunal committed jurisdictional error in the way in which it approached the question whether to accept the opinion of the RMOC as correct pursuant to reg 2.25A(3) of the Regulations; and

(c) if the Tribunal did commit jurisdictional error, whether, as a matter of discretion, I should refuse to send the matter back for determination by the Tribunal according to law.

The proper test

43 I turn to deal with the first issue. In my view, the applicant's submission as to the appropriate test to be applied, is to be accepted. A proper construction of Public Interest Criterion 4005 of the Regulations, requires the MOC to ascertain the form or level of condition suffered by the applicant in question and then to apply the statutory criteria by reference to a hypothetical person who suffers from that form or level of the condition. It is not the case that the MOC is to proceed to make the assessment at a higher level of generality by reference to a generic form of the condition.

44 There are two reasons for coming to this view.

45 Firstly, the weight of the authorities appears to favour that view. In *Seligman*, the Full Court considered the position of an applicant for a permanent residency visa who had a 22 year old son who had borderline intellectual functioning. The MOC in that case had in September 1996 issued an opinion that the applicant's son did not meet the health requirement.

46 The applicant then obtained further opinions as to the level of his son's impairment and the extent to which this impairment might result in his son being a cost to the Australian community. These opinions were provided to the MOC. Subsequent to obtaining these opinions, the MOC issued a further opinion in identical terms to the opinion which he had issued in September 1996. On the face of the opinion there was no reference to the further materials which had been submitted by the applicant. The trial judge however found that in issuing the second opinion, the MOC had in fact taken the subsequent material into account.

47 The applicant challenged that finding by way of a notice of contention before the Full Court. At 133 of the judgment, the Full Court said at [83]:

> *'At this stage it is necessary to consider the point raised on the Notice of Contention. It was submitted on behalf of Mr Seligman that the learned trial judge erroneously decided against him that the Medical Officer, after his decision dated 17 September 1996, made a further decision which took into account the material submitted by the applicant dated 25 November 1996, 5 May 1997, 27 March 1997 and 9 March 1997.*
>
> *Having regard to the conclusions which the Court had reached above about the validity of reg 2.25B and its impact on the Medical Officer's opinion, it is not strictly necessary to consider the point raised in the Notice of Contention. With respect to his Honour, it is difficult however to avoid the conclusion that no consideration was given to the additional material or that they were put to one side as going only to the actual likelihood of Gregory using health care or community services.* ***The material in part also went to issues of his level of impairment. It should have been considered...'*** (emphasis added)

48 Although the observations of the Full Court referred to above were not necessary for its decision, the observations demonstrate that, as a matter of construction, the Full Court regarded the particular level of the applicant's son's impairment as a relevant consideration in determining whether the applicant's son was 'a person who has a disease or condition' to which the statutory criteria in Public Interest Criterion 4005(c) (as it then read) applied.

49 In the case of *Imad v Minister for Immigration and Multicultural Affairs* [2001] FCA 1011 *('Imad')* Heerey J considered the construction of Public Interest Criterion 4005(c) of the Regulations. At [14] his Honour said:

> *'The intention behind this regulation is understandable, particularly in the light of reg 2.25A. One would expect that a medical officer would be able to assess* ***the nature of a disease or condition and its seriousness in terms of its likely future requirement for health care****. On the other hand, one would not expect a medical officer to inquire into the financial circumstances of a particular applicant or family members or friends or other sources of financial assistance.'* (emphasis added)

50 In *Inguanti v Minister for Immigration and Multicultural Affairs* [2001] FCA 1046 Heerey J endorsed the observations that he made in the *Imad* case.

51 Further, in the case of *Blair v Minister for Immigration and Multicultural Affairs* [2001] FCA 1014 *('Blair')* Carr J considered the case of a medical opinion issued by a RMOC, Dr Pincus, in respect of a nine year old boy with Down's Syndrome.

52 In that case, Dr Pincus went to some lengths to obtain up to date information as to the current condition of the boy in question. He commissioned a clinical psychologist's report to determine the boy's IQ and two areas of social function, mainly adaptive behaviour and capacity for independent living. He also requested a report by a speech therapist on the boy's speech and communication skills.

53 In his opinion Dr Pincus referred specifically to the boy's IQ and his social function, adaptive behaviour and capacity for independent living and applied the criteria of Public Interest Criterion 4005(c) to the personal circumstances of the boy in question. He did not refer to having made his assessment by reference to a hypothetical person who suffered from that form of the Down's Syndrome condition. The applicant in that case argued that on the proper construction of Public Interest Criterion 4005(c), it was necessary for the RMOC to have done so; and submitted that because Dr Pincus had not done so, the opinion had not been validly given. Carr J said that the applicant's argument on the construction of the Public Interest Criterion 4005(c) of the Regulations may be correct, and, assuming it to be so, he went on to say at [44]:

> *'Implicit in Dr Pincus' assessment was that a person who had Michael Courey's condition would be likely to require health care or community services and would meet the medical criteria for the provision of long-term income support in the form of a disability support pension. Furthermore, the "condition" of an applicant is an inherently personal attribute which may well be at a particular point in a gradation. It seems clear from the medical evidence that this is such a case. In those circumstances, a distinction between the applicant's (Michael Courey's) actual condition and the likely requirements of a "person" (i.e. someone other than the applicant) having such a condition is, in my view, too artificial to have any substance in this matter. In any event, the applicant's case was not put on the basis that Dr Pincus had unduly 'personalised' his opinion; the applicant's case was basically to the opposite effect.'*

54 The point which his Honour makes in his observations is, not that Dr Pincus was wrong to 'personalise' his opinion by reference to Michael Courey's actual condition, but that in assessing whether the statutory criteria in Public Interest Criterion 4005(c) applied to the applicant, there was in truth no meaningful distinction between whether this was judged by reference to the applicant's actual condition, or by reference to a hypothetical person having the same condition as the applicant. In the passage referred to above his Honour specifically recognises that the 'condition' of an applicant, is an inherently personal attribute which may

well be at a particular point in a gradation.

55 It appears to me, therefore, that the observations by Finkelstein J in the case of *X*, relied on by the first respondent, are against the weight of authority and I would, accordingly, respectfully decline to follow those observations.

56 Secondly, the construction contended for by the applicant is also consistent with the 'scheme' of Public Interest Criterion 4005 of the Regulations. If, as the first respondent contends, the RMOC need make the assessment called for under Public Interest Criterion 4005(c) only by reference to a person suffering from the disease or condition generally, it seems that such an assessment could be made in the abstract. For example, an assessment could be made in the abstract as to whether a person with a typical form of Down's Syndrome would be likely to require health care or be eligible for income or community support services, and whether provision of that care or those services would be likely to result in significant cost to the Australian community. Thus, on the basis of such abstract assessments, it would have been open to Parliament to have identified in the Regulations a number of specific diseases or conditions which, if suffered by any person in the typical form, would preclude that person from satisfying Public Interest Criterion 4005(c); and to have provided that a person who is not 'free from' that specific disease or condition fails the health requirement. The fact that Parliament has not done so, except in the case of tuberculosis (par 4005(a)), supports the construction contended for by the applicant, namely, that Parliament intended the assessment made under Public Interest Criterion 4005(c) to be made on a case by case basis by reference to the form or level of the disease or condition actually suffered by the applicant. Further, the applicant's contention is also supported by the contrast between the use of the words 'free from' in par 4005(a) - which import the notion that the applicant be free from the disease or condition in any form - and the qualifications imposed in Public Interest Criterion 4005(c)(i) and (ii) on the words 'disease or condition' in Public Interest Criterion 4005(c).

Jurisdictional error

57 The second issue is whether the Tribunal committed jurisdictional error in the way in which it approached the question of determining whether to accept the opinion of the RMOC as correct under reg 2.25A(3) of the Regulations. The Tribunal rejected the applicant's

argument as to the appropriate test to apply in assessing whether the opinion of the RMOC was to be taken as correct on the grounds that the decision of Carr J in the *Blair* case was inimical to the applicant's argument. As I have mentioned above, the decision of Carr J in the *Blair* case is not, in my view, inimical to the applicant's contention. It follows that by rejecting the test contended for by the applicant, the Tribunal made an error of law which precluded it from exercising its jurisdiction according to law. It therefore committed jurisdictional error.

Discretion

58 The third issue is whether I should decline to grant relief on the basis that it would be futile to send the application back to the Tribunal.

59 In *Re Refugee Tribunal; Ex parte Aala* (2004) 204 CLR 82 *('Aala')* the High Court considered the circumstances in which a Court should withhold relief on discretionary grounds where there had been a breach of the rules of procedural fairness. In that case the High Court accepted the principle that had earlier been stated in *Stead v State Government Insurance Commission* (1986) 161 CLR 141 at 147, namely, that relief consequent upon breach for procedural fairness should only be refused if the Court could say that a properly conducted hearing could not have yielded a different result.

60 In the case of *Lu v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 340 the Full Court held that the principles in *Aala* on withholding relief referred to above, also applied to cases of jurisdictional error, other than procedural unfairness.

61 At [48] Sackville J said:

> *'...in Ex parte Aala Gaudron and Gummow JJ distinguished the rationale underlying the requirement of procedural fairness from that underpinning the doctrine of excess of jurisdiction. However, I do not think that anything said by their Honours is inconsistent with adapting the approach taken in cases of alleged procedural unfairness to other jurisdictional errors. In particular, I can see no reason why that approach cannot be adapted to a case where an applicant says the decision-maker committed a jurisdictional error by failing to take into account the relevant considerations (in the* Peko-Wallsend *sense).'*

62 In *VAAD v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCAFC 117 *('VAAD')*, also a case where the jurisdictional error was the failure to take into account relevant considerations, the Full Court approved the observations of Sackville J referred to above. The Full Court in *VAAD* at [83] applied a test which asked whether the jurisdictional error was one 'which could possibly have deprived the appellants of a successful outcome to their application for review'.

63 On the application of that test, it is my view that the jurisdictional error of the Tribunal was one which could possibly have deprived the applicant of a successful outcome to the application. It is at least possible that a Tribunal, acting according to law, would have concluded that the RMOC had not, in providing his opinion, applied the appropriate test. There is no reference by the RMOC in the letter of the need to assess the statutory criteria in Public Interest Criterion 4005(c) by reference to a hypothetical person who had the actual level of David's condition. The letter does contain some statements which purport to describe David's condition but the statements are at such a high level of generality that they could be taken as being descriptive of the condition of persons suffering from Down's Syndrome generally. Importantly, there is no recognition in the letter that the RMOC regarded as relevant the fact that the level of David's condition was described by Dr Silva as 'mild'. Nor, is there any specific reference in the opinion to the contents of the reports furnished by the applicant, notwithstanding that in its letter of 2 August 2004 the Tribunal asked the RMOC to identify in his opinion the materials he considered, and to express his reasons for any disagreement with the information in the materials. I do not regard the fact that the RMOC recommended the application for Ministerial intervention as indicative of the RMOC having applied the appropriate test. That comment is equally consistent with the RMOC having applied the generalised approach.

64 It follows that the application succeeds and that the first respondent should pay the applicant's costs.

I certify that the preceding sixty-four (64) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Siopis.

Associate:

Dated: 10 November 2005

Counsel for the Applicant:	Mr S Penglis (Pro Bono)
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Counsel for the Respondent:	Mr J Allanson
Solicitor for the Respondent:	Australian Government Solicitor
Date of Hearing:	27 June 2005
Date of Judgment:	10 November 2005