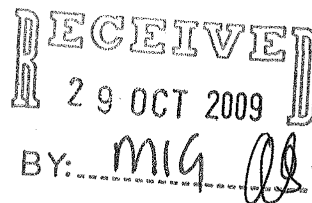
Submission No 63



ATTACHMENT 7

THE HEALTH REQUIREMENTS –
When the ends do not justify the means

Chantelle Perpic

Over the past century, migrants have been denied entry into Australia under various exclusionary policies. The recent use of a health test reveals a marked shift in immigration law whereby compelling policy objectives are said to legitimate the administration of an otherwise exclusionary test. Upon contrasting Australia's migration framework with that employed in Canada and the UK, we may begin to question whether the constrictive migration laws presently in place are in fact necessary or whether it is time for reform. Ultimately it will be argued that the current migration framework is not proportionate to the ends it seeks to achieve and thus reform is the inevitable option.

1. The structure of the migration framework

The power to subject migrants to health testing as a prerequisite to the grant of a visa is established in s60(1) of the *Migration Act* 1968 (Cth) whereby 'the Minister may require the applicant to visit, and be examined by, a specified person, being a person qualified to determine the applicant's health, physical condition or mental condition'. Not all applicants will therefore have to undergo health testing[247].

The administration of the health requirements has been outsourced to the Health Assessment Service (HAS)[248] and Health Services Australia (HSA)[249]. Panel doctors, referred to as Medical Officers of the Commonwealth (MOCs), are employed by HAS and HSA and are given the role of determining whether the applicant meets the requisite health requirements under the regulations[250]. In the event of an appeal, an applicant may apply to have the merits of the case internally reviewed by Review Medical Officers of the Commonwealth (RMOCs).

1.1 The Health Requirements

The regulations firstly establish an absolute prohibition on applicants with tuberculosis (TB) from meeting the criteria for entry[251]. If the applicant does not suffer from TB, the applicant will fail the health test unless the applicant:

> (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[252].

Preventing the spread of communicable diseases may be put forth as the basis upon which these health requirements are justified; they seek to peruse a legitimate aim where that aim

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[247] For who must be assessed refer to: Form 1071i *Health Requirement for Permanent Entry into Australia* or Form 1163i *Health Requirement for Permanent Entry into Australia.*
[248] See Procedure Advice Manual 3 (PAM 3), Sch4/4005-4007, section 6.3 for further information about HAS.
[249] See PAM 3, Sch4/4005-7, section 6.5 for further information about HSA.
[250] *Migration Regulations 1994* reg 1.03.
[251] *Migration Regulations 1994*, Sch 4 cl 4005(a), 4006A(1)(a), 4007(1)(a).
[252] *Migration Regulations 1994*, Sch 4 cl 4005(b), 4006A(1)(b), 4007(1)(b).

lies in preventing infectious disease spreading across borders. However, not all diseases caught by the health rules can be justified on this basis.

The spread of disease is not the only basis upon which a migrant may fail the health test. An economic policy objective has been incorporated into the health regulations producing what is arguably one of the more controversial bases upon which potential migrants may be excluded. One of the grounds upon which an applicant may fail to meet the health requirements is where the:

> (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[253]

The idea that an applicant poses a potential burden to the Australian community is a message communicated clearly by the regulations. The objectivity of the test precludes the MOC forming their opinion on what the applicant they are assessing will actually cost the Australian community and whether there are other compelling grounds upon which the visa should be granted[254].

Whilst challenges have been made to these regulations on the basis of inconsistency with the rest of the regulations, the Full Court of the Federal Court has upheld its validity[255]. Since the decision in *Minister for Immigration and Multicultural Affairs v Seligman*[256], the regulations have been altered to make clear that the assessment is objective. In *Imad's case*, the validity of the regulations were upheld:

> The "person" referred to in (i) is not the applicant but a hypothetical person who suffers from the disease or condition which the applicant has...It is not a prediction of whether the particular applicant will, in fact, require health care or community services at significant cost to the Australian community. This meaning is rendered, in my view, clear beyond argument by the concluding words beginning with "regardless"[257].

The court went on to discuss the objective underlying the regulation:

> 14 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 any family members or friends or other sources of financial assistance.

The PAM 3 also extrapolates on why a subjective assessment of costs is not permissible:

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[253] *Migration Regulations 1994*, Sch 4 cl 4005(c)(ii), 4006A(c)(ii), 4007(c)(ii).

[254] *Imad v Minister for Immigration and Multicultural Affairs* [2001] FCA 1011 at 13.

[255] *Imad v Minister for Immigration and Multicultural Affairs* [2001] FCA 1011.

[256] *Minister for Immigration and Multicultural Affairs v Seligman (Seligman)* [1999] FCA 117

[257] Ibid at 13.

> there is no way such intentions can be legally enforced once residency is obtained...some applicants may simply change their mind regarding services once residence is achieved and the full level of costs is realised[258].

The economic policy objective underlying the regulations is evidently focused on the notion that a migrant who suffers from a disease of disability poses a burden on the Australian community regardless of what they have to offer. The inability for a MOC to assess the merits of an applicant's case further constricts any cost benefit analysis being undertaken in the decision to grant a visa.

1.2 Assessing the merits of a case

For the majority of visa applicants[259], compassionate considerations cannot be taken into account. This is due to a combination of two factors. Firstly, the limited role MOCs have been ascribed in purely assessing costs precludes compassionate arguments being considered[260]. Secondly, under reg 2.25A(3), the Minister cannot challenge the findings of a MOC therefore, a finding by a MOC that the applicant poses a 'significant cost' will mean the Minister cannot override this decision and, as a result, the application will fail.

Only in the limited visa classes such as spouse, interdependency and humanitarian visas[261] can the health requirements be waived thus allowing room for the Minister to consider the merits of an applicant's case thus softening the implications of a MOCs negative findings. However, for the vast majority of visas, failure of the health test means failure to obtain a visa.

Recent decisions of the Migration Review Tribunal reveal the way in which reg 2.25A(3) is being used as a device to effectively tie the hands of the Tribunals in reviewing the merits of a case[262]. Instead, by relying on reg 2.25A(3), the Tribunal insists that it lacks the legislative authority to consider whether the applicant will fail to meet the health criteria thus the application is dismissed based solely on the MOCs opinion.

A combination of the health requirements and reg 2.25A(3) limit the opportunity for an applicant to seek entry into Australia even if they can put forth strong compassionate arguments. For example in *Re Wade*[263] a 79 year-old women sought entry on a Contributory Parent visa. The applicant, who was living alone in the UK, suffered from 'diabetes mellitus with vascular, kidney and eye complications' so sought entry into Australia to live with her daughter. On the opinion of the MOC, the applicant failed the health test and thus her application was declined.

The applicant's daughter wrote to the Department of Immigration and Citizenship (DIAC) seeking to have the case considered on compassionate grounds. When she was informed by DIAC that the migration regulations prohibit the Department questioning the decision of a MOC or considering the merits of a case under PIC 4005, the applicant wrote a profound and heartfelt statement to the Department:

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[258] PAM 3, Sch4/4005-7, section 114.5

[259] With the exception of visas classes to which *Migration Regulations 1994*, Sch 4 cl 4007 applies.

[260] See 1.1.1 of this paper.

[261] For these visas *Migration Regulations 1994*, Sch 4 cl 4007 applies.

[262] See for example: *Re Freeman* (MRTA 1606, 21 August 2009); *Re Savu* (MRTA 1203, 1 July 2009).

[263] *Re Wade* (MRTA 1413, 30 July 2009).

> I realise that due to current migration regulations, [the RMOC] was unable to consider that my mother would have lived, and been cared for, in my home. She would have top private medical insurance if allowed into Australia. People in my mother's situation will never be able to meet the PIC 4005 (c)(ii)(A)- due to the last paragraph "regardless of whether the health care or community services will actually be used"[264].

This case highlights the harsh effect the migration framework may have on applicants. By effectively precluding a subjective assessment to be made as to whether an individual applicant will be a "burden" on the health care system or whether costs can be absorbed by the applicant or a family member, there is no possibility open for applicant to have their individual circumstances considered.

Having briefly outlined the framework in which the health test operates, the next section will analyse the policy objectives said to justify the test. In the final section, these policy objectives and the foregoing discussion of the migration framework will be analysed against overseas migration jurisprudence.

2. The Health Test's policy objectives

The Department of Health and Ageing (DHA) is the body responsible for providing DIAC with 'high-level policy advice'[265]. The policy objectives, which the health test is said to achieve include:

- to protect the Australian community from public health and safety risks;
- to contain public expenditure on health care and community services; and
- to safeguard the access of Australian citizens and permanent residents to health care and community services in short supply[266].

The Longitudinal Survey of Immigrants to Australia (LSIA) is promulgated on the DIAC website as justifying the ongoing application of a rigid health test[267]. The LSIA was conducted by DIAC between September 1993 and August 1995 with the aim of examining the early years of various aspects of a migrant's life once they had immigrated to Australia. Health was included as an aspect of the study with the results revealing that, of the migrant's surveyed, 9% initially reported poor to fair health with this figure rising to 16% just 3.5 years after migrating[268].

According to LSIA, those with poor English skills reported the worst health and those migrants who accessed health services most frequently were 'Humanitarian immigrants had made an average of 2.13 visits and the Preferential Family entrants, 2.06 visits'[269].

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[264] Ibid at 32.
[265] PAM 3, Sch4/4005-7, section 6.5
[266] See PAM 3, Sch4/4005-7, section 10.1.
[267] Department of Immigration and Citizenship (DIAC), 'New settlers have their say - How immigrants fare over the early years of settlement', <http://www.immi.gov.au/media/publications/research/overview/newset1.htm> (accessed 23 September 2009).
[268] Ibid.
[269] Ibid.

What is implicitly suggested through the study is the need for the ongoing application of the health test to ensure migrants do not burden our health care system. This point is made clear in the executive summary for LSIA where it is stated:

> In line with the fact that Humanitarian and Preferential Family visa entrants may be exempted from meeting certain health requirements when they are selected to migrate to Australia, we found that a higher proportion of these two groups (especially the Humanitarian immigrants) compared with the overall average noted fair to poor health[270].

An examination of the case law in the next section demonstrates the way in which the policy objectives obstruct the ability for compassionate grounds to be pleaded or for the benefits the applicant will bring to be factored into the decision-making process. Instead, once assessed as posing a burden, the applicant will be denied entry.

2.1 The problem with a policy emphasis on 'cost'

The decision of *Barwon Health*[271] illustrates the way in which the regulations, by presuming that migrants are a burden to the health system, fails to allow for a balancing exercise of potential benefits that a migrant may possess.

In *Barwon Health*, the applicants sought entry into Australia on an Employer Nomination Visa. The primary applicant was offered the position of Director of Radiation Oncology at Geelong Hospital and evidence was led that the applicant was urgently needed to fill this position and in doing so would provide his services to the local community[272]. The visa was declined on the basis of the applicant's son suffering from autism and moderate mental retardation estimated at costing $533,000 during the child's lifetime[273]. With waiver not being applicable to the visa class applied for, there was no scope for arguments to be led that the applicant would be providing an invaluable service if granted entry or any other arguments to that effect.

The overriding concern that migrants are burdens on the Australia health care system appears to be a blinding policy objective. Even in cases where the Minister, in his discretion, may waive the health requirements if the applicant does not pose an 'undue cost' or 'undue harm' to the Australian community[274], financial factors are still a real concern for decision-makers. The following cases aptly demonstrate this point.

In the case of *Re Papaioannou*[275], the applicant was refused a Spouse visa on the basis that the cost of treating him for chronic renal failure would constitute an 'undue cost'. Despite waiver being applicable in the present case, and thus a consideration of compassionate grounds being undertaken, the applicant was still denied a visa.

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[270] Ibid.
[271] (MRTA 1111, 10 May 2000).
[272] Ibid at 11.
[273] Ibid at 7.
[274] See *Migration Regulations 1994*, Sch 4 cl 4007.
[275] *Re Panagiotis* (IRT V90/00215, 19 April 1991).

The Tribunal member made it clear that he did not arrive at the decision to deny the visa lightly having considered the willingness of the Greek community to absorb some of the applicant's costs[276] and the fact that the applicant's wife was a permanent Australian tax payer[277]. The Tribunal member, in arriving at the decision, appeared compelled to decline the visa due to the inability of the applicant or his wife to absorb any of the costs either in the past or into the future[278].

The decision of *Re Kaur*[279] also reveals the significant role costs continue to play even in cases where waiver is applied. The presiding tribunal member in *Re Kaur* commented on what will be taken into account in determining whether waiver is applicable to a particular case:

> It may be to Australia's benefit in moral or other terms to admit a person even though it could be anticipated that such a person would make some significant call upon health and community services. There may be circumstances of a "compelling" character, not included in the "compassionate" category that mandates such an outcome[280].

In *Re Kaur*, similarly to in *Re Papaioannou*, compassionate factors were taken into account including the commitment the applicant's religious community in Australia had shown and also the large support network and family the applicant had in Australia. However, in *Re Kaur* the applicant was able to demonstrate that she would not pose a financial liability to the Australian community. Unlike in *Re Papaioannou*, the applicant in *Re Kaur* was able to show a history of supporting herself financially and also prove that her large Australian family would also contribute financially. In taking into account these factors, the tribunal member waived the health requirements and the applicant was successful in obtaining a Spouse visa despite having failing to meet the medical criteria.

Where waiver is available, and thus compassionate grounds can be taken into consideration, the issue of costs is still given a significant degree of prominence[281]. The case law highlights the way in which, both in cases where waiver is and is not applicable, an assessment of costs is given primacy in determining whether or not to grant an applicant a visa.

Having considered the way in which policy has heavily influenced decision-making in Australia, in the next section this will be contrasted with international jurisprudence. By doing so, it is aimed to reveal the unjustifiably stringent nature of the Australian requirements in comparison to that employed in the UK and Canada.

3. International Migration Law

3.1 Canada's Excessive Demand Criteria

In Canada, the policy objectives mirror those put forth in defence of the Australian health test. Section 38 of the *Immigration and Refugee Protection Act* S.C. 2001 lists the grounds

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[276] Ibid at 52.
[277] Ibid at 51.
[278] Ibid at 53.
[279] (MRTA 1002, 18 February 2004).
[280] Ibid at 53.
[281] See also *Re Nguyen* (IRT N96/02452, 29 January 1998) for a further illustration of this point.

upon which a migrant may be refused entry based on 'their health condition' including that the applicant:

> (*a*) is likely to be a danger to public health;
> (*b*) is likely to be a danger to public safety; or
> (*c*) might reasonably be expected to cause excessive demand on health or social services.

Section 38 forms the Excessive Demand Criteria[282] which has been interpreted in a rather different way to the interpretation given to the health test by Australian courts. In decisions of *Hilewitz* and *de Jong*, the Canadian Courts have made clear that when applying the health test, an individualistic approach must be taken by examining each case on its particular facts. In *Hilewitz* and *de Jong* the courts remarked:

> Using contingencies to negate a family's genuine ability and willingness to absorb some of the burdens created by a child's disabilities anchors an applicant's admissibility to conjecture, not reality[283].

In examining the Canadian provisions, commentator Iyioha argues that the policy arguments, whilst superficially attractive, are not plausible. He particularly calls into question the idea that migrants will pose an economic burden to the native population but rather considers the policy objectives as unjustified and discriminatory. As a proposal for reform he suggests a rethinking of migration policy based on a legal, rather than moral argument. He calls for the health test under Canadian law to be revised in light of Canada's international obligations under international instruments such as the ICCPR so as eradicate the discriminatory element inherent in the test.

Whilst Iyioha's challenge to the health criteria is compelling, it is questionable whether the argument for legal rather than moral grounds can translate in the Australian context. This is particularly the case given Australia's lack of commitment to incorporating fully international instruments such as the ICCPR and by maintaining the ability to discriminate on the basis of disability when it comes to migration[284].

Where Iyioha's suggestions for reform may be more readily applicable to Australian law include where he suggests that health testing include a cost-benefit analysis. He asserts that if a health test deems migrants to be a cost, an analysis of benefits should also be included. Iyioha argues:

> if an individual's economic contribution to the host nation outweighs their use of resources, there is no reason why their healthcare needs should be an issue during the admission process[285].

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[282] Immigration and Refugee Protection Regulations SOR/2002-227, June 11, 2002 (Can.)

[283] *Hilewitz v. Minister of Citizenship and Immigration* and *de Jong v. Minister of Citizenship and Immigration* [2005] 2 S.C.R. 706, 2005 SCC 57 (Can.) at 59.

[284] For a discussion of issues in Australia's compliance with international law surrounding disability see: Report 95, Ch 2: Convention on the Rights of Persons with Disabilities, *Joint Standing Committee on Treaties* <http://www.austlii.edu.au/au/other/jscot/reports/95/> (accessed 2 September 2009).

[285] A Different Picture Through The Looking-Glass: Equality, Liberalism And The Question Of Fairness In Canadian Immigration Health Policy 22 *Geo. Immigr. L.J.* 621 at 635.

In light of this suggestion, we may be inclined to consider a more appropriate approach would be for the law to include a balancing exercise of a migrant's cost and benefit. A cost-benefit analysis would not only look at the burden on the health system the individual may pose, but also the contributions the individual will bring to the country as a result of their unique and personal skills and qualities. In introducing a cost-benefit analysis into the Australian system, decisions such as that in *Barwon Health* (discussed earlier in this paper) would seem more just and fair.

Despite the criticism Iyioha mounts against the health test, we only need to refer back to the ratio in *Hilewitz* and *de Jong* to find that the Canadian provisions allow for more compassion than those in Australia. The difference lies in the ability of the Canadian test to allow for subjective factors unique to the individual to be taken into account whereas the Australian framework explicitly expels such considerations.

3.2 UK health testing

The UK Border Agency, part of the Home Office, controls migration into the UK through medical criteria contained in the Medical Issues (MED)[286]. In a way the MED is similar to the PAM3 in that it provides the guidelines for determining who requires medical testing, what the testing consists of and other such related issues.

Under MED6, a policy rationale emerges for why medical testing is deemed necessary as part of an immigration program which is similar to that employed in Canada and Australia. Under the MED6, the policy objectives are to ensure migrants do not[287]:

- endanger the health of other persons in the UK; or
- be unable for medical reasons to support themselves and/or dependants in the UK; or
- require major medical treatment (for which an entry clearance application has not been made).

Where the UK guidelines differ from the PAM 3 is where an outline is given as to when compassionate grounds can be considered as part of an application. The inability of many migrants applying for visas in Australia to have their individual circumstances taken into account is something to which the UK does not share. Under MED10, an entry clearance officer is permitted to consider the applicant's circumstances and, if there are compassionate grounds for granting a visa which outweigh the need for exclusion based on medical grounds, then it is mandated that the Entry Clearance Officer (ECO) refer the matter to the UK Border Agency to determine.

Whilst in the UK, Canada and Australia a similar policy rationale supports the health requirements, the application and form of the provisions remain disparate. Unlike under the Australian migration framework, the UK and the Canadian health requirements allowing for compassionate and unique individual circumstances to be taken into account. From this, we may begin to really question whether the Australia requirements are just too stringent and thus not proportionate to the policy aims they seek to fulfill.

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[286] For the latest issue (7 August 2008) see: http://www.ukvisas.gov.uk/en/ecg/medicalissues#20667684 (accessed 22 September 2009).
[287] MED6 see: <http://www.ukvisas.gov.uk/en/ecg/medicalissues#20667684>, (accessed 22 September 2009).

An attempt to ascertain whether or not the policy objectives of the health test are proportionate to the health regulations will be likely to be met with little success. The Australian National Audit Office conducted an analysis of the test's application and found that DIAC currently lacks any clear guidelines to effectively measure whether or not it is meeting the policy aims behind the health test. Therefore, as part of ANAO's recommendations, they have suggested that DIAC set up procedures to assess, monitor and report on its performance in this area[288]. When DIAC implements these recommendations, then we may better assess the health requirement's proportionality to the policy objectives.

4. What can we learn from the UK and Canada?

Both the UK and Canada employ health criteria as a way of screening applicants for entry into the country. These countries, like Australia, also have similar policy objectives, which are said to justify the exclusion of migrants who fail to meet the requisite criteria. Where the major point of divergence is when it comes to analysing the way in which compassionate considerations are allowed to factor into the decision making process. Whilst the Australian jurisprudence reveals there is very little weight (if any) attached to the merits of an applicant's case, in Canada and the UK it is mandated that factors beyond health are taken into account when determining whether or not to grant a visa.

In order to lessen the harsh impact of the current law, it is suggested that Australia reform its policy and laws as a whole to allow decision-makers to consider factors beyond the medical. The MOC can give their opinion as to the potential cost of the applicant's condition but there opinion should be only one factor in the matrix of considerations. The cost an applicant's condition potentially poses to the Australian community should at least be weighed against the benefits an applicant poses to come up with a cost benefit analysis.

5. Beyond the medical: room to consider the individual's circumstances?

The health requirement has become a way of excluding migrants from entering Australia. Whilst employing an exclusionary policy, as part of the migration framework, is nothing new, what is innovative about the health requirements is the strong policy basis put forth as justifying the test's application. Through this paper, it has sought to be argued, that the law currently assumes an applicant will pose a cost to the Australia community and thus, for most visa classes, precludes a consideration of compassionate factors or benefits an applicant may possess. Furthermore, it has been argued that the policy rationale behind the health requirements is not proportionate to the aims they seek to achieve. As a result, reform should take place and the migration framework of the UK and Canada provides a useful starting point.

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[288] Audit Report No. 37, 2006-2007, Administration Of The Health Requirement Of The Migration Act 1958, Table 30.1.8.

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