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Discrimination and Immigration: An Australian (Bad) Example

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Australia is an immigrant nation. Apart from its now small indigenous population, all of its 19 million population have immigrant ancestors. But though it has sought immigrants since earliest colonial times, its policies of recruiting and attracting immigrants have always been selective. In the twentieth century, it was notorious for its 'White Australia' policy which, for most of the last century, kept out people of non-European heritage. And in the twenty-first century, it continues to earn itself an ugly international reputation for its treatment of asylum seekers.

Our topic today concerns the Australian government's practice of keeping out yet another group of people – in this case, people with Down syndrome. But we should say, it is not just people with Down syndrome who are discriminated against, but people with almost any type of significant disability or health-related problem. And this is not a new policy; discriminating against people on the grounds of ill-health or disability, and seeking to refuse them permanent entry into Australia, has been part of Commonwealth government immigration policy since 1901, the year Australia became a nation.

Today, we hope to give you an idea of the situation for people wishing to migrate to Australia with a family member who has Down syndrome, try to pull together some common threads from cases which have been successful, and point to the inherent discrimination in the application process which we believe should be outlawed. We need to start however by making this important point: we are not lawyers; we are not migration agents. We cannot offer you legal advice on how to proceed with a particular migration case. What we can do, we hope, is to give you some idea about how other people have managed to gain entry to Australia in the past. And we sincerely hope this may be of some value to any of you who are contemplating attempting to migrate to Australia with a family member with Down syndrome.

One family's story

Our story began with a temporary visa, which brought my partner and I to the Australian National University in Canberra in 1993 for work. We spent three years in Canberra and instead of travelling extensively all over Australia and the entire Pacific region – as we had intended – we had two children in those three years. First Cailan (our daughter) and then Lucas (our son) arrived within 16 months of each other and our lives were transformed for ever... a scenario familiar to every parent. Once we had recovered from the initial shock that Cailan had Down syndrome we set about getting

on with our new family life, but Australia had taken on a different hue. It was no longer the short-term adventure we had embarked on in 1993 – by 1996 it was the place where we wanted to raise our children – and we would live to regret that we did not take up the possibility of permanent visas that had initially been offered to us when Roberto accepted the ANU job.

At the expiry of our temporary visas in 1996 we left Australia resolved to return permanently as soon as we could secure another job that would attract a permanent migration visa. Eighteen months later, we had that chance. Roberto was offered a position in Western Australia and we duly applied, in August 1998, for permanent residence visas for our family to immigrate. Our application was employer nominated (visa class 121) by the University of Western Australia. We weren't entirely naïve about migration procedures. Cailan had had heart surgery at 3 months of age – in Australia, ironically. Putting this and the Down syndrome together, we decided to preempt any hesitations the Commonwealth Medical Officer (CMO), who conducted the obligatory medical assessments, might have. We took along, and asked him to submit with his report, no less than 14 pieces of supporting documentation, attesting to Cailan's general health, developmental progress, educational advances and stable cardiac status.

In October, we learned that Cailan's medical papers had been referred to the Health Assessment Service in Sydney, and almost exactly a month later we received the letter refusing to grant our family a visa on the grounds that Cailan did not meet the health requirements because (I quote) “she has a disease or condition which, ... would be likely to result in a significant cost to the Australian community in the areas of health care or community services”. Whilst the Medical Officer's report, on whose opinion this conclusion rested, was entitled “Applicant Fails to Meet

Health Requirements” the reasons given were as follows: (and this is the full text, my emphasis)

“This 4-year old girl has Down's Syndrome. In my opinion it would be likely that she would require additional educational resources beyond mainstream education. It would be likely she would require supported employment in the future at significant cost to the Australian community.”

We were dismayed: firstly, this report rested solely on the label of Down syndrome – had anyone read any of the reports we submitted? There was no reference to our daughter at all, just Down syndrome. Secondly, it seemed ironic that the Medical Officer's report, concerned in title with health requirements, made no reference to anything medical – it was all about education and future employment!

Fortunately, our employer nominator shared our disappointment at the decision – at this point their research project had incurred ‘significant cost’ due to the delay in processing the visa of one of its principal researchers. They agreed to lodge a request to review the decision on our behalf (in the case of visa decisions made outside Australia – in our case, in London – an individual applicant is not able to request a review, only a third party in Australia can do this). Up to this point, this process had cost us about AU\$3,000.

Henceforth, we felt that we needed heavyweight help. We strongly doubted that the 14 reports we submitted with Cailan's papers had been taken into account in the making of the decision, and they certainly did not appear to have been seen by anyone who had a contemporary professional knowledge of what it means to have Down syndrome. If we were to have any chance of the decision

being reconsidered we needed to add independent professional advice that would have less chance of being refuted by the immigration authority.

So, along with the employer nominator's statement refuting the decision, which I drafted, our review documentation included statements from known research professionals both concerning the nature of Down syndrome and specifically about Cailan. We also had strong statements of support from professional colleagues, statements of support from two of Australia's state Down syndrome associations and we included copies of case studies which highlighted the potential of young people with Down syndrome. The application for review was submitted on February 1, 1999 at an additional cost of AU\$1,400, and incurred a swift response requesting a further AU\$330 in order to obtain a further (Review) Medical Officer's opinion.

In April a letter was received announcing that an up-to-date report from a psychologist was needed to help the Review Medical Officer with his/her opinion. This we duly submitted (a further AU\$840) choosing our psychologist very carefully.

As the year dragged on, we had lost faith. We were not going to drop the case – by this time we could not let go of the dreadful injustice that we felt was being served on Cailan by labelling her “a significant cost to the Australian community”, and would have felt apart of that injustice had we withdrawn – but we were resigned to the inevitable depressing end of this whole saga. We started to make other plans.

On November 19, we received a letter from Canberra advising us that a decision on our case had been taken, and inviting us to attend the formal handing down of that decision. The handing down ceremony was held in Canberra on the same day on which we received the letter advising us of it – in Brazil, where we were by this time living. We marveled at the irony of being invited to attend a visa decision ceremony in a country which we could not enter since we had no visa.

However, a phone call to Canberra rendered the unbelievable news that the original decision had been set aside. Our visa had been granted. Based on reassessment of the case, in view of “new medical evidence”, it was not considered likely that Cailan's condition would result in a significant cost to the Australian community.

We remain eternally indebted to the University of Western Australia and all the professionals and friends who rallied and supported us through this costly 18 month process.

The application process

As this story illustrates, if you apply to migrate to Australia and have a family member with Down syndrome, you face a much harder application process than would otherwise be the case.

For a start, a family member with Down syndrome, whilst they may be in excellent health, will nonetheless FAIL to meet the health requirements. The criteria read as follows:

MIGRATION REGULATIONS 1994, Schedule 4, Sub para 4005(c)

The applicant:

...

(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 healthcare and community services; or

(B) prejudice the access of an Australian citizen or permanent resident to healthcare or community services;

regardless of whether the health care or community services will actually be used in connection with the applicant;

Basically, people with Down syndrome face automatic exclusion on the grounds that the applicant for migration must not be a person who is likely ever to be a significant cost to the Australian community in terms of health care and community services, including education. A family member with Down syndrome will be automatically judged as likely to incur significant cost.

Many Australians, when confronted with this situation, will say, wait a minute! We have a disability discrimination act! Surely it is illegal to discriminate against anyone on the grounds of their disability! Well, yes it is – Australia has an adequate, though not perfect, Disability Discrimination Act (DDA), and should your family member with Down syndrome ever migrate into Australia, the Disability Discrimination Act is there with the full force of law behind it to protect them from discrimination. But what is less well known is that the DDA itself has an important clause within it which I want to read in full because I think it is so significant, and so fundamental to the whole issue:

OVERHEAD

Section 52 of the Disability Discrimination Act (DDA), which deals with exemptions to the Act of 1992, states with regard to migration, that no section of the DDA shall

- (a) affect discriminatory provisions in the Migration Act 1958 or any regulation made under that Act; or**
- (b) render unlawful anything done by a person in relation to the administration of that Act or those regulations.**

In other words – as far as the DDA is concerned, migration regulations and migration officers can discriminate as much as they like.

So – the family is excluded and then is required to request a review of the decision along the long and grindingly slow journey to the Migration Review Tribunal.

It is then up to the family to prove that their family member will NOT be a significant cost in one, two or all of three areas – health, schooling and education; and adult life. It seems to me to be logically impossible for anyone to prove that in the future they will NOT be a significant cost – the Australian government has the much easier case of arguing that the person is LIKELY to be a significant cost.

To take each in turn:

Health – if there is no outstanding health issue, in other words, if the child has no major health problems, then this may not be deemed to be a likely significant cost – an ironic situation, given that the child's entry has been refused on the basis of failing the 'health criteria'.

Schooling – the cost of schooling a child in a special education facility will be used against the family, regardless of whether the child will be sent into the public school system or not. Estimates of how much this costs are usually made by the Commonwealth Medical Officer (CMO) assigned to the case, and they vary widely. There is apparently no accepted scale or guideline – so one CMO may estimate the likely costs at a much higher level than another. Furthermore, for anyone applying to migrate to a state such as Tasmania, where schooling for children with disabilities is inclusive, then the likely estimated costs of schooling a child are much lower than for a family hoping to go to, for example, Western Australia, where public schooling is more likely to entail a special education facility.

Future costs – this is the most difficult category, and for the CMO and the family, It involves looking at a child with Down syndrome, often just a few months old, and estimating his/her likely capacity to hold down a job 20 years into the future. The exercise is patently ridiculous – but is done nonetheless. Research done by Terry Wiggins in Queensland (unpublished paper, Barriers to Immigration for Applicants with an Illness or a Disability, Nov 2001) in this area suggests that, once again there is no proper benchmark for estimating costs. For a start, the estimated life expectancies of people with Down syndrome used by the CMOs before the MRT ranged from 40 years (re Yatim) to 65 years (re Huerta). Similarly, the estimated costs associated with individuals with Down syndrome of a similar age and with a similar 'level' of disability, ranged from \$180,000 over a lifetime to \$1.9590,000. In other words – there is NO set scale and CMOs can produce figures based on their own particular bent and prejudices and are not called upon to justify them.

What is apparently not taken into account in this whole cost analysis process is that a person with Down syndrome is not simply a cost. It is clearly unreasonable to assume that a person with Down syndrome does not make any contribution to society which might offset their 'cost', but this is not mentioned in the equation. Furthermore, the skills and expertise which the family as a whole brings to Australia is disregarded although it seems likely that, in the vast majority of cases, the cost of one person with Down syndrome would be more than offset by the overall contributions of all the family members.

Finally, no comparison is made to the cost of Joe Average. The analysis assumes that everyone who does not have a disability costs nothing! Ultimately, of course, the logic of the cost analysis is flawed, since none of us can estimate the likelihood that we will not contract a terminal illness or other such serious condition after arrival in Australia.

We are more than happy to discuss any of this further with anyone interested, either here in the next day or so, or later by email. We would also very much like to hear from people who have had, or know of similar, or contradictory, experiences in other parts of the world as we are continuing to conduct research in this area and hope to turn our research to practical ends.

In conclusion then, governments might well argue that a migration policy is, by definition, intended to be selective and therefore exclude some and include others. In an ideal world one could argue for a world without borders. We do not live in such a world and we can see no point in advocating that position before the Australian or any other government. The point is that the current practice of automatic exclusion, based on a manifest disability or condition, is discriminatory. What we think disability advocates should be arguing is, that if a family is otherwise qualified to migrate, then disability *per se* should not be a bar preventing that family migrating. This is simply in line with the United Nations Declaration of the Rights of Disabled Persons.

At the very least, if cost analysis is going to continue to be employed in deciding a person's right to migrate, then it needs to be applied consistently. And in the case of people with a disability, it needs to be fine tuned and flexible enough to avoid judgments about individuals based on erroneous general assumptions. Moreover, the guidelines for applicants need to point to the need for supporting documentation relating to disability and give clear direction as to what documentation is needed and why. It should not be necessary for families to have to and endure the lengthy and costly review process, in order to have proper consideration given to their application.

Australia is a country which ostensibly welcomes and celebrates difference and diversity. The Racial Discrimination Act of 1973 prohibited discrimination on the grounds of race in the migration field. Difference – when defined in terms of race – is publicly celebrated and applauded in Australia today. Why then should Australian law continue to discriminate so flagrantly against those with a disability? Excluding people with disabilities from Australia devalues the lives and rights of every person with a disability who is an Australian citizen or resident. It says, people like you are an unacceptable cost to the community and are not fit to live here. Such an attitude is an anachronism and a disgrace, of which Australia and Australians should be truly ashamed.

As a step towards dismantling the barriers to migration that are faced by people with Down syndrome and other disabilities and conditions, we ask that this Congress frame a resolution, based on its understanding that the Australian government, and other governments which employ discriminatory migration practices by automatically excluding individuals and families with a member with Down syndrome, is in contravention of the United Nations Declaration on the Rights of Disabled Persons.