



World Hepatitis Day Symposium 28 July 2017 Hepatitis B and Migrants

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AUSTRALIA'S MIGRATION LAWS AND HEALTH CRITERIA: Legalised discrimination?

- **Overview of Australian migration law and policy and centrality of the 'health requirement'**
- **Impact upon persons with HBV**
- **Role of Medical Officer of Commonwealth and 'Notes for Guidance' for Viral Hepatitis**
- **Specific Migration Policy provisions as to HBV**
- **Migration Law and Australia's international obligations and domestic (Australian) law**



Migration Law: *Migration Act 1958* and *Migration Regulations 1994*

- **Migration Act 1958- sections 60 and 65.**

- **Migration Regulations 1994:**

Regulation 2.25A

“The Minister is to take the opinion of the Medical Officer of the Commonwealth on.. [whether an applicant satisfies the criteria for the grant of a visa].. to be correct for the purposes of deciding whether a person meets a requirement or satisfies a criterion.”

Minister v. Seligman [1999] FCA 117 (1 March 1999)



Migration Regulations 1994 cont.

It's about 'cost' and 'prejudice'

- Schedule 4 Regulations (Public Interest Criteria-PIC)

- HEALTH PIC'S 4005, 4006A AND 4007.

- "is free from **tuberculosis**; and

- 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

 - is free from a **disease or condition** in relation to which:

 - a person who has it would be likely to:

 - require **health care or community services**; or

 - meet the medical criteria for the provision of a community service,

 - during the period [OF THE VISA APPLIED FOR]; and...



HEALTH PIC'S (CONT.)

- *“...the provision of the health care or community services 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 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”



Migration Policy (procedural instructions for DIBP officers)

- Sch4/4005-4007 - The Health Requirement

- Significant costs

- *“MOCs must provide an opinion as to whether an applicant’s condition or disease would be likely to result in ‘significant’ health care and community service costs if a visa were to be granted....”*

- *The policy threshold for the level of costs regarded as significant is currently AUD 40 000.”*



Migration Policy (cont.)

- **Prejudice to access**
- ***“Under policy, prejudice to access will occur if in the MOC’s opinion a hypothetical person with a condition of the same form and severity as the applicant’s would be likely to require access to the following services, which are considered to be in short supply:***
- ***organ transplants (including bone marrow transplants) and***
- ***dialysis.”***



Law and Policy- about a 'hypothetical person'

- **Actual use of services is irrelevant-** Schedule 4 says so.
- **Policy:**
- **MOC's "must assess the likelihood of an applicant's condition resulting in a need for health care or community services without regard to the applicant's personal circumstances or any claims by the applicant that they do not intend to use the identified care or services."**



A 'hypothetical person'

- Policy cont. *“MOCs thus provide a costing that is based on a hypothetical person with a disease or condition of the same form and level.”*
- [Robinson v MIMIA \[2005\] FCA 1626](#)
- **The court found that the appropriate test to apply was not to the particular applicant but a hypothetical person with the actual form of the disease or condition and not a hypothetical generally.**
- **Remember Reg. 2.25A!!! What the MOC thinks 'likely'**



HEALTH 'WAIVERS' PIC 4006A/4007

- **PIC 4007:** *“The Minister may waive the requirements of paragraph (1)(c) if:*
- *the applicant satisfies all other criteria for the grant of the visa applied for; and*
- *the Minister is satisfied that the granting of the visa would be unlikely to result in:*
- **undue cost** to the Australian community; or
- **undue prejudice to the access** to health care or community services of an Australian citizen or permanent resident.”

Health Waivers- Case Law

➔ **Bui v. Minister [1999] FCA 118**

- ➔ *The evaluative judgment whether the cost to the Australian community or prejudice to others, if the visa is granted, is “undue” may import consideration of compassionate or other circumstances. 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 will make some significant call upon health and community services. There may be circumstances of a “compelling” character, not included in the “compassionate” category that mandate such an outcome.*

Waiver factors: *Policy from 1 July 2017*


- **Prejudice to access - factors afforded weight under policy**
- *“If the MOC has identified the applicant is likely to require organ transplantation, consideration should be given by the **s65** delegate as to whether the organ could be provided through live donation or if the donation would need to be from a deceased donor:....*
- *deceased donor: consideration would only be able to be given to a statement from the treating specialist/doctor that it would be unlikely that the application would be placed on a transplant list.”*

Waiver factors Policy- **cost based issues** (from 1 July 2017)-non-humanitarian visas

- Range of issues grouped under “compassionate and compelling’-type issues and ‘criteria to demonstrate ability to mitigate cost’
- But: What to take into account?
- *Given the broad range of discretionary considerations that can be taken into account, the individual circumstances of the visa applicant need to be considered in coming to a conclusion about whether the granting of the visa would be unlikely to result in undue cost or undue prejudice to access. Each health waiver case must be considered on its merits, with all relevant factors taken into account...”*



HBV AND MIGRATION LAW & POLICY

- **Notes for guidance for Medical Officers of the Commonwealth of Australia**
 - ***Financial Implications and Consideration of Prejudice of Access to Services Associated with Viral Hepatitis.***
 - 2 August 2016
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Role of MOC Guidance Notes & context for HBV

- “Medical Officers of the Commonwealth consider information in the Notes for Guidance and apply these principles and some of the specifics when assessing an applicant against the health requirement, PIC [4005](#), [4006A](#) and [4007](#). The Notes are for Medical Officers of the Commonwealth.”
- ‘Notes’ for Viral Hepatitis (types A-E) prepared with assistance of the Gastroenterological Society of Australia and in particular:
- Amany Zekry, A/Prof of Medicine – UNSW -Director of Gastroenterology and Hepatology St George Hospital, Sydney
- Wendy Cheng, Head, Liver Service, Department of Gastroenterology & Hepatology, Royal Perth Hospital -Adjunct Professor, School of Medical Sciences, Faculty of Health, Engineering and Science Edith Cowan University
- David Lister, Infectious Diseases Advanced Trainee -Westmead Hospital, Sydney

HBV and significance of migration (Notes)

*“In Australia, about 7,000 new cases of CHB are diagnosed annually. This estimate is, however, only about half of those living with the infection. **Majority of the new cases are attributable to migration** and cannot be prevented through local vaccination initiatives.. .People at risk of CHB include migrants born in regions endemic (>2prevalence) for HBV – that is the Asia and Pacific regions. Other Australian born people at higher risk for CHB include those whose parents were born overseas in an endemic area...”*

HBV Notes: Costs

- **Table 3 summarises 'commonly prescribed medications for chronic hepatitis B treatment' and estimated annual costs, and table 4 'other medical service costs'.**
- **COMMENT: A person seeking a permanent visa will be assessed for those costs for their life expectancy and the MOC estimate will usually exceed the \$40,000 'threshold'. Those seeking a temporary employer sponsored short term visa (for either two or up to 4 years) may not receive an estimate of \$40,000 or more.**

HBV Notes: Prejudice to access

- **End-state liver disease with HBV 'is an indication for liver transplantation'. The costs of a liver transplant, medications and follow-up are estimated in table 11-13.**
- **COMMENT: Where a 'health waiver' is not available these cost estimates will always result in visa refusal. Where a 'waiver' is available the 'prejudice to access' criterion will only allow consideration where the treating specialist/doctor confirms that it is 'unlikely' the person will be placed on the transplant list.**

Other Migration Policy Issues and HBV:

1. Pregnancy.

- **All pregnant visa applicants (temporary or permanent) intending to give birth in Australia must have a Hepatitis B test.**
- *“Hepatitis B infection is a potentially serious infection that a mother might transmit to her baby at, or about, the time of birth. Infants who are infected during birth are at a high risk of becoming chronic carriers of the virus. This significantly increases their risk of developing chronic liver disease, which may cause premature death. If the mother is diagnosed with hepatitis B before the baby is born, the new-born infant can receive appropriate immunisation immediately in the delivery room.”*

Other Migration Policy Issues and HBV:

2. Health Care Workers.

- All applicants who intend to work as, or study to be a doctor, dentist, and nurse or ambulance paramedic must have a medical examination, chest x-ray, HIV test and hepatitis B and C tests.
- *“These additional requirements apply because, although HIV and Hepatitis are not generally considered to be threats to public health, HCW applicants assessed as having these conditions may be found to be a threat to public health if they intend to be involved in Exposure Prone Procedures (EPPs).”*

Australia's migration health requirements and discrimination.

- Australia has always asserted the right to 'exempt' its migration law and policies regime from domestic and international prohibitions against discrimination!!
- **DISABILITY DISCRIMINATION ACT 1992 (CWTH.)**
s.4....."*disability* " , in relation to a person, means:.....
 - (c) the presence in the body of organisms causing disease or illness; or
 - (d) the presence in the body of organisms capable of causing disease or illness..."
- Thus viral hepatitis accepted as a disability.

Disability Discrimination Act 1992-s.48

“Infectious diseases.

This Part does not render it unlawful for a person to discriminate against another person on the ground of the other person’s disability if:

(a) the person's disability is an infectious disease; and

(b) the discrimination is reasonably necessary to protect public health.”

Disability Discrimination Act: migration-s.52

➤ “Migration

➤ Divisions 1, 2 and 2A do not:

(a) affect discriminatory provisions in:

(i) the **Migration Act 1958**; or

(ii) a legislative instrument made under that Act;

or

(b) render unlawful anything that is permitted or required to be done by that Act or instrument.”



Convention on Rights of Persons with Disabilities-Australia ratified 2008.

➤ Article 18 – Liberty of movement and nationality

”1. States Parties shall recognize the rights of persons with disabilities to liberty of movement, to freedom to choose their residence and to a nationality, on an equal basis with others, including by ensuring that persons with disabilities:

- *a) Have the right to acquire and change a nationality and are not deprived of their nationality arbitrarily or on the basis of disability;..”*

Australia's 'interpretive declaration' on ratification of Convention

- *“Australia recognizes the rights of persons with disability to liberty of movement, to freedom to choose their residence and to a nationality, on an equal basis with others. Australia further declares its understanding that the Convention does not create a right for a person to enter or remain in a country of which he or she is not a national, nor impact on Australia’s health requirements for non-nationals seeking to enter or remain in Australia, where these requirements are based on legitimate, objective and reasonable criteria.”*