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**Deal Breakers
Complex Health & Character Cases**

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David Prince is a graduate of the University of New South Wales where he obtained a Bachelor of Science and a Bachelor of Laws. He worked for some time as the personal researcher for Dr Kathryn Cronin before joining *Corby Levingston Solicitors* (later *Christopher Levingston & Associates*) between 1994 and 2007. Since 2007 David has been an Associate with *Kah Lawyers*.

David has been accredited as a specialist in Australian Immigration Law by the Law Society of New South Wales from August 2000 until the present time and from 1995 he has practiced extensively in all areas of Australian Immigration Law including primary visa applications, merits review and judicial review in all Federal jurisdictions. David is currently a lecturer with the *Graduate Certificate of Migration Law and Practice* offered by the Australian National University.

In 2003 and 2007 David edited the *Immigration, Citizenship and Passports* chapters of *Halsbury's Laws of Australia*. In 2007 David also edited the *Immigration* chapter of *Australian Encyclopaedia of Forms and Precedents*.

In early 2008 and again in March 2008 David was listed in the Australian Financial Review as being one of Australia's "best lawyers".

DEAL BREAKERS – Complex Health and Character cases

[1.0] Introduction

Most legal professionals who practice in Australian migration law well understand the “standard” legal criteria that an applicant must satisfy to be granted a particular Class of visa; those criteria being primarily set out in Schedules 1 and 2 of the *Migration Regulations 1994 (Cth)* (“the Regulations”).

One set of criteria that must be satisfied are commonly referred to as the “Public Interest Criteria”, which historically have been essentially set out in Schedule 4 of the Regulations, the most common of which are colloquially known as the “health” and “character” provisions.

In the vast majority of cases the provisions in Schedule 4 do not create any difficulties for applicants. However, the health and character provisions are the real “devil in the detail” which can create enormous difficulties for applicants who otherwise meet all the visa criteria. They are often the “deal breakers” that led to mandatory refusal, and with character cases, they can also lead to visa cancellation.

The purpose of this paper is three-fold, as follows:

- To briefly examine the state of the law for health and character cases;
- To look at practical ways to address and fight these cases; and
- To suggest interesting areas that may open up future judicial review attack of adverse administrative decisions by the Department of Immigration & Citizenship (DIAC) or the various merits review Tribunals.

David Prince
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19 March 2009

The Health Test: Schedule 4 items 4005 – 4007

The “health test” as it is commonly known is set out in item 4005 of Schedule 4 of the regulations.

In fact 4005 comprises 4 separate health tests, and failure of any one leads to an applicant being unable to satisfy the Schedule 2 criteria.

The 3 tests are as follows:

TEST 1: Tuberculosis

4005 (a): The applicant is free from tuberculosis

This is an absolute question of fact. It is asking whether the applicant has tuberculosis (“TB”) at a specific moment in time. Therefore, even if the applicant does have TB, they could generally be successfully treated and therefore satisfy this test at some future point in time.

TEST 2: Serious threat to public health

4005(b): The applicant 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.

This test looks both to the current situation as well as to the possible future. However, the threat is limited to specific factors, being:

- A treat to public health in Australia; or
- A danger to the Australian community.

The Procedures Advice Manual (“PAM”) gives no guidance at all on this issue apart from referring to TB, which would normally be covered by 4005(a). However, in 15 years of practice I have never encountered a case where this provision was under question.

TEST 4: Signed Undertaking

4005(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.

This is simply an administrative process.

TEST 3: Cost and Access 4005(c)

1. The applicant is not a person who has a disease or condition to which the following subparagraphs apply:
 - (a) the disease or condition is such that a person who has it would be likely to:
 - (i) require health care or community services; or
 - (ii) meet the medical criteria for the provision of a community service;

during the period of the applicant's proposed stay in Australia;
 - (b) provision of the health care or community services relating to the disease or condition would be likely to:
 - (i) result in a significant cost to the Australian community in the areas of health care and community services; or
 - (ii) 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.

This is the most common of the medical tests raised in visa application and one which we deal with on a daily basis.

There are a number of steps here that must be examined, as set out below.

STEP 1: Do we have a problem?

The first question is often overlooked, being whether the applicant has a “disease” or “condition”? If not, the analysis ends.

STEP 2: Is treatment likely to be needed?

We need to identify when a *person* with that disease/conditions *would be likely to* require health care or community services, or meet the medical criteria for the provision of a community.

The first point to note here is that the test is not asking whether the particular applicant is likely to require treatment, but whether a person with that condition would be likely to require treatment.

The second point to note is that it needs to be likely (balance of probabilities) that the need for the care or treatment will arise. It is not enough that there is a possibility that the care is needed.

STEP 3: Quantification

The next step involves a quantification of the treatment likely to be needed. Importantly, pursuant to regulation 2.25A, this assessment is performed by the Medical Officer of the Commonwealth ("MOC") with the Minister and the Migration Review Tribunal being bound to accept that assessment (provided that the MOC's decision is not itself tainted by jurisdictional error¹).

Keep in mind that all that matters is eligibility for that treatment/service and not whether the applicant will actually ever call upon that treatment/service.

The issue of how much costs meets the Regulatory test of "significant" is not defined in the Act, Regulations or even within PAM.

However, in the late 1990's and early 2000's, PAM spoke of a "significant" cost being a total cost of \$15,000 over 5 years with 65% certainty, with costs beyond that initial 5-year term being included if the costs were at least 50% certain to flow.

The Current State of the Law – *Robinson's case*

The current leading case on how the item 4005 health test operates remains the decision of Siopis J in *Robinson v Minister for Immigration and Multicultural and Indigenous Affairs*².

There the Applicant argued that the MOC was required 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. The applicant further argued that it was not sufficient to make the assessment by reference to a hypothetical person with a generalised notion of the condition. The Minister argued to the contrary.

In finding for the Applicant, Siopis held:

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

¹ See *Minister for Immigration & Multicultural Affairs v Seligman* [1999] FCA 117 (1 March 1999), French, North & Merkel JJ.

² [2005] FCA 1626, 10 November 2005 (addendum 18 November 2005).

assessment at a higher level of generality by reference to a generic form of the condition.

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).

Practical Issues to running health cases

The critical issue for successfully running health cases lies with obtaining detailed and high quality medical reports from very well respected specialists which specifically address the legislative issues raised by item 4005(c).

In my experience this involves the following logical steps:

- You need to understand what actual range of medical conditions the applicant suffers from?
- What type(s) of medical specialists will be needed to address each medical condition?

- Working with each specialist to help them understand the legal test and be able to craft their report to address the specific treatment, cost and likelihood issues present in item 4005(c).
- Identifying whether the applicant needs to take practical steps to prove the accuracy of predictions made by the specialists (eg capacity for employment)
- Preparing detailed submissions building on those reports.

Issues to be aware of

1. Is there a necessary causal nexus between the medical condition and the likely costs. That is, will the cost be caused by the medical condition or some other factor?
2. Is it at least 50% likely that the treatment will be required?
3. Will the treatment actually result in a cost to the *Commonwealth of Australia*?
4. Will the applicant actually meet the statutory requirements for a pension/benefit under our social security legislation?

Future areas of interest

In many respects the health test as articulate in *Robinson* is very confusing.

- While the identification of the subjective condition of an applicant is clear, how the “objective treatment test of the hypothetical person” with that subjective condition is to be applied is not at all clear. It is my view that this may well be a promising area of analysis in the future.
- The application of well understood administrative law to the MOC’s decision making process is likely to continue to be very fruitful.
- There also does not appear to have been any judicial investigation into the meaning of “costs to the Australian community”. This opens up a range of possibilities, including whether this phrase actually has any real meaning.

The Character Test:
Schedule 4 items 4001-4003 and section 501

Historical changes

Prior to 1999 the “character provisions” were essentially set out Schedule 4, items 4001 – 4003, as follows:

4001.

- (1) The applicant meets the requirements of subclause (2), (3) or (4).
- (2) An applicant meets the requirements of this subclause if, after appropriate enquiries, the Minister has decided that there is no evidence of anything that might justify refusal, under section 501 of the Act, to grant the visa.
- (3) An applicant meets the requirements of this subclause if, after appropriate enquiries and consideration of all available evidence of anything that might justify refusal, under section 501 of the Act, to grant the visa, the Minister has decided that that evidence is insufficient to satisfy the Minister of any of the matters referred to in paragraph (1) (b) and subsection (2) of that section.
- (4) An applicant meets the requirements of this subclause if, despite being satisfied that refusal, under section 501 of the Act, to grant the visa is justified, the Minister has decided not to exercise the power under that section to refuse to grant the visa.

4002: The applicant is not assessed by the competent Australian authorities to be directly or indirectly a risk to Australian national security.

4003: The applicant is not determined by the Foreign Minister to be a person whose presence in Australia would prejudice relations between Australia and a foreign country.

At that time s.501 of the Act simply read as follows:

501. (1) The Minister may refuse to grant a visa to a person, or may cancel a visa that has been granted to a person, if:

- (a) subsection (2) applies to the person; or
 - (b) the Minister is satisfied that, if the person were allowed to enter or to remain in Australia, the person would:
 - (i) be likely to engage in criminal conduct in Australia; or
 - (ii) vilify a segment of the Australian community; or
 - (iii) incite discord in the Australian community or in a segment of that community; or
 - (iv) represent a danger to the Australian community or to a segment of that community, whether by way of being liable to become involved in activities that are disruptive to, or violence threatening harm to, that community or segment, or in any other way.
2. This subsection applies to a person if the Minister:
- (a) having regard to:
 - (i) the person's past criminal conduct; or
 - (ii) the person's general conduct;
3. is satisfied that the person is not of good character; or
- (a) is satisfied that the person is not of good character because of the person's association with another person, or with a group or organisation, who or that the Minister has reasonable grounds to believe has been or is involved in criminal conduct.
4. The power under this section to refuse to grant a visa to a person, or to cancel a visa that has been granted to a person, is in addition to any other power under this Act, as in force from time to time, to refuse to grant a visa to a person, or to cancel a visa that has been granted to a person.

Prior to 1999 these provisions were in general rarely used and normally only for people with quite serious criminal records (pedophiles) or people likely to cause serious discord in the Australian community³.

The *Migration Legislation Amendment (Strengthening Of Provisions Relating To Character And Conduct) Act 1998* dramatically changed this situation by transforming a brief and rarely used s.501 in the enormous suite of complex provisions that are now used by DIAC on an almost daily basis.

The current state of the law

³ See for example *David John Cawdell Irving v Minister of Immigration, Local Government and Ethnic Affairs* [1993] FCA 457; (1993) 44 FCR 540 (16 September 1993) **and** *David John Cawdell Irving v Minister of Immigration, Local Government and Ethnic Affairs* [1995] FCA 1506 (31 August 1995).

For several years following the 1998 amending Act applicant's pursued various attacks upon these frankly draconian provisions with various degrees success.

For me personally, the nadir was reached in *Re Minister for Immigration and Multicultural and Indigenous Affairs* [2003] HCA 56⁴ ("Thomas Palm") when the High Court held by a 4 to 1 majority (Kirby J dissenting) that the Minister's failure to give reasons for the personal decision to cancel the applicant's visa under s.501 did not vitiate the decision.

Overall, there was very "new ground" broken on these provisions under the decision in *Sales v Minister for Immigration and Citizenship* [2008] FCAFC 132⁵, when the Full Federal Court held that visas deemed to have been held by no-citizens under the 1994 Transitional Act and Regulations had never been "granted" to their holders and as such were not amenable to cancellation under s.501. Any in any event, the Minister quickly neutralised that decision the in effect retrospective amendments to the Act introduced by the *Migration Legislation Amendment Act (No.1) 2008* which deemed transitional visas to have been "granted" for the purposes of s.501.

Future areas of interest

⁴ 216 CLR 212; 201 ALR 327; 77 ALJR 1829 (2 October 2003), Gleeson CJ, McHugh, Gummow, Kirby and Heydon JJ.

⁵ 17 July 2008, Gyles, Graham And Buchanan JJ.