



## Call for reform of Australian migration policies affecting refugees living with HIV

### UNHCR's call for removal of the discriminatory Health Requirement as it affects refugees living with HIV <sup>1</sup>

*The current application of the Health Requirement is broader than is necessary to ensure the protection of the Australian community and to achieve the relevant policy objectives.*

*In the processing and health screening which are necessary to implement the health requirement, there is a danger of the infringement of some human rights norms. The availability of a Ministerial waiver of elements of the Health Requirement goes some way to addressing these concerns, however it does not address the underlying issue of principle. Additionally, reliance on a discretionary and non-reviewable avenue of intervention as a response to the protection of human rights remains less than ideal. A more appropriate response is to address the underlying structures which give rise to discriminatory results.*

*Although the waiver is theoretically available, UNHCR's experience in practice suggests that it is very rarely granted and, effectively, automatic rejection of refugee cases which fail the Health Requirement is the norm. Subsequent application of the principle that 'one fails, all fail' means that the resulting effects are felt by all family members included in the given case.*

*... it should be recalled that the numbers of refugee and humanitarian entrants remain a very small proportion of the overall migration program. Although the theoretical demand upon health services may be significant when calculated on the basis of hypothetical persons calling upon every service available to them, the actual demand exerted by a small group of entrants is unlikely to significantly prejudice the Australian community or present an untenable cost.*

*Perhaps most significantly, the present operation of the Health Requirement is discriminatory in effect and endangers a number of other human rights norms. To that extent, Australia presently falls short of its international obligations.*

*The effective exclusion of refugees who are disabled or who have significant health concerns from resettling to Australia has a very real impact on the lives of already vulnerable refugees.*

*Resettlement is intended as a protection tool, but its linkage to health status significantly undermines the protection component and can lead to the separation of families and the creation of additional protection problems.*

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<sup>1</sup> UNHCR, *Submissions to the 2009 Joint Standing Committee on Migration Inquiry into the Migration Treatment of People with a Disability*.

*Ultimately, the underlying principle of non-discrimination should apply in all cases.*

## **Australia's migration laws regarding the health of applicants**

The Migration Act 1958 and Migration Regulations 1994 impose rules regarding health. These rules are referred to as the 'Health Requirement' and to pass a person must demonstrate that they are:<sup>2</sup>

- (i) free from tuberculosis;
- (ii) free from any disease or condition that is, or may result in you being a threat to public health in Australia or a danger to the Australian community;
- (iii) not a person who has a disease or condition:
  - a. that would be likely to require health care or community services or meet the medical criteria for the provision of a community service, and
  - b. that health care or those community services would 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.

HIV is not considered to impose a 'threat' or 'danger' under criterion (ii). There is no definition of what is considered a "significant" cost under criterion (iii) but generally any disease or condition which is likely to cost \$20,000 or more over a five year period is considered to be significant.<sup>3</sup> Policy regarding the assessment of future cost in relation to HIV<sup>4</sup> stipulates that the assessment must include a lifetime estimate of the cost of medication and health-care, including hospitalisations. Given the cost of antiretrovirals, this policy effectively precludes people living with HIV from passing the Health Requirement.

A test for HIV is a mandatory part of the final health check for all prospective migrants to Australia, for off-shore applicants for refugee and humanitarian visas and also for certain temporary visa applicants.

On-shore applicants for protection visas must undergo a health check, but the Health Requirement does not apply.<sup>5</sup>

## **Waiver**

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<sup>2</sup> *Migration Regulations*, Schedule 4 – Public Interest Criteria and Related Provisions

<sup>3</sup> *IARC Client Information Sheet: Health*, February 2010.

<sup>4</sup> *Notes for Guidance for Medical Officers of the Commonwealth of Australia: Financial implications and consideration of prejudice to access for services associated with infection with human immunodeficiency virus and acquired immune deficiency syndrome (HIV/AIDS)*, 9 July 2008.

<sup>5</sup> Further, if an on-shore applicant for a protection visa is found to have a disease or condition that poses a threat to public health, they will be granted a visa but will be required to undergo any necessary treatment to control the risk.

For some visa sub-classes, the Health Requirement may be waived where granting of the visa would be unlikely to result in:

- *undue prejudice to the access to health care or community services of any Australian citizen or permanent resident; or*
- *undue cost to the Australian community.*<sup>6</sup>

The waiver cannot be exercised where the visa applicant is assessed as representing a risk to public health or safety in Australia.

Factors taken into account when determining whether prejudice/cost would be “undue” may include potential hardship if the applicant is returned to their country of origin, the impact on their relationships in Australia, and their state of health.

Waiver is available to off-shore refugee and humanitarian visa applicants but as noted in the UNHCR’s submission to the 2009 Joint Standing Committee on Migration Inquiry into the Migration Treatment of Disability, in its experience waiver is rarely granted to such applicants.

### ***Violation of Australia’s treaty obligations to refugees***

Article 14 of the 1948 *Universal Declaration of Human Rights* states: “*Everyone has the right to seek and to enjoy in other countries asylum from persecution.*”

International law obliges States to admit persons who satisfy the criteria for refugee status, and to accord such persons the rights specified by the 1951 *Convention relating to the Status of Refugees*. These rights include the right to enjoyment of the protections offered by the Refugee Convention without discrimination, and the right to freedom from expulsion, save on grounds of national security or public order.<sup>7</sup>

Article 3 of the Refugee Convention requires States to apply the provisions of the Convention to refugees without discrimination as to race, religion or country of origin. This list of factors is non-exhaustive and the principle of non-discrimination must be observed in relation to all factors save those for which exceptions are expressly made.

Under international law, the right to access, and remain in, a country of asylum, is not dependent on the health status of the applicant, save where that status may present a risk to national security or public order. This principle is observed in the treatment accorded by Australia’s migration legislation and regulations to onshore applicants for ‘protection’ visas.

This principle is not presently observed by Australia in its consideration of resettlement, or ‘offshore’ humanitarian cases.

In its submission to the 2009 Inquiry of the Joint Standing Committee on Migration, the Office of the United Nations High Commissioner for Refugees (UNHCR) stated:

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<sup>6</sup> *Migration Regulations*, Schedule 4 – Public Interest Criteria and Related Provisions (4005-07 of Schedule 4).

<sup>7</sup> Article 32 (1) of the Refugee Convention.

*Although the (health requirement) waiver is theoretically available, it is very rarely granted. Automatic rejection of HIV+ refugees is the norm. Subsequent application of the principle that 'one fails, all fail' means that the resulting effects are felt by all family members. The Health Requirement is discriminatory in effect. Australia presently falls short of its international obligations.*

The UNHCR recommended:

- 1. That refugee and offshore humanitarian visa applications be made exempt from the operation of the Health Requirement.*
- 2. In the alternative, that a prima facie presumption in favour of the granting of Ministerial waivers for refugee and offshore humanitarian cases be instituted.*
- 3. That mandatory HIV testing be discontinued as an element of medical screening prior to resettlement.*

The 2010 Report of the Joint Standing Committee did not accept these recommendations. Instead, the report recommended that the Australian Government amend the Migration Regulations 1994 to provide access to consideration of a waiver to offshore refugee visa applicants involving disability or health conditions on compelling and compassionate grounds.

## **AFAO's position**

Application of the Health Requirement in respect of off-shore refugee applicants is clearly contrary to the Government's stated policy that consideration of a claim for Permanent Protection should involve no issues other than the person's need for protection. AFAO is strongly of the view that a person's disability is irrelevant to their claim for protection.

The fact that a person with HIV may require antiretroviral medications, hospitalisation and access to community programs is irrelevant to the context of their need for asylum and resettlement, whether their application is lodged off-shore or on-shore.

Apart from the fact that maintaining refugee intake policies that discriminate against refugees with a disability is contrary to the Government's international human rights commitments, it is important to note the effect of current policies on those who are refused permanent protection due to diagnosis with HIV.

There are generally minimal health-care and support services available in refugee camps for people who discover that they have HIV as a result of testing associated with the Health Requirement. Off-shore refugee applicants who are refused Australian residence on the grounds of their HIV status are effectively left in the lurch – remaining in camps with the knowledge that they are HIV positive but with no or limited access to appropriate counselling, including pre-test, post-test and diagnosis counselling. Given this context, the limited availability of waiver for off-shore humanitarian applicants is unconscionable, and the policy rationale for treating on-shore applicants for Permanent Protection more favourably is unfathomable.

The issues faced by off-shore applicants are compounded for a person affected by the “one fails, all fail” policy for families. Knowledge that their own HIV positive status means that all of their family will be refused protection by Australia can place an enormous burden on the person diagnosed with HIV, in terms of guilt and shame, and in terms of the reaction of the rest of their family – if they disclose the diagnosis. These issues are of particular concern for refugees, where family members deliberately excluded from a permanent protection application can be left behind in situations made more vulnerable by the loss of family support.

If there is to be mandatory HIV testing of refugees, the test should be after permanent protection is granted, and only once the person has arrived in Australia – thereby effectively treating off-shore humanitarian and refugee applicants the same as on-shore applicants. The rationale for HIV testing should relate to the health of the applicant, and preferably should only occur voluntarily, with fully informed consent and culturally appropriate counselling.

AFAO supports the UNHCR’s comments and recommendations regarding the application of the Health Requirement to refugee and offshore humanitarian visa applications, namely:

- *That refugee and offshore humanitarian visa applications be made exempt from the operation of the Health Requirement;*
- *In the alternative, that a prima facie presumption in favour of the granting of Ministerial waivers for refugee and offshore humanitarian cases be instituted; and*
- *That mandatory HIV testing be discontinued as an element of medical screening prior to resettlement.*