BRIEF:

Recommendations for Policy Changes in the Permanent Residency Application Process and in Section 38(1)(c) of the *Immigration and Refugee Protection Act*, Based on Phillip Montoya´s Application for Permanent Residency

Presented to:

House of Commons' Standing Committee on Citizenship and Immigration studying the Federal Government Policies and Guidelines Regarding Medical Inadmissibility of Immigrants

Phillip (Felipe) Montoya

Introduction

This Brief is composed of three sections. The first summarizes our experience as a family in applying for Permanent Residency, and is centered on the specific case of our son Nicolas Montoya (Nico), who because of an intellectual disability (Down syndrome) was deemed inadmissible for Permanent Residency, and by extension, the entire family. The second section lays out the reasoning that emerged from our case to critique Section 38(1)(c) of the *Immigration and Refugee Protection Act* (*IRPA*) on issues regarding disability discrimination in the Permanent Residency application process. The third section focuses on specific recommendations for policy changes to the Permanent Residency application process, especially regarding Section 38(1)(c) of the *IRPA*.

1. Particulars of Nicolas Montoya´s Case

1.1. Before coming to Canada to work for York University as a tenured full professor, I was warned by York University´s Immigration & Relocation Coordinator that my son´s Down syndrome could be an obstacle for acquiring Permanent Residency in Canada. This already suggested the existence of a practice of profiling and discrimination based on disability in the Permanent Residency application process. My son´s Down syndrome was not, however, an obstacle for obtaining Temporary Work and Student Visas for my family. These were granted for a period of four years. We landed in Canada July 1st of 2012.

1.2. Approximately a year after our arrival, we began our application for Permanent Residency. As part of the normal application process the entire family had the required medical exams. We all came out as healthy individuals, including my son Nico, who was as healthy as the rest of the family. However, because of his visible genetic identity as a person with Down syndrome, he was singled out for additional examinations (pediatric exam, spinal column x-rays, thyroid exams, developmental and cognitive assessments). No one else in the family was prodded, examined, or tested further because of their genetic makeup. Only Nico, because of his visible genetic difference, was saddled with the burden of proof of health and ability beyond the basic medical exams required of all family members.

1.3. The Permanent Residency application process dragged out for more than three years, representing additional costs in time, energy and money for the family precisely because of the burdens placed on Nico for his disability. At the end of this difficult and costly process, the *Fairness Letter* we received in response to the Permanent Residency application stated that Nicolas had the "*medical condition*" of Down syndrome (code 759), and that due to his: "*Moderate Intellectual Disability*" Nicolas was deemed Inadmissible for Permanent Residency, along with his entire family because of the excessive demand Nico was expected to

have on Canadian social services. In the *Fairness Letter* were given the opportunity to submit a *Declaration of Ability and Intent* where we could show how our family could cover the costs of this excessive demand, in order for Immigration Canada to re-evaluate their decision.

1.4. While signing a *Declaration of Ability and Intent* was a viable option for us, we chose not to go this route, and instead opted for trying to promote changes in what we considered was a defective and discriminatory process that affected not only our family, but many other families unjustly. We took our case and arguments to the media, whose overwhelming response was supportive of our arguments.

1.5. Eventually I was invited to meet with representatives of the office of the Minister of Immigration to converse about our case, present our observations and recommendations. At this meeting my legal counsel and I were guaranteed by the Minister´s office that they would take the necessary steps to enact relevant policy changes by Fall of 2016. While this did not take place at that time, in August we were notified that the Minister had exercised his authority intervening on Humanitarian and Compassionate grounds to grant Nicolas Montoya and the entire family relief from inadmissibility based on the health provisions in Section 38(1)(c) of the *Immigration and Refugee Protection Act*. Soon after we took the steps to become Permanent Residents of Canada, which is our current status.

2. Critiques that emerge from Nicolás Montoya´s case

2.1. Because I was warned before entering Canada as a temporary worker that my son´s Down syndrome could be an obstacle in obtaining Permanent Resident status, this insinuated that there exists a common practice of denying Permanent Residency based on disabilities like Down syndrome. While Citizenship and Immigration Canada (CIC) contends that persons with disabilities are not rejected automatically, because each case is evaluated individually, we found that many steps during the Permanent Residency application process are discriminatory, and the end result, however individualized, is discriminatory against disabled persons. That inadmissibility is not declared automatically at the onset is irrelevant.

2.2. Because there cannot be grounds of "inadmissibility" based specifically on "Disability" because this would *explicitly* contravene Article 15 of the *Canadian Charter of Rights and Freedoms*, Nico, due to his Down syndrome was placed under the spurious heading of inadmissibility based on "Health" grounds, despite the fact that he is a healthy person. The same practice is directed against persons with a wide range of other physical and intellectual disabilities. This decision exposed an underlying stigma against people with disabilities, which is based on the misconception that they are unhealthy or ill, when in fact, and according to other legislative definitions of disability, and the model of disability espoused by the *United Nations Convention on the Rights of Persons with Disabilities* (ratified by Canada in 2010), disabilities are a reflection of the failure of societies to provide accommodations for full inclusion.

2.3. The *Fairness Letter* we received in response to the Permanent Residency application stated that Nicolas had the "*medical condition*" of Down syndrome (code 759). This showed a pre-established (coded) red flag for a person with this disability, analogous to other forms of discriminatory profiling that are illegal in Canada and internationally. The fact that the revision process of Permanent Residency applications includes specific codes for disabilities such as Down syndrome is uncomfortably reminiscent of historic and incomparably more horrific practices of segregation and discrimination based on the person´s identity, because disabilities are, indeed, part and parcel of a person´s identity, and not an illness that can be cured, as the confusingly vague term "*medical condition*" seems to imply.

2.4. Section 38(1)(c) of the *Immigration and Refugee Protection Act*, which states that *"38 (1) A foreign national is inadmissible on health grounds if their health condition (c) might reasonably be expected to cause excessive demand on health or social services,"* allows for discrimination against people with disabilities in more than one way. If the "Health" argument for finding probable excessive demand of people with

disabilities fails, then the argument of excessive demand on "Social Services" kicks in. Contributing to this sense of being stigmatized, bullied, and persecuted unjustly, is the fact that the "social services" subject to "excessive demand" considerations represent only a small fraction of social services, in general, precisely those required by people with disabilities, making their use of these services automatically a burden to the State, whereas the social services used by able bodied persons are not considered in the excessive demand equation. In the *Regulatory Definitions Related to Excessive Demand* (attached in the *Fairness Letter*), **"**Social Services" are defined as: *"any social service, such as home care, specialized residence and residential services, special education services, social and vocational rehabilitation services, personal support services and the provision of devices related to those services.*" This circular reasoning makes it inevitable that people with disabilities will have the label of "excessive demand" automatically applied to them, as occurred in Nico's experience. (It is indicative that on the contrary, "gifted" children, who will also require "special education services", are not considered as candidates for "excessive demand", revealing the discriminatory nature of how these regulations are interpreted and applied).

2.5. The response of Citizen and Immigration Canada (CIC) to the media reports generated by Nico's case, stated: *"Canada's immigration law does not discriminate against those with illness or disability. It does strive, however, to find the appropriate balance between those wanting to immigrate to Canada, and the limited medical resources that are paid for by Canadian taxpayers."* This response obviates the fact that my family and I, like all temporary workers in Canada, are also paying Canadian taxes. The option provided to us by CIC in the *Fairness letter*, to sign a "*Declaration of Ability and Intent*," would sentence us to paying for services that we are already being taxed for. This unjustly discriminates against immigrant workers, who pay Canadian taxes, sometimes for years, making their taxes worth less than the taxes paid by Canadian citizens or permanent residents.

2.6. CIC´s response to the media stated: "*Excessive demand decisions are based on the likely costs […] and the potential impact on waiting lists.*" However, the expert cited in the Fairness Letter sent to us as ***the*** source for determining these costs, actually stated: "*The issue of cost is insignificant and should not be used as a consideration*." Furthermore, the document cited (Bennett, 2009) in *Appendix 1* of the Fairness Letter as supporting the cost calculations of social services, did nothing of the sort. The *Fairness Letter* falsely assigned supporting data to this document, to which the author, Sheila Bennett, later stated in a letter to her MP Chris Bittle: *"I am an advocate for inclusion and I strongly object to my work (see below) being used in any way to suggest that a student with any disability can be perceived as a burden."* When I asked Nico´s school (Roselawn Public School) to tabulate the cost of having Nico participate in the special education classroom, they were unable to offer individual costs. If the actual school where my son studied was unable to calculate the cost of his participation, it seems improbable that CIC, so far removed from the specific case, would be able to come up with a reliable value to determine his excessive demand. It seems that there is no clear methodology to fairly measure the likely costs and potential impact on waiting lists, especially in the case of "social services".

2.7. In the process of determining admissibility for Permanent Residency, no consideration was made of the possible contributions of individuals with disabilities or of their families. They are simply reduced to their lowest denominator, defined by what they are perceived to lack, instead of being accepted and valued for their differences and by what they are capable of contributing to society. On a very basic level, the tax contribution of our family to Canada's social services far outweighed the stated excessive demand our family would supposedly cost. And from a broader perspective, the incommensurable contributions (artistic, cultural, intellectual, social, etc.) of persons with disabilities and their families to their communities are not considered at all. This perspective is shortsighted, economically foolish, and ultimately, mean-spirited.

3. Recommendations for Policy Changes

In the spirit of expediting necessary changes in the policies around Section 38(1)(c) of the *IRPA*, we present very succinct recommendations, based on inputs from stakeholders across a wide sector that have been following this case and have reached out to share their perspectives. Notable stakeholders include: The Council of Canadians with Disabilities and the Canadian Association for Community Living.

3.1. There should be a distinction between those who apply from outside of Canada, and have not yet contributed with taxes to Canadian Health and Social Services, and those who have been accepted as temporary workers, and have already become payers of Canadian taxes. If one is being taxed, one should be granted access to public services paid for by one's tax dollars. **Recommendation:** Persons accepted into Canada as temporary workers who pay Canadian taxes, should be exempt from considerations of inadmissibility based on excessive demand on health and social services (analogous to the exemption Refugees already enjoy).

3.2. There is inequality and discrimination in how decisions regarding excessive demand are made. Subjectivity in this decision-making process has fostered a systemic disability prejudice in this policy area. Specifically, the application for Permanent Residency includes a medical exam at the onset which screens for health issues to be looked at under the "Health" condition for inadmissibility. If applicants pass the medical exam, there should be no further "medical" examinations. The initial exam should not additionally screen for disabilities, for example, for code 759, Down syndrome, or other disabilities that are not illnesses or diseases, in and of themselves. There is a grey area that confounds "medical condition" or "health condition" with "disability". It is imperative to provide the evaluating officers a clear mandate NOT to target persons with disabilities for further medical exams. This is discriminatory on disability grounds, in direct contravention of Article 15 of the *Canadian Charter or Rights and Freedoms*. These terms need to be clearly defined in order to provide a clear mandate so that the evaluation process does not become discriminatory by default, or based on subjective interpretations. **Recommendation:** We suggest, at the very least, going over the processing manual used by evaluation officers and eliminating all the "red flags" (or codes) around disabilities. We further suggest disability rights training, conducted by organizations run by persons with disabilities, for all Immigration personnel both in Canada and abroad.

3.3. There is a logical and conceptual problem with including excessive demand of "social services" under the category of Health. Section 38(1)(c) says: *"38 (1) A foreign national is inadmissible on health grounds if their health condition[…](c) might reasonably be expected to cause excessive demand on health or social services."* **Recommendation:** One option is to eliminate the two words ***"or social"*** from this sub-clause. This would provide for a much less problematic statement: *"38 (1) A foreign national is inadmissible on health grounds if their health condition […](c) might reasonably be expected to cause excessive demand on health […] services."*

3.4. Especially problematic is the definition of "social services" in the *Regulatory Definitions Related to Excessive Demand*. The narrow selection of social services included in the calculation of excessive demand, specifically targets those services used primarily by disabled persons, automatically making any use of these services subject to excessive demand considerations. This circular reasoning makes disabled persons a burden by definition! This definition clearly discriminates against those services that improve accessibility and inclusion for people with disabilities in Canadian society, so by extension, it discriminates against people with disabilities. Social services, whose funds are invested in by the State, are many, and cannot be reduced to *"…home care, specialized residence and residential services, special education services, social and vocational rehabilitation services, personal support services and the provision of devices related to those services."* Subsection (a) of the definition of "social services" further defines them as services "*intended to assist a person in functioning physically, emotionally, socially, psychologically or vocationally*". Having these social services be the only ones subject to considerations of excessive demand contravenes existing

Canadian policies aimed at improving accessibility and fostering the inclusion of persons with disabilities, including policies derived from such laws as the *Canadian Charter of Rights and Freedoms,* the *Canadian Human Rights Act*, and the *United Nations Convention on the Rights of Persons with Disabilities*, among others. The definition of "social services" in the *Regulatory Definitions Related to Excessive Demand* is tautological, clearly skewed by an outdated perception that persons with disabilities are a burden to society, and that all services aimed at their inclusion is a cost, instead of an investment. **Recommendation:** Revising, or better yet, eliminating this definition is key to mitigating the role Section 38(1)(c) of the *Immigration and Refugee Protection Act* plays in perpetuating disability discrimination, and would help harmonize the conceptions of disabilities across federal policy.

3.5. The *Fairness Letter* offers the opportunity to applicants for Permanent Residency who have been deemed inadmissible on grounds of excessive demand on health and social services, to sign a *Declaration of Ability and Intent*, where they are able to demonstrate their ability and intent to cover the costs of the excessive demand calculated for them. As shown above, this not only discriminates against disabled persons, but in addition it discriminates based on economic income. While the option of signing a *Declaration of Ability and Intent* was established to mitigate the problems with excessive demand considerations, it simply confounded the extremely problematic Section 38(1)(c) of the *IRPA* with an additional layer of discrimination. **Recommendation:** Eliminate the thirteen words contained in Section 38(1)(c) ("*might reasonably be expected to cause excessive demand on health or social services"*) from the over 40,000 words contained in the *Immigration and Refugee Protection Act.*

Summary of Recommendations in order of Priority

1. Eliminate the thirteen words contained in Section 38(1)(c)*:* "*might reasonably be expected to cause excessive demand on health or social services,"* from the over 40,000 words contained in the *Immigration and Refugee Protection Act*, because of its serious problems on medical, legal, economic, social, and ethical grounds.

2. Persons accepted into Canada as temporary workers who pay Canadian taxes, should be exempt from considerations of inadmissibility based on excessive demand on health and social services (analogous to the exemption Refugees already enjoy).

3. Eliminate the two words "*or social*" from Section 38(1)(c) of the *IRPA*. This would provide for a much less problematic statement, reading thus: *"38 (1) A foreign national is inadmissible on health grounds if their health condition […](c) might reasonably be expected to cause excessive demand on health […] services."*

4. Eliminate all the "red flags" (or codes) around disabilities contained in the processing manual used by evaluation officers reviewing Permanent Residency applications, and in addition, we further suggest disability rights training, conducted by organizations run by persons with disabilities, for all Immigration personnel both in Canada and abroad.

5. Eliminate the narrow and biased definition of "social services" contained in the *Regulatory Definitions Related to Excessive Demand* to mitigate the role Section 38(1)(c) of the *Immigration and Refugee Protection Act* plays in perpetuating disability discrimination, and to help harmonize the conceptions of disabilities across federal policy.

Immediate action on these brief recommendations would go a long way to improving the blatantly discriminatory outcomes resulting from the current spirit, interpretation and application of Section 38(1)(c) of the *Immigration and Refugee Protection Act,* sparing Canada the harmful, unnecessary and shameful contradictions between the *IRPA* and the *Canadian Charter of Rights and Freedoms* and the United Nations *Convention on the Rights of Persons with Disabilities* (ratified by Canada in 2010).

We look forward to any further collaboration with the Ministry of Immigration, Refugees and Citizenship to enact these policy changes as quickly as possible, in order to avoid the unhealthy and unnecessary perpetuation of disability discrimination in Canada.

References:

Bennett, Sheila. (2009). Including Students with Exceptionalities. *The Literacy and Numeracy Secretariat (January, 2009). Research Monograph #16.* http://www.edu.gov.on.ca/eng/literacynumeracy/inspire/research/Bennett.pdf

Citizen and Immigration Canada (CIC). (2016) *Regulatory Definitions Related to Excessive Demand.* In CIC (2016) "*Fairness Letter*" Response to Permanent Residency Application y Phillip Joseph Montoya, Application: E000158425. March 15, 2016.

Citizen and Immigration Canada (CIC). (2016). *Appendix 1.* In CIC (2016) "*Fairness Letter*" Response to Permanent Residency Application y Phillip Joseph Montoya, Application: E000158425. March 15, 2016.

Citizen and Immigration Canada. (2016). *"Fairness Letter"* Response to Permanent Residency Application y Phillip Joseph Montoya, Application: E000158425. March 15, 2016.

Government of Canda. (1982). *Canadian Charter of Rights and Freedoms.*

Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada. (2001). *Immigration and Refugee Protection Act (IRPA).*

Parliament of Canada. (1977). *Canadian Human Rights Act.*

United Nations (2008) *Convention on the Rights of Persons with Disabilities* (Ratified by Canada in 2010)