

REPORT FOR TABLING IN PARLIAMENT BY THE COMMONWEALTH OMBUDSMAN

Under s 486O of the Migration Act 1958

Personal identifier: 017/05

Principal facts

Personal details

1. Mr X is a male aged 33 who says he is from Bangladesh. He is an orphan. On the Department's (DIMIA's) file, he is identified with the single name X but he told Ombudsman staff that he goes by a first name as well.

Detention history

2. Mr X arrived in Australia by boat on 28 September 1999 and was detained under s 189(2) of the *Migration Act 1958*. He has been in immigration detention at Curtin (1999-02), Baxter (2002-05), and in alternative detention at Glenside Hospital (2005).

Visa applications

3. Mr X applied for a protection visa (PV) (February 2000). The Department (DIMIA) refused his application (June 2000); and the Refugee Review Tribunal (RRT) rejected his appeal as having been made in the wrong forum (April 2001). Mr X's appeals to the Administrative Appeals Tribunal (AAT) (June 2001), and the Federal Court (FC) (June 2002), were both dismissed. Mr X appealed to the Full Federal Court (FFC) but then discontinued the appeal (October 2002).
4. Mr X lodged a complaint to the UN Human Rights Committee (UNHRC) (2004), which is still outstanding.
5. Mr X made several applications to the Minister under s 417 for a favourable exercise of her discretion (February 2003-July 2005) which were rejected. He applied to the Minister for an exercise of her discretion under s 48B to allow him to lodge a further application for protection (July 2005) but the Minister rejected it. Mr X's migration agent advised that she made applications to the Minister under s 501J for a favourable exercise of her discretion (March 2004, July 2005 & November 2005). DIMIA is currently preparing a submission to the Minister regarding the s 501J application.

Current immigration status

6. Mr X is in alternative detention at Glenside Hospital under a Mental Health Treatment Order.

Removal details

7. DIMIA attempted to remove Mr X in November 2004, but the removal attempt was aborted when Mr X lodged a complaint to the UNHRC. The UNHRC reportedly issued an Interim Measures Request not to deport Mr X until his complaint had been determined. In its October 2005 submission to the UNHRC, the Australian Government states it will inform the UNHRC if Mr X is removed from Australia. DIMIA advises, however, that the Minister has determined that the Interim Measures Request from the UNHRC is unwarranted and so will not prevent Mr X's removal.
8. DIMIA advises that Mr X may be eligible for removal again, pending the result of his application to the Minister and his health issues.

9. The Bangladesh High Commission does not recognise Mr X as a Bangladeshi citizen and has refused to issue travel documents for him. DIMIA states it may use an Australian issued 'Australian Certificate of Identity' if it attempts removal again.

Ombudsman consideration

10. The DIMIA report to the Ombudsman under s 486N of the Migration Act was received 18 August 2005 (dated 4 August).
11. Ombudsman staff interviewed Mr X at Glenside Hospital on 25 August 2005, in the presence of a friend, Ms C.
12. The Ombudsman received a submission from the Circle of Friends dated August 2005; a letter from Ms J dated 22 July 2005; and a submission from Refugee Advocacy Service SA (RASA) dated 23 November 2005. The Ombudsman also received RASA's submissions for Ministerial Intervention dated 22 July 2005 and 15 November 2005; and Ms C's submission to the Human Rights Committee dated 15 September 2004. The Ombudsman also sighted a report from Dr D dated 7 November 2005 and a copy of the Australian Government's response to the UNHRC of October 2005.
13. The Ombudsman received a summary medical report from the International Health and Medical Service (IHMS) dated 18 August 2005, a summary report from Psychological Support Services (PSS) dated 17 August 2005; several documents from a psychiatrist including an undated report (referring to interviews on 12 and 19 February 2005), a statutory declaration dated 14 August 2005 and a letter dated 14 June 2005; a Glenside Hospital 'Special Stay Unit' (SSU) action plan undated; a report by another psychiatrist dated 28 June 2005; reports by a third psychiatrist at Glenside Hospital dated 19 August 2005 and 24 October 2005; and a Multidisciplinary Action Plan from Glenside Hospital dated 7 October 2005. The Ombudsman received the Progress Notes from the psychiatrist at IHMS dated 28 May 2005 and 19 June 2005.

Key issues

Health and welfare

14. The medical reports diagnose Mr X with a major depressive disorder, anxiety and complex post-traumatic stress disorder (PTSD). A psychiatrist's report, among others, describes his depressive condition as '*major depression*'. The Glenside Hospital reports say that Mr X's depression has psychotic features.
15. The Glenside Hospital psychiatrist reported on 24 October 2005 that, '*return to a detention centre is strongly contraindicated ... Although confirmation of a permanent status here would be of considerable benefit ... the longevity of his detention (six years) and his preceding period of fear and flight from Bangladesh (at least 5 years) would require careful supportive follow-up for many months post release, should this occur.*'
16. The IHMS report of 18 August 2005 states that Mr X has a range of other physical health conditions. The Glenside Hospital psychiatrist states that Mr X has Type 1 diabetes, which requires self-administered insulin. His report conveys an extract from a further report by a Consultant Endocrinologist and Director of a Diabetes Clinic, which states: '*Mr X is insulin dependent. He therefore requires twice daily injections of insulin. This would cost approximately \$300 per month. There is no subsidised medicine available in Bangladesh. Mr X would therefore have to pay for his medication. He has no family and he has no money. Within a week of return to Bangladesh, without insulin, Mr X would become ill. In 2 to 3 weeks he would perish from a diabetic coma.*'

17. One submission made to the Ombudsman claimed that Mr X's transfer to hospital was not made in a timely way and that the care for his mental health in detention has been substandard. There is substantiation of this claim in some of the medical reports viewed by the Ombudsman, which raise cause for concern. For example, Mr X's admission to Glenside Psychiatric Hospital on 25 July 2005 was preceded by a report five weeks earlier (19 June 2005) by a psychiatrist recommending admission, and an application on 22 June by Mr X to the Federal Court seeking admission to a mental health facility.

Attitude to removal

18. Mr X is not prepared to return to Bangladesh voluntarily. He has asked to be removed to India if he has to be removed, but India has also refused to issue travel documents. He said that he would be tortured, beaten, or killed because of his former membership of the XX Party in Bangladesh. Mr X said that he joined the XX Party when he was 15 years old, after running away from the orphanage in which he grew up. He says he was not initially aware of what the party was involved in, except that it was part of a political struggle.

Protection Visa claim

19. The length of Mr X's period in detention partly stems from his refusal to accept the rejection of his claim for a protection visa. While it is not part of this reporting process to re-examine fully the merits of his claim, its relevance to his period in detention should be noted.
20. The tribunal decision that he was not entitled to a protection visa was based on a finding that he had committed the serious non-political crime of drug smuggling. In discussing the issue, the AAT observed that there was '*no specific evidence before the Tribunal regarding the type(s) of drugs concerned or the quantity of such drugs*', but the Tribunal went on to infer primarily from Mr X's evidence that the drugs were hard drugs, of trafficable proportions, they were used to finance the operations of a banned political party, and that he was aware of those matters. Mr X contests that finding on the basis that the term 'drugs' is a common expression used in both India and Bangladesh to describe prescription medicine and that his use of the term was to describe the smuggling of pharmaceuticals, not illicit drugs. He claims that his evidence was misunderstood by the AAT, that he has not had an opportunity to make a submission on the point to the AAT or FC, that it took him some time to appreciate the misunderstanding, and that at the critical times when he could have raised the issue he was not legally represented (for example, prior to the AAT hearing, when the AAT asked him to clarify a point after the hearing, and on two of the three occasions he gave evidence at the FC).
21. In consequence of finding that Mr X had committed a serious crime, the AAT and FC did not address his claim that he is at risk of ill-treatment or death if he is returned to Bangladesh. The Australian Government has made submissions on Mr X's claims to the UNHRC but as yet the UNHRC has not made a decision and his claims have not been fully tested.

Other Detention Issues

22. Mr X also makes a specific number of comments about his time in detention. These issues have not been put to DIMIA, but they are included in this report for the sake of completeness and so that DIMIA and the detention services provider are aware of them. It may also be the case that some of Mr X's comments reflect his current mental state.
23. Mr X described Baxter as '*the perfect definition of hell, worse than a prison and like a concentration camp in the second World War*'. He said the GSL guards

'carry the soul of evil'. He said 'people become, mad, crazy, I am one of them' and described an occasion where he was placed into management unit after he told GSL guards that he thought the television was telling him to harm himself. He alleged that he was strip-searched in front of a female officer and other people, which he says was culturally inappropriate and distressing.

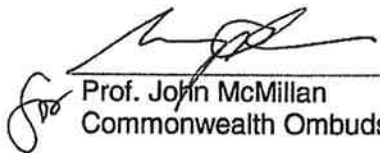
24. Mr X claimed the food was poor quality and that it was sometimes past its expiry date and contained maggots. He said that it was difficult to see DIMIA staff, and he had to fill out a form and wait seven-ten days.

Ombudsman assessment/recommendation

25. Mr X has spent six years in immigration detention. He is presently the longest serving immigration detainee in Australia. The length of his detention stems primarily from his unsuccessful pursuit of a PV, and his application to the UNHRC. However, the significance of that point has steadily been overtaken by the length of his detention and its impact on his mental health. The uncontradicted medical evidence before the Ombudsman is that Mr X has a serious mental illness that is partly a consequence of his experience of lengthy detention. He has been in alternative detention at the psychiatric facility at Glenside Hospital for over four months. In October 2005, the psychiatrist at Glenside Hospital said '*return to a detention centre is strongly contraindicated*'.
26. The Ombudsman **recommends** that Mr X not be returned to an immigration detention facility. That recommendation, important in its own right, leaves unresolved the longer term issue to do with Mr X's immigration status in Australia.
27. DIMIA has advised that it is preparing a submission for the Minister for her to consider her discretion under s 501J of the *Migration Act*. This section allows the Minister, if it is in the public interest to do so, to set-aside an AAT protection visa decision and substitute a more favourable decision. It is **recommended** that the Minister give urgent attention to the s 501J submission, in any case, not later than the statutory period prescribed in s 486P of the Migration Act for the tabling of this report in Parliament (viz, within 15 sitting days of receiving this report).
28. There are a number of possible outcomes of the Minister's consideration of the s 501J submission. They include: action being taken to return Mr X to Bangladesh; providing him with a Return Pending Bridging Visa (RPBV); or granting him a permanent visa on humanitarian grounds, for example, a Subclass 202 Global Special Humanitarian (Class XB) visa. In the Ombudsman's view there are considerations that point in favour of the latter option, of granting Mr X a permanent visa on humanitarian grounds:
- Mr X, as noted previously in this report, has a serious mental illness that is partly a consequence of his experience of lengthy detention.
 - It may not be easy to effect an early removal of Mr X to another country. DIMIA advises that it has tried to obtain identity documents for Mr X from both Bangladesh and India, but both countries have declined to recognise him as a citizen. A further delay in making a final decision in Mr X's case could foreseeably damage his mental health to a greater extent. The Glenside Hospital psychiatrist has said, '*confirmation of a permanent status here would be of considerable benefit*' to his mental health conditions.
 - The option foreshadowed by DIMIA of returning Mr X to Bangladesh using an Australian Certificate of Identity is not free of difficulty. Returning Mr X to a country that does not recognise him will potentially render him stateless. Mr X also has a strong fear, whether rightly or wrongly based, that he could face persecution if he were returned to Bangladesh. The view has also been

expressed, in a report from the Glenside Hospital psychiatrist, that, '*as a consequence of his diabetes, a return to Bangladesh would result in certain death within 2 to 3 weeks*'.

- The evidence in Mr X's case before the AAT suggests that his life has been difficult. The AAT accepted Mr X's evidence that he was recruited into the XX Party as a child of 15 after running away from an orphanage. This report earlier drew attention to Mr X's claim that the evidence of his involvement in smuggling illicit drugs was misunderstood by the AAT.
 - Mr X has strong community support. There are over ten people in his 'Circle of Friends' and they have advised that they are willing to provide him with accommodation, financial support, and practical assistance. Mr X has told his Circle of Friends about '*his desire to work and regain his self-respect and dignity in the Australian community*'.
29. If released, it is clear from the medical evidence that Mr X is in continuing need of assistance, including medical and psychiatric assistance. The Ombudsman **recommends** that DIMIA consider what support it will provide to Mr X, in light of the professional opinion noted in this report about the impact of detention on Mr X's mental health.


Prof. John McMillan
Commonwealth Ombudsman

9 December 2005
Date