

REPORT FOR TABLING IN PARLIAMENT BY THE COMMONWEALTH OMBUDSMAN

Under s 486O of the Migration Act 1958

Personal identifier: 018/05

Principal facts

Personal details

1. Mr X is a 61 year old man from Vietnam. His wife and four children (aged between 20 and 29) reside in Vietnam. Mr X's sister and three cousins reside in Australia.

Detention history

2. In October 2003, Department of Immigration and Multicultural and Indigenous Affairs (DIMIA) officers identified Mr X as an unlawful non-citizen. He was detained under s 189(1) of the *Migration Act 1958* and placed in immigration detention at Arthur Gorrie Correctional Centre. He was transferred to Baxter Immigration Detention Facility (Baxter IDF) in February 2005.

Visa applications

3. Mr X was granted a close family visa in September 1993 (valid until April 1994) and arrived in Australia in October 1993. Mr X remained in Australia for several years after the expiration of his close family visa. In October 2003, Mr X applied for a protection visa (PV), which was refused by DIMIA later the same month. The Refugee Review Tribunal (RRT) affirmed DIMIA's decision in January 2004. Mr X has not sought judicial review of the RRT decision.

Current immigration status

4. Mr X remains detained at Baxter IDF.

Removal details

5. DIMIA had earlier advised the Ombudsman that it held a valid travel document for Mr X (received on 21 October 2005) and that his removal from Australia would occur in mid-December 2005. The Ombudsman was later advised (on 13 December 2005) that scheduled removal action had been aborted in light of a request lodged by Mr X with the Minister under s 417. DIMIA advised that if this request did not result in a visa being granted to Mr X, removal action would be re-initiated.

Ombudsman consideration

6. The DIMIA report to the Ombudsman under s 486N is dated 16 November 2005.
7. Ombudsman staff interviewed Mr X by telephone on 29 November 2005.
8. Ombudsman staff have sighted medical reports from International Health and Medical Service (IHMS), dated 24 November 2005, and Psychology Support Services (PSS), dated 1 December 2005.

Key issues

Health and welfare

9. Mr X has been placed on suicide and self harm (SASH) watch on several occasions since his arrival at Baxter IDF, in response to changes in his behaviour noted by staff and other detainees, and intimations of suicide. Medical staff at Baxter IDF report that Mr X complains about his time in detention, tiredness and depression.

10. In July 2005, an eye specialist assessed Mr X's cataract condition and scheduled a follow up appointment in 12 months. Mr X suffers from Menier's disease and is receiving medication. Chest x-rays have revealed an obstructive airway disease. He has been advised to stop smoking.
11. The IHMS report notes that Mr X has been assessed by an external psychiatrist and diagnosed with depression. Mental state examinations were performed on Mr X in August and October 2005 and no mental health concerns were identified at those times. The IHMS report indicates that, *'Currently his conditions can be managed appropriately within the detention centre environment. If it is agreed that he is suffering from severe depression, this may be better managed in the community.'*
12. The PSS report observes, *'As Mr X is old and he is suffering from some medical problems. Keeping him in the detention for a long period of time is likely to have a negative impact on his mental health.'*
13. Progress notes taken by IHMS psychiatrist, Dr M, on 3 December 2005 indicate that Mr X was diagnosed with major depression on 14 November 2005. In his 3 December assessment of Mr X's mental condition, Dr M comments, *'complex diagnostic problem – interplay between pain and depression – in other words is the pain a somatic manifestation of a depressive disorder or is the pain contributing to depression.'* His assessment notes state that Mr X's *'mood [is] anxious and depressed with constricted affect. Became tearful at times during the interview ... He does have symptoms of major depression but treatment of the depression will depend on whether there is an organic cause of the pain.'* Dr M has recommended a treatment regime consisting of blood work, non-steroidal medication for Mr X's back pain, anti-depression medication (monitoring of his mood and pain for four to six weeks), supportive psychological counselling and development of a daily routine of activities. Dr M ended his assessment by noting, *'If those measures are ineffective then hospitalization would be appropriate.'*

Security and safety

14. DIMIA is not aware of Mr X having any criminal history.

Attitude to removal

15. Mr X advised Ombudsman staff that he agreed to voluntarily return to Vietnam in early 2004 and completed the relevant travel document forms. He says that the Vietnamese Consulate contacted him later that year and advised that his request for a travel document was rejected. He was unable to provide Ombudsman staff with further information regarding the reasons for the rejection, and claims not to have heard anything further from the Vietnamese Consulate about the matter. DIMIA advises that it made several attempts to obtain a travel document from Vietnamese authorities between October 2003 and November 2004, but without success. In addition, DIMIA states it approached the Vietnamese Ministry for Foreign Affairs in November 2004 (through DIMIA's Hanoi post) and also made representation to a Vietnamese delegation in June 2005 asking that it conduct an interview with Mr X. These attempts were unsuccessful. However, the Ombudsman is advised that Vietnamese authorities recently issued a valid travel document for Mr X. DIMIA also reports that Mr X has met with his DIMIA case officer on several occasions since March 2005 to discuss travel document processing, and in October 2005, arrangements were made to obtain photographs for his travel documents.
16. When asked whether he would voluntarily return to Vietnam now, Mr X informed Ombudsman staff that he feared return because Communist officials are still seeking his whereabouts. Mr X stated that he recently received word from his family in Vietnam that Communist officials visited his family's old address looking for him in connection to the murder of a soldier in 1975. Mr X denies any involvement in the crime, but claims Communist officials kept he and his family under surveillance for many years. He

commented to Ombudsman staff that *'once you are suspected of doing bad things, you have a bad name forever and they make your family suffer'*. Mr X says that this news reinvigorated his concerns and fears about returning to Vietnam. He believes he will be arrested on arrival and gaoled for an indefinite period. He also advised Ombudsman staff that *'the Communists'* killed two of his brothers. DIMIA advises that Mr X refused to sign a voluntary removal form on 2 December 2005.

17. Mr X advised Ombudsman staff that his health is ailing and he is *'half of what he was'*. He says that while he has confidence that herbal medicine available in Vietnam may assist with some of his ailments, such as ear and bladder problems, he is concerned that the necessary medication for his insomnia, back pain, eye problems and respiratory condition will not be available in Vietnam, causing his health to further deteriorate.

Ombudsman assessment/recommendation

18. Mr X has been residing unlawfully in Australia for 12 years, and has spent the last two years in immigration detention in AGCC and Baxter IDF. Medical evidence suggests that since his transfer to Baxter IDF in February 2005, his mental and physical health has declined. Mr X has been on SASH since 24 September 2005 (on and off) and is currently under heightened medical observation.
19. Mr X's PV claims have been reviewed by the RRT and he has been found not to satisfy the tests for protection. The Ombudsman does not hold any information to the contrary and notes that Mr X has not sought judicial review of the RRT's findings. The Ombudsman does not, therefore, wish to comment on the decision to remove him.
20. Two issues requiring comment arise in Mr X's case. The first has to do with the two years and two months that he has already spent in detention. Mr X has been eligible for removal from Australia since early 2004, after his unsuccessful application to the RRT and his choice not to initiate judicial review. While DIMIA initiated action with Vietnamese authorities in October 2003 to seek travel documents for Mr X's return to Vietnam, the relevant documents were not provided until two years later in October 2005. It does not appear that Mr X obstructed DIMIA's initiative to obtain travel documents. In hindsight, it is regrettable that Mr X spent such a long period in detention, perhaps unnecessarily. There may have been a risk that he would abscond if granted a visa in Australia while the removal action was being planned, but this issue could have been given greater attention by DIMIA in its management of Mr X. The Ombudsman draws attention to this issue because of its continuing relevance to Mr X, but also its relevance more generally to immigration detention policy and practice.
21. The second issue relates to Mr X's present situation. It is possible that a decision will soon be made on whether Mr X is to be granted a visa in response to his request under s 417, or whether removal action is to be restarted. If there is any further delay in a final decision being made on Mr X's future, the Ombudsman **recommends** that consideration be given to granting him a Removal Pending Bridging Visa.


Prof. John McMillan
Commonwealth and Immigration Ombudsman

16 December 2005
Date