

REPORT FOR TABLING IN PARLIAMENT BY THE COMMONWEALTH OMBUDSMAN

Under s 486O of the Migration Act 1958

Personal Identifier: 021/06

Principal facts

Personal details

1. Mr X is a 34-year-old male born in Vietnam. He arrived in Australia in 1989 aged 17 with his two brothers. He held a refugee and special humanitarian entry visa (allowing him multiple entries into Australia). Prior to arrival in Australia Mr X spent almost four years in a refugee camp in the Philippines. Mr X's parents are deceased and he has one sister living in Vietnam.

Detention history

2. Mr X became an unlawful non-citizen in May 1995 after his visa expired (explained below). Mr X was sentenced to terms of imprisonment on four occasions between 1996 and 2002 for possession and supply of prohibited drugs and receiving stolen goods. In June 2002 he was notified to the Department of Immigration and Multicultural and Indigenous Affairs (DIMIA) by the NSW Department of Corrective Services. At the completion of his criminal detention in November 2002 he was detained at Villawood Immigration Detention Centre (IDC) under s 189(1) of the *Migration Act 1958*.

Visa applications

3. Since arriving in Australia in 1989 Mr X has visited Vietnam on three occasions, in December 1991 (2 months), December 1992 (3 months) and October 1994 (6 months). He was eligible to return to Australia in 1995 on a five-year resident return visa that had been granted in 1991. It appears that Mr X was unaware that he held this substantive visa, and in fact returned on a '*titre de voyage*' (a travel document issued by the United Nations to refugees). He was granted a border visa at his point of entry, which had the effect of superseding his resident return visa. He was advised at the time, without the aid of an interpreter, to apply for another resident return visa. Mr X did not apply for another resident return visa and his border visa expired in May 1995.
4. In April 2003, Mr X applied to the Federal Magistrates Court (FMC) seeking judicial review of a purported decision to order his deportation. The application was dismissed in June 2003 on the basis that no such decision had at that stage been made. He lodged applications in May 2004 for a protection visa and for a bridging visa; these were refused by DIMIA in May 2004; and Mr X's appeals to the Refugee Review Tribunal (RRT) and the Migration Review Tribunal were dismissed in August and May 2004 respectively. An application to the FMC for judicial review of the RRT decision was dismissed in March 2005. An appeal against that decision to the Full Federal Court (FFC) was heard in May 2005; judgment has been reserved, pending the outcome of a matter known as "*NBGM and the MIMIA*", heard in part by the FFC in May 2005.
5. In August 2004 Mr X lodged a request with the Minister under s 417 seeking the favourable exercise of the Minister's humanitarian discretion. Consideration of that request has been deferred pending the outcome of the litigation.

Current immigration status

6. Mr X is currently detained at Villawood IDC. DIMIA advises that his case will be referred to the Minister for consideration of her detention intervention powers.

Removal details

7. DIMIA has advised that Mr X cannot be removed from Australia at this time due to his outstanding litigation and the request before the Minister. However, DIMIA advises that Vietnamese authorities issued a valid travel document for Mr X in February 2005.

Ombudsman consideration

8. The DIMIA report to the Ombudsman under s 486N is dated 28 September 2005.
9. Ombudsman staff interviewed Mr X at Villawood IDC on 4 November 2005 with the aid of an interpreter.
10. The Ombudsman has viewed letters of support from Mr X's family and the Dominican Sisters of Eastern Australia.

Key issues

Health and welfare

11. DIMIA advises that it is not aware of any significant medical issues faced by Mr X. However, Mr X informed Ombudsman staff that he is depressed and taking medication for headaches. He says that he spoke with the doctor about his depression more than one year ago and psychological services were offered to him. He says he declined these services on advice from a fellow detainee who said that the psychologists are not helpful. He also advised that he recently visited the dentist and is receiving ongoing treatment.

Security and safety

12. Mr X was convicted on four occasions between 1996 and 2002 for possession, then later, supplying a prohibited drug, and receiving stolen goods while in custody. Mr X informed Ombudsman staff that his convictions for supply were for small quantities he gave to friends for personal use, and he has no links to drug trafficking or major supply. Mr X states he has no ongoing contact with any drug suppliers and has vowed to stay 'straight' if released from immigration detention.

Attitude to removal

13. At interview with Ombudsman staff, Mr X expressed fear and concern about being removed to Vietnam. He advised that he left Vietnam as a refugee in 1985 and has no remaining links to Vietnam (though it has to be noted that he visited Vietnam on three occasions between 1991-1995). He mentioned that his sister continues to reside in Vietnam, however he has limited contact with her. Mr X advised that Vietnamese police (under direction from the Vietnamese Consulate) recently approached his sister and asked her to sign papers stating that she will care and support her brother upon his return to Vietnam. Mr X claims his sister declined to sign the statement, as she is physically and financially unable to care for her brother.
14. He says that he is scared about the prospect of being returned to Vietnam, as he would have no freedom, no prospects for employment and is concerned that there are no human rights in Vietnam. These were part of the reasons, he said, for his brothers and himself fleeing in the first place. He has lived in Australia for a long time and knows Australian culture well. He no longer understands Vietnamese culture.
15. He is close to his two brothers (both Australian citizens), who are willing to guarantee his support and security if released from immigration detention. Mr X has presented Ombudsman staff with statements showing that if released he will be able to gain work with his former employer, and will reside with his brother. He advised that his brothers visit him regularly at Villawood IDC.

Citizenship and issue of a border visa

16. Mr X applied for Australian citizenship in March 1991, but his application was deferred because he could not demonstrate competent knowledge of the English language. DIMIA advises that Mr X failed to attend a scheduled interview and his citizenship application was deemed to be withdrawn in March 1992. He has not made any further applications for citizenship since this time.
17. At the interview with Ombudsman staff Mr X explained that his present status as an unlawful non-citizen stems from his earlier misunderstanding of his immigration status. He believed that he had permanent residency and was free to depart and re-enter Australia whenever he liked; he had relied on a travel agent to arrange his affairs when he left Australia in 1994; he disputes that DIMIA advised him in 1995 to apply for a visa or provided him with documentation for that purpose; and he states that he was unaware that he was residing unlawfully in Australia until 2002 when DIMIA approached him while he was in prison.

Ombudsman assessment/recommendation

18. Mr X arrived in Australia as a refugee when he was 17 years old, having fled his home country, Vietnam, at age 14. He has remained in Australia on a permanent basis since 1989, travelling to Vietnam three times for short stays. Mr X is now 34 years old, and has spent more than half of his life in Australia.
19. Mr X came to DIMIA's attention because of his criminal behaviour. His offences are drug related matters, linked directly to his heroin addiction at that time. Mr X informed Ombudsman staff that he became involved in drugs after he broke up with his girlfriend in 1996. He says that he was depressed and had lost faith in the world. Mr X pointed out that he was never involved, and never charged, with any matters relating to physical violence, or any matters receiving a lengthy prison sentence. Mr X informed Ombudsman staff that he has not touched drugs while in criminal and immigration detention, and if released, will not revert to his past ways. He says he wishes to start a new life.
20. Even though Mr X came to Australia as a refugee from Vietnam, recent consideration of his PV application resulted in DIMIA and the RRT concluding that he no longer satisfies the Convention relating to the Status of Refugees and that Australia does not owe him protection. Mr X's appeal to the FFC is the subject of a reserved judgment.
21. Mr X's case raises similar issues to other cases that are the subject of a draft Ombudsman report arising from an own motion investigation into the immigration detention and removal of long-term Australian permanent residents whose visas have been cancelled on character grounds under s 501. A draft report on that study was provided to DIMIA in November 2005. It is possible that if the Government accepts the Ombudsman's recommendations, the immigration status of some individuals subject to the report will change. Mr X is not the subject of a s 501 decision, because he did not hold a valid visa after 1995 that was liable to cancellation; but in other respects he faces removal from Australia in similar circumstances to those whose visa has been cancelled under s 501 on character grounds due to criminal conviction. Features of his (and other) case to which the draft report on s 501 draws attention include that he arrived in Australia as a minor, spent much of his formative years in Australia, has strong family and other ties in the Australian community, there are no similar ties with Vietnam, and it is likely that his removal would cause hardship both to him and to his family in Australia.
22. In light of those points, the Ombudsman **recommends** that the Minister consider granting Mr X a Removal Pending Bridging Visa to enable his release from immigration detention while the Government considers the Ombudsman's own motion report. In reaching this recommendation, the Ombudsman notes the following matters: Mr X has strong community ties (two brothers and their families); one brother has committed to support

Mr X financially; Mr X has assurances from his former employer that he can regain his employment; it seems unlikely that he would abscond or be difficult to locate given his family contacts; Mr X has already spent more than three years in immigration detention (as well as time spent in criminal detention); the current delay in the finalisation of his legal proceedings are not of his own making; and it is likely that further indefinite detention would adversely affect his health.



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Prof. John McMillan
Commonwealth and Immigration Ombudsman

4 January 2006
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Date