

## REPORT FOR TABLING IN PARLIAMENT BY THE COMMONWEALTH OMBUDSMAN

*Under s 486O of the Migration Act 1958*

Personal identifier: 023/06

### **Principal facts**

#### *Personal details*

1. Mr X is a male citizen of Vietnam, 46 years old and a permanent resident of Australia since 1990. He has three children, aged 16, 11, 10 and a stepchild aged 8. His children reside with his ex-wife.

#### *Detention history*

2. Mr X was detained in October 2002 at an Immigration Detention Centre (IDC) after his permanent visa was cancelled.

#### *Visa applications*

3. Mr X and his then wife arrived in Australia on an Emergency Rescue Visa in May 1990 with a young child. On arrival they were granted permanent entry permits. They had met and married in a refugee camp in Hong Kong (where they had lived for 3 years after fleeing from Vietnam in 1987). In November 1998 Mr X was granted a five-year resident return visa.
4. Mr X's visa was cancelled on character grounds under s 501(2) of the *Migration Act 1958* in September 2002, two years after he was released on parole for conviction of certain offences. The Federal Court (FC) dismissed Mr X's application for judicial review of the Minister's visa cancellation decision in July 2004. The Full Federal Court (FFC) dismissed Mr X's appeal in a split decision in March 2005. Mr X sought leave to appeal to the High Court in April 2005. The Department (DIMIA) advises that on 16 December 2005, the High Court dismissed Mr X's application.
5. Mr X's Protection Visa (PV) application of September 2005 was refused and Mr X has applied to the Refugee Review Tribunal for a review of the decision. The Department advises that a detention intervention submission is currently with the Minister.

#### *Current immigration status*

6. Mr X is an unlawful non-citizen detained at an IDC.

#### *Removal details*

7. DIMIA first approached the Vietnamese authorities regarding the issue of a travel document to Mr X in December 2003. DIMIA advise that discussions with the Vietnamese authorities are continuing.

### **Ombudsman consideration**

8. The DIMIA report to the Ombudsman under s 486N of the Migration Act is dated 26 September 2005.
9. The Ombudsman received a submission from a volunteer for a refugee support agency dated 23 November 2005, and a submission from a senior member of that organisation, dated 9 December 2005.
10. Ombudsman staff interviewed Mr X at the IDC on 27 October 2005.

11. The Ombudsman sighted a psychology summary report by a psychologist, of Professional Support Services (PSS) dated 7 December 2005; and an International Health and Medical Services summary report by a doctor dated 6 December 2005.
12. A psychological report on Mr X's children by a clinical and forensic psychologist was also considered.

### **Key issues**

#### *Criminal history*

13. In August 1999 Mr X was sentenced to two years imprisonment comprising 18 months for one charge of assault with intent to cause grievous bodily harm, and six months for one charge of unlawful wounding. Mr X pleaded guilty to assaulting his ex-wife's lover and that man's wife after she tried to intervene. Mr X said that the victim had been influencing his wife to gamble.
14. Mr X was released on parole in April 2000 after serving ten months. In July 2000 Mr X resumed living with his wife in an attempt at reconciliation.
15. Mr X argues that he has reformed since committing his crime. He pleaded guilty at an early stage of the proceedings. A report from the prison that was sent to the Department as part of the review of his visa cancellation was described by French J as follows: *'That report indicated, inter alia, that Mr X was a "good worker", displayed "good behaviour" and was "always respectful in his dealings with staff". He interacted well with his peers and was "easy to manage"'*. Mr X was released on bail one month after the offences, and was given early release from prison on parole after serving ten months of a two-year sentence. Mr X resided in the community, without offending, for 29 months from his release on parole until he was placed in immigration detention in October 2002. In his interview with Ombudsman staff, Mr X expressed remorse and stated that he would not re-offend due to the impact upon his children.

#### *Visa cancellation*

16. The former Minister for Immigration cancelled Mr X's visa in September 2002. In October 2002 he was placed in immigration detention where he remains.
17. Mr X sought judicial review of the Minister's decision principally on the basis that the Issues Paper put to the Minister by the Department did not fairly address all the issues that could be considered by the Minister, and in particular did not fairly state the impact that Mr X's removal would have upon his children. Both the FC and the FFC (by majority) dismissed that challenge, on the basis that there was no jurisdictional error in the Minister's decision. However, all four judges expressed disquiet in varying terms with the adequacy of the Issues Paper. In the FC French J observed that *'the treatment of the interests of the children in the Issues Paper might be thought to be superficial and apparently wanting any attempt to appreciate the serious human dimensions of the decision facing the Minister'*. The majority judgment in the FFC (Jacobsen & Bennett JJ) endorsed French J's criticisms of the adequacy of the decision-making process. Their Honours observed that Mr X was closely involved with his children's upbringing, that his return to Vietnam would in all likelihood result in a total separation, and that *'the consequences of his actions do seem harsh on them and on him'*. The dissenting judge in the FFC (Lee J) was more strongly critical of the adequacy of the Issues Paper.

#### *Health and welfare*

18. The volunteer expressed concern for Mr X's well-being, *'His continued detention, coupled with little or no progress in the resolution of his case is extremely discouraging for him and I fear for his mental and emotional health'*.
19. At interview with Ombudsman staff, Mr X seemed despondent, and talked of his pain and suffering in detention. He expressed guilt about the impact that his offending and his subsequent detention had on his children. He spoke of suicide. After the interview, Ombudsman staff asked the detention centre provider to keep an eye on him for his own safety.
20. A doctor in the IHMS medical report lists medical problems of *'depression and anxiety'* and a *'past history of drug abuse'*. He stated, *'In April 2004, Mr X became very anxious about the welfare of his family. He spent a period of time on SASH (Suicide and Self-Harm) observations'*.
21. DIMIA reports that Mr X has a history of self-harming behaviour and he regularly uses counselling/mental health support services. Mr X spent three days in a psychiatric hospital in November 2002 after an incident of self-harm. He was on Suicide and Self-Harm (SASH) observations then, and again in April 2004.

#### *Family issues*

22. The volunteer's submission to the Ombudsman commented on Mr X's parenting – *'In my opinion the children greatly value the interaction they have with their father. They are always willing to go and visit him and seem very happy to be with him at the Detention Centre. I am aware that the children telephone Mr X almost daily with news and to ask his advice. In my opinion the children would suffer greatly if Mr X were to be deported'*.
23. The psychological report on Mr X's children noted *'it was evident that all three children perceive Mr X in a very strong and favourable parental role. It is evident from their letters and drawings that they have a strong attachment to him and he is a very significant person in their lives. From what I could ascertain, he is even buying food and sending it home for them to cook. This would be indicative of someone who takes a high responsibility for his children, therefore the children are going to receive a lower level of care and may be at a greater risk (deleted for privacy purposes). The children are also going to miss out on the relationship of someone who is very important for their psychological well being'*. The report concluded *'there is no question that the children would be adversely affected by the deportation of their father and that their best interests would not be served.'*
24. The senior person of the refugee assistance organisation, expressed concerns regarding the level of supervision provided to the children by their mother. The senior person stated, *'Volunteers have observed the children leaving detention with parcels on a number of occasions. Last Saturday it was explained by Mr X that he converts the points he is awarded by the (detention centre provider) for chores into food that he sends home with the kids to make sure they get at least 1 meal a day per week. (Our agency) have since sought to assist with food vouchers and have initiated contact with (deleted for privacy purposes). The senior person also indicated that the eldest daughter (age 16) 'has left school to work to support the family as (deleted for privacy purposes) problems leave the family with little financial resources'*.

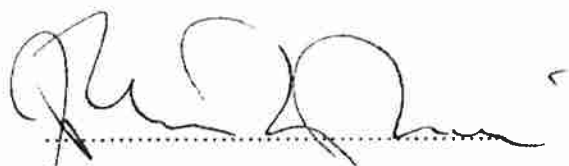
#### *Attitude to removal*

25. In his submission to the Department in response to advice of the intention to cancel his visa, Mr X asked to be allowed to stay in Australia so he could care for his children.

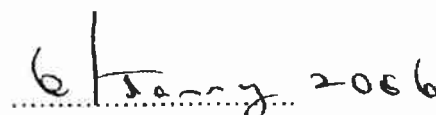
26. Mr X told Ombudsman staff that he fled Vietnam as he declined to take further part in the war against Cambodia. He was ultimately captured and gaoled for over 12 months then escaped to Hong Kong where he remained in a refugee camp for three years. He met his wife there and with their child they were admitted legally to Australia and granted permanent entry permits. He said he feared retribution by the Vietnamese Government if he were returned.

#### **Ombudsman assessment/recommendation**

27. Mr X's case is both troubling and complex. A decision has already been made at Ministerial level under s 501 of the Migration Act to cancel Mr X's visa on character grounds arising from his conviction for crimes of violence. Mr X's application for judicial review of the Minister's decision was unsuccessful, as were his appeals to the Full Court of the Federal Court and to the High Court.
28. Mr X has now been in detention for three years at the IDC, which is a small facility that is not suited for long-term detention. Continued long-term detention at the IDC poses a real risk of further damage to Mr X's mental and emotional stability. There is no immediate prospect of him being removed from Australia. The Vietnamese Government is yet to issue any travel documents in response to a request first made by DIMIA in December 2003. It is to be noted too that Mr X has not lived in Vietnam since 1987.
29. The submissions provided to the Ombudsman in support of Mr X contain independent psychiatric and medical reports that point in a convincing manner to the strong bond that exists between him and his children and to the adverse effect that his continuing detention is having upon the members of the family. Questions have been raised about the adequacy of the care the children can receive both while he is in detention and if he is removed from Australia. The four members of the Federal Court who considered his application for judicial review each expressed disquiet about whether the situation of the children was adequately presented in the Issues Paper presented to the Minister in 2002.
30. In light of those considerations, the Ombudsman is of the view that it is timely for Mr X's case to be reconsidered by the Minister in exercise of her detention intervention powers. Two specific recommendations are made. First, in light of the period that has elapsed and the events occurring since the decision of the Minister in 2002 to cancel Mr X's visa, it is **recommended** that the Minister reconsider that decision. Secondly, in the event that the Minister does not substitute a different decision, it is **recommended** that the Minister consider granting Mr X a Return Pending Bridging Visa (with appropriate reporting conditions) to enable his release from detention to care for his family while questions to do with his removal to Vietnam are resolved. It is further **recommended** that this process of consideration by the Minister be undertaken as soon as possible and 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 the report).



Prof. John McMillan  
Commonwealth and Immigration Ombudsman



Date