

REPORT FOR TABLING IN PARLIAMENT BY THE COMMONWEALTH OMBUDSMAN

Under s 486O of the Migration Act 1958

Personal Identifier: 024/06

Principal facts

Personal details

1. Mr X is a male aged 34. He is a citizen of Vietnam. His wife and three children (aged 6, 4 and 2 – all born in Australia) are Australian citizens and live in Australia. His mother and three sisters live in Vietnam and he has two brothers, one in Russia and one in Denmark. Mr X left Vietnam in 1992 and spent two years in a camp for asylum seekers in Hong Kong where he married his current wife. He arrived in Australia in January 1994 from Hong Kong on a transitional (permanent) BF 205 visa. He departed Australia for Vietnam three times between 1996-2000, due mainly to important family occasions and the deaths of his father and father-in-law.

Detention history

2. Mr X held a 5 year subclass 155 Resident Return Visa upon his return to Australia in 2000. He was sentenced in May 2001 to 3 years imprisonment for heroin possession. The Minister cancelled his visa in November 2002 under s 501 of the *Migration Act 1958* (the Act) due to the criminal conviction. He was detained the same month at an immigration detention centre (IDC) under s 189(1) of the Act upon his release on parole.

Visa applications

3. Mr X sought judicial review of the Minister's decision to cancel his visa in December 2002: the action was dismissed by the Federal Court (FC) (August 2003); by the Full Federal Court (FFC) (February 2004); and special leave to appeal to the High Court was refused in April 2005. During those proceedings the FC ordered the release of Mr X on a \$5000 bond with reporting conditions, between April 2003 – February 2004.
4. Mr X applied for a protection visa in May 2005; this was refused by the Department of Immigration and Multicultural and Indigenous Affairs (DIMIA) in June 2005. The Refugee Review Tribunal (RRT) affirmed the refusal in July 2005. In August and October 2005, requests to the Minister to favourably exercise her discretion under s 417 of the Act were submitted and these are still outstanding. Mr X has no other tribunal or court action pending.

Current immigration status

5. Mr X is currently detained at an IDC. The report from DIMIA indicates that Mr X has not been considered for release against the criteria for a Removal Pending Bridging Visa (RPBV). DIMIA advised that the Minister has requested additional information in relation to Mr X's case before possibly considering a residence determination in accordance with her detention intervention powers.

Removal details

6. The RRT noted that Mr X has no right of re-entry to Hong Kong in order to claim residency. DIMIA contacted the Vietnamese authorities in October 2004 to arrange for travel documents. The Vietnamese authorities advised DIMIA in April 2005 that as Mr X had been in a camp for asylum seekers in Hong Kong, he should be returned to Hong Kong. However, as Australia has a Memorandum of Understanding with Vietnam,

DIMIA is continuing to pursue Mr X's return to Vietnam and is confident that travel documents can be provided.

Ombudsman consideration

7. The DIMIA report to the Ombudsman under s 486N of the Migration Act was dated 6 October 2005.
8. Mr X was interviewed by Ombudsman staff at the IDC on 27 October 2005 with the assistance of an interpreter.
9. Professional Support Services (PSS) psychological reports (23 September and 3 October 2005) on Mr X were examined. The Ombudsman also sighted a newspaper article about Mr X's detention, in which Mr X's wife pleaded for the return of her husband to his family.

Key issues

Health and welfare

10. DIMIA has advised that Mr X's mental health has deteriorated over recent months. No medical diagnosis has been provided, however the PSS reported his symptoms are consistent with a diagnosis of depression. He was placed on Suicide and Self Harm (SASH) observation for two periods, in November 2004 and in September/October 2005 following incidents of threatened self-harm exacerbated by the approaching birthdays of his children. The PSS Report of October 2005 reported that he had attempted to swallow razor blades when distressed at the time of his two youngest sons' birthdays. The Report recommended that the Minister give early consideration to Mr X's case.
11. Mr X advised Ombudsman staff that he has had adequate medical treatment while at the IDC and that the nurse and psychiatrist see him when necessary. Mr X stated that at the time of interview, he was not on any medication, that he has completed a drug rehabilitation program and has not been on heroin or any other drugs since 2002.
12. DIMIA advised that Mr X's wife and children visit him regularly at the IDC, that he occasionally attends external outings and that he is in regular contact with mental health services within the centre.

Criminal history

13. There is no evidence to indicate that Mr X had any criminal background while he lived in Vietnam. The following is a list of offences committed in Australia.

Date	Offence	Sentence
17/12/1997	Possess prohibited drug (cannabis); goods in personal custody (camera) – reasonably suspected stolen	\$200 \$1000
27/11/1998	Heroin possession	\$300
14/04/1999	Unlawful possession of a television – reasonably suspected stolen	\$1500
29/05/2001	Heroin possession (29.2 grams) – quantity intent sell/supply	3 years imprisonment – to be declared a drug trafficker

14. During the interview with Ombudsman staff, Mr X stated that he started using heroin and became addicted only after his wife left him in 1995. He claimed that he had reduced his

use when re-united with his wife but still had sufficient quantities in his possession to be considered a trafficker.

15. Mr X's Progress on Parole Report dated September 2002 indicated that substance abuse and anger management counselling were provided to Mr X. The report stated '*Mr X is adamant that he does not use any illicit drugs at the moment*'. Upon urinalysis testing, no illicit drugs were detected. The report indicated that Mr X had not breached the terms of his parole during his community supervision.

Attitude to removal

16. Mr X stated to Ombudsman staff that if he is removed to Vietnam, his life with his wife and three children in Australia would cease as, being Australian citizens, they would not return to Vietnam with him. Mr X said it would mean the end of their marriage of over 10 years and the permanent separation of the young children from their father, which neither of the parents want. Mr X stated that he is despondent contemplating a future without his family. Mr X indicated that '*all his family's land and house in Vietnam has been taken and that the situation there is getting worse as, internally, it is the same, even if externally it looks different*'. Mr X was also fearful of returning to Vietnam, believing that he would be persecuted because of his Chinese ethnicity, his father's problems with the authorities in the past and his Australian criminal history.

Family considerations and community support

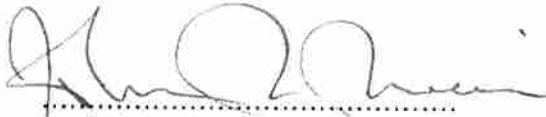
17. Mr X advised Ombudsman staff that he has strong family ties with his wife and children and wishes to be free to work and support his family. He expressed the view to Ombudsman staff that his wife was exhausted from caring for the children. Mr X's wife is quoted as being keen to have her husband released from detention so he can help raise the children and provide financial support.
18. Mr X's children have developed health concerns since the date of the earlier decision in 2002 to cancel his visa. The DIMIA report to the Ombudsman notes: '*The eldest has developed eczema, requiring regular hospital visits. Another son has ongoing health problems which require regular monitoring and investigation*'.
19. Mr X also has had support from community advocates and a Buddhist association while in detention.

Ombudsman assessment/recommendation

20. There are many similarities between Mr X's case and that of another person (Mr Y) on whom the Ombudsman has recently prepared an assessment under s 486O of the Act. That report expressed the view that it was timely for the Minister to reconsider Mr Y's case, in light of the period that had elapsed and the events that had occurred since Mr Y was detained in 2002. It is appropriate that the same recommendations be made in relation to Mr X. Specifically, it is **recommended** that the Minister reconsider the earlier Ministerial decision made in 2002 to cancel Mr X's visa; and, if a new decision is not made in substitution for the earlier 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. Mr X currently has an application before the Minister under s 417 which should be determined as part of this process. It is **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 Act for the tabling of this report in Parliament (viz, within 15 sitting days of receiving the report).

21. In support of these recommendations, the Ombudsman draws attention to the following features of Mr X's case that are similar to those on which the above recommendations were made in Mr Y's case:

- Mr X has been detained at an IDC between November 2002 – April 2003, and between February 2004 to the present;
- It is problematic whether Mr X can be removed to Vietnam and he therefore faces a period of indefinite detention;
- Mr X has a wife and three children aged under 7, and his continued detention is reportedly having a negative and worsening impact on his wife and children;
- Mr X's mental and emotional health has deteriorated during his time in detention, related primarily to concerns about his children and his inability to care for his family;
- Mr X would receive support from his family and the community if he was released;
- The decision of the Minister that led to Mr X being detained in an IDC was made more than three years previously in November 2002.



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Prof. John McMillan
Commonwealth and Immigration Ombudsman

6 February 2006
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Date