

# REPORT FOR TABLING IN PARLIAMENT BY THE COMMONWEALTH OMBUDSMAN

*Under s 486O of the Migration Act 1958*

Personal identifier: 026/06

## **Principal facts**

### *Personal details*

1. Mr X is a male aged 29. He is a citizen of the Socialist Republic of Vietnam (Vietnam). He first arrived in Australia in 1990, at the age of 13, and has lived in Australia since then. He has a de facto spouse and a stepdaughter residing in Australia. His father and stepmother are also resident in Australia. He has a grandmother residing in Vietnam, the only relative of whom he is aware in that country.

### *Detention history*

2. In February 2003, the Minister cancelled Mr X's Resident Return Visa (RRV) under s 501(2) of the *Migration Act 1958* on character grounds, because of his criminal record. He was detained in June 2003 under s 189(1) at the Fulham Correctional Centre in Victoria, and transferred to Port Philip Prison later that day. In October 2003, Mr X was transferred to Baxter Immigration Detention Facility (Baxter IDF).

### *Visa application*

3. RRV granted (March 1994); RRV cancelled under s 501(2) (February 2003); application to Federal Magistrates Court (FMC) dismissed (May 2004); appeal to Full Federal Court (FFC) dismissed (October 2004); special leave to appeal to High Court (HC) was refused (September 2005).

### *Current immigration status*

4. DIMIA advises that the Minister is currently considering the grant of a Removal Pending Bridging Visa (RPBV) as part of a submission that includes a number of immigration detainees who have had an adverse s 501 character determination.

### *Removal details*

5. In September 2003, consideration was given to returning Mr X to Vietnam under an agreement for the return of criminal deportees. In May 2004, Vietnamese authorities requested that Mr X be allowed to remain in Australia. In March 2005, Vietnamese authorities requested a statement that Mr X has no family support in Australia. DIMIA advised that efforts to obtain the statement were deferred pending the outcome of the HC appeal.

## **Ombudsman consideration**

6. The DIMIA report to the Ombudsman under s 486N was received 6 September 2005 (dated 30 August 2005).
7. Mr X was interviewed by Ombudsman staff at Baxter IDF on 22 September 2005.
8. Submission from Mr X's solicitors dated 31 October 2005 including a statement from Mr Y, a Youth Support Worker, dated 29 October 2005.
9. Letters of support from Sister A, dated 6 December 2005, and Sister B dated 8 December 2005.

10. Mr X's criminal history, which is summarised:

| <i>Date</i>  | <i>Offence</i>                         | <i>Sentence</i>                                      |
|--|--|--|
| 11/04/2000   | Possess Heroin                         | Four months imprisonment concurrent                  |
|  | Robbery                                | Eight months imprisonment concurrent                 |
|  | Possess drug of dependence (not named) | Six months imprisonment concurrent                   |
|  | Use drug of dependence (not named)     | Four months imprisonment concurrent                  |
|  | Possess regulated weapon               | Three months imprisonment concurrent                 |
|  | Fail to answer bail (2)                | On each charge: Three months imprisonment concurrent |
|  | Assault with a weapon                  | Sixteen months imprisonment concurrent               |
|  | State false name when requested (2)    | With conviction, fined an aggregate of \$400         |
| <b>Effective total State term imposed was one year four months. Non-parole period fixed at ten months.</b> |  |  |

| <i>Date</i>   | <i>Offence</i>             | <i>Sentence</i>   |
|---|----------------------------|---|
| 20/06/2002  | Armed Robbery              | Two years   |
|   | Armed Robbery              | Two years. One year three months of sentence concurrent |
|   | Intentionally Cause Injury | Six months, three months of sentence concurrent         |
|   | Intentionally Cause Injury | Six months concurrent                                   |
| <b>Total three years. Non-parole period of twenty-one months.</b> |                            |   |

### Key issues

#### *Health and Welfare*

11. DIMIA advises that Mr X suffered minor injuries, which required dental treatment, during a soccer game in September 2004. Remedial dental treatment was completed in October 2004. Mr X has had subsequent dental checks.
12. DIMIA advises Mr X has had no mental health issues. Mr X confirmed this during his interview with Ombudsman staff.

#### *Attitude to removal*

13. Mr X advised Ombudsman staff that he is worried at the prospect of being removed to Vietnam. He said he only has a grandmother in Vietnam but she is very old and will not recognise him. Mr X said he did not have good job prospects in Vietnam, and feels Australia is his home as he arrived when he was 13 and grew up in Australia.

#### *Community and Family Support*

14. Mr X has a choice of people prepared to support him if he is released into the community, including his family, the Jesuit Priests, Sister A and Mr Y.
15. Sister A reports that she has come to know Mr X through her ecumenical chaplaincy work at Baxter IDF and believes that he was a neglected child in a difficult family environment who wants to put his days of drug-induced crime behind him and start his life again. She also mentioned in her letter dated 6 December 2005, that Mr X has '*taken part in drug*

*rehabilitation programs ... He has given up drugs completely and wishes to stay drug-free. He tells me he wants to study at TAFE and become a motor mechanic'.*


16. The Ombudsman notes a statement from Mr Y. Mr Y states that he has a long-standing counselling relationship with Mr X, from when Mr X was in prison and in immigration detention. He advised that Mr X has '*matured and settled down considerably*' and '*has changed into a man who accepted advice and kept away from trouble.*' Mr Y said that he is willing to provide assistance and support for Mr X upon his release from immigration detention, including assistance with finding accommodation and employment and providing on-going supervision and counselling. He also said he will assist Mr X with re-connecting with the Australian community and his family.
17. Mr X's father lodged an affidavit with DIMIA dated 14 December 2005. He stated '*I love my son and am willing to provide support to him ... X can live with me. I will provide financial support until he obtains employment. I will care for, and supervise, him. I know Mr Y and will cooperate with Mr Y to help X become a good person*'.

### **Ombudsman assessment/recommendation**

18. Mr X has spent approximately 2½ years in detention, principally as a consequence of his unsuccessful litigation attempts to overturn the cancellation of his RRV by the Minister.
19. Mr X arrived in Australia in 1990 on a permanent residency visa, which allowed him to reside permanently in Australia. In 1994, Mr X obtained a RRV, which was cancelled by the Minister in February 2003 as a result of his substantial criminal record.
20. Mr X is adamant that all of his offences were directly related to being addicted to heroin. He has expressed remorse for his actions and states that he has been successfully rehabilitated from his drug dependency. He indicated that if he wanted to use drugs now, he could, as they are readily available. However, he has no desire to use them again. He stated that he wants a second chance to start a new life, to renew his relationship with his father and obtain employment. He said that he is '*now 30 years old and am not stupid and want to get a better life. I am no longer on heroin and will not go back. My life is no longer controlled by the drug.*'
21. It is clear that if Mr X is removed to Vietnam, he will have little, if any, support in that country. This undoubtedly underpins the concerns expressed by Vietnamese authorities. Mr X has similarly voiced concerns about his prospects and lack of support in Vietnam.
22. The level of support Mr X has in Australia is notably different. He has a de facto spouse, a stepdaughter, a father and a stepmother residing in Australia. Furthermore, the Ombudsman has been presented with letters of support from a number of people.
23. From the information presented to the Ombudsman, the Vietnamese Government has demonstrated a reluctance to accept Mr X back, and has asked that DIMIA provide a statement confirming the lack of support Mr X has in Australia. Taking into consideration Mr X's father's recent affidavit, the Ombudsman notes that there may be ongoing difficulties in relation to returning Mr X to Vietnam, and as such there is the realistic likelihood of Mr X remaining indefinitely in immigration detention.
24. It is also presently relevant that the Ombudsman is currently completing an own motion report 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 is currently before the Department. It is possible that the Ombudsman will make recommendations that, if accepted by the Government, would change the immigration status of some of those subject to the report. If that were to be the case, there would be a small number of current immigration detainees who, if removed, would lose the benefit of any changes arising from the report. Mr X is one of those people. Features of his (and other cases) to which that draft report will draw

attention include that he arrived in Australia as a minor, spent his formative years in Australia, has strong family and other ties in the Australian community, there is limited support available in Vietnam, and it seems likely that his removal would cause both financial and emotional hardship both to him and to his family in Australia.

25. Taking the above into consideration, the Ombudsman makes two **recommendations**. The first is that Mr X not be removed from Australia at the present time. The second is that the Minister consider granting a RPBV to Mr X, enabling his release from detention, pending any review of his case in light of the Government consideration of the Ombudsman's draft report. In making the second recommendation, the Ombudsman notes: Mr X does not appear to pose a current threat to the Australian community; he has strong family and community ties in Australia; it seems unlikely that he would abscond or be difficult to locate; he has already spent over two years in immigration detention in addition to that time already spent in serving out his sentence; and that continued indefinite detention could impact adversely on Mr X's mental and physical health.



Prof. John McMillan  
Commonwealth and Immigration Ombudsman

9 January 2006  
Date