

## REPORT FOR TABLING IN PARLIAMENT BY THE COMMONWEALTH OMBUDSMAN

*Under s 486O of the Migration Act 1958*

Personal identifier: 027/06

### **Principal facts**

#### *Personal details*

1. Mr X is a single male, aged 44 and a citizen of Sri Lanka. He is English speaking and from a high socio-economic status family.

#### *Detention history*

2. Mr X's permanent visa was cancelled for a second time in October 2003, whilst he was in prison in Western Australia. He was detained under s 189(1) of the *Migration Act* on 5 October 2003 upon his release from prison and was taken to the Perth Immigration Detention Centre. He was transferred to Baxter Immigration Detention Facility (IDF) on 27 January 2005.

#### *Visa applications*

3. Arrived in Australia on a student visa (February 1989); application for a Protection Visa (PV) refused (October 1993); refusal affirmed by Refugee Review Tribunal (RRT) (March 1994); granted a bridging visa (September 1994) and a permanent resident return visa (subclass BF-154) (February 1995); resident return visa cancelled by Minister on character grounds under s 501(2) (November 2001) on the basis of Mr X's conviction on three counts of sexual penetration without consent; Federal Court (FC) quashed the Minister's visa cancellation decision (September 2003); Acting Minister made a fresh decision cancelling Mr X's resident return visa (October 2003); Mr X commenced proceedings for judicial review by the FC of the Minister's decision, which are yet to be finalised.
4. Mr X made a s 417 request (1 September 2005) which the Department (DIMIA) advises was deemed inappropriate to consider on 26 October 2005. A s 48B submission (commenced on 26 October 2005), and a s 195A submission are before the Minister.

#### *Current immigration status*

5. Mr X is currently detained at Baxter IDF.

#### *Removal details*

6. DIMIA advised that, as he has outstanding litigation, Mr X is unsuitable for removal at this time. Pending the outcome of the litigation, the Department may seek to remove Mr X. While Mr X has not cooperated to date to effect his voluntary removal, the Department does not consider that removal to Sri Lanka would be problematic.

### **Ombudsman consideration**

7. The DIMIA report to the Ombudsman under s 486N dated 30 September 2005 (received 14 October 2005).
8. A letter from the Australian Government Solicitor, WA to a psychiatrist, dated 15 April 2005, and a psychiatric report, dated 24 May 2005.
9. Mr X was interviewed at Baxter IDF by Ombudsman staff on 8 November 2005.

10. Mr X provided extensive information to the Ombudsman including: a submission to the Ombudsman dated 8 November 2005; a copy of a letter to his DIMIA case manager dated 31 October 2005; a copy of the above psychiatric report; a copy of a s 48B and s 417 application by Mr X dated 1 September 2005; and a compact disc from Mr X, addressed to the Ombudsman and dated 8 November 2005. The compact disc contained: transcripts of his District Court of WA hearings; a copy of his FC Affidavit for the current FC appeal against the decision to re-cancel his visa; and a 273 page document titled '*Operational Blizzard-a*' authored by Mr X.

## **Key issues**

### *Health and welfare*

11. The report on Mr X by the psychiatrist was produced in response to a request from the Australian Government Solicitor in WA, seeking an assessment of Mr X's ability to provide instruction in the Federal Court proceedings. The psychiatrist recommended that: Mr X was incapable of managing his affairs in the court, that he was '*mentally disabled by virtue of a narcissistic and paranoid personality disorder and possibly a delusional disorder*'. The psychiatrist recommended that a '*tutor*' be appointed to provide instructions on Mr X's behalf in the Federal Court. The report commented also on the difficulty of communication with Mr X and his delusional ideas. The psychiatrist concluded '*In summary, it is difficult on the basis of this one interview, particularly in the setting of a detention centre to be certain as to whether Mr X suffers from any significant psychiatric illness. The possibility is that he may have a delusional disorder.*'
12. Mr X was very keen for the Ombudsman's staff to examine his 273 page document '*Operational Blizzard-a*', which he provided at interview in a CD format. This document is a record of Mr X's concerns and beliefs that the justice system in WA is corrupt. The text is often rambling and circumstantial and is punctuated by pictures and an odd formatting style. There are frequent statements that appear to be persecutory and unusual. He restates his belief that his original criminal trial involved corruption by the magistrate, prosecutor, his barrister and the police. There are multiple religious quotes and themes. Mr X recommends the sacking of 75% of WA police and the re-establishment of the Queen to govern Australia as a solution to that corruption. There were also several unrelated references to three recent alleged murders in WA, Mr X's belief that they are also explained by official corruption, and copies of his letters to the victims' families, and to a television station, regarding the murders.
13. Mr X was cooperative and seemed to be pleased to be interviewed by Ombudsman staff. His mood was unusually cheerful given that he was in detention. He was expansive, he seemed grandiose and due to his rambling style it was difficult to be sure what point he was making at times. He was inappropriately frank in raising and discussing his stated sexual difficulties. He stated that his chief concern was to clear his name and that he was innocent of the sexual assault offences for which he was gaoled. The themes of corruption and his innocence dominated his interaction with Ombudsman staff.
14. Mr X stated that he was suffering as a consequence of his detention, that he had a serious stress related skin condition that was not responding to medication. He said that he needed to see a dermatologist and that this had not yet occurred. Mr X referred also to an undisclosed and worsening medical and psychiatric problem about which he had previously sought psychiatric assistance in Sri Lanka. He believed that he should be released and that immigration detention was an unjust second punishment.

### *Criminal issues*

15. The sexual offences for which Mr X was gaoled were serious. He served approximately five years and three months of an eight year sentence. A Supreme Court judgment, dismissing his appeal, noted that he had displayed no remorse or empathy for the victim and by reason of his attitude was unsuitable for a sexual offender program. A factor in mitigation at his sentencing *'was that the applicant was a person of otherwise good character who had no previous convictions of any kind'*.
16. The Federal Court set aside the visa cancellation decision on the basis that Mr X had not been shown a document, Annexure L, which had been included in the brief to the Minister. The Court accepted that the document contained non-disclosable information, but further held that it contained relevant information that could have been presented to Mr X in a summary form; the failure to do so was a breach of procedural fairness.

### *Attitude to removal*

17. In his s 417 application Mr X stated that his life would be at serious risk if he was returned to Sri Lanka. He alleged that his life was threatened in Sri Lanka in 1987 and again in 1988. He believes that a left-wing militant group, the Janatha Vimukthi Peramuna (JVP), now a political party, may try to kill him if he returned. He believes he is at risk due to his family background, his privilege and status.
18. Mr X also claims to be hardly able to *'speak, write or understand'* Sinhalese and to be out of touch with his country of origin and its culture.

### **Ombudsman assessment/recommendation**

19. The Minister has made a decision cancelling Mr X's visa on the basis of his conviction for serious offences. He has commenced proceedings in the Federal Court challenging the Minister's decision. If those proceedings are unsuccessful the Department expects that arrangements will be made for Mr X's removal to Sri Lanka. His application for a PV has been rejected by the Department and on appeal by the RRT. He is currently being held at Baxter IDF until a final decision can be made about whether he is to be removed to Sri Lanka. The Ombudsman has no recommendation to make concerning those aspects of Mr X's case.
20. The Ombudsman does, however, draw attention to the complicating issue of Mr X's psychiatric health. It is possible that Mr X is suffering from a psychiatric illness. It is possible also that any such illness arose independently of Mr X's detention, and that is neither worsening nor improving during his period of detention. The Federal Court has appointed a tutor for Mr X in the current proceedings: some of the documentation sighted by the Ombudsman's office suggests that those proceedings could be difficult and protracted even though a tutor has been appointed. If so, that could lengthen indefinitely the time spent by Mr X in immigration detention. On the basis of what is known, and particularly the observations in the psychiatrist's report, it may be appropriate for the Department to seek further psychiatric assessment to resolve the diagnostic uncertainty of Mr X's condition. Any assessment of Mr X's health should consider whether his mental health can be appropriately managed in a detention environment, or is better managed in some other way. The practitioner asked to conduct any further psychiatric assessment should be forwarded a copy of this report and Mr X should be asked to provide a copy to the practitioner of his CD *'Operational Blizzard - a'*.
21. It is possible that the issues concerning Mr X's immigration and detention status will not be resolved by the time the Ombudsman is required to complete another

report in six months time under s 486O. That report would provide the Ombudsman with an opportunity to review any action taken to assess or treat Mr X's mental wellbeing. An issue the Ombudsman will address in any future report is whether Mr X should be released from immigration detention (for example, on a Return Pending Bridging Visa) while his immigration status is resolved. In foreshadowing that issue, the Ombudsman notes that Mr X has served his custodial sentence following his conviction, that he resided in the community on bail for a lengthy period without reported incident as far as the Ombudsman is aware, that his period in immigration detention has now been over two years, and that if he does, in fact, have a psychiatric illness it is unlikely that the immigration detention environment will be conducive to any recovery. The Ombudsman foreshadows also that in any future assessment of Mr X pursuant to s 486O the Ombudsman may seek access to the document described as Annexure L (see para. 16 above) to gauge its relevance or significance to this assessment.

22. Finally, if Mr X is removed to Sri Lanka, the Department should give consideration to making a proper transmission of relevant medical information to a Sri Lankan doctor.



Prof. John McMillan  
Commonwealth and Immigration Ombudsman

10 January 2006

Date