

# REPORT FOR TABLING IN PARLIAMENT BY THE COMMONWEALTH OMBUDSMAN

*Under s 486O of the Migration Act 1958*

*Personal identifier: 030/06*

## **Principal facts**

### *Personal details*

1. Mr X is a citizen of Pakistan. He is 53 years old. He says members of the ruling party in his province in Pakistan killed his father, kidnapped his 18-year old son, and attacked his home. His wife, remaining 3 sons, and 2 daughters still live in Pakistan, although they were recently affected by the earthquake and may have to move from that area. Mr X is also recorded as having the alias, Mr Y, but in this report he will be referred to as Mr X.

### *Detention history*

2. Mr X arrived in Australia in February 2001 as a crewmember of a ship on a special purpose visa. That visa expired when he failed to return to his ship. He was granted a bridging visa when he applied for a protection visa (PV) on 30 January 2003. That bridging visa was cancelled on 10 June 2003, and he was detained at Villawood Immigration Detention Centre (IDC) on the same day under s 189(1) of the *Migration Act 1958*. He has been at Villawood IDC since then.

### *Visa applications*

3. Mr X's agent allegedly lodged an application for a protection visa under the false name of Mr Y in May 2001, which DIMIA refused on 12 June 2002. Mr X lodged an application for a protection visa under his own name on 30 January 2003, which DIMIA declined to consider pursuant to s 48A in June 2003. Mr X has appealed this refusal unsuccessfully to the Refugee Review Tribunal (RRT) (October 2003), the Federal Court (FC) (March 2004), and the Full Federal Court (FFC) (August 2004). He also applied for special leave to appeal to the High Court (HC), which the HC initially deemed abandoned because of failure to file additional material (June 2005). When he applied again, he was refused leave in October 2005.
4. He applied for an exercise of the Minister's discretion under s 48B on March 2004, June 2004, and for a third time in October 2005. The Minister denied the first two requests and the third request is still outstanding. Mr X has also made a number of applications for bridging visas (BVs), which have been denied.

### *Current immigration status*

5. Mr X is an unlawful non-citizen in immigration detention at Villawood IDC. He has applications before the Minister for an exercise of her discretion under s 48B and for a possible exercise of her detention intervention powers.

### *Removal details*

6. No removal attempts have been made. The DIMIA report says that Mr X holds a valid Pakistan passport and it will remove him if his current application for Ministerial intervention is unsuccessful.

## **Ombudsman consideration**

7. The Ombudsman received a report pursuant to s 486N of the *Migration Act 1958* from the Department on 24 October 2005 (dated 13 October).

8. Ombudsman staff interviewed Mr X at Villawood on 3 November 2005. Mr X said that he did not want an interpreter.
9. Ombudsman staff spoke to Ms Z, a friend of Mr X, on 16 November 2005 and sighted a copy of Mr X's submission to the Minister dated 7 October 2005.

## **Key issues**

### *Visa issues*

10. Mr X allegedly caused his agent to lodge an application for protection under a false Afghan identity. Mr X says that, while he agreed to his migration agent lodging an application on his behalf, he did not authorise him to do so under a false name or with false claims. The FC later found that, although Mr X had not personally signed the false application form, he had known and consented to its false contents. In considering Mr X's case, the FFC noted, *'It is contrary to the public interest for any encouragement to be given to conduct of the type engaged in by the appellant'*.
11. The FC commented that the migration agent was most likely the instigator and author of Mr X's initial fraudulent PV application. It stated, *'I think there is a strong probability that [the migration agent] was the instigator and author of this application, in consideration of a substantial fee, that he made the application on behalf of the present applicant and, with his knowledge and consent, used an Afghan identity and pseudonym. It does not matter whose idea it was to take that course. I think both [the agent] and the applicant thought it would improve the chances of success.'*
12. Mr X's friend says that because of the false application made by his agent, Mr X's claims for protection have not been considered. It does seem that Mr X is prevented, under s 48A, from making another claim for protection while in the migration zone. He attempted to make another application in June 2003 as a Pakistani, but was rejected on that basis.

### *Health and welfare*

13. The DIMIA report says that Mr X has not had any significant health issues while he has been in detention. Mr X confirmed that his health has generally been good and that he has kept himself busy by working in the kitchens. He reported that more recently he has been feeling stressed and having difficulty sleeping. He attributes this to being worried about his family.

### **Attitude to removal**

14. Mr X is strongly opposed to going back to Pakistan because he believes his life is at risk there from the ruling party in his province. Mr X worked as a seaman for over 30 years, coming to Australia many times. He says he stayed in Australia in 2001 after he telephoned his family and they told him that his life was in danger from the party if he returned to Pakistan. He says members of the party have killed his father, abducted his son, and attacked his home, and his daughter stopped going to school because she fears for her safety.
15. Mr X says that there is no other country that he wishes to go to.

### **Other detention issues**

16. Mr X said that he gets on well with staff and other detainees at Villawood. His friend, Ms Z, said that he is mature and has a strong calm character. Both he and Ms Z report that he is generally known within the detention centre as *'mama'*, which means *'uncle'*.

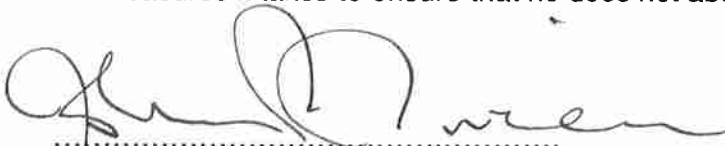
17. Mr X was generally positive about his time in detention. He reported working in the kitchens every day from 6am to 6pm in return for a \$10 phone card.
18. He said there had been a couple of minor incidents while he had been at Villawood. He said there was one time when a detention centre officer made a racist comment to him. He reported another occasion where a fellow detainee had hit him and trashed his room when he refused to participate in a hunger strike.

### **Ombudsman assessment/recommendation**

19. There are two applications currently before the Minister. The first is an application under s 48B for the Minister to consider exercising her discretion to allow Mr X to make a further application for protection. The second is a referral from DIMIA to the Minister for her to consider using her detention intervention powers. It is **recommended** that the Minister make a decision on these issues as soon as possible, and in any case not later than the statutory period prescribed in s 486P of the Migration Act for tabling a version of this report in Parliament (that is, within 15 sitting days of receiving the report).
20. The Ombudsman also wishes to comment on the s 48B application that is currently before the Minister. This is the third occasion on which Mr X has made such an application; his unsuccessful pursuit of the right to make a fresh PV application is the principal reason he has remained in immigration detention since June 2003. Mr X's first two applications under s 48B were considered and rejected by the Minister. The most the Ombudsman wishes to do at this stage is draw attention to issues that the Minister might consider in deciding the third s 48B application lodged by Mr X.
21. The substantial obstacle to a fresh application being allowed is that Mr X was a party to a false application being lodged in 2001. While that is a weighty consideration, it should not constitute an insuperable barrier to a new PV application being considered. The principle that ordinarily applies in administrative decision-making is that the dishonesty of a person in applying for a benefit may expose them to criminal prosecution, but is irrelevant to their entitlement to the benefit unless the legislation makes it a relevant consideration. Thus, it is ordinarily open to a person to reapply for a benefit that they have earlier been denied in circumstances marred by their dishonesty. The position is somewhat different under the Migration Act, since s 48A prevents a second application being made for a PV without the Minister's consent. The breadth of the Minister's discretion under s 48B to grant consent would include the earlier dishonesty of the applicant as a relevant consideration. Nevertheless, the person's dishonesty is neither the only nor necessarily the decisive consideration. The application must be considered on its merits.
22. Mr X's conduct was roundly criticised by the FFC. There are, however, countervailing considerations that the Ombudsman thinks it appropriate to draw to the Minister's attention. The issue of whether Mr X faces persecution in Pakistan and is in need of protection has not been assessed in the earlier RRT and court proceedings. Mr X relies on country information and statements from his family to claim that he faces likely death because of a vendetta. He claims that the ruling party in his province are actively involved in trying to harm him, and so the State cannot provide him with effective protection. It is probable that those claims would have to be examined by DIMIA even if Mr X is denied the right to make a fresh PV application. The reason is that if DIMIA was to return Mr X to Pakistan it would need to consider whether his *refoulement* was likely to breach Australia's international obligations, in particular whether he was likely to experience torture or ill treatment. Finally, as noted earlier, the FC commented that the migration agent was most likely the instigator and author of Mr X's initial fraudulent PV application. Even though the Court apportioned some of the blame to Mr X, a countervailing

consideration is that those who are new to Australia and applying for protection are likely to rely heavily on the advice of their migration agent.

23. There is a possibility that if Mr X is granted the opportunity to make a fresh PV application, and it is rejected on substantive grounds, he will challenge that refusal by appealing to the RRT and possibly by judicial review. That poses a risk that he would remain either in immigration detention or in limbo far longer. While the relevance of this point is undoubted, it is equally a scenario that is inevitable under a system that confers rights and allows a refusal to grant that right to be challenged.
24. It seems likely that Mr X's situation will not be resolved for some time, even if his s 48B application is rejected and he is to be removed from Australia. For that reason, the Ombudsman **recommends** that consideration be given to releasing Mr X from immigration detention on a Return Pending Bridging Visa (RPBV). He has been in detention for a long period and, although he is healthy at present, there is a risk that longer detention will lead to a deterioration in his health. There do not appear to be any community safety issues that would prevent his release (although this is subject to the completion of a health and security check). In addition, Mr X has some community support. In making this recommendation, it is noted that DIMIA will need to consider what measures it takes to ensure that he does not abscond.



Prof John McMillan  
Commonwealth and Immigration Ombudsman

19 January 2006  
Date

NOTE: Since completing this report, the Ombudsman has been advised that the Minister has exercised her discretion under s 48B and permitted Mr X to lodge a fresh application for a PV. This is the same course of action recommended by this report. The Ombudsman nonetheless submits this report unchanged, because of the general importance of the issue and the discussion.