

REPORT FOR TABLING IN PARLIAMENT BY THE COMMONWEALTH OMBUDSMAN

Under s 486O of the Migration Act 1958

Personal identifier: 031/06

Principal facts

Personal details

1. Mr X is a male aged 43. He is a citizen of Iran. He has children in Australia with both his ex-wife and his current wife, whom he married in 2002. His brothers and sisters are living in Iran, aside from one sister who lives in the USA. His mother also resides in the USA.

Detention history

2. Mr X arrived in Australia in September 1991 from India with his wife and two children as the holder of a Refugee Visa under the refugee program. He was charged with drug related offences in October 1992; he pleaded guilty in September 1995; and he was released from gaol on 22 April 1997.
3. In June 1997, the Minister's delegate (the Deputy Secretary) signed a deportation order under s 200 of the *Migration Act 1958*. Mr X was placed in immigration detention in September 2000 under s 253 and taken to the Villawood Immigration Detention Centre (IDC). In the same month, he was transferred to immigration detention in various NSW gaols. He was returned to Villawood IDC in February 2002, where he remains.

Visa applications

4. The United Nations High Commissioner for Refugees (UNHCR) certified that Mr X was a refugee in June 1990. He came to Australia on a Refugee Visa in September 1991. In June 1992, he was granted a Resident Return Visa (RRV), which DIMIA reports is still current.
5. In August 1999, the Administrative Appeals Tribunal (AAT) dismissed his application for review of the deportation order that was made in 1997. The AAT held that Australia no longer had protection obligations to Mr X because he had been convicted of drug related offences and was a risk to the Australian community. It considered a number of other factors and held that the deportation order was justified.
6. In November 2000, the Federal Court (FC) dismissed his applications for an extension of time to challenge the AAT decision, and for leave to challenge the Minister's decision to order his deportation. The Full Federal Court (FFC) dismissed an appeal in February 2001. His application for an injunction restraining his removal from Australia was dismissed by the FC in several decisions in November 2003 and December 2003. In July 2004, the Minister rejected an application to exercise her discretion under s 206 to revoke the deportation order.
7. In July 2004, Mr X applied for a Protection Visa (PV), which DIMIA refused in September 2004. The Refugee Review Tribunal (RRT) dismissed his appeal in January 2005. The RRT did not accept that he was at risk of persecution when he left Iran and found that he was unlikely to be persecuted upon his return. It determined that the circumstances in which he was found to be a refugee no longer existed. Mr X's appeal to the FC was heard in April 2005; judgment is reserved.
8. In June 2004, DIMIA assessed him against Australia's international obligations and found that it would not violate the *International Covenant for Civil and Political Rights* or the *Convention on the Rights of the Child* by returning him to Iran.

9. In August 2004, the Minister refused his application for her to exercise her discretion under s 417. In 2005, he applied for the Minister to exercise her discretion under s 253(9), which states that the Minister can order that a person subject to a deportation order be released from immigration detention. The Minister is considering that application.
10. In March 2005, he unsuccessfully applied for a BV.

Current immigration status

11. Mr X is being held in immigration detention at Villawood IDC. Although he holds a RRV, he is subject to a deportation order. He is awaiting the result of his appeal to the FC, the Minister's decision under s 253(9) and the Minister's decision on her detention intervention powers.

Removal details

12. DIMIA advises that action to remove Mr X has been deferred because of his litigation. He was offered the Iranian re-integration package in April 2003, which he rejected. DIMIA also advises that removal options will be pursued with the Iranian authorities if Mr X is unsuccessful in his current matters; if necessary, DIMIA can remove him to Iran involuntarily.

Ombudsman consideration

13. The DIMIA report to the Ombudsman under s 486N was dated 7 September 2005 (received 12 September).
14. The Ombudsman received a medical summary report from the International Health Medical Service (IHMS) (report undated) and a Psychological Support Services (PSS) summary report dated 13 September 2005. The Ombudsman also received a report from a psychiatrist dated 17 August 2005.
15. The Ombudsman received submissions from Ms Y dated 12 October 2005, Ms Z dated 11 October 2005, Sister B dated 13 October 2005, Ms C dated 14 October 2005, Ms D dated 8 October 2005, and Ms E dated 20 October 2005.

Key issues

Health and Welfare

16. In their September 2005 summary report, PSS states, *'Without a full psychological assessment, a formal diagnosis has not been made. However, Mr X's presentation is consistent with a diagnosis of Major Depressive Episode'*. However, the psychiatrist diagnosed him in August 2005 with a Major Depressive Disorder and Chronic Post-traumatic Stress Disorder. The psychiatric report states that his symptoms include sleep disturbance, compulsive eating, crying, suicidal thoughts, intrusive memories and hyper-vigilance. PSS confirms many of these symptoms and notes that he has been placed on Suicide and Self-Harm (SASH) observation. The psychiatric report states, *'I am very concerned about the danger that he may actually commit suicide if he completely loses hope'*. The PSS report notes that Bankstown Hospital assessed him and found that admission to hospital was not appropriate at that time.
17. The psychiatric report discusses his prognosis and states, *'the fundamental cause of his depressed mood is his situation of prolonged detention with complete uncertainty about his eventual release and the very frightening prospect of being forcibly returned to Iran'*. He states, *'The problem in managing Mr X's depression is that it is being actively generated by his present circumstances'*. PSS also express the view that his situation is unlikely to improve, *'the prognosis for long-term positive change remains poor given that his depressive symptoms appear related to his separation from his family, his ongoing*

detention and his state of hopelessness. This situation is most likely worsened by his now limited support system within the Villawood centre'.

18. Mr X suffers from diabetes, which is treated with insulin. He also suffers from arthritis. The IHMS summary report mentions some other physical complaints.
19. Mr X gave evidence at the District Court in his drug trial in 1995 that he was addicted at the time to opium. He told the District Court that he developed this addiction in order to self-medicate for diabetes and because of stress related to his persecution in Iran. The District Court held that this was implausible because it had evidence that he did not have diabetes. He has since been diagnosed with diabetes. The psychiatric report states that, *'While in gaol, Mr X was placed, for a while, on a methadone program. He says he accepted this although he was no longer dependent on opiates. He did not like the methadone and soon came off it without difficulty ... There is no further evidence of significant illicit drug or alcohol abuse since that time'*. In DIMIA's 1997 submission to the Minister, a report from NSW Probation and Parole is quoted as stating, *'no psychological, drug or alcohol related problems have been identified with this inmate'*.

Attitude to removal

20. Mr X does not wish to be removed to Iran. He said that he has family in Australia and he believes he will be persecuted if he is returned to Iran because of the political activities he engaged in prior to his departure. He said that he was tortured and some of his friends have been killed. He said that the Iranian Government is worse now than when he left and he still fears for his safety.

Criminal History

21. In November 1994, Mr X was convicted on two counts of assaulting his previous wife and daughter and he was fined \$250 on each count. In September 1995, Mr X pleaded guilty in the District Court of New South Wales to three offences: Count 1 – importation of prohibited imports consisting of a trafficable quantity of opium; Count 2 – possession of a trafficable quantity of opium imported into Australia; and Count 3 – possession of a trafficable quantity of opium reasonably suspected of having been brought into Australia. He was sentenced on the first and third counts to a period of six months imprisonment and, in relation to the second count, two years and three months with a minimum of one year and six months.

Detention issues

22. In his interview with Ombudsman staff, Mr X raised a number of issues about conditions in detention. These issues have not yet been put to DIMIA or the detention service provider, and they are included in this report for the sake of completeness and so that they can be investigated, where appropriate.
23. Mr X said he was unhappy with the food in detention, stating *'it is chicken wings or legs every day'*. He suggested that not enough money was spent on food and other items. He said he attends regular meetings and, in one example, said it took three months before a shower curtain was fitted and, at the time of the interview with Ombudsman staff, some shower curtains had still not been supplied and fitted. He also said that there were not enough activities and claimed he had been told *'the budget does not cover it'*. He also claimed there is a lack of facilities and overcrowding in Stage 2 at Villawood IDC.

Ombudsman assessment/recommendation

24. The Minister is currently considering whether to exercise her detention intervention powers in Mr X's favour. She is also considering whether to exercise her discretion under s 253(9) to order his release from detention. The Ombudsman **recommends** that the Minister make a decision on those issues as soon as possible, in any event within the

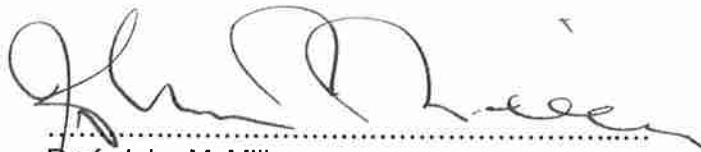
time set out in the legislation for tabling a version of this report in Parliament (viz. within 15 sitting days of receiving this report).

25. In support of the recommendation for an early consideration of those issues, the Ombudsman notes that Mr X has been in immigration detention for over five years. The expert medical evidence points to a risk for Mr X should his detention continue. The PSS report of 13 September 2005, states, *'the challenge posed by his ongoing detention will most likely increase over the next few weeks and months as a number of his close Iranian friends (other long term detainees) have recently been released from detention [which will] limit his support system within the detention environment and this may have ongoing implications for his ability to manage'*.
26. A further option open to the Minister is to exercise the power conferred by s 206 to revoke the deportation order for Mr X that was made in 1997. The Minister decided in July 2004 to reject an application for a decision to revoke under s 206. The Ombudsman **recommends** that it would be appropriate for the Minister to consider that issue afresh. In doing so, it would be for the Minister to weigh the considerations outlined below against Mr X's serious convictions for domestic violence and dealing in drugs. It is also for the Minister to consider whether the revocation of the deportation order would be warranted as coming within the terms of DIMIA Migration Series Instruction 26 of 1994, viz, that *'a considerable amount of time has elapsed since the order was made and circumstances may have changed dramatically'*.
27. The considerations that, in the Ombudsman's view, favour a reconsideration by the Minister of whether to revoke Mr X's Deportation Order under s 206 of the Act are as follows:
 - * Ten years have elapsed since Mr X was convicted in 1994 and 1995;
 - * There has been a significant improvement in the relationship between Mr X and his children from his first relationship. In deciding to affirm the deportation order, the AAT in 1999 put a great deal of weight on the potential benefit of a deportation order for these children, holding that it *'may well improve the health and welfare of two children who have been subjected to severe trauma by their father in the past'*. In making her decision in 2004, the Minister did not have the benefit of a submission from these children. The psychiatrist interviewed the children, who are now adults, and includes his expert opinion in his report, *'Both children now visit their father in the VIDC and both now hold good opinions of him and express love for him. Both believe that he has profoundly changed for the better and express the view that he was abusive because he was having a bad time.'* He concludes, *'Deporting Mr X will greatly harm the psychological well-being of the same children who are now adults'*;
 - * Mr X had another child, G, around 11 months ago. His third wife, Ms F, gave birth in around January 2005, which is after the Minister last reviewed Mr X's case. The psychiatrist interviewed Ms F and writes in his report, *'Ms F and G visit almost every day ... She described him as being a very loving father'*;
 - * Mr X has now been in immigration detention for five years. The medical evidence is that he suffers from major anxiety and post-traumatic stress disorder and his conditions are unlikely to improve while he remains in detention. The psychiatric report is clear on the risk to Mr X's life if he is deported, stating, *'I am very concerned that he may actually commit suicide if he completely loses hope'*;
 - * The psychiatrist examined the risk that Mr X may commit further crimes. Although DIMIA considered this in its submission to the Minister in July 2004, it did not have the benefit of the psychiatrist's expert evidence at the time. The psychiatrist concludes in his report that *'In my opinion it is extremely unlikely that Mr X will commit*

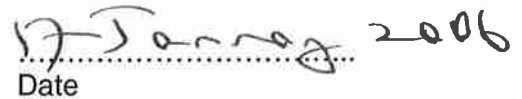
any further criminal offences and I do not think he will present any risk to the Australian community if he is permitted to remain in Australia'; and

- * As considered by the Minister in 2004, there is evidence that Mr X has participated in a methadone program and rehabilitated from his previous purported addiction to opium.

28. It is also **recommended** that DIMIA consider what form of psychiatric support it will provide Mr X if he is released from immigration detention in Australia.



Prof. John McMillan
Commonwealth and Immigration Ombudsman



Date

NOTE: Since writing this report, the Ombudsman has been advised that Mr X was released from detention on 2 November 2005, pursuant to s 253(9). The Ombudsman commends this step as, in this report, he recommended an early resolution of Mr X's s 253(9) application. DIMIA has further advised that Mr X's application for judicial review to the FC was dismissed (November 2005), he has appealed to the FFC, and his application under s 417 was rejected (October 2005). The Ombudsman's recommendations (above) in relation to the Minister considering revoking the deportation order, and supporting Mr X with psychiatric treatment now that he has been released, remain unchanged.