

REPORT FOR TABLING IN PARLIAMENT BY THE COMMONWEALTH OMBUDSMAN

Under s 486O of the Migration Act 1958

Personal identifier: 036/06

Principal facts

Personal details

1. Mr X is a 47 year old male from Afghanistan. He came to Australia with his wife Mrs X, aged 35, and 3 children (A aged 14, B aged 11 and C aged 6). His family now live as Australian citizens in Sydney.

Detention history

2. Mr X and his family arrived in Australia by plane in September 1999. They were taken into detention at the airport and transferred to Villawood Immigration Detention Centre (IDC). Mr X's wife and children were released from detention in August 2000. Mr X has remained in detention at Villawood IDC.

Visa applications

3. Mr X and his family entered Australia as the holders of tourist visas. Prior to clearing immigration, Mr X told immigration officials that he wished to seek political asylum in Australia. The family's tourist visas were cancelled and they were taken into immigration detention. He applied for a protection visa (PV) on 6 October 1999, listing his wife and children as dependents. Although the rest of his family were granted PVs in August 2000, the Department (DIMIA) refused his application. His appeal against that refusal was dismissed by the Administrative Appeals Tribunal (AAT) (October 2001) and the Federal Court (FC) (September 2003). His appeal was upheld by the Full Federal Court (FFC) (March 2004) and remitted to the AAT. On remittal, the AAT held there were not serious reasons for considering that Mr X had engaged in discrediting conduct within Article 1F and remitted the matter to DIMIA (October 2005). Mr X lodged a new application for a PV, which is being considered by DIMIA. His application for a bridging visa was rejected (November 2005).
4. On 8 November 2005, Mr X's request seeking the Minister's favourable humanitarian discretion under section 417 of the *Migration Act 1958* was deemed inappropriate to consider. In November 2005, the Minister made a decision not to exercise her detention intervention powers in Mr X's case.

Current immigration status

5. DIMIA is currently considering Mr X's application for a PV.

Removal details

6. No attempts have been made to remove Mr X.

Ombudsman consideration

7. DIMIA's report to the Ombudsman under s 486N was received on 6 October 2005 (dated 14 September).
8. Ombudsman staff interviewed Mr X, with his advocate Ms D, at Villawood IDC on 3 November 2005.
9. The Ombudsman received a medical summary from the International Health and Medical Service (IHMS) dated 17 November 2005; a summary from Professional Support

Services (PSS) dated 16 November 2005; and several documents from a psychiatrist, including a report dated 3 December 2003, a supplementary report dated 24 February 2005, and an expert opinion dated 31 May 2005.

10. The Ombudsman received a statement from Dr E, an academic and expert on Afghanistan, dated 30 October 2005. The Ombudsman also sighted a transcript of the ABC PM radio program dated 30 November 1999 and conducted a 'Google' internet search on the name 'X' on 14 November 2005.
11. Many letters of support and character reference for Mr X were received by the Ombudsman from members of the community. Many claimed to know him, and all called for his release from detention following the decision of the AAT in his favour in October 2005.

Key issues

Health and welfare

12. There is a difference between the medical summary reports provided by IHMS and PSS in November 2005, and the psychiatrist's reports of December 2003 and May 2005. IHMS and PSS state that Mr X has '*depression*', while the psychiatrist states that Mr X has '*major depression*', anxiety, and post-traumatic stress disorder. The Ombudsman is not in a position to resolve the difference, but notes that the IHMS and PSS reports state that a psychologist assessed Mr X; and that the other reports are from a psychiatrist.
13. The psychiatrist's 2003 report says that Mr X's '*indefinite detention and consequent separation from his wife and family, contribute directly to the onset and perpetuation of his psychiatric illness*'. In her 2005 report she states '*His psychiatric symptoms have not resolved in the two years since I last saw him and have become chronic*'. Her later report also discusses his prognosis as being '*extremely poor if he remains in detention and separated from his family, and given the chronicity of his symptoms, even if released, his recovery is likely to be prolonged and difficult*'. This contrasts somewhat with the IHMS report, which states, '*These medical conditions can be managed appropriately within the detention centre environment. It is likely that his depression would be improved if he were reunited with his family in the community*'.
14. In his interview with Ombudsman staff, Mr X said that he experienced symptoms including disturbed sleep, shaking, crying, forgetfulness, and a lack of concentration. He said that he had been on suicide watch many times.

Attitude to removal

15. Mr X informed Ombudsman staff that he continues to be at risk if he is returned to Afghanistan. Mr X was associated with the pro-Soviet People's Democratic Party of Afghanistan (PDPA). Dr E's statement indicates Mr X may be harassed because of his association with the pro-Soviet regime and his long time in the former USSR. He reports that law enforcement is weak and unlikely to give protection to Mr X. He also said that the allegations that he committed war crimes are available on the internet; the 'Google' internet search on the name 'X' confirms this.
16. Mr X says that he cannot go to any other country.

Other detention issues

17. Mr X said that for a time he had taken on the role of attending monthly liaison meetings with DIMIA to discuss issues in the detention centre. He complained that the recommendations from these meetings were not followed through, and so he stopped attending regularly out of frustration.

18. Mr X said he went on a hunger strike during his first year in Villawood IDC. He claimed that DIMIA put pressure on him to end his involvement in the strike by taking his children away and saying to him, *'if you do not end the hunger strike, you will have no access to your children'*. He said that in the end his children were away from him for one or two nights. In addition, when his application for protection was rejected, he said the DIMIA officer initially told him it was because he participated in the hunger strike, and only later told him that it was because he had been accused of committing war crimes.
19. He said that Villawood IDC had been very hard for his family. He claims his children witnessed instances of detainees being injured and self-harming and had not been given any schooling.

Family issues

20. At interview with Ombudsman staff, Mr X and his advocate talked about the impact of his detention on his family.
21. Mr X said that his family are *'in the big detention'* outside. Mrs X is reportedly finding it difficult to cope without her husband and has said to Mr X, *'I can't hold the kids anymore'*. In 2003, the psychiatrist reported that Mrs X had symptoms of a *'Major Depression'*. The report says, *'she reported very broken sleep, little energy and depressed mood and times when "I cry and cry"'*. Mr X said his wife has brought the children to visit him in detention every week for over five years, except when she has been unwell. He said she has had to have knee cartilage surgery, which she attributes to the physical strain of carrying the pram to the flat and up the railway steps to the detention centre. He said that his wife calls him at least every night and cries during every phone call.
22. Mr X said that his children find it hard to be separated from him. When his family was first released from detention, he said that the youngest was so emotionally distressed after visiting him that they had to peel her fingers off the detention centre fence to get her to leave.
23. In her 2003 report, the psychiatrist writes about the impact of their father's detention on the children: *'their preoccupation with their father and sense of perplexity and shame about his detention limits their peer relationships'*. She says that the children *'will never arrange to do anything with friends at the weekend in case they are able to visit their father'*. She reports that C shows signs of separation anxiety and reportedly says to Mr X, *'I don't like you, because you always promise me to come to my home, and you don't come'*. The psychiatrist writes that A takes on the responsibility of caring for the family, which takes a toll on his psychological wellbeing. The psychiatrist also notes that B avoids friendships with girls whose fathers are present in the family.
24. The psychiatrist's 2003 report recommends that Mr X be reunited with his family as a matter of priority. She says *'Mr X's wife and family all show signs of anxiety and difficulty functioning under these adverse circumstances'* and *'reunification will end a period of extreme distress and uncertainty for the family'*. She claims that, *'Prolongation of this [detention] situation is medically contra-indicated and further endangers the health and wellbeing of Mr X and his wife and 3 children.'*

Protection Visa claim

25. Mr X's PV claim has not as yet been accepted, though the claim of his other family members was accepted by DIMIA in 2000. The basis on which DIMIA and the AAT initially rejected his claim is that he was alleged to have committed torture and ill-treated people in the period 1986-1989, as a member of *Khadimat-e Atal'ay-e Dowlati* (the KhAD), the Afghani State Information Services. His PV application was therefore rejected under s 36 and Article 1F(a) of the *Convention relating to the Status of Refugees*, providing that a person can be refused protection if there are serious reasons for believing he has *'committed a war crime, or a crime against humanity'*.

26. The FFC held that the AAT had been in breach of natural justice in reaching that finding, in that it had not given Mr X adequate particulars of the allegations that were made against him in evidence that was covered by a confidentiality order. On the second hearing, at which Mr X was able to respond to that confidential evidence, the AAT accepted Mr X's claim that he was most likely the victim of mistaken identity and that the criminal actions alleged against him may have been committed by another person. His case was remitted to DIMIA for reconsideration on the basis that the evidence did not sustain the claim that he had engaged in discrediting conduct for the purposes of the Refugee Convention.
27. The AAT also commented on the length of Mr X's detention, observing that *'it is indeed unfortunate that [he] had to spend such a long time in Villawood'* in light of the AAT's finding. On the other hand, the AAT said that to some extent Mr X was the author of his own misfortune, having regard to the manner in which he came to Australia and sought protection, the implausibility of some of his evidence, and his close association with a regime that committed war atrocities.

Ombudsman assessment/recommendation

28. Mr X is awaiting a decision from DIMIA on his application for a PV, following the decision in his favour by the AAT in October 2005. The decision of DIMIA may soon resolve the question of Mr X's immigration status. It is therefore premature for the Ombudsman to make a recommendation addressing that substantive visa issue. The Ombudsman is also aware that the Minister, as recently as November 2005, decided not to exercise her detention intervention powers in Mr X's case.
29. Apart from that unresolved issue of Mr X's immigration status, there is a pressing issue as to whether he should remain in immigration detention while the substantive issue is resolved. He has spent over six years in immigration detention, and is now one of the longest serving detainees in immigration detention. The medical evidence indicates that Mr X's mental health is deteriorating, primarily due to his long period in detention, uncertainty about the future, and concerns over his family situation. His long-term detention is likewise having a negative impact on the health and wellbeing of his family. It seems clearly to be in the best interests of his children that he is released and reunited with them. Given the family's need for reliance upon each other, there seems little fear of Mr X absconding if released from detention. There is, moreover, considerable community support for Mr X as expressed to the Ombudsman. Finally, Mr X and his family are understandably distressed at his continued detention, notwithstanding the favourable decision of the AAT in October 2005 that removes a major obstacle to acceptance of Mr X's PV claim. The PV claims of other family members were accepted over five years ago. The Ombudsman therefore **recommends** that Mr X be released from detention pending any final decision on his immigration status.
29. Mr X presently sees a psychologist every fortnight and he is likely to need ongoing psychological support following his release from detention. His mental health is particularly important in light of the needs of his family. The Ombudsman **recommends** that, if Mr X is released from detention, DIMIA consider and document what mental health support should be provided to him and his family following his release.


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Prof. John McMillan
Commonwealth and Immigration Ombudsman

17 January 2006
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Date