

**REPORT FOR TABLING IN PARLIAMENT BY THE
COMMONWEALTH OMBUDSMAN**
Under s 486O of the Migration Act 1958

Personal identifier: 038/06

Principal facts

Personal details

1. Mr X is a 41 year old male with an Australian citizen wife and a child aged 23 months. Mr X is a Vietnamese citizen who was born in Laos.

Detention history

2. On 23 December 2003 Mr X was detained under s 189(1) of the *Migration Act 1958* at Maribyrnong Immigration Detention Centre IDC after his visa was cancelled under s 501(2).

Visa applications

3. Mr X arrived in Australia on a short stay tourist visa (September 1998); applied for a combined spouse visa and bridging visa (granted November 1998); married an Australian citizen (December 1998); left and returned to Australia; granted a spouse visa (September 1999); visa cancelled under s 501(2) (December 2003); judicial review of visa cancellation sought in the Federal Court (FC) dismissed (March 2005); Full Federal Court (FFC) appeal dismissed (August 2005); application made to High Court (HC) for special leave to appeal, notice of discontinuation filed (November 2005).
4. To the Ombudsman's knowledge, Mr X has made no s 417 requests.

Current immigration status

5. Mr X is currently detained at Maribyrnong (IDC).

Removal details

6. Mr X's removal to Laos is scheduled for Tuesday 17 January 2006. In February 2005 the Australian Embassy (Bangkok) responded to a request from Laotian authorities and supplied Mr X's bio-data, and in May 2005 a travel document was sought from Laos. In November 2005 Laos indicated that it was willing to accept Mr X and agreed to provide a travel document.
7. On 13 December 2005, DIMIA sent a first stage submission to the Minister for consideration of the grant of a Removal Pending Bridging Visa (RPBV).

Ombudsman consideration

8. The DIMIA report to the Ombudsman under s 486N dated 4 January 2006 was received on 11 January 2006.
9. Ombudsman staff interviewed Mr X by telephone on 12 January 2006 with a Vietnamese interpreter.

Key issues

Criminal history

10. In August 2001 Mr X was convicted of trafficking heroin and was sentenced for six years with a non-parole period of four years. He was released on parole in December 2003. At interview Mr X said that he was remanded in August 1999. He did not supply a lot of information in relation to his offending but said that he had been tricked into the transport of drugs; he felt obligated to people who were his friends and had received no payment. He had loaned his car to friends and then drove his car to transport a suitcase to his house (containing the

drugs). They were apprehended and he was charged. He denied personal use of heroin and stated that he had no prior criminal history in Australia or Laos.

11. The FC reported that Mr X made an early guilty plea and was recruited into the trafficking at a late stage and had been involved only for a short time – however, counsel for the Minister pointed out that he had claimed that he would receive \$10,000 for his role in trafficking.
12. On 16 May 2002, Mr X was convicted of intentionally causing injury and received an additional three months to his sentence. Mr X said that he got into a fight in gaol with the person whom he alleges tricked him into the offence of transporting drugs.
13. At interview Mr X questioned his removal as he had paid for his wrongdoing and had served his time.

Health and welfare

14. At this stage no health reports have been received.
15. At interview Mr X said that he had '*b een very sad, depressed*', he felt guilty and he began to cry. He stated that he had decided to not seek psychiatric or counselling assistance at Maribyrnong IDC as he feared he would be hospitalised and this would make it difficult for his wife to visit him.
16. In August 2005 he was hospitalised for three days to treat pneumonia after he was observed by IDC staff to be in an unwell state.

Attitude to removal

17. Mr X has agreed to cooperate with his removal from Australia. The FC decision indicates that, in considering the best interests of the child, the Minister was advised that Mr X's partner had decided to return to Laos with Mr X and their baby. Initially, Mrs X had planned to sell her home and business to accompany him to Laos but at interview, Mr X advised that two issues had changed this decision. Firstly, his infant daughter had been taken briefly to Laos and had developed a severe skin rash. Secondly, he had decided that his daughter would receive a better education and future if she remained in Australia with his wife. Therefore he had decided to return alone to Laos. He was aware that as a person whose visa had been cancelled under s 501 he would be unable to return. While Mr X was cooperating with removal he was regretful and crying at interview when the issues were discussed.

Other detention issues

18. The Department reports three incidents where Mr X is alleged to have assaulted another detainee and an occasion where he was involved in a group fight that he did not instigate. On 14 August 2005 he allegedly assaulted two IDC staff, striking one officer with a chair and pushing another to the ground during a visitation session with his wife and daughter. The Department reports that police investigated the incident and to date no charges have been laid.
19. Mr X complained that he was allowed to attend the birth of his child but that he remained in handcuffs for the whole time. He also complained that he had applied to visit his wife and child when they were sick, or in hospital on several occasions, and the Department had refused all requests.

Family considerations

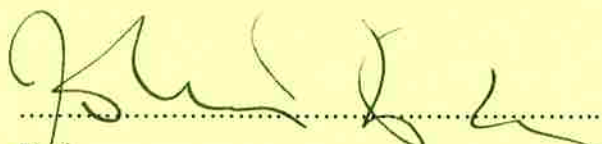
20. Mr X married Ms Y, an Australian citizen, in November 2003. Mr X said that she had been a friend of his first wife and she began to visit him regularly in gaol. Conjugal visits were allowed and their child, Ms Z, was born in February 2004. Ms Z is 23 months of age.
21. In deciding to cancel Mr X's visa, the Minister took into account the best interests of the child. The reasons for decision included '*Mr X's partner advised that she would accompany Mr X if he were returned to Laos. I found that it was reasonable to assume that the unborn child would not have access to educational opportunities and a health support system of a*

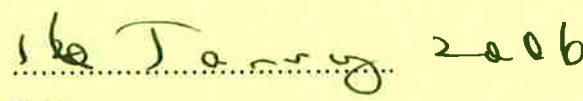
comparable standard to those available in Australia. I also found that the child would be raised in Laos and would therefore not have any assimilation problems.'

22. Mr X is concerned that his wife will not cope after he leaves. He stated that she visits him every day at Maribyrnong IDC. He believes that after he is deported, she may attempt suicide and fears that she may also harm their child. He stated that she was twice treated recently in Sunshine Hospital (Victoria) for deliberate self-harm via overdose. He says she has one friend in Australia and no relatives here. He stated that he ceased his litigation (November 2005) as it was impacting adversely on his wife's mental health and increasing her level of debt – she had mortgaged the house to pay a \$50,000 legal debt.
23. Mr X said that his only surviving relatives in Laos are his uncle and aunt. His only other relatives are his wife and child.

Ombudsman assessment/recommendation

24. Mr X committed a serious offence for which he served four years. He offended within a year of coming to Australia. He committed a further offence of assault in prison against the person whom he alleges tricked him into his initial offence. Mr X's visa was consequently cancelled and he is to be removed from Australia. He is aware that he will be unable to return.
25. Mr X's wife and child will remain in Australia although Mr X stated that his wife's preference would be to live with him. Mr X has made a choice not to take his family to Laos as he believes it would not be in the best interests of his daughter and that their *'life there would be very difficult'*. He believes that his daughter would not receive an education in Laos and will have a better life here in Australia. His daughter's severe skin condition was a factor in this decision. Mr X is distressed by his choice and fears that his wife may seriously self-harm after he is removed.
26. The Ombudsman notes the changed circumstances in relation to the best interests of Mr X's family from the time of the Minister's initial decision until now. Now that his family is not accompanying him to Laos, Mr X's daughter will be deprived of a father; his wife is confronted with raising their child alone without the emotional and financial support of her husband; she also faces the prospect of discharging Mr X's considerable legal debt alone. It is also apparent that Mrs X's mental health has suffered with the strain of his incarceration and prospective removal. The Ombudsman is not, however, in a position to comment on whether the weight given to the best interests of the child would result in a different decision if the Minister were to reconsider it today.
27. The Ombudsman **recommends** that DIMIA, either directly or by alerting the relevant state authorities, make urgent inquiries about Mrs X and assess what support should be made available to her over the coming days and weeks following her husband's departure to ensure her safety and the safety of her baby.


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Prof John McMillan
Commonwealth and Immigration Ombudsman


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Date