

REPORT FOR TABLING IN PARLIAMENT BY THE COMMONWEALTH OMBUDSMAN

Under s 486O of the Migration Act 1958

Personal identifier: 040/06

Principal facts

Personal details

1. Mr X is a 36 year-old man, who was born in XXXX. His family, including his mother and brothers, live in XXXX.

Detention history

2. Mr X came to Australia by boat in October 2000 and was detained under s 189(2) of the *Migration Act 1958* at Port Hedland Immigration Detention Centre (IDC). He was transferred to Perth IDC in January 2004, to Baxter Immigration Detention Facility (IDF) in February 2004, and to Villawood IDC in September 2005.

Visa applications

3. Applied for a Protection Visa (PV) (March 2001); PV application refused (June 2001); appeal to the Refugee Review Tribunal (RRT) dismissed (October 2001); unsuccessful in seeking judicial review at the Federal Magistrates Court (FMC) (May 2002); unsuccessful in appealing to the Full Federal Court (FFC) (October 2002); lodged a complaint with the United Nations Human Rights Committee (UNHRC) (January 2004), which is ongoing.
4. Applied to the Minister under s 48B but refused (March 2003); applied to the Minister under s 417 but refused (May 2003); permitted to make a further application for a PV (September 2005) as he had left and returned to the migration zone.

Current immigration status

5. Mr X is currently detained in Villawood IDC. DIMIA is considering his fresh PV application. DIMIA has determined that he is entitled to protection and is conducting health and security checks.

Removal details

6. DIMIA has twice attempted to remove Mr X to XXXX, in January 2004 ("the first removal attempt") and in August 2005 ("the second removal attempt"), discussed below.

Ombudsman consideration

7. DIMIA's report to the Ombudsman under s 486N was received on 30 August 2005 (dated 18 August 2005).
8. The Ombudsman and a member of his staff interviewed Mr X at Villawood IDC on 13 September 2005 with the assistance of an interpreter and in the presence of his lawyer from Legal Aid NSW.
9. Ombudsman staff spoke to his refugee advocate, Mr Y, on 26 September 2005 and staff from the United Nations High Commissioner for Refugees (UNHCR) on 11 October 2005.
10. The Ombudsman received a medical summary from the International Health and Medical Service (IHMS) dated 7 October 2005; a summary from Professional Support Services (PSS) dated 6 October 2005; and psychiatrist's notes dated 29 November 2005.
11. On 23 November 2005, Ombudsman staff viewed a number of DIMIA files relating to Mr X.

Key issues

Health and welfare

12. Upon returning to Australia on 5 September 2005, Mr X reportedly developed a depressed mood and was placed on suicide and self harm alert. He currently sees a psychologist bi-weekly. The PSS report states that '*much of his presentation at VIDC was the result of Mr X's aborted removal from Australia*'. The PSS report describes him as having poor sleep and nightmares, being withdrawn and isolated, feeling angry and tense, being confused, and having a poor appetite.
13. PSS requested a referral to a psychiatrist so that Mr X could be formally diagnosed. The psychiatrist's notes of 29 November 2005 state, '*Impression: possible delusional disorder – depressive agitated symptoms*'. The PSS report notes '*the prognosis for improvements in his mood state while he remains in detention is poor. It is unclear whether these symptoms would continue if he were released into the community and would depend on his personal response to the release situation*'.

Attitude to removal

14. Mr X is strongly opposed to returning to XXXX, as he believes he will be punished or killed for leaving a particular organisation and because he claims he has been linked to a suspected spy. He also says that his brother has been interrogated about his whereabouts. He says there is no other country to which he can go.

The first removal attempt

15. DIMIA first planned to remove Mr X to XXXX in January 2004, but stopped the removal after receiving a request from the UNHCR. On 22 January 2004, the UNHCR wrote to DIMIA requesting a week to provide further information. On 29 January 2004, it wrote again to DIMIA stating that Mr X is a refugee under Article 1D of the *Convention relating to the Status of Refugees*. The Australian Government and the UNHCR have a different approach to the interpretation of Article 1D. The UNHCR also said that it believed he could face protection problems if he was returned to XXXX. It concluded the letter by stating '*I would kindly request that the Australian Government reconsiders Mr X's need of international protection*'.
16. On 24 January 2004, Mr X lodged a complaint with the UNHRC, and the UNHRC issued an Interim Measures Request (IMR). The IMR dated 26 January 2004 states, '*the Special Rapporteur requests the State party not to deport the author before it has provided the Committee with its comments on the allegation that the author would face irreparable harm if deported, and the Committee has had an opportunity to address the submission of the State Party*'.

The second removal attempt

17. The Australian Government has a policy of rejecting an IMR request from the UNHRC where it considers that it is unwarranted and would delay the removal of an unsuccessful asylum seeker. In October 2004, the Australian Government stated to the UNHRC, '*Should the Australian government decide to proceed with Mr X's removal before the Committee's consideration of the communication has concluded, Australia undertakes to inform the Committee*'. In August 2005, the Minister decided that the IMR was not warranted in Mr X's case, and was not a bar to him being removed.
18. On 31 August 2005, DIMIA made its second removal attempt of Mr X.
19. Shortly before the second removal attempt, Mr X accepted an offer of a Return Pending Bridging Visa. He said he felt betrayed and distressed at being involuntarily removed, when he thought he was going to be released.

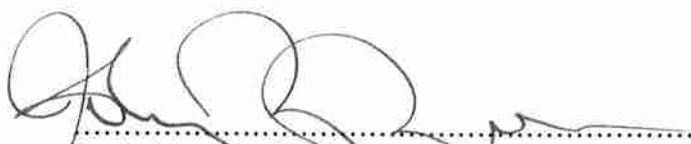
20. Mr X was only given a few hours notice of the removal attempt and his legal representatives were not notified. DIMIA policy (Migration Series Instruction (MSI) 267), states that removees are to be given reasonable notice of their removal arrangements (at least 48 hours prior to departure) *'unless there are significant security reasons or other risks (eg possibility of a suicide attempt) for a later notification'*. DIMIA told the Ombudsman, *'while it is policy that removees are given 48 hours notice of removal this can be varied for operational reasons. Given Mr X's non-cooperation, previous behaviour and the risk assessment provided by GSL it was decided that he would be given notice of his removal immediately before he was removed'*.
21. Mr X's advocate, Mr Y, said that he found out about the removal through a contact at the detention centre. Mr X's lawyers commenced an action in the Federal Court (FC) on the same day. The FC issued an *ex parte* injunction restraining his removal but it was served on DIMIA after he had left Australia.
22. DIMIA did not notify the UNHRC of the removal until after Mr X had left Australia. It sent a letter on the afternoon of 31 August 2005, but had to resend it on 1 September 2005 when it was not received. In a briefing to the Minister, DIMIA notes that this was a regrettable complication and states that it has taken steps to ensure that in future it will notify the UNHRC prior to removal attempts.
23. Mr Y notified the UNHCR of the removal attempt. On 2 September 2005, the UNHCR sent DIMIA a letter reiterating its belief that Mr X would not be guaranteed effective protection in XXXX. It requested time to provide some further information about Mr X's safety.
24. DIMIA stopped Mr X in transit in Dubai while the FC proceedings were finalised. Mr X's legal representatives withdrew his application for an injunction.
25. On 3 September 2005, the UNHCR provided DIMIA with detail about the risk to Mr X. As a result of the UNHCR's information, Mr X was granted a Special Purpose Visa, returned to Australia on 5 September 2005, and placed in detention at Villawood IDC.

Ombudsman assessment/recommendation

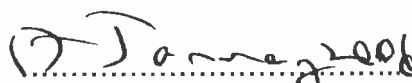
26. Mr X has been in detention for over five years. This is partly the result of his pursuit of a PV, his requests to the Minister, and his complaint to the UNHRC. The RRT accepted that Mr X is from XXXX, and that he was a member of a particular organisation, but it did not accept his reasons for leaving the organisation, or his concerns about returning to XXXX. The FMC and the FFC both found the RRT did not make any jurisdictional error.
27. In September 2005, Mr X was allowed to lodge a fresh application for a PV. DIMIA's file indicates that it has found he is owed protection, subject to health and security checks. This was partly on the basis of information provided by the UNHCR, which indicated that a person of Mr X's profile is at risk if returned to XXXX.
28. As there have been two aborted attempts to remove Mr X from Australia, it is relevant to make some observations about those attempts in the light of the decision that Mr X is now owed protection. It is perhaps not unreasonable to expect that DIMIA would have contacted the UNHCR prior to the removal to see if it had any further or more detailed information bearing on Mr X's need for protection. This is so particularly considering that the information from the UNHCR had halted the first removal attempt. In the interests of good public administration, it is probably best practice that DIMIA contact the UNHCR prior to any removal attempts where it is on notice that the UNHCR has information about a case.
29. It is not clear to the Ombudsman's satisfaction that the procedures around prior notification to Mr X and his legal representatives warranted being departed from in this case. MSI 267 does not distinguish the notification requirements in cases of involuntary

removal from cases of voluntary removal. The Ombudsman **recommends** that DIMIA review the policy and consider whether it should more clearly articulate the factors that justify a variation from the standard of prior notification in relation to an involuntary removal. In making this comment, the Ombudsman notes that he would expect there to be only limited circumstances in which the obligation to give substantial prior notice would be abrogated.

30. It seems likely that Mr X will be granted a substantive visa in the near future. However, should Mr X's health and security screening delay his visa grant, the Ombudsman **recommends** that the Minister grant Mr X a bridging visa with work rights to enable his immediate release from detention. In doing so, the Minister may wish to exercise her powers under s 195A.
31. There are a number of options for the granting of Mr X's substantive visa. The Ombudsman **recommends** that consideration be given to a PV. This seems appropriate in Mr X's case for a number of reasons:
- It seems unlikely that, given Mr X's situation, he will be able to return to XXXX; the information provided by the UNHCR suggests that some of the threats to his safety are likely to be ongoing;
 - The indications are that Mr X has developed a serious mental health condition, partly as a result of DIMIA's attempted removals. A permanent visa would provide him with some stability and the opportunity to recover his mental health; and
 - Mr X has already spent five years in detention. If DIMIA had been aware of the information provided by the UNHCR prior to the second removal attempt, it may have concluded that he was entitled to protection at an earlier stage.
32. It seems likely from the medical evidence that Mr X may require ongoing psychiatric care once he is released into the community. DIMIA will need to consider what continuing role it plays in providing assistance to Mr X.



Prof. John McMillan
Commonwealth and Immigration Ombudsman



Date