

REPORT FOR TABLING IN PARLIAMENT BY THE COMMONWEALTH OMBUDSMAN

Under s 486O of the Migration Act 1958

Personal identifier: 046/06

Principal facts

Personal details

1. Mr X is a male, aged 45 and a citizen of Country A. He is married to Ms Y an Australian citizen and has three children - U, aged 14, from his first marriage (in Australia on a Bridging Visa (BV)), V aged 13, from Ms Y's first marriage, and W, aged 6 (the latter two are Australian citizens). Ms Y and the three children live in Queensland.

Detention history

2. In May 2001, Mr X was convicted of a number of offences and sentenced to a period of criminal detention. In September 2001, the Department (DIMA) refused to grant Mr X a permanent spouse visa when his temporary spouse visa ceased. Upon his release from gaol on 24 October 2003, Mr X was detained pursuant to s 189(1) of the *Migration Act 1958*, and placed in Port Phillip Prison (Victoria). He was transferred to Baxter Immigration Detention Facility (Baxter IDF) shortly after.

Visa applications

3. Arrived in Australia on an Entertainment Visa (September 1997); two Tourist Visas granted (ceasing in May 1998 and September 1998 respectively); Temporary Spouse Visa granted (February 2000); Temporary Spouse Visa ceased (September 2001); BVs refused (November 2003 and July 2004); Protection Visa (PV) application (14 November 2003), refused (September 2004); PV decision set aside by the Administrative Appeals Tribunal (AAT) (December 2005); DIMA has sought judicial review in the Federal Court (FC) (January 2006), which is ongoing.

Current immigration status

4. Mr X is currently detained in Baxter IDF, as an unlawful non-citizen.

Removal details

5. DIMA advises that it has asked Mr X to voluntarily return to Country A, however he has remained consistently uncooperative, refusing to complete travel document applications. In November 2003, Country A Consular officials advised DIMA that they would be willing to issue a travel document for Mr X.

Ombudsman consideration

6. The DIMA report to the Ombudsman under s 486N dated 18 October 2005.
7. Mr X was interviewed by Ombudsman staff at Baxter IDF on 8 November 2005.
8. The Ombudsman sighted psychology reports from Dr XXX (June and October 2005), and Dr YYY (June 2005).
9. Letters of support and character references from family members, employees of the Fulham Correctional Centre and Baxter IDF, immigration detainees, a former inmate of Fulham Correctional Centre, Mr X's former landlord, Ms Y's employer and members of the public.
10. Ombudsman staff received a submission from ZZZ and Associates (his migration agent) dated 4 November 2005.
11. Ombudsman staff spoke with Mr X's spouse, Y, as well as Mr X's barrister, Mr R.

Key issues

Criminal history

12. On 27 July 2002, Mr X was sentenced for the following offences – two counts of intentionally causing serious injury, one count of false imprisonment and two counts of threat to kill. They all related to one incident in 1999. He was sentenced to five years and ten months imprisonment, with a non-parole period of three years.

Mr X's Application for a Protection Visa and the Refugees Convention

13. In Ms ZZZ's letter to the Ombudsman dated 4 November 2005, she summarised the complex history associated with Mr X, *'The applicant is a high profile actor and singer in Country A. His ex wife, Z (U's mother) was also a famous actress and singer. In Country A it is traditional for these famous actors/singers to support the political parties and be used by political parties for promotion purposes. Both the couple were initially supporting RR [the President of Country Y]. Whilst X was visiting Australia RR coerced X's wife into a relationship and she became his mistress. X was warned not to return to Country A. After some time X's wife was murdered and it is alleged the person behind the crime was the President's wife. Z's sister and family gained asylum status in France. X and Z's son was finally granted a visa to travel to Australia but by the time he got here X had been charged with a crime and sentenced. This background has been confirmed and accepted by the UNHCR, Amnesty and DIMIA.'*

14. DIMA recognises that Mr X is a refugee however his application for a PV was refused on the basis of Article 33(2), which states that a refugee may not claim for protection *'who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country.'*

15. The AAT set-aside the decision and remitted the application back to DIMA for further consideration of his visa application. In making its decision, the tribunal considered that Article 33(2) required a person to both have been convicted of a particularly serious crime, and that the person constitutes a danger to the community of Australia. The tribunal concluded *'on the basis of evidence before it that there is not an unacceptably high risk that the applicant might commit further serious crimes, and that he does not constitute a danger to the community.'*

16. The tribunal noted that it particularly took into account that:

- Mr X has no other convictions other than the three convictions which arose out of the same event;
- whilst he was convicted under s 323 of the Crimes Act as a principal offender, his involvement in the offending conduct was secondary to another person, who at the time was apparently in a highly emotional state due to his concerns about the relationship between the victim and his estranged wife;
- there is no evidence that he knew in advance that the victim would be subjected to the vicious attack that ensued;
- he no longer has and is unlikely to re-establish a close relationship with the other offender;
- there is no evidence he is suffering from any addiction that might give rise to further criminal conduct;
- during his incarceration in two institutions he has not been guilty of any inappropriate behaviour, and on the contrary, a significant number of people have referred to his quiet and polite behaviour, and his positive influence on others;
- he has undertaken a large number of courses likely to assist his rehabilitation;
- he is concerned about the well being of his wife and sons and step-daughter, and the tribunal accepted his desire to resume his life with them and to look after them, and that his wife will be supportive of him; and
- he appears to have prospects of employment if he is released from immigration detention.

Health and welfare

17. DIMA advises that Mr X interacts well with Baxter IDF staff. Mr X said that living in the detention centre brings back bad 28 year old memories of the YY regime. He pointed out that although the detention centre staff treat him well and he is well cared for, the bad memories persist and cause him trouble sleeping.
18. DIMA advises that Mr X is in regular contact with Professional Support Services (one of the detention service health providers). During his interview with Ombudsman staff, Mr X stated that he suffers from ongoing stress due to the uncertainty surrounding his immigration status, his possible removal and his separation from his family. He takes sleeping pills to deal with this stress, and manages a vegetable garden at Baxter IDF (the produce of which is used in the kitchen).
19. In her report of October 2005, Dr XXX commented, *'It is obvious that this man is in a severely depressed and debilitated state. He makes continuous efforts to control himself and to manage his emotional distress. He is not suicidal, nor is he psychotic, but as a man almost without hope, he is being worn down.'*
20. Mr X has had dental problems while in detention. He said several teeth were causing him a lot of pain as they were infected. He said he asked to see the dentist (and made his request in writing) and was told it would take two weeks. He was given Panadol for the pain but they were not strong enough and due to the delay in seeing a dentist he decided to pull two teeth out himself and the dentist removed another two teeth. He suffered complications from his self-administered dentistry.

Family Concerns

21. Mr X expresses deep concern for his young family and is upset over his inability to support them financially and emotionally. Mr X said it is very hard for his wife as a single mother raising three children. He said that he tries to phone his wife every day, to talk to her and his children. He works as the chief Asian cook at Baxter IDF so that he can earn enough money to call his family. He said that his children suffer from a number of medical ailments, at times requiring hospitalisation. Mr X also expressed concerns about how his children are coping, especially U.
22. Special mention should be made of Mr X's first son, U who is currently on a BV as a dependent of Mr X. U would have no independent legal right to remain in Australia should Mr X be removed to Country A. U arrived in Australia in January 2001 after the murder of his mother (Mr X's first wife) in July 1999. It has been claimed that U witnessed his mother's murder. Mr X has been in some form of detention since U's arrival into Australia. Mr X advised Ombudsman staff that U had not coped well following his move to Australia, as he not only had to deal with the traumatic death of his mother, but had to deal with living with a new family, in a new country, and without his father. Mr X mentioned that U had recently run away from home as a result of his family's situation. Dr XXX reported, *'[U] felt oppressed, as he had become a main carer for his sister and younger brother, while mother worked. U did not think it was fair that he should have to remain at home while other boys of the same age could participate in activities suitable for their age.'*

Other detention issues

23. Mr X indicated that the detainees rely heavily on telephone contact with their families but there are an inadequate number of phones available in the compounds. He resides in White One with about 60 other detainees and he advised that they have two public telephones available to them. When U ran away from home, Mr X said he was not able to eat or sleep for worry, yet his wife, despite repeated attempts, was unable to reach him by telephone, as the phones were busy, to tell him that they had found U. Eventually she passed a message onto him via Mr X's DIMA Case Officer.

Attitude to removal

24. Mr X confirmed that he fears returning to Country Y and has therefore refused to help DIMA return him. Mr X said he would be returned to certain death and it is likely his son would also be killed. Mr X pointed out that his former enemy is still very powerful in his

country and Mr X's name and face is very well known from his previous career as an actor and singer. He asked that at least U be allowed to remain in Australia to spare his life.

Ombudsman assessment/recommendation

25. Mr X has been in immigration detention for two years three months but it is five years eight months since he was taken into custody. His son W was 4 months old then and now he is 6 years old. Mr X's long-term detention is having a negative impact upon his health and the risk of his mental health deteriorating must increase with continued detention. Likewise, his detention is having a negative impact upon the health and wellbeing of his family. Clearly it would be in the best interests of his wife and children that he be released and reunited with them.
26. The submissions made to the Ombudsman in support of Mr X contain independent psychological reports that indicate he is a low risk to the Australian community, that he has a strong attachment to his family, and they to him. These views have been accepted by the AAT. There is no immediate prospect of Mr X being removed from Australia and the potential for Mr X to be detained for a further considerable period of time is high, as DIMA has sought judicial review in the FC. Given that the AAT's decision of December 2005 was in Mr X's favour, the Ombudsman is of the view that Mr X should be released from detention while the judicial review is conducted. The Ombudsman **recommends** that Mr X be released from detention pending any final decision on his immigration status.
27. It is relevant that the various outcomes of judicial review be contemplated. Mr X could ultimately be successful in obtaining a PV. Alternatively, the DIMA appeal could be upheld by the FC finding an error of law, remit the matter back to the AAT who could either affirm or set-aside the original decision to refuse a PV. If it were affirmed, Mr X would ultimately be refused a PV. The Ombudsman considers that a permanent solution should be sought and **recommends** that the Minister grant Mr X (and his son U) a permanent visa such as a global humanitarian visa.
28. In support of these recommendations, the Ombudsman draws attention to the following features of Mr X's case:
- If Mr X is removed from Australia, his son U would also have to be removed.
 - Mr X has a realistic fear that he and his son will be harmed if returned to Country A.
 - The AAT considered carefully whether Mr X would constitute a risk to the Australian community should he be released from detention and concluded from the evidence that he would not.
 - The AAT favoured the granting of a protection visa.
 - Mr X has significant support in the community and good prospects for employment.


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Mr R I Brent
Acting Commonwealth and Immigration Ombudsman


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Date