

REPORT FOR TABLING IN PARLIAMENT BY THE COMMONWEALTH AND IMMIGRATION OMBUDSMAN

Under s 486O of the Migration Act 1958

Personal identifier: 060/06

Principal facts

Personal details

1. Mr X died on 17 March 2006. He had terminal cancer and prior to his death, resided with his parents on the central coast of New South Wales. He was 49 years old and had been divorced, with no children. His three siblings are in Australia.
2. Mr X arrived from Scotland with his family in 1967 under the 'Assisted Passage Scheme'. The family returned to Scotland in 1969. In 1974 the family returned to Australia under the 'Second Assistance Scheme' and Mr X obtained a Transitional Permanent Residence (TPR) visa.
3. Under the *Migration Act 1958* s 486O the Ombudsman is required to prepare an assessment of the appropriateness of detention arrangements for a person upon receiving a report from the Secretary under s 486N of the Act. This report is being submitted to the Minister as required by s 486O and was prepared in draft before advice was received that Mr X had died.

Detention history

4. Mr X was detained at Villawood Immigration Detention Centre (IDC) from 25 February 2003 until 22 August 2005. On 22 August 2005 he was placed on a Residence Determination (RD) and he moved to his parent's home. On 5 October 2005, he was released from immigration detention as the Department (DIMA) considered he may be an 'absorbed person' to whom the Full Federal Court (FFC) of *Nystrom v MIMA [2005] FCAFC 121* (*Nystrom* decision) applied. The Minister has sought High Court leave to appeal the *Nystrom* decision.

Visa applications

5. In January 2003, the then Minister cancelled Mr X's TPR visa (class BF C) under s 501(2). His application to the Federal Magistrates Court (FMC) for judicial review of the Minister's cancellation decision was dismissed (April 2005).

Removal details

6. On 31 May 2005, the Department was informed that Mr X was not available for removal on medical grounds.

Ombudsman consideration

7. The DIMA report to the Ombudsman under s 486N dated 17 October 2005 was received on 3 November 2005.
8. A submission was received from Mr X's legal representative, dated 30 January 2006.
9. Ombudsman staff did not interview Mr X as the Ombudsman had been advised that his terminal condition had deteriorated and that he had recently been in hospital and was then unable to speak. On 4 April 2006, the Department informed the Ombudsman's office that Mr X had died.

Key issues

Health and welfare

10. Mr X had throat and mouth cancer, which first arose in 1999. He had surgery in December 1999 and follow-on chemotherapy. He was in remission and was advised to have twice yearly checkups. The Department reported that while in detention he had regular medical attention at Westmead Hospital from 28 March 2003 onwards. On 20 August 2003, he had a lesion on his vocal cords investigated and biopsied. He underwent radiotherapy from 13 January 2004 until 27 February 2004. On 28 May 2005, Mr X noticed a lesion under his tongue and on 31 May 2005 he saw a doctor. On 6 July 2005 he had surgery at Westmead Hospital to remove and graft part of his tongue and the floor of his mouth.
11. His lawyer, in her submission, reported that *'In September 2005 [Mr X] was told by [a doctor] at Westmead Hospital that he had inoperable cancer which was terminal'*. The lawyer reported then, that his life expectancy was short.
12. The Minister granted a RD for Mr X on 22 August 2005, based on his care needs and on humanitarian grounds.

Attitude to removal

13. Mr X had not cooperated with past efforts to remove him. He had refused to apply for a British passport. He stated he was an Australian, having lived here for the last 30 years. He believed that he should stay in Australia as his family were all here and he had no contacts in Scotland. In his submission (5 November 2002) in response to the Department's notice of intention to consider cancelling his visa, Mr X stated *'I was not even aware that I was on a visa'*.
14. His lawyer stated that about four months after Mr X was detained, a representative of the British Consulate phoned Mr X, explaining that the Department was seeking the issue of a travel document for him and indicating that the Consulate would not issue a travel document without Mr X's permission. Mr X's lawyer reported that Department officers regularly visited Mr X while he was in detention and pressured him to apply for a United Kingdom passport.

Criminal history

15. Mr X's visa was cancelled on character grounds under s 501(2). Mr X's criminal history extended from 1976 to August 2002 and included assault, multiple breach of Apprehended Violence Orders (domestic violence), theft, drink driving, breach of recognizance, breach of a community service order, resist police etc. From 1984 to 2002 he spent approximately four years and nine months in prison.
16. Federal Magistrate Scarlett, in the FMC decision, commented on the seriousness of Mr X's offences. *'Paragraph 29 of the issues paper states that the Applicant's assault offences are very serious offences under the Ministerial Direction. I would not necessarily agree from a perusal of the Applicant's criminal record that is that on the face of it the offences are very serious offences. All crimes of violence have some degree of seriousness but there is a very broad scale and there is nothing to indicate that to my view the offences of which the Applicant's then committed were amongst the most serious. ... There is certainly evidence upon which it was open to the decision maker to form that view'*.
17. The s 501(2) cancellation decision relied upon Mr X cooperating to effect his own removal from Australia, by applying for a UK passport. Mr X refused to do so. Scarlett FM commented: *'The Applicant does not have a British passport because he has not applied for one. There is some substance to the view that whilst the Applicant refuses to apply for*

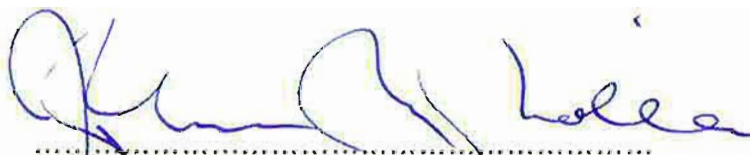
a British passport or fails to apply that he remains his own gaoler'. The resulting stalemate left Mr X in immigration detention for two and a half years.

Other detention issues

18. His lawyer's submission raised several issues of concern as relayed to her by Mr X. Mr X had claimed that the large dormitory in Stage One of Villawood IDC where he first resided was filthy and smelly with a lot of litter on the floor. He had also found it difficult to sleep due to the noise at night and was prescribed sleeping tablets for a brief period. He felt that the doctor should have been willing to prescribe them for a longer period but the doctor refused and expressed concern regarding the potential for addiction.
19. His lawyer stated that Mr X requested a transfer to Stage Three (Villawood IDC) and shortly after he was transferred. In Stage Three he had a room of his own which alleviated much of the cleanliness problem. His lawyer mentions '*continuous infestation of rats, mice and cockroaches in Stage 3 ... It was very bad from 2003 to 2004*'. She reported that Mr X participated in monthly meetings with management and made suggestions to alleviate the rat problem, for example proposing that garbage bins be emptied every night. His lawyer reported that this took a year to be actioned.
20. Mr X's lawyer reported that Mr X claimed to have been exposed to fights between detainees, including gang fights between different ethnic groups, and to drug use and used syringes. His lawyer reported that '*There was little activity for detainees during the day. There were no exercise facilities. There were two TV rooms. Often the televisions did not work ... There were two fridges for 180 people and two microwaves ... Fights often broke out over the microwave or the television ... There were three dryers and three washing machines. They often broke down because of constant use*'.
21. Mr X felt that the food in the canteen at Villawood IDC was too spicy, and caused him '*very bad heartburn every time he tried to eat the food available at lunch and dinner*'. Mr X's lawyer said he asked the doctor for Sustagen and milk, but the doctor refused Mr X's request, saying he didn't need them.

Ombudsman assessment/recommendation

22. In light of Mr X's death the Ombudsman has no recommendations to make concerning his detention. The Ombudsman wishes to convey his condolences to Mr X's parents and family.



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Prof. John McMillan
Commonwealth and Immigration Ombudsman

..... 7/4/06
Date