

**REPORT FOR TABLING IN PARLIAMENT BY
THE COMMONWEALTH AND IMMIGRATION OMBUDSMAN**

Under s 486O of the Migration Act 1958

Personal identifier: 061/06

Principal facts

Personal details

1. Mr X is a 35-year-old male from Vietnam. His 14-year-old son Master Y, is an Australian citizen and lives in Sydney with his maternal grandmother. Mr X's extended family, including his parents, eight siblings, grandmother, aunts and uncles all reside in Australia as Australian citizens.

Detention history

2. Mr X was detained under s 189(1) of the *Migration Act 1958* in May 2002 after the Department (DIMA) cancelled his substantive visa pursuant to s 501(2). He was placed in Villawood Immigration Detention Centre (IDC), where he currently remains.

Visa applications

3. Mr X arrived in Australia at the age of 11 and was granted refugee status under the Indo-Chinese Refugee Program, together with his grandmother, aunt and four siblings (January 1982); granted a Transitional (permanent) Visa (TV) (September 1994); issued with notice of intention to cancel his TV and granted a Resident Return Visa (RRV) (November 2001); RRV cancelled pursuant to s 501(2) (April 2002); Federal Court (FC) appeal, proceedings transferred to Federal Magistrates Court (FMC) (June 2002); FMC dismissed appeal (October 2002); appeal to Full FC (FFC) discontinued (February 2003).
4. Bridging visa (BV) application rejected (May 2002); appeal to the Migration Review Tribunal upheld and decision set aside and remitted back to DIMA (May 2002); BV refused pursuant to s 501 (July 2002); review to the Administrative Appeals Tribunal dismissed because the delegate had no power to consider the application (s 501E) (September 2002); further BV application deemed invalid (June 2005).
5. Protection Visa (PV) application refused (May 2004); decision affirmed by the Refugee Review Tribunal (July 2004); FMC appeal dismissed (December 2004); application to the FFC completed, judgment reserved (September 2005).
6. Three s 417 requests lodged on Mr X's behalf (July 2004 – June 2005) currently outstanding and pending outcome of his litigation; two further s 417 requests, deemed inappropriate to consider (July 2005).

Current immigration status

7. Mr X remains detained in Villawood IDC. Two submissions are currently before the Minister for consideration of her detention intervention powers (October and December 2005). The Ombudsman understands that the latter submission was put to the Minister in light of the Ombudsman's own motion investigation into the immigration detention and removal of long term Australian permanent residents whose visas have been cancelled on character grounds under s 501¹.

Removal details

8. DIMA advises that removal action has been suspended pending the outcome of Mr X's current litigation, the Minister's decision on the current submissions, and thereafter, consideration of Mr X's s 417 requests. DIMA has not made any attempts to obtain travel documents for Mr X, but indicates that efforts will commence if outstanding matters are unsuccessful.

¹ *Administration of s 501 of the Migration Act 1958 as it applies to long-term residents*, February 2006

Ombudsman consideration

9. Two DIMA reports to the Ombudsman under s 486N, dated 20 October 2005 and 6 January 2006.
10. Ombudsman staff interviewed Mr X on 4 November 2005 at Villawood IDC.
11. Ombudsman staff have sighted a number of documents, including: medical summary reports from International Health and Medical Services (IHMS), dated 21 October 2005 and Professional Support Services (PSS), dated 3 November 2005; and several submissions of support from members of Mr X's family, members of the Australian-Vietnamese community, and independent health professionals.

Key issues

Health and welfare

12. The IHMS report indicates that Mr X acquired a brain injury after being assaulted in 1994. This injury impacts on his memory and causes him severe headaches. IHMS notes that he is receiving anti-convulsant medication and complains of headaches and insomnia. At his interview with Ombudsman staff, Mr X mentioned that he takes two separate medications for these complaints but is still only able to sleep for three to four hours per night. He also mentioned that he regularly accesses psychological services at Villawood IDC. The PSS report indicates that *'Mr X has presented with depressed affect, amotivation, loss of appetite, and sleeping difficulties ... Mr X's presentation appears consistent with depression.'* The PSS report observes his prognosis is *'unlikely to change whilst he remains in detention.'*
13. DIMA advises that in November 2003, Mr X was found on the floor of his room in a comatose state after taking an unknown substance (tablets) and being identified with three needle marks on his arm. He was transferred to Liverpool Hospital where he received medical attention and returned to Villawood IDC the following day. He advised Ombudsman staff that he *'wanted to die, because I thought I was going back [to Vietnam]. I took pills and heroin to die.'*

Criminal history

14. Since 1988, Mr X has been convicted of 28 separate offences and has been gaoled for over five years. His crimes range from robbery and assault, to supply and possession of heroin. Mr X claims that his crimes relate directly to his drug addiction. He says that he commenced taking heroin to manage his brain injury, however, later became addicted. He argues that the combination of his injury and addiction led him into a life of crime.
15. Prior to Mr X's visa cancellation and subsequent detention, he made several attempts to overcome his drug addiction through participation in a methadone program from 1996. Such participation continued when he was in gaol. Jacaranda House advised in their letter dated 7 May 2002, *'[Mr X] commenced on the program on the 28th August 2001 and ... presented daily. He was always polite to the staff and followed the rules and regulations of Jacaranda House. He was not denied dosing due to intoxication.'*
16. Mr X has advised Ombudsman staff that he simply wishes to be given another chance and that *'if I commit another crime then the Minister can remove me to Vietnam'*.

Visa claims and absorbed person status

17. Mr X held a RRV that was cancelled by the Minister under s 501(2) in April 2002. Mr X advised Ombudsman staff that this occurred after he approached the Department in 2001, following his release from jail, to obtain a visa to travel to South America to visit his uncle, and he acknowledged that he had criminal convictions. Mr X unsuccessfully challenged the cancellation decision in the FMC in 2002. Two other visa claims have

subsequently been made by Mr X to which it is appropriate to draw attention in this report – his claim to absorbed person status, and for a PV.

18. Mr X and his legal representative claim that he is an absorbed person pursuant to s 34 of the Migration Act and argue that he should be released from detention by virtue of the FFC decision *Nystrom v Minister for Immigration and Multicultural and Indigenous Affairs*². They contend that Mr X was the holder of two visas, a TV and an absorbed person visa when he approached DIMA in November 2001 and that, in the event that he was granted a RRV in place of the TV, he still retained his absorbed person status.
19. The Ombudsman's office raised Mr X's claim to absorbed person status with DIMA, which has not accepted the claim. DIMA has drawn attention to s 82(2) of the Act, which provides that a substantive visa held by a non-citizen ceases if another substantive visa comes into effect. Thus, if Mr X held an absorbed person visa, it could have ceased when he was granted an RRV in November 2001. DIMA also disputes that Mr X met the criteria for an absorbed person visa at the relevant time required by the statute (2 April 1984), bearing in mind that he had only arrived in Australia 26 months earlier as a young person without his parents and in the care of his grandmother. It is possible but speculative that the forthcoming decision of the High Court in the appeal in *Nystrom* will have some bearing on Mr X's claim to absorbed person status.
20. Mr X made an application for a PV in May 2004 that was refused. The claim was subsequently pursued to the FFC, which reserved judgment in September 2005. The Ombudsman's own motion report into character cancellations of long term Australian residents also drew attention to Mr X's PV claim. It is likely that the FFC decision will either address or overtake the issue raised in the Ombudsman's report. The issue will nevertheless be noted at this stage because it was a relevant issue that is formally unresolved. The Ombudsman's own motion report stated as follows: *'Mr SVT's was one case that warranted a fuller assessment against the provisions of the Refugee Convention. He had come to Australia from Vietnam, aged 11, as a refugee. The quality of the assessment in the Issues Paper of any protection obligation which might still be owed to Mr SVT was pitched at an abstract level and did not give individual consideration to his situation were he to be returned to Vietnam. There was no information about the precise circumstances in which Mr SVT was initially granted refugee status. Discussion about the current situation in Vietnam relating to civil and political rights was very general, noting only that there is no evidence of general persecution of returnees. Mr SVT was not given the opportunity to comment on the assessment that there was no evidence he would face adverse treatment if returned to Vietnam.'*

Family considerations and attitude to removal

21. Mr X has expressed a fervent desire not to return to Vietnam. Mr X's extended family all reside in Australia, including his 14-year-old Australian-born son, Master Y. Master Y is currently residing with his maternal grandmother, Mrs Z, and was apparently abandoned by his mother when he was four years of age. At the time of Mr X's visa cancellation, Master Y was residing with his maternal aunt. Mr X raised concerns with Ombudsman staff about Master Y's welfare, having recently been informed by Mrs Z that he has dropped out of school and is *'getting into trouble'*. He has regular telephone contact with his son and reports that he has a good relationship with him. He wants to be released from detention so that he can play a primary role in the care of his son. In an undated statutory declaration by Mrs Z, she states *'I could not give [Master Y] the love that a real parent could. He often talks about his parents especially his father, who calls and speaks to him from the detention centre. [Master Y] is now almost thirteen years old. He often tells me that he misses his father and needs him ... I feel I am getting older and older each day. I am now over seventy years old. I don't know how long I can keep up with*

² [2005] FCAFC 121 (1 July 2005)

looking after [Master Y] properly ... I have talked to [Master Y] and he agrees and is very happy to be able to live with his father. [Master Y's] mother has left home and she does not care for [Master Y] anymore.'

22. Mr X further commented that he no longer has any connection to Vietnam, having left when he was quite young and he has no remaining immediate family members in Vietnam. He told Ombudsman staff that he will have no one to look after him in Vietnam and claims that will not receive the appropriate level of medical assistance and care he requires as a result of his brain injury.

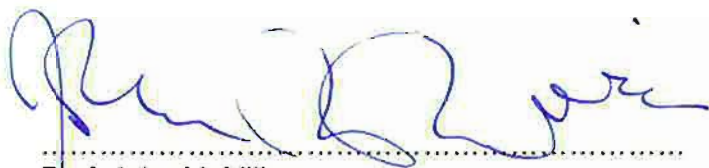
Other detention issues

23. Mr X complained about the medical treatment he received following his suicide attempt in November 2003. He reported that on return from the hospital he was placed in the management unit for three weeks. During this time he was unable to have visitors or interact with other detainees, and claims that he was unable to exercise or have a cigarette. He says that at this time his mental health was fragile and feels that the isolation prolonged his recovery.
24. Mr X further commented that he was not happy that he was not allowed to continue on the methadone program after his placement in Villawood IDC. DIMA advised him that methadone is not administered at Villawood IDC. He claims that his abrupt withdrawal from the program was difficult, because it was forced upon him and premature.

Ombudsman assessment/recommendation

25. Mr X has been in immigration detention for nearly four years, since May 2002 after the Minister cancelled his RRV under s 501(2). The principal explanation for the length of his detention is that since May 2002 he has made a number of applications and initiated proceedings, to challenge the decision to cancel his visa, to be granted a BV, to be granted a PV, and to seek the Minister's intervention under s 417. Some of those matters are presently unresolved – three s 417 requests before the Minister, two DIMA submissions to the Minister to consider her detention intervention powers, and the appeal to the FFC in which judgment was reserved in September 2005. DIMA has advised that removal action has been suspended pending the resolution of each of those matters.
26. In the Ombudsman's opinion it is undesirable that Mr X remain in immigration detention indefinitely pending the resolution of those outstanding matters, notwithstanding that Mr X largely initiated them. It is relevant that he had completed the period of imprisonment imposed upon him for various offences prior to his visa being cancelled in 2002: but for that visa cancellation he would not be detained or be subject to any restraint on his freedom of movement. Two **recommendations** are therefore made. **The first** is that the Minister make a decision on the matters presently before her within the statutory period prescribed in s 486P for the tabling of this report in Parliament (viz, within 15 sitting days of receiving the report). Secondly, if the Minister is not in a position to resolve those matters by that date, it is **recommended** that Mr X be released from detention on an appropriate visa (for example, a Removal Pending Bridging Visa) while the matters are resolved. In support of this recommendation the Ombudsman draws attention to other relevant aspects of Mr X's case: Mr X is committed to his son's welfare and needs to resume a parenting role in his son's life; Master Y's care arrangements are uncertain and his maternal grandmother has noted concerns about her age and ability to continue to care for Master Y; Mr X has strong family ties in Australia and it seems unlikely that he would abscond or be difficult to locate; he suffers from a brain injury which impairs his judgment and it appears that he would be better cared for by his family; he does not appear to pose a current threat to the Australian community; and the medical evidence suggests that he is unlikely to recover from depression while in an immigration detention facility.

27. As to the matters currently before the Minister, the Ombudsman offers comment on one only of those matters. It is whether the decision made by the former Minister in May 2002 to cancel Mr X's visa should stand. It is relevant to that matter that the Ombudsman has since completed an own motion investigation into cancellation decisions made under s 501(2) in respect of long-term Australian residents. In that report the Ombudsman questioned the appropriateness, other than in exceptional cases, of applying s 501 to visa holders who came to Australia as minors and who had lived here for more than ten years before committing an offence (at pp 44-45). The report noted that it was ultimately a matter for the Minister as to when it was appropriate to make a decision under s 501; and DIMA in its response to the report noted that it was a matter for Government as to how to respond to the Ombudsman's recommendation. In furtherance of the views expressed in the own motion report, the Ombudsman draws attention to the competing considerations in Mr X's case, noting that his case is borderline in the context of the matters discussed in that report. On the one hand, Mr X came to Australia at age 11; he spent his formative years in Australia; he has strong family and other ties in the Australian community; he does not have similar ties with Vietnam; and his removal would likely cause hardship to him, his son, and his family in Australia. On the other hand, Mr X has been convicted of 28 separate offences between 1988 and 2001; the first of those offences was committed six years after he arrived in Australia, and the remaining offences were committed while he was an adult.



Prof. John McMillan
Commonwealth and Immigration Ombudsman

21 April 2006.
Date