

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

*Under s 486O of the Migration Act 1958*

*Personal identifier: 091/06*

## **Principal facts**

### *Personal details*

1. Mr X is an Indian citizen aged 36. His family remains in India, with the exception of one sister who resides in the UK.

### *Detention history*

2. Mr X has been detained on three separate occasions under s 189(1) of the *Migration Act 1958*. DIMA advises that Mr X was twice detained for periods less than two weeks (over November-December 2001) for breaching the conditions of his visa, by engaging in employment on the first occasion and changing his place of residence without notice on the second.
3. Mr X was detained a third time after being found residing unlawfully in the community between April 2002 and March 2004, and he has been in detention continuously since that time. Initially detained at the Villawood Immigration Detention Centre, he was transferred to the Baxter Immigration Detention Facility (IDF) in March 2005, where he remains.

### *Visa applications*

4. Mr X arrived in Australia on a short-term business visa in March 2000. After his arrival, he made two applications for a Protection Visa (PV) and was granted a Bridging Visa (BV) (April 2000); one PV application found to be invalid (June 2000); applied for review of that decision (July 2000); BV cancelled (February 2001); Migration Review Tribunal (MRT) set aside original decision, substituted decision to grant BV (December 2001); Refugee Review Tribunal (RRT) affirmed June 2000 refusal (March 2002); granted further BV with reporting requirements (June 2002); BV expired (August 2002); BV application submitted and rejected (April 2004).
5. Mr X then filed application in Federal Magistrates Court (FMC) for review of the March 2002 RRT decision (April 2004); second BV application submitted (June 2004); rejected application affirmed by MRT (July 2004); FMC application dismissed (October 2004); filed appeal to Full Federal Court (October 2004); appeal dismissed (December 2004); filed appeal to the High Court (May 2005); appeal withdrawn (June 2005).
6. Mr X has made four s 417 applications to the Minister, dated March 2002, July 2005, April 2006 and September 2006. The first three were assessed as not meeting appropriate guidelines on July 2002, January 2006 and June 2006 respectively; the fourth remains outstanding. Requests under s 48B were submitted in February 2006 and September 2006; the former was found not to meet the guidelines in March 2006, the latter remains outstanding.

### *Current immigration status*

7. Mr X is detained at the Baxter IDF.

## **Ombudsman consideration**

8. Two reports from DIMA to the Ombudsman under s 486N of the *Migration Act* are dated 23 May 2006 and 14 September 2006.
9. DIMA file records.

10. Ombudsman staff interviewed Mr X with the aid of an interpreter on 15 June 2006, in the presence of a supporter.
11. A report from Professional Support Services (PSS) dated 25 May 2006.

### **Key issues**

#### *Health and welfare*

12. According to the PSS report, Mr X, although he has not been formally assessed, '*presented with symptoms of depression and anxiety throughout his detention experience [which] varied in intensity and duration depending on circumstances*'. The report also notes that he was placed on Suicide and Self-Harm watch for three days in February 2005 and two weeks in February 2006. However, from this time until the completion of the PSS report in May 2006, he showed no indication of being at risk of harming himself or others.
13. Mr X has been recently diagnosed as a borderline diabetic, a condition which is being managed by a diet and exercise regime.

#### *Attitude to removal*

14. Mr X refused to sign Indian travel documents lodged on his behalf in August 2005. He has consistently maintained that he is at risk should he be returned to India because of his (and his family's) past political activities and association with the Indian Congress Party. The RRT and the courts have examined these claims and found that he is not owed protection by Australia.
15. Departmental records also indicate that Mr X has declined to sign a travel document application until the result of his (most recent) s 417 request becomes known. The Indian High Commission refuses to issue travel documents if the person concerned does not sign them. In August 2006, Mr X was referred to DIMA's National Identity Verification and Advice (NIVA) Section to resolve this issue.

#### *Other issues*


16. Mr X, who has stated he is a chef by trade, has expressed dissatisfaction with the food at Baxter IDF but he also notes that he and other detainees have since early 2006 been granted access to a kitchen to cook and to serve food to other detainees.
17. Mr X has stated at interview with Ombudsman staff that he should not have been detained in December 2001, as he gave sufficient explanation to the Department regarding apparent breaches of the conditions of his BV. The Ombudsman notes that Mr X sought review of DIMA's decision to cancel his BV and the RRT set-aside the decision on 20 December 2001. In exercising its discretion, the RRT considered '*that there was at least in part a reasonable excuse for the non-compliance and that the review applicant did comply with the condition after the period of non-compliance*'. While the RRT set the decision aside, this does not mean that DIMA's original decision to cancel his BV was invalid. The Ombudsman notes that Mr X obtained relief through the appropriate review processes at the time.


### **Ombudsman assessment/recommendation**

18. Mr X's claims to remain in Australia have been well tested in the RRT and the courts. It is not for the Ombudsman to question those findings.
19. The issue of current concern in Mr X's case is whether he should remain in detention while his outstanding application under s 417 is resolved. On the one hand, the Ombudsman notes that Mr X has a history of non-compliance with visa conditions. On the other hand Mr X has been in immigration detention for two and a half years and a date for his removal from Australia has not been set. Mr X has been ineligible for removal during that time because his matter was either before the courts or the Minister. Mr X's

failure to cooperate with removal efforts has also been a significant factor in the continuation of his detention.

20. Bearing these considerations in mind, the Ombudsman does not at this time make any recommendation about Mr X's release, apart from noting that it is undesirable that he remain indefinitely in immigration detention. The evidence suggests that Mr X is suffering from depression and anxiety. It is open to the Minister to consider granting Mr X a Removal Pending Bridging Visa (subject to conditions that DIMA deems necessary to ensure that he does not abscond) while the issues concerning his immigration status and removal from Australia are resolved. The Ombudsman **recommends** that DIMA examine the options for alternative accommodation or detention for Mr X, and report on its consideration of that issue in the next report to be provided by DIMA under s 486N of the *Migration Act*.
21. The Ombudsman further **recommends** that the Minister make a decision on Mr X's s 417 and s 48B applications as soon as possible and in any case not later than the statutory period prescribed in s 486P of the *Migration Act* for the tabling of this report in the Parliament (*viz*, within 15 sitting days of the Minister receiving this report).

  
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Prof. John McMillan  
Commonwealth and Immigration Ombudsman

  
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Date