

REPORT FOR TABLING IN PARLIAMENT BY THE COMMONWEALTH AND IMMIGRATION OMBUDSMAN

Under s 486O of the Migration Act 1958

Personal identifier: 099/06

This is the second s 486O report by the Ombudsman on Mr X as he remained in immigration detention for a further six months following the Ombudsman's first report (14/05). The Ombudsman's first report was sent to the Minister on 1 December 2005 and tabled in Parliament on 1 March 2006. This report updates the material in that report and should be read in conjunction with it.

Principal facts

Detention history

1. Mr X was released from Villawood Immigration Detention Centre (IDC) in February 2006.

Visa applications

2. According to the Department (DIMA), Mr X has not made any applications for a visa. The Minister exercised her detention intervention powers and granted him a Removal Pending Bridging Visa (RPBV) on 11 February 2006.

Current immigration status

3. Mr X is residing in the community on a RPBV.

Ombudsman consideration

4. DIMA's reports to the Ombudsman under s 486N of the *Migration Act 1958* are dated 5 October 2005 and 14 January 2006.
5. Ombudsman staff invited Mr X to provide information by telephone or in writing, but did not receive a response. In August 2006, Ombudsman staff communicated in writing with Mr X about a Centrelink matter.

Key issues

Nationality

6. DIMA reports that it is still investigating Mr X's identity and has taken steps including interviewing Mr X's visitors, checking with overseas authorities, searching databases, and communicating with state and territory police.
7. In its January 2006 report, DIMA states that the National Identity Verification and Advice Section (NIVA) is pursuing the avenue of publishing photos of Mr X to assist in identification efforts. Under s 336FC, disclosure of photos to the general public is allowed with the DIMA Secretary's authorisation, which can be given if DIMA has exhausted all other 'reasonable steps' to identify the person. Disclosures that are authorised by law do not breach the Information Privacy Principles.

Health and welfare

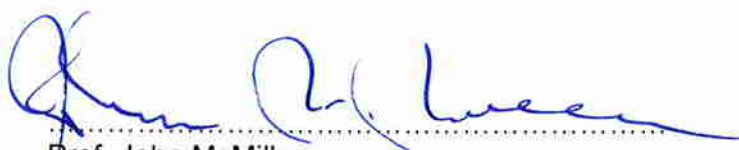
8. In Report 14/05, the Ombudsman suggested that Mr X could have a mental illness, which may be difficult for DIMA to confirm, given he has not cooperated with mental health assessments.

Ombudsman assessment/recommendation

9. Report 14/05 recommended that DIMA seek further legal advice on whether there were grounds to support the continuing detention of Mr X under s 189. The Minister states Mr X was released from immigration detention on a RPBV, following receipt of legal

advice that the possibility of him being an unlawful non-citizen was no longer 'of sufficient cogency to warrant ongoing detention'.

10. The view was expressed in Report 14/05 that the restrictions associated with a RPBV would only be appropriate in Mr X's case if DIMA maintains its 'reasonable suspicion' under s 189 that he is an unlawful non-citizen. On a RPBV Mr X is prevented from travelling overseas and he is required to comply with reporting requirements, with the attendant risk of being returned to immigration detention if he breaches those requirements. The Ombudsman has not seen the legal advice received by the Minister. If it confirms that DIMA continues to hold a reasonable suspicion about Mr X, then a RPBV may be appropriate. On the other hand, as noted in Report 14/05, 'if Mr X's circumstances do not meet the "reasonable suspicion" test ... he would be entitled to be released into and remain in the community free of any restriction'. The Ombudsman **recommends** that DIMA continue to monitor whether it maintains a reasonable suspicion that Mr X is an unlawful non-citizen. This is necessary to avert the danger that Mr X could continue on a RPBV into the indefinite future.
11. If DIMA no longer has a reasonable suspicion that Mr X is an unlawful non-citizen, then a RPBV, with its attendant limits on freedom of movement, would appear to be inappropriate. The option would be to release Mr X into the community free of any restrictions. In terms of identity documents, this would place Mr X in the same position as he was prior to being apprehended by the NSW police and DIMA in 2002. The difficulty with this course of action is that, if Mr X is unable to establish his identity, he is likely to face difficulties in accessing Centrelink benefits, Medicare, and public housing. This is not a relevant consideration in deciding Mr X's immigration status under the *Migration Act 1958*, but it is not a matter that can be altogether ignored by DIMA in the circumstances of Mr X's release from detention. Active steps should continue to be taken by DIMA to establish Mr X's identity. A further option that may merit consideration is for the Minister to consider exercising her discretion under s 32 of the *Australian Citizenship Act 1948* to grant a certificate of citizenship to Mr X as 'a person with respect to whose status as an Australian citizen a doubt exists'. Such a certificate can be cancelled if it is later established that Mr X concealed a material fact.
12. Regardless of which option DIMA prefers, it is the Ombudsman's view that DIMA should intensively case-manage Mr X's case for some time. As discussed in the Ombudsman's previous report, it is possible that Mr X has a mental health condition, and it is also possible that this condition is at least partly related to his 3½ years in immigration detention. Case management should ensure that he has access to housing, income support, and treatment, if necessary. It would be unacceptable if Mr X were disadvantaged by the effect of a decision to remove his RPBV.



Prof. John McMillan
Commonwealth and Immigration Ombudsman

23 October 2006
Date