

REPORT FOR TABLING IN PARLIAMENT BY THE COMMONWEALTH AND IMMIGRATION OMBUDSMAN

Under s 486O of the Migration Act 1958

Personal identifier: 100/06

Principal facts

Personal details

1. Mr X is a male from India aged 29. He is married to an Australian citizen, Mrs X and they have one child, Y, aged 5. Mrs X also has three boys from a previous relationship, aged 14, 19, and 20.

Detention history

2. Mr X came to Australia in October 1998 and was on a Student Visa (SV) until November 2000. He was in gaol from November 2002 to November 2003. He was released from gaol and the Department (DIMA) placed him in immigration detention pursuant to s 189(1) of the *Migration Act 1958*. He was initially at Parklea Correction Centre and he was transferred to Villawood Immigration Detention Centre (IDC) (June 2004). He was transferred to the Pacific International Hotel (April 2006), while Villawood IDC was temporarily closed, and then back to Villawood IDC (April 2006).

Visa applications

3. Mr X arrived in Australia (October 1998) on a SV; SV expired (November 2000); applied for a Protection Visa (PV) (March 2004); DIMA refused (April 2004); appeal to the Refugee Review Tribunal (RRT) dismissed (June 2004); application for judicial review to the Federal Magistrates Court (FMC) (December 2004) unsuccessful (June 2005); appeal to the Full Federal Court (FFC) dismissed (September 2005).
4. Applied to the Minister under s 417 (April 2004); refused (April 2004); applied again (June 2004); refused (November 2004); applied again (July 2005, referred to the Minister January 2006); pending; the Minister is also considering using her detention intervention powers (December 2005, updated May 2006).
5. Applied for Bridging Visas (BV) (June and July 2004, July 2005, March 2006); refused, except for the March 2006 application which was withdrawn; applied for merits review at the Migration Review Tribunal (MRT) but withdrew application (July 2004); unsuccessfully sought merits review at the MRT (September 2004, August 2005); unsuccessfully applied for judicial review at the FMC (November 2005).

Current immigration status

6. Mr X is an unlawful non-citizen in immigration detention.

Removal details

7. DIMA advises that Mr X refuses to sign an application for the issue of an Indian travel document. He did however indicate to the RRT in 2004 he would be prepared to return to India if he could gain money through employment to offset the difficulty of relocation to a region in India where he would not be at threat. Mr X has been ineligible for removal because of his various visa applications, appeals, and Ministerial intervention requests.

Ombudsman consideration

6. DIMA reports to the Ombudsman under s 486N are dated 12 December 2005 and 5 June 2006.

7. Ombudsman staff interviewed Mr X, together with his wife, on 20 February 2006 at Villawood IDC.
8. Ombudsman staff sighted medical reports including summary reports from International Health and Medical Service (IHMS) dated 9 December 2005 and 25 May 2006; Psychology summary reports from Professional Support Services (PSS) dated 14 December 2005 and 18 May 2006, and notes dated June to August 2004; and reports from neurologist Dr Z dated 3 and 28 November 2005. Ombudsman staff spoke to Dr A on 13 September 2006.
9. Correspondence from Mr X to the Commonwealth Ombudsman dated 15 February 2006 and from his wife, Mrs X, dated 12 January 2006.

Key issues

Criminal history

10. The DIMA submission to the Minister states that Mr X was convicted in October 2001 of shoplifting (five counts), larceny (two counts), and custody of a knife in a public place; in July 2002 of larceny, shoplifting (two counts), and possession of a prohibited drug; and in September 2003 of larceny (two counts), common assault, and possession of an armed weapon with the intent to commit an offence. Mr X says that he was smoking '*too much pot*' at the time he committed these offences. At the time that he was convicted of offences (in October 2001 and July 2002) he was without a visa, which had expired in November 2000. It is unclear why he was not taken into immigration detention at that time. He was in gaol from November 2002 to November 2003.
11. The DIMA submission to the Minister states that Mr X completed a number of literacy courses while he was in gaol. He provided the FC with certificates for '*writing for practical purposes*', '*general education for adults*', and '*OHS induction for employees*', among others. Mr X states '*I know I made a mistake and I want a second chance*'.
12. DIMA advises these convictions mean that Mr X would not meet the character requirements for the grant of a permanent visa. DIMA's submission to the Minister states '*In the circumstances, if you are minded to exercise your public interest power in this case, you may wish to waive the health and character requirement and the need for an [Assurance of Support] and grant Mr X a permanent Subclass 801 Spouse visa*'.

Protection claims

13. Mr X's claims for protection have been unsuccessful. He claimed that he was at risk in India because he is from a strict Sikh family and has married a Muslim woman. The RRT did not accept that he was covered by the *Convention Relating to the Status of Refugees 1951*, finding the government in India takes reasonable measures to protect citizens from family and religious violence. It also found that it was reasonable for Mr X to move to a different part of India.
14. The FFC held there was no reviewable error, however, Justice Conti stated in his judgment '*I would observe that the appellant's situation presents as a compelling case for reconsideration by the Minister on at least humanitarian grounds, in the light of the material I have summarised. It is no understatement on my part to record that the appellant presented as a person of sincerity whose circumstances as disclosed to the Court disclose a compelling case for consideration for release into the community for the time being, and for re-consideration of the case for remaining in Australia as part of a family unit involving his wife and young son. His indication to the Court of anxiety to obtain employment and enjoy a normal life as part of a family unit would appear to merit appropriate reconsideration*'.

Health and welfare

15. Mr X has Multiple Sclerosis (MS). He tendered a certificate to the FFC from an imaging service dated July 2005 which he said was supportive of the diagnosis. The DIMA report states *'Mr X showed IHMS staff a letter suggested [MS] as a possibility'*. DIMA accepted the diagnosis in November 2005, after a neurologist Dr Z examined Mr X. Dr Z wrote *'This man undoubtedly has cerebellar dysfunction which would be consistent with a diagnosis of multiple sclerosis'*. In a later report, he states *'the sensory evoked potentials on this man showed bilateral delay consistent with demyelination. In view of this and the MRI scan changes I think it would be reasonable consider treating him with immuno-modulatory therapy'*.
16. In his interview with the Ombudsman, Mr X expressed concerns about his condition, stating *'I am worried I will not be released until I am in a wheelchair'*. He reported feeling numbness in parts of his body and a poor memory. The DIMA report records that he commenced immuno-modulatory therapy in January 2006 after complaining of increasing weakness. The IHMS report states *'Mr X will need review by a specialist neurologist on a regular basis ... It is likely that his multiple sclerosis would be better managed in the community, particularly should his condition worsen'*.
17. DIMA advises that Mr X's MS means that he does not meet the requirements of the health check for a permanent visa, unless the Minister waives this requirement.
18. The IHMS report also states that Mr X suffers from depression. The DIMA report states *'Dr [B] reported that due to Mr X's negative experiences in prison ... he had developed a major depressive episode which required anti-psychotic medication. Mr X is prescribed this medication and accesses the mental health team at VIDC as required'*. The PSS report states *'On admission, the PSS psychologist identified no active psychopathology. However, since this time he has presented with some depressive symptom[s], stress and sleeping difficulties'*. In terms of prognosis, the report goes on to state *'The levels of stress he exhibited appears related to his immigration situation and, until he is resolved, Mr X's stress will continue to fluctuate. The mild depressive symptoms and sleeping difficulties will most likely remain until his situation changes'*. In September 2006, Dr A stated that Mr X is on an anti-depressant but does not have major depression.
19. In addition, the IHMS report states that Mr X has Pilonidal Sinus, which will need surgery after he is released from detention.

Other detention issues

20. Mr X stated that immigration detention is *'worse than gaol'*.

Family issues

21. DIMA's submission to the Minister states *'The Department is satisfied that Mr X's marital relationship is bona fide and that he is part of an established family unit'*. It further reports, *'when held in Parklea, Mr X was in daily telephone contact with Ms [X] and Y ... they regularly visited him ... Recent evidence has been sighted that they visit him regularly at the VIDC'*.
22. Mrs X states that Mr X's prolonged detention is very hard for the family. She says *'It's difficult to cope. My little son goes to kindy and is teased because he doesn't have a dad'*. She reports that Y has exhibited some behavioural problems that she attributes to the absence of his father.
23. Mrs X also reports that she has been diagnosed recently with Type 2 Diabetes, which is currently treated by tablets, but may require regular insulin injections if it does not improve. In addition, she states that she was recently involved in a car accident and requires treatment for her injured back three to four times a week. She says these medical conditions make it harder for her to cope without Mr X in the home. The

Ombudsman sighted a medical certificate confirming that she has diabetes, hyperlipidemia, and back pain.

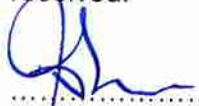
Debt


24. The DIMA submission to the Minister states that Mr X's debt to the Commonwealth is over \$86,000. It states *'this debt will remain even if you decide to exercise your power under s 417 of the Act to grant a visa unless it is waived by the Minister for Finance. If you intend to grant a visa at this stage please indicate whether or not the department should pursue a waiver of the debt to the Commonwealth'*.
25. If Mr X were removed from Australia, he would have to pay this debt to the Commonwealth before he could apply for a Spouse Visa. Along with other issues (including the character issues), this would form an effective bar to him returning to live with his wife and child.

Ombudsman assessment/recommendation

26. Mr X has been in immigration detention for over two and a half years, following one year in criminal detention. Throughout his time in immigration detention, he has had litigation or applications before the Minister, which have prevented his removal from Australia.
27. The Minister is currently considering a s 417 application in relation to Mr X. It is **recommended** that the Minister make a decision on this application as soon as possible, in any event before the time for tabling a version of this report in Parliament (viz within 15 Parliamentary sitting days of receiving this report). In the Ombudsman's view there are compelling humanitarian factors that warrant consideration by the Minister, as noted earlier by the Department in its submission and by Conti J. Those factors include:
 - Mr X has a degenerative disease, MS. It appears that it may have taken several months for DIMA to agree that he had MS, and two months to start appointments with an appropriate specialist and treatment. IHMS has conceded that his condition may be better managed outside a detention centre.
 - In the past, Mr X has had major depression and psychosis. Although Mr X's mental health conditions first appeared while he was in gaol, PSS states that his continuing depressive symptoms are related to his immigration situation.
 - Mr X has a wife and son who are both Australian citizens. He reports that his time in detention has had a major impact on both of them. Y was 16 months when he was detained and is now 5 years of age.
 - Mrs X has three other children in Australia and both Mrs X and Y are Australian citizens. If Mr X is removed from Australia, it is possible that he would be permanently separated from his family.
 - Mrs X's recently diagnosed medical condition may be better managed if her husband is able to live with her.
28. The Ombudsman notes that the Department does not appear to consider that Mr X is a threat to the Australian community. The Ombudsman understands that in the recent move of all detainees from Villawood IDC because of asbestos concerns, a number of detainees were transferred to correctional facilities because of safety considerations. DIMA's report indicates that Mr X was transferred to a hotel, indicating a low level of concern in this respect.
29. If the Minister is inclined to grant Mr X a permanent Spouse Visa, the Ombudsman **recommends** that the Minister may also wish to consider appropriate waivers of health and character requirements, and whether the grant of any visa should also include a recommendation to the Minister for Finance that Mr X's detention debt be waived.

30. If the Minister is not minded to grant a permanent visa, or if the granting is likely to be delayed, then the Ombudsman **recommends** that Mr X be released on a BV with work rights. His ill-health and the needs of his family make it inappropriate that he spend further time within an immigration detention facility while his immigration status is resolved.


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Prof. John McMillan


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Date

24 October 2006.