

REPORT FOR TABLING IN PARLIAMENT BY THE COMMONWEALTH AND IMMIGRATION OMBUDSMAN

Under s 486O of the Migration Act 1958

Personal identifier: 101/06

Principal facts

Personal details

1. Mr X is a single male aged approximately 31 from Afghanistan of Hazara ethnicity. His mother, brother and brother's family reside in Afghanistan, however their exact whereabouts is unknown.

Detention history

2. Mr X entered Australia on 25 March 2001 as an unauthorised boat arrival. He was immediately detained pursuant to s 189(2) of the *Migration Act 1958* and placed in the Port Hedland Immigration Reception and Processing Centre. In May 2005, Mr X was transferred to Baxter Immigration Detention Facility (Baxter IDF). In September 2005, he was admitted to Glenside Hospital for psychiatric treatment. Mr X was granted a Temporary Protection Visa (TPV) and remained in Glenside Hospital as a voluntary patient.

Visa applications

3. Protection Visa (PV) refused (August 2001); decision affirmed by the Refugee Review Tribunal (RRT) (November 2001); applications for judicial review dismissed by the Federal Court (FC) (April 2002) and the Full FC (November 2002); requests under s 48B refused (November 2002); s 48B request successful; TPV granted (November 2005).

Current immigration status

4. Mr X now resides lawfully in Australia, as a holder of a TPV.

Removal details

5. DIMA advises that Mr X was offered the Afghanistan re-integration package on two occasions (November 2002 and May 2005). The first offer lapsed without response and the second offer was declined.

Ombudsman consideration

6. The DIMA report to the Ombudsman under s 486N was received on 7 September 2005.
7. Mr X was interviewed by Ombudsman staff at Glenside Hospital, Adelaide, on 27 September 2005.
8. Ombudsman staff have considered a number of medical reports including a psychiatric report by Professors A (University of Adelaide) and C (Melbourne University) dated 2 September 2005, and a follow-up report from Prof. A dated 6 October 2005; a medical summary report from International Health and Medical Service (IHMS) dated 12 September 2005; a psychology summary report from Professional Support Services (PSS) dated 12 September 2005; and a status report from Glenside Hospital dated 12 October 2005.
9. Ombudsman staff also sighted DIMA's submission to the Minister in response to Mr X's second s 48B request, dated 21 September 2005.

Key issues

Nationality

10. Mr X has consistently claimed to be an Afghan national, who fears persecution because he is a Shi'a Muslim of Hazara ethnicity. He told Ombudsman staff that the Taliban and Pashtun persecute Hazaras by advertising over their loudspeakers that a soldier would go to Heaven if he killed a Hazara. Mr X also said that DIMA refused his PV claim because he could not find his village on their map. The RRT rejected his nationality claim concluding that he was more likely to be a citizen of Pakistan. In August 2005, the Embassy of the Islamic Republic of Afghanistan confirmed that Mr X is a citizen of Afghanistan.
11. Mr X was interviewed by a delegation from the Embassy of Islamic Republic of Pakistan (April 2005) to determine whether he was a citizen of that country. DIMA did not receive a response from the Pakistan authorities.
12. DIMA's submission to the Minister in response to Mr X's second s 48B request stated that the recent confirmation of Mr X's nationality *'is significant new information which contradicts earlier findings on his nationality upon which his earlier refusal of a PV to this person was based.'* It also noted that the *'weight given by the RRT to the language analysis [of] Mr X was flawed and unreliable'*. It further mentioned that current information had been received from the United Nations High Commissioner for Refugees (UNHCR), illustrating that Mr X would *'fall within a profile of Afghans to whom the UNHCR has asked that complementary protection be provided'*.

Health and Welfare

13. In August and September 2005, Mr X was examined by Profs. A and C and diagnosed with a *'Persistent Severe Major Depressive disorder with an admixture of anxiety symptoms'*, which was *'solely caused by the circumstances of his detention'*. The psychiatric report states that further detention would lead to a deterioration in his condition, placing him at risk of self harm and suicide, and that *'it would be clinically inappropriate to attempt a treatment programme in that environment. It is only possible for his symptoms to improve if he receives a high standard of psychiatric care outside that environment.'* The report observes, *'the principal cause ... is that Mr X is imprisoned ... a core feature of the imprisonment, for Mr X, is the associated sense of injustice. This is firstly because he believes himself innocent of any wrongdoing ... feelings of injustice associated with his account [of his village of origin] not being believed ... he perceives this discrediting as an affront to his sense of himself as a honest, religious man ... the lack of work in Baxter Detention Centre has had a damaging effect on this core component of his personality. The menial nature of the work that has been offered to him has served to accentuate this ... no predisposition to depression could be identified'*.
14. The follow-up psychiatric report by Prof. A (completed after Mr X's transfer to Glenside Hospital), details partial improvement in Mr X's mental state. It states however, that treatment cannot be fully effective whilst Mr X remains socially isolated from the general community and while his visa situation remains uncertain. He notes that *'I would recommend that Mr X be granted a permanent visa rather than a temporary protection visa ... I would recommend that we strive to avoid any further situation of uncertainty and waiting because it will continue to undermine Mr X's sense of honesty and religious propriety that are so central to his self esteem. It would significantly hamper the psychological component of the treatment plan and compromise his recovery ... It is for this clinical reason that I recommend a permanent protection visa'*.
15. The PSS report details major depression with suicidal ideation and notes that, *'the ongoing detention environment will create further psychological issues'*. The IHMS report supports the possibility that Mr X would be better treated outside a detention centre.

Attitude to removal


16. Mr X advised Ombudsman staff that he would be subject to a greater level of persecution if returned to Afghanistan, due to the amount of time he has spent in Western society. He believes that this has increased the likelihood of the Mullahs labelling him an infidel.


Detention issues

17. During his interview with Ombudsman staff, Mr X expressed concerns about returning to Baxter IDF, saying that he can only see the sky from there, and that it is like a prison. He commented that the detention service provider guards don't listen to the detainees, nor do they respect them.

Ombudsman assessment/recommendation

18. Mr X spent a lengthy period in immigration detention (4 years and 8 months), principally because his claims for protection were denied as it was thought that he came from Pakistan, not Afghanistan. After positive confirmation from the Embassy of the Islamic Republic of Afghanistan, the Minister favourably determined Mr X's s 48B request and allowed him to lodge a second PV application. This process resulted in Mr X being granted a TPV in November 2005.
19. The uncontradicted medical evidence before the Ombudsman indicates that Mr X has suffered a major depressive disorder solely due to his lengthy detention in an immigration facility. The medical evidence also indicates that a TPV would not be sufficient to enable Mr X to fully recover from his disorders, as the inherent short-term characteristics would inhibit Mr X's recovery. For Mr X to rebuild his life, he would require a greater level of certainty and stability for the future.
20. It remains open as to what weight should be placed on Mr X spending over four years in detention before he succeeded in being granted a TPV. In November 2001, the RRT rejected his claim that he is an Afghan citizen, but the Embassy of the Islamic Republic of Afghanistan has since confirmed that he is an Afghan citizen. It is therefore difficult to escape the observation that he spent over four years in detention for reasons that appear to have been beyond his control. Had approaches been made to the Afghanistan authorities earlier than June 2005, it is possible that he would have been granted a substantive visa much earlier than November 2005. This being the case, Mr X might now be in a position to apply for a permanent PV.
21. In light of these considerations, the Ombudsman **recommends** that the Minister consider exercising her public interest powers and grant Mr X a permanent resident visa (either a Subclass 202 Global Special Humanitarian visa, or a Subclass 866 Protection (Permanent) visa) or consider waiving the 30 month waiting period for applying for a permanent PV, thus ending the uncertainty surrounding his immigration status in Australia.
22. This report highlights the negative impact a long period of detention has on an individual's mental and physical health. The poor state of Mr X's mental health is demonstrated by the fact that he remained under psychiatric care in Glenside hospital for a period of time, even though he was free to reside in the community. It would therefore be appropriate for DIMA to consider what continuing role it should play in providing medical assistance to Mr X.


Prof. John McMillan
Commonwealth and Immigration Ombudsman


Date