

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

Under s 486O of the Migration Act 1958

Personal identifier: 127/07

Principal facts

Personal details

1. Mr X is aged 26 years and advises that he is from the town of Chitwan in the Terai region of Nepal, the country where his parents, brother and sister currently reside.

Detention history

2. Mr X was located by the New South Wales (NSW) Police and detained under s 189(1) of the *Migration Act 1958* on 9 January 2005 and placed at Villawood Immigration Detention Facility (IDF).

Visa applications

3. Mr X arrived in Australia on 15 October 2001 as a holder of a Student Visa, which ceased in November 2001; granted Higher Education Sector Visa (HESV) in November 2001, ceased (August 2002); granted a Bridging Visa (BV) (August 2002); granted a Vocational Education Visa (VEV) (September 2002), ceased (March 2003); BV granted (March 2003); VEVs granted (March 2003 and April 2003); BVs granted (December 2003 and January 2004).
4. HESV granted (January 2004), due to cease on 14 April 2005, but cancelled on 26 May 2004 as Mr X failed to recommence his studies in March 2004. The HESV was reinstated on 17 August 2005 due to a Federal Magistrates Court (FMC) decision in *Uddin v DIMIA*, which had the effect of reversing the automatic cancellation of May 2004. Mr X therefore became unlawful on 14 April 2005, when his original visa expired. While Mr X had been detained in January 2005, his detention was lawful at this time as the *Uddin* decision was not handed down until 17 August 2005 and the March 2004 cancellation was considered still to be in effect.
5. Mr X applied for a BV (January 2005), application withdrawn (February 2005); s 351 Ministerial request not considered as the Minister had no power to intervene; applied for a Protection Visa (PV) on 1 April 2005; withdrew PV associated BV application (April 2005); PV application refused (April 2005); sought merits review of the PV refusal at the Refugee Review Tribunal (RRT) (May 2005), associated BV refused (May 2005); RRT affirmed decision (June 2005); sought judicial review of the RRT decision at the FMC (June 2005); Minister withdrew from the judicial review, and the matter was remitted to the RRT (November 2005); RRT again affirmed decision (24 February 2006); sought judicial review at the FMC (21 March 2006), application dismissed (21 August 2006); s 417 request made on Mr X's behalf (15 September 2006), which was forwarded to the Minister (10 November 2006); s 48B request initiated seeking exercise of Ministerial discretion, assessed as not meeting the guidelines (21 November 2006); Minister declined to intervene under s 417 (1 January 2007).

Current immigration status

6. Mr X is an unlawful non-citizen, currently detained at Villawood IDF.

Removal details

7. The Department of Immigration and Citizenship (DIAC) advised that Mr X's ongoing litigation prevented it from initiating removal processes. On 12 January 2007, Mr X

refused to sign a request for removal form and passport application form. DIAC subsequently advised that Mr X's involuntary removal is imminent.

Ombudsman consideration

8. DIAC report to the Ombudsman under s 486N dated 16 January 2007.
9. Ombudsman staff interviewed Mr X on 12 February 2007 at Villawood IDF.
10. Ombudsman staff sighted a report by International Health and Medical Services (IHMS) dated 2 November 2006 and a letter sent to the Minister from Mr X on 7 February 2007.

Key issues

Health and welfare

11. Mr X said that he found it difficult to continue his university course due to the financial pressures involved and his family's situation in Nepal. He said that while studying in Australia, he was told by his parents that the family's financial situation had changed and they '*couldn't afford him*' anymore. Mr X claims that this was a difficult period for him, as he had to combine work and study.
12. DIAC advised that on initial detention in January 2005, the NSW Police expressed concerns about Mr X and he was subsequently placed under Suicide and Self Harm (SASH) watch. Mr X was also placed under SASH watch in February 2005 after commencing a voluntary hunger strike.
13. In October 2005 Mr X fell while playing on a children's swing set, causing neck and back pain as well as a laceration to his face. Mr X was taken to Fairfield Hospital by ambulance and then transferred to Liverpool Hospital for an operation to insert 'K wires' to his fractured right radius.
14. Mr X said to Ombudsman staff that '*it is hard in detention*' but that he was staying strong and dealing with the '*obvious stress*'. Mr X outlined his daily regime of sport, music, tutoring and church that keeps him occupied because '*if I think too much I get crazy*'. The IHMS report of November 2006 advised that there were '*no mental health issues identified*' by a Mental Health Team review of Mr X.

Attitude to removal

15. Mr X claims that the Maoists in Nepal have targeted his parents, attempted to extort money from them and have beaten them '*as a warning*'. Mr X further claims that his brother is a member of the Nepalese Congress Party, has been actively involved in protests against the Government, and that there is a warrant out for his arrest. Mr X advised that his family has been forced into hiding, and that he has only been able to have indirect contact with them over the past few years. Mr X claims that he has been advised by his parents not to return to Nepal. If returned, Mr X claims that either the authorities or the Maoists would find him and subject him to persecution in an effort to find out where his relatives are hiding.
16. The RRT found that although the activity of the Maoists is an '*unfortunate element of the current situation in Nepal*', this factor in itself does not assist Mr X's case. The RRT did not find Mr X's claims about his brother to be plausible, and as such, found that Mr X is not a person to whom Australia owes protection.
17. Mr X has also claimed that since his arrival in Australia, he has become a devout Christian. Mr X advises that he regularly attends mass and has completed several theological courses. Mr X claimed to Ombudsman staff that he fears returning to Nepal as although '*the constitution of Nepal declares that everyone has the right to practice*

their own beliefs ... [it] does not allow anyone to convert other people into their religion. Such perpetrators are fined or imprisoned'.

Ombudsman assessment/recommendation

- 18. Mr X has spent more than two years in immigration detention, primarily due to his unsuccessful claim for a PV and the ongoing litigation surrounding that decision. The Ombudsman has no comment to make on this matter.
- 19. The Ombudsman notes that Mr X's involuntary removal is imminent and as such has no recommendation to make on his current detention arrangements. Should Mr X's removal be delayed, the Ombudsman may be required to prepare another report on Mr X's circumstances in six months time if he remains in detention. The Ombudsman will at that time review Mr X's circumstances, considering the impact of detention on his health and the suitability of continued detention in an immigration facility.

Dr Vivienne Thom
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Dr Vivienne Thom
Acting Commonwealth and Immigration Ombudsman

19 February 2007
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Date

