

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

*Under s 486O of the Migration Act 1958*

*Personal identifier: 131/07*

## **Principal facts**

### *Personal details*

1. Mr X is aged 40 and is a citizen of Spain. He has resided in Australia since he was 14 years of age. He has two sons, Master A and Master B (aged 17 and 13 respectively), both Australian citizens who reside with their respective mothers in Australia. Mr X's parents (both Australian citizens) and two siblings reside in Australia.

### *Detention history*

2. On 25 May 2002, the Minister cancelled Mr X's permanent visa pursuant to s 501(2) of the *Migration Act 1958* on character grounds. Mr X was detained under s 189(1) on 13 October 2002 and placed at Villawood Immigration Detention Facility (IDF) the following day. He was transferred to the NSW Metropolitan Remand and Reception Centre from 1 January 2003 to 16 January 2003. On 16 April 2004 he was released from detention as a result of a successful court appeal. He was re-detained on 8 March 2005, when this appeal decision was quashed, and returned to Villawood IDF.
3. Mr X was released again from detention on 20 February 2007 when the Minister set aside the cancellation decision and his visa was re-enlivened.

### *Visa applications*

4. Mr X arrived in Australia with his immediate family as holders of Transitional Permanent Visas (October 1980); submission sent to the delegate of the Minister for consideration of signing a deportation order in respect of Mr X (February 1992); the delegate issued a warning to Mr X (March 1992); Notice of Intention to cancel visa was issued (November 2001); visa was cancelled by the Minister (May 2002); decision appealed to the High Court (September 2002), proceeding remitted to the Federal Court (FC) (February 2003); on appeal, cancellation decision was set aside by the FC (April 2004); FC decision was set aside by the Full Federal Court and the Minister's appeal was allowed (February 2005); submission before the Minister for the possible use of his detention intervention powers (December 2005), no outcome as yet.
5. The Department of Immigration and Citizenship (DIAC) advises that Mr X's visa was re-enlivened (February 2007) as a result of jurisdictional error in the cancellation decision, due to the incorrect visa being referred to, and for containing information detrimental to Mr X, on which he was not given the opportunity to comment. DIAC advises that Mr X's case will be assessed for re-cancellation action.

### *Current immigration status*

6. Mr X is currently living lawfully in the community.

### *Removal details*

7. DIAC has received advice from Spanish Consular officials that clearance for the issue of travel documents has been provided. DIAC is making arrangements for Mr X's removal pending the outcome of a review of his visa cancellation, which is being undertaken in response to the Ombudsman's report *Administration of s 501 of the Migration Act 1958 as it applies to long-term residents* (February 2006).

## **Ombudsman consideration**

8. DIAC reports to the Ombudsman under s 486N are dated 23 December 2005, 9 January 2006, 22 March 2006, and 8 September 2006. DIAC advised that the report of 9 January 2006 was not required according to the legislation.
9. Ombudsman staff interviewed Mr X at Villawood IDF on 20 February 2006 and have had several telephone discussions with him after that date.
10. Ombudsman staff sighted an affidavit prepared by Ms Y (Master B's mother) dated 27 September 2002, and a DIAC Ministerial detention intervention submission, undated. Staff also spoke to Ms Y by telephone on 8 March 2006.

## **Key issues**

### *Criminal history*

11. DIAC advised that between 1989 and 2001 Mr X was convicted for the offences: supplying a prohibited drug (two occasions), robbery, larceny, possession of a prohibited drug, possession of equipment for administering a prohibited drug, self-administering a prohibited drug, entering enclosed land not prescribed without lawful excuse, goods in personal custody reasonably suspected of being stolen, shoplifting, goods in personal custody, common assault, contravening an Apprehended Domestic Violence Order, smoking Indian Hemp, offensive behaviour, resisting arrest, refusal to leave premises, failure to leave licensed premises, mid-range prescribed concentration of alcohol and driving whilst licence cancelled.

### *Health and welfare*

12. DIAC advised that Mr X told a detention services officer in August 2006 that he had been injecting a medication, Buprenorphine (a drug of dependence used in maintenance pharmacotherapy programs) and more recently heroin. Mr X requested, and was placed upon, a methadone program by Dr Z, a drug and alcohol consultant. Mr X advised Ombudsman staff that he was on a reducing regime of methadone and hoped to be off it in four to six weeks.
13. DIAC advised that Mr X has been diagnosed with Hepatitis C, that he receives prescription medication for treatment of hand pain, and that he has a history of palpitations and post-palpitation chest pain (no abnormality detected). Mr X advised Ombudsman staff that he has no health concerns, although he is losing weight.

### *Best interests of the children*

14. Mr X has a number of family members residing in Australia, including two young sons. Although he has limited contact with Master A, who resides in Brisbane, he has a close relationship with his younger son, Master B, who resides in Sydney. Mr X advised that Master B visits him regularly at Villawood IDF and they talk often by phone. His parents also visit him every week.
15. Ms Y outlined concerns about the potential effect that Mr X's removal would have on Master B, particularly during this time in his life (puberty). In her affidavit, Ms Y described Mr X as a loving and devoted father and said '*If [Mr X] was to be deported, I feel that the consequence of deportation on [Master B] would be catastrophic. I have no idea how I would be able to explain this to [Master B] and probably in the short term would not be able to do so. [Master B] adores his father and talks about him all the time. They have an excellent relationship and deportation would break [Master B's] heart.*'
16. The FC in its decision (April 2004), referred to an affidavit that was supplied by Mr X's mother, '[Master B] loved and worshipped his father, the Applicant, and that he loved and adored [Master B]. The two were, she said, very close. She said that they would come to

*see her every Sunday and spend the whole day with her and that the family days were very special. She said that [Master B] spent a lot of time with her son and that if he were to be deported to Spain it would have a terrible effect on her and her husband. They were a very close family. She said also that she and her husband had sold their previous house to purchase a house which had an extension where the Applicant could live with them and where they could look after him. She said that she would find it financially difficult to travel to Spain to see the Applicant if he were deported'.*

#### *Attitude to removal*

17. At interview, Mr X stated that he did not want to be removed from Australia as his sons and parents reside here.

#### **Ombudsman assessment/recommendation**

18. In May 2002, the Minister formed the view that Mr X did not pass the character test because he had a substantial criminal record within the meaning of s 501 and cancelled his visa.
19. In February 2006, the Ombudsman released his report into the cancellation of visas of long-term permanent residents on character grounds. The report made recommendations that, if implemented, may change the immigration status of those subject to the report. Features of this and other cases to which the report draws attention include: Mr X arrived in Australia at the age of 14, has lived in Australia for 27 years and has strong family ties here, he has no similar ties to Spain, and it is likely that his removal would cause hardship both to him and to his family in Australia.
20. The Ombudsman draws particular attention to the relevance in Mr X's case of recommendation 4 in the report – that an independent psychological assessment be obtained to consider the impact that the person's removal would have on any Australian citizen children. Mr X has two children in Australia and the information available to the Ombudsman is that his relationship with his son Master B is particularly close. The Ombudsman also draws attention to the comments made by the FFC (February 2005) in Mr X's matter where the Court indicated that it should be assumed that the best interests of the child would be taken into account, without any need for the issue to be raised with the decision-maker. The Court suggested that the practice be adopted *'in every visa cancellation case in which the visa holder has young children who are citizens or permanent residents of Australia, of obtaining an independent report addressing the effect cancelling the visa would have on the welfare of the children ... whether it [the practice] should be introduced is a matter within the province of the Executive Government. It is, however, not implausible that such a practice would not only protect the interests of vulnerable young Australians, but prove to be cost effective in reducing litigation arising out of Ministerial decisions'*.
21. The cancellation of Mr X's visa was set aside by the Minister in February 2007 because of defects, being jurisdictional error, in the cancellation process. Mr X's Transitional Permanent Visa was re-enlivened and Mr X is currently living lawfully in the community. DIAC has advised that Mr X's case will be reassessed for re-cancellation action. The Ombudsman notes that Mr X has served custodial sentences for his crimes and has been in immigration detention for two periods totalling over 42 months. The Ombudsman has not investigated the errors in relation to the cancellation of Mr X's visa nor formed a view about the impact such errors have on the legality of part or all of Mr X's time in immigration detention. This is a matter that only a court of competent jurisdiction could determine.

22. The Ombudsman **recommends** that any further consideration of Mr X's case be conducted in accordance with the improved s 501 visa cancellation processes that the Department is implementing, having regard in particular to the best interests of the children.



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Dr Vivienne Thom  
Acting Commonwealth and Immigration Ombudsman

14.3.07

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Date

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