

REPORT FOR TABLING IN PARLIAMENT BY THE COMMONWEALTH AND IMMIGRATION OMBUDSMAN

Under s 486O of the Migration Act 1958

Personal identifier: 134/07

This is the combined second, third and fourth s 486O report by the Ombudsman on Mr X as he has remained in immigration detention since the Ombudsman's first report (17/05). The Ombudsman's first report was sent to the Minister on 9 December 2005 and tabled in Parliament on 29 March 2006. This report updates the material in that report and should be read in conjunction with it.

Principal facts

Detention history

1. At the time of the Ombudsman's last report, Mr X was in immigration detention at Glenside Campus psychiatric facility. He was then placed on a Residence Determination (RD) (March 2006), initially at Glenside Campus and then in the community (19 April 2006).

Visa applications

2. Report 17/05 noted that Mr X had made a number of applications to the Minister under s 48B, s 195A, s 197AB and s 501J (October 2004 - July 2005); the Minister refused these applications (March 2006) but indicated that Mr X's case had been referred to the War Crimes Taskforce within the Department (DIAC) and she would consider another submission after it completed its investigation; the War Crimes Taskforce completed its investigation (June 2006); the Attorney General's Department advised that Australia does not have jurisdiction to prosecute Mr X for war crimes (September 2006).
3. Mr X made combined submissions to the Minister (March and April 2006); DIAC is preparing another submission to the Minister under s 195A and s 501J (January 2007).

Current immigration status

4. Mr X is an unlawful non-citizen who remains in immigration detention but is living in the community on a RD.

Removal

5. DIAC stated that it has not actively sought to remove Mr X recently due to the outstanding Ministerial requests and the War Crimes Taskforce investigation.

Ombudsman consideration

6. DIAC's further reports to the Ombudsman under s 486N are dated 12 January 2006, 6 July 2006 and 9 January 2007. The Minister's Statement to Parliament on Report 17/05 is dated 28 March 2006.
7. Ombudsman staff interviewed Mr X on 14 June 2006 along with his lawyer.
8. Ombudsman staff sighted a number of documents including: a psychiatric report from Dr A dated 4 July 2006; a draft report from Glenside Campus dated 6 March 2006; a medical report from Dr B of the Royal Adelaide Hospital dated 27 July 2006; an International Health and Medical Services (IHMS) summary report by Dr C dated 5 July 2006; DIAC's International Treaty Obligation Assessment (ITOA) dated 17 January 2006; the United Nations Human Rights Committee's (UNHRC) determination CCPR/C/88/D/1324/2004 dated 13 November 2006; letters from the Public Advocate

(SA), Mr D, dated 28 December 2006 and 2 February 2007; and all documents from DIAC's files.

Key issues

Health and welfare

9. In Report 17/05, the Ombudsman noted that Mr X has a Major Depressive Disorder, anxiety, complex Post traumatic stress disorder (PTSD) and Type 1 diabetes, which requires self-administered insulin. DIAC reports that Mr X's condition improved in Glenside Campus where he was able to be partly self-sufficient, living in an occupational therapy unit on the campus with another detainee. Mr X was placed on a RD on 30 March 2006 and left Glenside Campus on 19 April 2006.
10. His treating psychiatrist, Dr A, commented on his condition in July 2006: *'There is a great sense of despondency that persists due to the uncertainty of his future. Although he has denied active suicidal ideas his motivation and sense of helplessness may lead to an active depression ... His mental state remains significantly affected due to the sense of not knowing what might happen to him in the future'*. In his interview with Ombudsman staff, Mr X commented that he feels quite uncomfortable in public and socially isolated. He is afraid *'because immigration can come and take me at any time'* and thinks the fear would pass if he had a permanent visa.
11. Dr A stated that Mr X was at risk of his condition worsening if he continued to live in a state of uncertainty, noting *'I do believe that unless quick positive action happens to his visa status ... Mr X's functioning will deteriorate. He may even need rehospitalization and [the] level of his mental health with deteriorate'*. She said that he is at risk of developing demoralisation syndrome *'a common syndrome that happens on a background of chronic uncertainty. It makes people lose their skills, withdrawing into themselves and make it harder for them to regain their functional status'*. She stated *'I would appreciate it if the Commonwealth Ombudsman realizes how important it is for Mr X to have a degree of certainty about his future'*.

Diabetes

12. Dr B commented in July 2006 that Mr X's depression was having an impact on his diabetes, noting *'Mr X reported feeling quite depressed and occasionally forgetting to self-inject insulin prior to meals ... His blood glucose levels have been higher in recent months ... He has not been engaging in regular physical exercise or adhering strictly to a diabetic diet, as he has been feeling more depressed in the cold winter months, and this also had a negative impact on his blood glucose control'*. DIAC reports that it has facilitated a request from a psychiatrist to pay for Mr X's gym membership for his physical and mental health.
13. Report 17/05 noted the expert advice that Mr X could die from a diabetic coma *'within 2 to 3 weeks'* if he did not have access to his diabetes medication. Dr B reports that other complications are also possible including *'kidney disease, eye complications with the risk of deteriorating vision and possible blindness and foot problems'*. In response to the suggestion that Mr X would not be able to afford diabetes medicine if removed to Bangladesh, the DIAC briefing to the Minister stated *'Countervailing country information from the Post in Dhaka has been sought ... It would appear that the country has adequate facilities for treatment of diabetes that are easily accessible and the cost of insulin is within the financial reach of most patients. The Bangladesh Institute of Research and Rehabilitation in Diabetes Endocrine and Metabolic Disorders ... reserves 100 beds for the poor and all medical treatment including insulin is provided free of charge to these patients'*. The World Diabetes Foundation reports that *'The prevalence of*

diabetes in Bangladesh is estimated to be 5.2% among the adult population. It is estimated that almost 3 million people have diabetes in Bangladesh.

Claim regarding drug smuggling

14. Report 17/05 noted Mr X's claim that he used the term 'drugs' to describe the smuggling of pharmaceuticals, not illicit drugs. However, Report 17/05 misquoted Mr X's argument when it stated *'He claims ... he has not had an opportunity to make a submission on the point to the AAT [Administrative Appeals Tribunal] or FC [Federal Court]'*. To the contrary, a file note on the DIAC file by a Senior Lawyer from the Australian Government Solicitor indicates that Mr X's counsel raised the issue before the Federal Court (FC) and was given an adjournment to *'consider transcripts or tapes of the applicant's interviews ... and his evidence before the AAT in order to decide whether any reviewable ground could be made out'*. Mr X's Circle of Friends' submission states Mr X *'was advised by Mr [E] not to pursue this argument ... As a result of Mr [E's] advice, no tribunal of fact has been asked to consider the issue of illegal trafficking in medicine'*.

Protection visa claim

15. As discussed in Report 17/05, the Administrative Appeals Tribunal (AAT) and the FC did not consider Mr X's claim that there was a risk he would be ill-treated or killed if returned to Bangladesh. Since then, DIAC has conducted another ITOA, which assesses whether Mr X's return would breach Australia's obligations under the International Covenant on Civil and Political Rights, and other treaties.
16. The ITOA found *'Because of the exposure of Mr X's circumstances in Australia, particularly the fact that he was a member of an "outlawed communist party" and that his protection visa application was rejected because of "crimes" he had committed, there exists a very real possibility that he will have attracted the interest of Bangladesh security forces and that he would be detained, legally or illegally, upon return to Bangladesh. Such detention would, given the human rights record of the Bangladesh security forces, raise the possibility of torture and/or extrajudicial execution'*. In summary, DIAC advises the Minister *'there is a real chance he may face serious human rights abuse in Bangladesh'*.

War Crimes Taskforce

17. In March 2006, DIAC noted that Mr X's case had been referred to the newly established War Crimes Taskforce *'for an investigation into whether or not he could be charged with involvement in war crimes, crimes against humanity or genocide'*.
18. DIAC advised the Minister that *'To defer a decision on Mr X's case, until the referral to the AFP has been finalised and outcome known, runs the risk of his psychological state deteriorating further'*. The Minister refused Mr X's application but indicated that she would be willing to consider it again when the War Crimes Taskforce had completed its investigation. In April 2006, the War Crimes Taskforce requested a legal opinion from the Attorney-General's Department on jurisdiction. In September 2006, the Attorney-General's Department advised *'The international law elements of the offences ... would be an impediment to the successful prosecution of Mr X'*.
19. The proposition that Mr X had committed crimes against humanity had already been rejected by the AAT in June 2001 – *'The Tribunal finds, therefore, that there are not serious reasons for considering that the applicant has committed, either as a principal or as an accomplice, a crime against humanity'*.

Human Rights Committee

20. In November 2004, Mr X lodged a complaint to the UNHRC. In November 2006, the UNHRC issued its determination that Australia had violated Mr X's rights under article

9 paragraphs 1 and 4 of the International Convention on Civil and Political Rights (ICCPR).

21. Article 9(1) protects against arbitrary detention. The UNHRC commented *'every decision to keep a person in detention should be open to periodical review, in order to reassess the necessity of detention and detention should not continue beyond the period for which a State party can provide appropriate justification'*. It found *'The State party has not provided any other justification, in relation to the author's particular case, which would justify his continued detention for a period of over seven years as at present. The additional fact that the author has become mentally ill during this period should have been a sufficient ground for a prompt and substantive review of his detention'*. The UNHRC rejected Australia's argument that it is *'its general experience that asylum seekers abscond if not retained in custody'*, stating *'from the time of his placement in an open institution in July 2005 until the present time, he has not attempted to abscond'*.
22. Article 9(4) provides for Mr X's detention to be reviewed by a court. The UNHRC concluded that his right under article 9(4) was violated and noted *'the Australian courts' control and power to order the release of an individual remain limited to a formal determination whether this individual is an unlawful non-citizen within the narrow confines of the Migration Act. If the criteria for such determination are met, the courts have no power to review any substantive grounds for the continued detention of an individual and to order his or her release'*.
23. Mr X had also claimed breaches of article 7 and 10(1), which relate to cruel, inhuman or degrading treatment or punishment and the right to humane treatment in detention. The UNHRC found that his application under these articles was inadmissible as he still had the possibility of a domestic remedy because the Minister was considering his application under s 501J.
24. The UNHRC concluded *'the State party has undertaken to ensure to all individuals within its territory ... the rights recognised in the Covenant and to provide an effective and enforceable remedy in case a violation has been established'*. It states *'the State party is under an obligation to provide the author with an effective remedy, including release and appropriate compensation'*.

Residence determination

25. In his interview with Ombudsman staff, Mr X commented that a Residence Determination does not allow him to work, study or attend courses. Dr A comments that this is a problem for his recovery, stating *'Mr X would benefit from vocational training, which needs to be organized as soon as possible'*. The Public Advocate has noted that *'we believe his chances of a decent recovery diminish with each day he remains in detention'*.

Ombudsman assessment/recommendation

26. Report 17/05 recommended that Mr X not be returned to an immigration detention facility. The Minister's Statement to Parliament said that she would rely on advice from medical health professionals. Shortly afterwards, Mr X was placed on a RD, which enabled him to live in the community.
27. Although Mr X is residing in the community, he remains detained while on a RD. The UNHRC has recently found that Australia has breached its obligations under art 9(1) to protect Mr X from arbitrary detention and is under an obligation to release him. The UNHRC found that the Australian Government should have periodically reviewed his case to assess the necessity of detention. The UNHRC considered that Mr X's poor mental health strengthened the case for a *'prompt and substantive review of his detention'*, and concluded that Mr X has demonstrated he is unlikely to abscond if he lives outside of the detention centre.

28. Report 17/05 recommended that the Minister give urgent attention to Mr X's s 501J application and stated that there were a number of considerations that pointed in favour of the Minister granting Mr X a permanent visa on humanitarian grounds. The Minister refused the s 501J submission but indicated she would invite another submission once the War Crimes Taskforce completed its investigation. DIAC indicates the matter will soon be referred to the Minister.
29. The Ombudsman considers that the case for granting Mr X a permanent visa has strengthened since Report 17/05. Dr A has stated that the continuing lack of certainty is contributing to Mr X's despondency and he is in danger of becoming further demoralised. There is a medical opinion that Mr X could die from diabetes if unable to receive treatment in Bangladesh and it is far from certain that he will get access to treatment. The UNHRC has handed down its findings in relation to Mr X and has recommended that he be granted compensation. Significantly, DIAC has completed a recent ITOA that finds Mr X faces a real risk of '*serious human rights abuse in Bangladesh*'. The Ombudsman **recommends** that the Minister give urgent consideration to exercising his powers under s 501J to grant Mr X a permanent visa on humanitarian grounds.
30. In the light of Mr X's need for ongoing psychiatric support, the Ombudsman **recommends** that DIAC continue providing Mr X with assistance in accessing services that support his physical and mental health.



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Dr Vivienne Thom
Acting Commonwealth and Immigration Ombudsman

20 March 2007

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Date