

REPORT FOR TABLING IN PARLIAMENT BY THE COMMONWEALTH AND IMMIGRATION OMBUDSMAN

Under s 486O of the Migration Act 1958

Personal identifier: 215/07

Principal facts

Personal details

1. Ms X, aged 40, and her son Master Y, aged 11, are citizens of Indonesia. Ms X's mother and siblings, and her son's father, from whom she is separated, live in Indonesia. Ms X has a sister who is a permanent resident in Australia.

Detention history

2. The Department (DIAC) cancelled Ms X's visa under s 116 of the *Migration Act 1958* for working in breach of her Bridging Visa (BV) conditions and failing to notify DIAC of a change of address (November 2002). Ms X and Y were located and detained under s 189(1) and placed at Villawood Immigration Detention Centre (IDC) (October 2004). Ms X declined an offer to transfer to the Port Augusta Immigration Residential Housing Complex (May 2005). The former Minister exercised her power under s 197AB to allow Ms X and Y to live in Community Detention (July 2005).

Visa applications

3. Ms X arrived in Australia (February 2000) on a Short Stay Tourist Visa with her son; applied for a Protection Visa (PV), an associated BV was granted, PV application refused (March 2000); PV refusal affirmed by the Refugee Review Tribunal (RRT) (March 2001); associated BV ceased (April 2001); joined *Lie* class action at High Court (HC), granted associated BV (May 2001); BV cancelled pursuant to s 116 (November 2002); HC dismissed class action (June 2003).
4. Ms X applied for a BV, refused (October 2004); the Migration Review Tribunal affirmed the decision (November 2004); made a s 417 request (November 2004), the Minister declined to consider (April 2005), further information pertaining to the s 417 request was provided, assessed as not meeting the guidelines for referral to the Minister (May 2005); BV application made and withdrawn (May 2005).
5. Ms X applied to the Federal Magistrates Court (FMC) for judicial review of the RRT decision, associated BV request refused (May 2005), the Minister intervened and placed them in Community Detention (July 2005); the FMC dismissed application (November 2005); appeal of FMC decision to the Full Federal Court (FFC) (December 2005), the FFC dismissed the appeal (June 2006).
6. First stage s 417 submission put to the Minister (August 2006); repeat s 417 requests lodged on behalf of Ms X and Y (June to November 2006), assessed as not meeting the guidelines (November 2006); combined s 48B/417 request lodged (December 2006), not referred to the Minister (January 2007).
7. Ms X lodged a PV application on behalf of Y with herself as a dependent applicant (December 2006); Ms X's dependent application assessed as invalid due to s 48A bar (January 2007); DIAC initiated a s 48B assessment for Ms X, assessed as not meeting the guidelines for referral to the Minister (January 2007); Y's PV application refused, appeal to the RRT (January 2007); DIAC initiated another s 48B assessment for Ms X (February 2007); s 48B assessment put on hold pending RRT decision (February 2007),

the RRT affirmed PV refusal (April 2007); s 48B assessment assessed as not meeting the guidelines for referral to the Minister (June 2007).

Current immigration status

8. Ms X and Y are unlawful non-citizens residing in Community Detention.

Removal details

9. DIAC reported that Ms X and Y were due to be removed in May 2005 but the removal was aborted because Ms X had made an application to the Minister. Another removal planned for November 2006 was postponed because Y had made a PV application.

Ombudsman consideration

10. DIAC reports to the Ombudsman under s 486N were dated 6 November 2006 and 3 May 2007.
11. Ombudsman staff interviewed Ms X on 13 February 2007.
12. Ombudsman staff have sighted the following documents: a letter from Dr A, Senior Staff Specialist in Child and Adolescent Psychiatry, University of New South Wales, dated 19 September 2006; Professional Support Services (PSS) psychological summary reports for Ms X and Y, both dated 25 April 2007; and multiple letters of support from the Anglican church community.

Key issues

Health and welfare

13. DIAC advises that Ms X and Y have not had any significant health issues while in detention. Dr A's report states that neither Ms X nor Y suffer from any psychiatric disorder.
14. The PSS reports note that Ms X sought assistance for problems relating to her son's poor attendance and performance at school. It was reported that Y's schoolwork improved over the period of his involvement with PSS.

Attitude to removal

15. Ms X claims to fear being persecuted in Indonesia because she is a Christian. The RRT in 2007 found *'on the basis of the country information reports ... the authorities do take reasonable measures to provide protection to its citizens, including Christians'*.
16. Y was four years old when he came to Australia with his mother and is currently attending school. Ms X has expressed concern that Y will receive poor education and healthcare if returned to Indonesia and is likely to be physically disciplined in school. However, the RRT in 2007 found *'the applicant's mother will be able to provide fees for the applicant's access to education, hospital and medical treatment as required'* and her concern about physical discipline was not *'Convention related'*.
17. Ms X is also worried that her son will find it difficult to adjust to life back in Indonesia. Dr A wrote *'Y ... thinks of himself as Australian'* and commented that the shock of forced removal could make *'Y and/or his mother far more likely to develop psychiatric disorders, and would significantly reduce their general well-being'*.

Attempted removal

18. Ms X was concerned about the way DIAC attempted to remove her and her son in May 2005. She says she was informed of the proposed removal at 6pm and told to be ready at 5:30am the next morning. Less than 48 hours notice of a removal is contrary to the policy at the time. Migration Series Instruction (MSI) 267 Advice of Removal Arrangements provides that *'the removee should be given reasonable notice of their*

removal arrangements (at least 48 hours before departure) unless there are significant security reasons or other risks ... for a later notification'. In another case, Report 40/06, the Ombudsman expressed concern that the requirement to give 48 hours notice was not followed. Following this report, DIAC replaced MSI 267 with MSI 408 Removal from Australia, making it clear that 48 hours notice must be given in all cases, the only exceptions being *'Where an officer believes that less than 48 hours notice of removal should be given, to minimise the risk of the person harming themselves or others, or the risk of the removal being disrupted, written approval must be obtained from a State/Territory Director or an SES officer'*.

19. Ms X said that she advised the DIAC officer that she had an outstanding Ministerial application but was told the computer records did not verify her claim. Ms X said that it was not until she reached the airport that any serious attempt was made to ascertain the truth of her story, and that a DIAC employee made several phone calls which resulted in the removal being cancelled 15 minutes before departure. MSI 376 *Implementation of Enforced Departures* provides that *'officers arranging removal who receive a request, or become aware of a request, for the Minister to use his intervention powers are to contact the appropriate Ministerial Intervention Unit immediately'*. According to Ms X, the first DIAC officer did not follow this protocol because he did not check on her claim that she had made a Ministerial request. The Ombudsman has not raised these matters with DIAC but includes them in this report for the sake of completeness and so that DIAC can undertake its own investigations, if necessary.

Ombudsman assessment/recommendation

20. Ms X and her son will have been in detention for three years in October 2007, primarily due to ongoing litigation relating to unsuccessful claims for a PV. The Ombudsman notes that Ms X and Y's claims for protection have been tested in the RRT and it was found that they were not owed protection by Australia. The Ombudsman has no further comments to make on this matter.
21. DIAC advises that removal proceedings were put on hold pending the outcome of their outstanding Ministerial request under s 48B, which was assessed as not meeting the Minister's guidelines for referral. It is therefore possible that removal proceedings will recommence.
22. If Ms X and Y remain in detention, a third report from DIAC under s 486N will fall due in November 2007. The Ombudsman will, at that time, review Ms X's circumstances, considering again the impact of detention upon her and her son and the suitability of continued detention. Ms X has expressed a desire to work and it may be more appropriate for her to be placed onto a visa with work rights if she is likely to remain in Australia for a prolonged period. The Ombudsman makes no recommendations.



Prof. John McMillan
Commonwealth and Immigration Ombudsman

19 July 2007
Date