

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

*Under s 486O of the Migration Act 1958*

*Personal identifier: 216/07*

## **Principal facts**

### *Personal details*

1. Mr X and Mrs X, aged 40 and 38 respectively, are citizens of Tonga. They have four children: Master A aged 14 and Miss B aged 12 are citizens of Tonga; Miss C aged nine and Master D aged two were born in Australia.
2. Master D was born in March 2005, after his parents were detained at Villawood Immigration Detention Centre (IDC). Although the Department (DIAC) provided an independent s 486N report regarding Master D, he is included in this report with his family.
3. Mr X's family are in Tonga and Mrs X's three brothers, one sister and parents are all permanent citizens of Australia.

### *Detention history*

4. Mr and Mrs X and their two eldest children, Master A and Miss B, arrived in Australia by plane on 19 November 1996. The family were located on 14 November 2004 by DIAC after it was determined that they had overstayed their Bridging Visas (BV). They were detained under s 189(1) and placed at Villawood IDC then transferred on 28 July 2005 to Community Detention.

### *Visa applications*

5. The X family arrived in Australia on a Long Stay Tourist Visa (TV) (November 1996); Mrs X and Master A lodged Protection Visa (PV) applications and Mr X departed Australia (January 1997); Mr X returned on a TV (April 1997); Mr X and Miss B lodged PV applications (July 1997), PV applications refused (September 1997 and August 1997); Mr X and Miss B sought a merits review from the Refugee Review Tribunal (RRT), followed by Mrs X and Master A (August 1997 and October 1997), respective reviews withdrawn (February 1998 and January 1998); the X family then became unlawful (February 1998); DIAC located them as BV overstayers (March 2002) and granted further BVs (valid until 4 May 2002).
6. The X family lodged a combined s 417/48B request seeking favourable exercise of the Minister's humanitarian discretion and/or discretion to lodge another PV (April 2002); the s 48B was found not to fall within the guidelines for referral to the Minister, the family sought review of this refusal at the Federal Court (FC) (April 2002); the s 417 request was finalised by DIAC and as there was no review decision made by the RRT the Minister's public interest powers under s 417 could not be enlivened (May 2002); FC appeal dismissed as incompetent (June 2002); subsequent appeal to the Full Federal Court dismissed as incompetent (November 2002); the X family were detained (November 2004).
7. Two s 417 requests lodged (December 2004 and June 2005), refused on the same grounds as the May 2002 refusals (December 2004 and July 2005); DIAC initiated a combined s 195A/197AB request on behalf of the X family, the family were then placed in Community Detention (July 2005); combined s 417/48B request lodged (December 2006), request assessed as not meeting the guidelines for referral to the Minister

(January 2007); DIAC advises that it is preparing a s 195A submission for the Minister's consideration, including the option of granting a Removal Pending Bridging Visa.

#### *Current immigration status*

8. The X family are unlawful non-citizens residing in Community Detention.

#### *Removal details*

9. DIAC advises that when the X family were located in March 2002, they gave an assurance that they would depart Australia within 48 hours, therefore further BVs were granted (valid until 4 May 2002). Despite the assurances, they failed to depart.
10. Mrs X advised that after the X family was detained in November 2004, she booked tickets for the family's return to Tonga and sought a travel document for Miss C from the Consulate General of the Kingdom of Tonga. On 9 December 2004 the Consulate advised that it was unable to issue a travel document, as Miss C had not held a Tongan passport previously. Mrs X advises that the family missed their flights due to the delay in receiving this information.
11. DIAC advises that Mr and Mrs X refuse to apply for travel documents on behalf of their Australian born children. DIAC also advises that it has made considerable efforts to arrange the removal of the X family to Tonga, however confirmed that one impediment is the uncertainty around the status of the Australian born children if they were to be removed to Tonga, and the potential for them to be regarded as stateless.

#### *Ombudsman consideration*

12. DIAC reports to the Ombudsman under s 486N dated 24 November 2006 and 15 May 2007, and DIAC's report concerning Master D dated 2 April 2007.
13. Ombudsman staff interviewed Mrs X in the community on 14 February 2007.
14. Ombudsman staff sighted the following documents: a letter from the Consulate General of the Kingdom of Tonga to Mrs X dated 9 December 2004; a letter to DIAC by Master A dated 25 June 2005; a letter by Mrs X to Mr Y, migration agent, dated 4 December 2006; a s 417/48B request by Mr Y dated 12 December 2006.

### **Key issues**

#### *Health and welfare*

15. DIAC advises that the X family have experienced no major health concerns. At interview Mrs X said that she experiences headaches when she thinks about her detention experience and that her husband feels 'stressed', however they have elected not to seek treatment. She said that the children experienced skin problems while in Villawood IDC, however they are physically healthy now.

#### *Attitude to removal*

16. At interview Mrs X said that she came to Australia to care for her mother who was sick, and decided to stay at her mother's insistence. She said that she had a good job in Tonga before she left, and mistakenly identified herself as a refugee to the Australian Government after receiving poor advice. Mrs X said that after she realised the distinction between a PV and a permanent visa she withdrew from the RRT review. The December 2006 s 417/48B request claimed that this event has undermined the possibility for the family's case to be recognised on humanitarian grounds, and that intervention and discretion appeals have been unsuccessful as their withdrawal from the initial appeal meant that they did not exhaust all forms of review.
17. Mrs X said that her family does not wish to return to Tonga, saying 'I have to fight for my life and my kids'. Mrs X does not believe that their life will be 'good' there, especially as

Tonga is currently experiencing instability. Mrs X said that it will be difficult to find work, the cost of living is expensive and the children will not have access to the same standard of education. She also said that their detention debt to the Commonwealth will preclude them from returning to Australia.

18. In Master A's letter he stated *'if I go back I won't have the wonderful education that this country has, I will miss my grandparents, uncles, aunties and my dear cousins'*. He further stated when his mother told him that the family may be removed from Australia he felt *'depressed, because I won't use any of my knowledge'*.

#### *Australian citizenship*

19. Prior to 20 August 1986, children born in Australia were automatically granted citizenship under s 12 of the *Australian Citizenship Act 2007*. Parliament amended this legislation to note that a child born in Australia to neither citizen nor permanent resident parents must be *'ordinarily resident'* in Australia for a period of 10 years to become a citizen. Depending on circumstances, Miss C will become an Australian citizen by virtue of this provision in September 2007.
20. The Ombudsman's report into children in detention<sup>1</sup> notes that while *'In principle there is nothing to stop DIAC, in the routine administration of the Migration Act, from arranging for the removal of a child who is an unlawful non-citizen at any time prior to the child turning 10 ... the Citizenship Act confers the right of citizenship when certain requirements are fulfilled, and it would be wrong for a government agency to take action specifically designed to pre-empt that opportunity'*. If the family were to be removed, Miss C would still be entitled to pursue the option of citizenship offshore. The Ombudsman understands that even if Miss C obtains Australian citizenship and the X family are removed, Mr and Mrs X can lawfully request that Miss C be *'removed'* with them.

#### *Other detention issues*

21. At interview Mrs X said that while in detention the children *'saw things they were not supposed to see'*, such as people jumping from the roof and self-harming. Mrs X said that their behaviour changed in response to witnessing such events. Mrs X said that she did not always feel safe in detention, as their room did not lock.
22. Mrs X claimed that when she went to hospital to give birth to Master D, she had to convince Global Solutions Limited (GSL) staff that her husband would not abscond if he was allowed to accompany her. She also expressed distress that guards were at the hospital 24 hours a day with her, and that she felt *'bad'* taking her baby back into the detention environment five days later.
23. Mrs X said that when the children went on excursions they were sad upon returning to Villawood IDC, and were ashamed that GSL staff took them to school. She stated that they are happier now that they are in Community Detention.
24. From the information available to the Ombudsman, it is possible that the X family may be affected by the Federal Court (FC) decision in *Srey*<sup>2</sup> where the Court was asked to consider whether Mr Srey had been properly notified in accordance with s 66 of the

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<sup>1</sup> *'Report into Referred Immigration Cases: Children in Detention'*, December 2006, Report by the Commonwealth and Immigration Ombudsman, Prof. John McMillan, Report No. 08/2006, Commonwealth Ombudsman, Canberra, Australia.

<sup>2</sup> *Chan Ta Srey v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 134 FCR 308; [2003] FCA 1292 (12 November 2003)

Migration Act of a decision to refuse his application for a visa to remain in Australia. The Court held that the letter of notification was ineffective, as it had been framed in reliance on a regulation that had been declared invalid. The ruling could potentially apply to any visa refusal letter posted to a person in Australia during the period of the regulation's invalidity (between 1 September 1994 and 30 June 2000). The ruling in *Srey* had two immediate and important consequences: a letter that failed to notify a person in accordance with s 66 would not cause their bridging visa to cease; and the person would remain a bridging visa holder who was not liable to be detained; and the person would still have the option of pursuing an application for review by a tribunal of the visa refusal decision. The Ombudsman suggests that DIAC determine whether the X family is affected by the *Srey* decision as this could mean that they held valid visas at the time of their initial determination and may not have been unlawful non-citizens since that time.

### *Community Detention*

25. Mrs X said that she and her husband would prefer to be granted visas and allowed to work rather than remain in Community Detention supported by DIAC, as *'they give payment for family but I talked to them that week and I said "why you give that to us? We are healthy, we can do something, we don't want to rely on your money, why don't give us a working visa?" ... My kids need to get out and all the rules you gave us stop us from doing everything, so if we do something we have to let you know. It is like living in limbo'*.

### *Community support*


26. Mrs X said that they are members of the Latter Day Saints church. Mr X is a lay teacher on Sundays and during the week visits church members. The Bishop of their church is currently encouraging Mr X to use his English language skills in his teachings. Mrs X has taught weekly Sunday school. Mrs X said that *'because we don't have anything to do we volunteer to do things'*.
27. The family is also a part of the Australian League of Immigration Volunteers organisation and the children perform in the Aloha Dance troupe.


### **Ombudsman assessment/recommendation**

28. The X family have spent over two and a half years in immigration detention, consisting of nine months in Villawood IDC and the remaining time in Community Detention. The X family's case raises a number of competing but compelling considerations. On the one hand, Mr and Mrs X lived unlawfully in the community over two combined periods of approximately six and a half years, and did not depart when they were granted BVs for that purpose in 2002. Mr and Mrs X have been unsuccessful in their applications to stay in Australia. On the other hand, the length and indefinite nature of their detention and continuing uncertainty about their future is a matter of concern. The Ombudsman draws attention to the following aspects of the X family's circumstances that deserve consideration:
- It is now settled Government policy that it is unacceptable to detain children in immigration detention centres, particularly for lengthy periods of time. The X children spent eight months at Villawood IDC. It is clear from Mrs X's account of this time in detention that her children witnessed unfortunate events that would not normally come within the experience of young children, such as the attempts by other detainees to self-harm. Any ongoing impact on their development is not known as the family has elected to not seek professional treatment.
  - Miss C is likely to become an Australian citizen when she turns 10 in September 2007. If the X family are removed after that date they would be forced to choose between taking Miss C to Tonga, or leaving her in Australia, neither of which is a

desirable outcome. Both Miss C and Master D have no experience of living outside Australia.

- The family has shown an active willingness to integrate with the Australian community and are involved in activities within the Australian-Tongan community and their church. Mrs X's siblings and parents are all Australian citizens.
  - The family remains in detention and removal options continue to be frustrated, amongst other things, by uncertainties around Tongan law and the status of the children.
29. The situation of Australian citizen children deserves special mention and was raised in Reports 205/07 and 214/07. The Parliament, in amending the legislation in 1986, clearly sought to ensure that children born in Australia to unlawful non-citizen parents did not automatically gain citizenship simply by virtue of their birth. It is implicit in the legislative amendments, however, that by living in Australia for 10 years and gaining Australian citizenship, a child is then able to exercise their fundamental human right to live in their country of citizenship. While the Ombudsman recognises that Parliament must have envisaged that a possible consequence of the amendments was that Australian citizen children might depart if their parents were to be removed, the interests of a child is a matter that must be taken into account when a decision is being made concerning the immigration status of the parents.
30. A s 195A submission is currently with DIAC. The Ombudsman **recommends** that the Minister make a decision on this submission as soon as possible and in any case not later than the statutory period prescribed in s 486P for tabling this report in Parliament (*viz*, within 15 sitting days of receiving the report).

  
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Prof. John McMillan  
Commonwealth and Immigration Ombudsman

  
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Date