

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

*Under s 486O of the Migration Act 1958*

*Personal identifier: 439/08*

## **Principal facts**

### *Personal details*

1. Mr X is aged 29 and is a citizen of Sri Lanka of Sinhalese ethnicity. Four of Mr X's siblings live in Sri Lanka, and one in Italy. Mr X is in regular contact with his two sisters. Mr X's parents and another brother are deceased.

### *Detention history*

2. Mr X arrived by boat code-named the *Dulcot* at the Cocos (Keeling) Islands on 15 September 2001. He disembarked on 20 September 2001 and was detained under s 189(3) of the *Migration Act 1958* at the Cocos Islands Immigration Reception and Processing Centre (IRPC). In February 2002 he was transferred to the Christmas Island IRPC; in June 2002 to Perth Immigration Detention Centre (IDC); in August 2002 to Port Hedland IRPC; and in May 2004 to Baxter IDC. He remained at Baxter IDC until he was released from detention on a Removal Pending Bridging Visa (RPBV) on 14 July 2005.

### *Visa applications*

3. Mr X unsuccessfully applied for a Refugee and Humanitarian Visa in January 2002. The Department's (DIAC) decision in November 2002 to refuse Mr X's application for a permanent Protection Visa (PV) was affirmed by the Refugee Review Tribunal in December 2002. He unsuccessfully sought judicial review at the Federal Magistrates Court and the Federal Court (FC) (June 2003), appealed to the High Court (HC) for special leave (October 2003); s 48B request lodged (September 2004); HC action discontinued (November 2004); s 417 requests lodged (January and July 2005); Mr X applied for a RPBV (June 2005), RPBV granted (July 2005); s 417 request lodged (April 2006); first stage submission referred to the Minister (September 2006), Minister declined to intervene (November 2006); s 417 request initiated and assessed as not meeting the guidelines for referral to the Minister (January 2007); s 417 request and s 48B request initiated (March 2007), both requests not referred (May 2007); guidelines met on new s 417 request (July 2007), request currently before the Minister (June 2008).

### *Current immigration status*

4. Mr X resides lawfully in the community on a RPBV.

### *Removal details*

5. DIAC advises that Mr X was assessed in August 2007 and found to be unfit to travel. Mr X was reassessed by an independent psychiatrist in November 2007 and International Health and Medical Services confirmed that his findings were similar to the initial assessment.

## **Ombudsman consideration**

6. DIAC's report to the Ombudsman under s 486N is dated 8 November 2005.
7. Ombudsman staff interviewed Mr X on 8 March 2006.

8. Ombudsman staff have sighted the following documents: excerpts of DIAC's response to the Human Rights and Equal Opportunity Commission (HREOC) dated 12 May 2003; a letter to the Ombudsman from Mr X's lawyer, Ms A, dated 17 March 2006, including a s 417 submission to the Minister from Ms B of the Refugee Advocacy Services of South Australia (RASSA) dated 23 June 2005, and 15 letters of support from members of the community; a s 417 submission from Ms A, dated 27 April 2006; a Professional Support Services (PSS) psychological summary report, dated 30 August 2006; a report by Dr C, Southern Adelaide Health Service dated 8 February 2007; a report by Prof D, Royal Adelaide Hospital dated 7 June 2007; and a report by psychiatrist Dr E dated 13 November 2008.

## **Key issues**

### *Issues relating to the excision of the Cocos (Keeling) Islands*

9. Mr X arrived two days before the excision of the Cocos Islands from the Australian migration zone, which took effect from midday 17 September 2001. DIAC advised that at the time, it thought that all those aboard the *Dulcot* who were seeking asylum were 'offshore entry persons' and not eligible to apply for a PV. It later became clear to DIAC that this was incorrect in its understanding that Mr X had not entered the migration zone. Details of a similar case are discussed in Report 201/07.

### *Health and welfare*

10. Mr X stated that while in detention he felt '*mentally down, thoroughly disgusted and mentally derailed*', he could not sleep properly and got '*very weak*' from '*too much thinking*'. The PSS report noted that Mr X received supportive counselling nine times in the 12-month period preceding his release from detention.
11. Mr X was critical of the continuity of health care provided during his time in detention and said that when he attended appointments the medical personnel did not listen very well and he saw a different person on each occasion.
12. In his report Dr C stated that Mr X '*suffers from post-traumatic stress disorder [PTSD] and major depression*' and that he has experienced suicidal ideation. In November 2007, independent psychiatrist, Dr E stated that he did not identify ongoing symptoms of PTSD, however he advised that Mr X is experiencing '*chronic anxiety and dysphoria, largely in relation to his uncertain living situation in Australia*'. In April 2008 DIAC advised that IHMS accepted Dr E' report that there is a potential risk for suicide and self-harm and that this risk is likely to increase if Mr X was to return to Sri Lanka.

### *Attitude to removal*

13. Mr X claimed at the RRT hearing that he had been a victim of violence and that unknown assailants who supported an opposing political party had twice threatened him. Consequently he feared persecution and death if he was to be returned to Sri Lanka. While the RRT accepted that Mr X had experienced '*a frightening and painful incident*', it determined that he would not '*face harm amounting to persecution for a Convention reason if he were to return to Sri Lanka*'. The FC agreed that this was a factual finding open to the RRT to make, but noted that '*it might be debatable whether the consequences to the appellant of these two instances upon which he relied did not amount to serious harm*'.  
  
14. Mr X told Ombudsman staff that he remains fearful of his life if returned to Sri Lanka.

*Other detention issues*

15. Mr X was detained at Cocos Islands IRPC for five months, a former animal quarantine station which was reported by HREOC to be '*completely inappropriate for anything but initial health checks*'.<sup>1</sup>

*Community support*

16. Mr X has a brother-in-law, living in Perth, who arrived on the *Dulcot* and has since been granted a PV. Mr X advised Ombudsman staff that he maintains fortnightly contact with his brother-in-law.
17. Ombudsman staff sighted 16 letters of support for Mr X from members of the community attesting to Mr X's good character and he continues to be assisted by The Circle of Friends.

*Post-release issues*

21. Mr X told Ombudsman staff at interview that being on a RPBV is stressful as he has to visit DIAC each fortnight. Since his release on a RPBV, Mr X has gained employment, been active in community organisations and activities and formed a strong social network.

**Ombudsman assessment/recommendation**

22. When Mr X arrived in Australia, DIAC appears to have made an administrative error in classifying him as an offshore entry person from an excised zone. As a result, Mr X was prevented from making a PV application until one year after his arrival and was detained at Cocos Islands IRPC for five months.
23. Mr X's immigration status has continued to remain uncertain since he was granted a RPBV in July 2005 and it has now been over six years since his arrival in Australia. Mr X spent nearly four years in immigration detention and independent medical advice from November 2007 accepted by DIAC in April 2008 indicates that Mr X is not fit to travel now or in the near future.
24. The Ombudsman **recommends** that the Minister give further consideration to Mr X's case having regard to the length of Mr X's detention, his mental state and the apparent disadvantage he experienced as a result of DIAC's administrative errors.



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Dr Vivienne Thom  
Acting Commonwealth and Immigration Ombudsman

8 July 2008

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Date

<sup>1</sup> 'A Report on Visits to Immigration Detention Facilities by the Human Rights Commissioner 2001', 2002, Human Rights & Equal Opportunity Commission.