

REPORT FOR TABLING IN PARLIAMENT BY THE COMMONWEALTH AND IMMIGRATION OMBUDSMAN

Under s 486O of the Migration Act 1958

Personal identifier: 505/09

Principal facts

Personal details

1. Ms X is aged 27 and is a citizen of New Zealand. Ms X's immediate family live in Australia, including her mother, father, stepfather, stepmother, four siblings (three of whom are minors) and paternal grandparents. Ms X married Mr Y, a detainee at Villawood Immigration Detention Centre (IDC) on 14 November 2008.

Detention history

2. On 15 September 2006, Ms X was detained under s 189(1) of the *Migration Act 1958* after completing a custodial sentence at Emu Plains Correctional Facility, and placed at Villawood IDC.

Visa applications

3. Ms X arrived in Australia in June 1985 at the age of three with her family. In September 2006 Ms X's Special Category Visa (SCV) was cancelled under s 501; appealed cancellation to the Administrative Appeals Tribunal (AAT) (September 2006), AAT affirmed cancellation (December 2006); appealed AAT decision to the Federal Court (FC) (December 2006), dismissed (October 2007); appealed the FC decision to the Full Federal Court (October 2007), withdrawn (May 2008); lodged request for a Protection Visa (PV) and associated Bridging Visa (BV), PV and BV refused (July 2008); appealed the PV refusal to the Refugee Review Tribunal (RRT) (July 2008); decision affirmed but noted that Ms X's case raises compassionate or humanitarian concerns that only the Minister can consider (August 2008); the Department (DIAC) initiated a s 417 assessment (September 2008), ongoing.

Current immigration status

4. Ms X is an unlawful non-citizen detained at Villawood IDC.

Removal details

5. DIAC advises that a tentative removal date for Ms X has been set and removal action will be reactivated subject to the outcome of the s 417 assessment.

Ombudsman consideration

6. DIAC's report to the Ombudsman under s 486N is dated 9 September 2008.
7. Ombudsman staff interviewed Ms X on 29 October 2008 at Villawood IDC. Ms X's support person Ms Z and Ms X's fiancé (now husband) Mr Y attended the interview. Ombudsman staff also spoke with Ms X by telephone on 17 November 2008.
8. Ombudsman staff sighted the following documents: a New South Wales Police Report dated 11 August 2006; a DIAC incident report dated 31 July 2008; a medical summary report by International Health and Medical Services (IHMS) dated 18 August 2008; a psychological summary report by Professional Support Services (PSS) dated 21 August 2008; a copy of the s 417 submission prepared by Ms X's advocate Ms A dated 3 October 2008; a GSL (Australia) Pty Ltd (GSL) internal client visiting plan signed

by Ms X on 17 October 2008; a Client Placement Assessment (CPA) report dated 30 October 2008; a GSL Behaviour Management Contract for Ms X commencing 4 November 2008; a DIAC incident report dated 14 November 2008; email correspondence from Ms A dated 17 November 2008; and a list of recorded incidents involving Ms X dated 26 November 2008.

Key issues

Criminal history and visa cancellation

9. Ms X's criminal record extends from 1996 to 2005 for crimes to support her drug addiction. In December 2005 Ms X was convicted of shoplifting and larceny and sentenced to 15 months imprisonment.
10. The AAT decision record noted that Ms X received a warning that she was being considered for visa cancellation in April 2005. The AAT reported that in August 2006 Ms X received a second Notice of Intention to Consider Cancellation (NOICC) after she had reoffended.
11. At interview with Ombudsman staff Ms X said that her mother suffered a stroke when Ms X was nine, and Ms X became a carer for her mother and younger brother after her father left the family home. She said that she started '*rebellious*' as a teenager and began shoplifting to support her drug addiction. Ms X said that she successfully completed detoxification and drug and alcohol counselling while in gaol as she was determined to '*start my life afresh*' upon her release.
12. Ms X stated that prior to her release from gaol, she received a NOICC of her SCV. She said that she had no knowledge of immigration law, no access to legal advice and did not understand that she held a visa, '*I was ready to go home ... I didn't even know I had a visa that existed ... I thought because I'd lived in this country [Australia] for so long ... I was a dual citizen*'. In the absence of legal advice Ms X wrote to DIAC from gaol requesting that her visa not be cancelled. Ms X also self-represented at the AAT hearing. The FC found no jurisdictional error.

Health and welfare

13. The IHMS report advises that Ms X '*has a history of drug dependence but was discharged from the drug maintenance program prior to commencing detention*'. It also reports that '*Ms X attempted self harm by ingesting bleach on 23/10/07 and was transferred to Liverpool Hospital Emergency Department for assessment. She was discharged on the same day and placed on SASH (Suicide and Self Harm) observation*'.
14. IHMS reports that a Mental State Examination was conducted on 5 August 2008 and '*no mental health issues were identified*'. The CPA report of October 2008 notes that Ms X has been on '*Constant*' SASH watch since 23 October 2007, but again confirms that the Mental Health Team '*advised that client has no mental health issues*'.
15. At interview Ms X said that that she had never attempted self-harm in gaol, and her first instance of self-harm was in immigration detention.
16. Ms X said she would rather go back to gaol than stay in detention indefinitely, because in gaol, '*you know your release date ... the rules are the same every day ... they don't chop and change like here*'. She further stated that in gaol she had access to legal advice but in immigration detention when she asked for advice she was told to contact her solicitor '*too bad if you haven't got one!*'.

Attitude to removal

17. Ms X said that she considers Australia her home having lived in Australia since the age of three, and she has no family support in New Zealand. She further advised that she would

not qualify for social security support until she had lived in New Zealand for two years, and thought it unlikely that she would easily find employment due to her criminal record.

18. The RRT considered Ms X's claims but said that it did not accept that Ms X *'had a well-founded fear of being persecuted ... if she returns to New Zealand now or in the foreseeable future'*. However, it accepted that Ms X's case raised compassionate or humanitarian considerations as she has lived in Australia *'since she was an infant'* and *'all her immediate family members live in Australia'*.

Other detention issues

Visiting and Placement Issues

19. Ms X told Ombudsman staff that she has been in a relationship with Mr Y for the past 12 months and they were married on 14 November 2008. Mr Y is in Stage One at Villawood IDC, and Ms X is in Stage Two.
20. Ms X said that she had been allowed to visit Mr Y for a period of one week and subsequently for one five-hour visit per week. However she said that in the past month this had been decreased to a one-hour visit per week with no logical explanation, and that GSL staff are *'not treating us with respect'*. She commented that she feels discriminated against because of her past history, *'one 501 does something and we are all branded'*. Mr Y said that GSL staff *'are manipulating our personal life ... [they are] trying to put a wedge between us – I don't know why'*.
21. DIAC advises that Ms X signed a plan drawn up by GSL outlining conditions of supervised visits of two hour visits twice weekly to Stage One for a period of eight weeks, commencing on 17 October 2008.
22. DIAC further advises that Ms X *'has engaged in a number of incidents while in detention'*. The last recorded incident provided to the Ombudsman was in July 2008, when *'there was an unsuccessful attempt to smuggle a suspected prohibited substance to Ms X'*. Ombudsman staff obtained a copy of all incidents involving Ms X and notes that in October and November 2008, there have been four incidents recorded of *'Minor abusive/aggressive behaviour'* listing Ms X as the alleged offender.
23. DIAC reports that Ms X signed a Behaviour Management Contract commencing 4 November 2008 *'to reinforce positive and appropriate pro-social behaviour and reduce negative behaviour by offering an incentive based reward schedule which provides weekly benefits for demonstrating compliant behaviour'*.
24. Ms X said that she had been told by mental health staff that the Client Placement Committee (CPC) may be considering the possibility of Mr Y and Ms X transferring to Stage Three to live as a couple. However DIAC advises that the only request currently being considered by the CPC is for Mr Y to move from Stage One to Stage Three.
25. Ms X reported that her two requests for transfer to Sydney Immigration Residential Housing (IRH) were refused on the basis that *'No, you're a 501 – you can't go'*. The Ombudsman obtained the most recent CPA report and notes that it refers to Ms X's risk assessment rating as *'Medium'* and that *'GSL advised that they are against the move due to aggressive behaviour of client and suspected drug activity'*. The report also confirms that Ms X's criminal history affected the placement recommendation.
26. At interview Ms X advised that she has not met with her DIAC case officer *'for over a year'*, is unaware of who her DIAC case manager is, and is confused about the differentiation of responsibilities between her case officer and case manager.

Assault

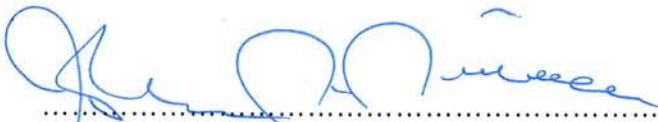
27. Ms X told Ombudsman staff that on the evening of 13 November 2008 a detainee assaulted her. Ms X said she saw a nurse directly after the assault and a doctor and Bankstown Police the following day. Ms X said that some months ago the same detainee had previously entered her room while she was showering and harassed her.
28. DIAC confirmed that an incident of '*Disturbance - minor*' occurred on 30 July 2008, when a detainee entered Ms X's room while she was in the shower to reclaim a sum of money owed to him. The detainee had been moved from Stage Three to Stage Two 12 days prior to this incident and the report stated that he was not allowed access to Stage Three for 30 days because of a '*similar situation where you entered a client's room and took a packet of cigarettes and this was not even a week ago*'. The incident report states that '*Both clients have history of being non compliant and it appears obvious that there is growing tension between both clients that could eventually explode if not dealt with immediately*'. The detainee was counselled, agreed not to enter detainee's rooms without permission and no further action was taken.
29. DIAC confirmed that a second incident of '*Assault – occasioning actual bodily harm – client on client*' occurred on 13 November 2008. The incident report states that the detainee entered Ms X's room, '*grabbed client [Ms X] from behind in a bear hug position and tried to kiss her*'. On questioning, the detainee confirmed that he was aware that Ms X was to be married the following day but he entered her room '*because he loved her*' and wanted to '*have sex*'. The report recorded '*reddened marks on [Ms X's] back and right arm – bruise to left flank to which ice pack was applied*'. Ms X said she suffered severe bruising as a result of the assault.
30. DIAC advises that the detainee was transferred to Maribyrnong IDC on 14 November 2008. The Police Constable assigned to the case informed GSL staff that '*she did not consider it viable for the client to be transported back to Sydney for the assault charge*' and GSL reports that the incident is '*now considered closed*'. Ms X told Ombudsman staff that she intends to pursue the assault charge.
31. At interview Ms X said '*I just want to have a normal life – [to be] a normal law-abiding Australian resident ... just give me that opportunity ... I have changed, I'm not going to go out and reoffend*'. She further commented that she had spent 15 months in gaol in addition to over two years in detention, and '*that's nearly four years of my life gone already*'.

Community detention

32. Ms X said that she receives regular visits from her mother who is willing to accommodate her in a community detention arrangement. Ms X said she has less contact with her father as he is uncomfortable with bringing her young brothers '*to the park with all the fences around it*'. In his letter of support Ms X's father wrote '*We all love [Ms X] and will support her in any way ... everyone deserves a chance and I feel her best possible one is with her whole family here in Australia*'.
33. Ms X said that while she would like to transfer from Stage Two to Stage Three to live with Mr Y or move to Sydney IRH, her strongest desire is to transfer to Community Detention pending resolution of her immigration status. She said that if she were to be released into Community Detention to live with her mother she would comply with any conditions required, '*whether it be I have to report to the police station ... or Immigration three times a day*'. She further advised '*I just want to go home – I cannot do another Christmas in here ... otherwise I'm just going to end up dead in this place*'.

Ombudsman assessment/recommendation

34. Ms X has lived in Australia for 23 years and has no ties to New Zealand. Ms X's visa was cancelled under s 501 because of her criminal record. The DIAC decision that Ms X does not qualify for protection has been reviewed and affirmed. The Ombudsman has no further comment on this matter.
35. Ms X requested a transfer to Sydney IRH in October 2008 and was refused by DIAC on the basis of her criminal history, her aggressive behaviour and suspected drug activity. Ms X's Client Placement Risk Assessment rating is 'Medium'. The Ombudsman notes that the four recorded incidents of Ms X's aggressive behaviour have occurred in the past two months, coinciding with the curtailing of her visits with Mr Y.
36. Ms X has been the victim of assault within the detention centre. The Ombudsman notes that the previous incident report involving the detainee and Ms X correctly predicted that the tension between the two detainees '*could eventually explode if not dealt with immediately*'. Although both detainees were counselled, it appears that after the first incident an alternate placement for the detainee may have been advisable.
37. The Ombudsman notes that Ms X perceives that she does not have regular or meaningful engagement with her DIAC case officer. It may be that more regular engagement may assist DIAC's understanding of Ms X's circumstances.
38. Ms X has been in immigration detention for over two years and there is a s 417 application before the Minister. The Ombudsman notes that Ms X committed a series of non-violent offences to support her drug addiction and has served her sentence. The Ombudsman also notes that Ms X has significant family support in Australia and her mother is offering her accommodation. The Ombudsman **recommends** that the Minister consider what alternative detention arrangements are available for Ms X, including allowing her to live in the community while her immigration status is resolved.


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Prof. John McMillan
Commonwealth and Immigration Ombudsman


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Date