

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

*Under s 486O of the Migration Act 1958*

*Personal identifier: 506/09*

## **Principal facts**

### *Personal details*

1. Mr X is aged 74 and is a citizen of New Zealand. Mr X lives in an alternative detention arrangement with his Australian citizen wife Ms Y and Australian citizen son Mr Z. Mr X has two other sons, one of whom is an Australian citizen living in Sydney and the other an Australian permanent resident living in the United States of America. He also has an Australian citizen brother in Melbourne.

### *Detention history*

2. On 31 January 2001 Mr X was detained under s 189(1) of the *Migration Act 1958* after completing a gaol sentence and placed at Villawood Immigration Detention Centre (IDC). Mr X was voluntarily removed to New Zealand (February 2001) but returned to Australia. In February 2005 Mr X was sentenced to three years imprisonment at Port Phillip Prison. On 31 October 2006 Mr X was redetained and transferred to Villawood IDC and in November 2006 he was placed in an alternative detention arrangement with his wife in their family unit.

### *Visa applications*

3. Mr X first arrived in Australia in the 1960s. In December 2000 Mr X's Special Category Visa (SCV) was cancelled under s 501(2); judicial review sought in the Federal Court (October 2004), dismissed (March 2006), decision appealed to the Full Federal Court (April 2006), withdrawn (February 2007); Bridging Visa (BV) granted (September 2006), BV cancelled, Mr X was redetained (October 2006); s 197AB assessment met the guidelines for Community Detention placement (June 2007), submission withdrawn as Mr X's removal was imminent, removal cancelled; second s 197AB assessment initiated, met the guidelines and referred to the Minister (July 2007), the Minister declined to intervene (August 2007).
4. Mr X lodged a Protection Visa (PV) application, refused (July 2007); lodged two BV applications (July 2007), initially thought to be invalid but subsequent legal interpretation confirmed BVs were not invalid on two occasions in July 2007; Refugee Review Tribunal (RRT) affirmed the Department's (DIAC) PV refusal (October 2007); s 417 request lodged (October 2007); referred to the Minister (March 2008); the Minister declined to consider (April 2008); fresh s 417 request lodged (May 2008), request being considered in the s 501 submission currently being drafted by DIAC.

### *Current immigration status*

5. Mr X is an unlawful non-citizen detained in Alternative Detention.

### *Removal details*

6. DIAC advises that removal has not been actively pursued while Mr X has a Ministerial Intervention request in process.

## **Ombudsman consideration**

7. DIAC's report to the Ombudsman under s 486N is dated 1 October 2008.
8. Ombudsman staff interviewed Mr X on 19 November 2008. Ms Y also attended the interview.

9. Ombudsman staff sighted the following documents: s 417 submissions from Mr X's lawyers dated 24 October 2007 and 9 May 2008; a medical summary report from International Health and Medical Services (IHMS) dated 1 October 2008; and a letter from Ms Y's consultant physician Prof A dated 18 November 2008.

## Key issues

### *Criminal history and visa cancellation*

10. Mr X has three criminal convictions for illegal gambling, in 1960, 1984 and 1990. In December 1999 Mr X was convicted of supplying and cultivating cannabis and sentenced to 12 months imprisonment, and in February 2005 he was convicted of cultivating cannabis and sentenced to three years imprisonment.
11. Mr X's s 417 submission of 9 May 2008 advises that, concerning Mr X's recent two offences of 1999 and 2005, he *'foolishly agreed to mind a house used for cultivating cannabis and refused to do-in those responsible ... his involvement in [these] two more serious crimes was as a minder. He did not own the property'*.
12. The s 417 submission further states that following the Minister's decision to cancel Mr X's visa in December 2000, Mr X was *'denied the opportunity to seek merits review of the decision to cancel his visa—an opportunity extended to persons who committed far more serious and abhorrent crimes than himself'*.

### *Health and welfare*

13. IHMS reports that Mr X has a history of gout which is managed with medication, and no significant mental health issues have been identified.
14. DIAC advises that Mr X is the primary carer for his wife, aged 66, who suffers from a life-threatening illness. DIAC also acknowledges recent information that indicates her condition is getting progressively worse.
15. In November 2008 Prof A wrote *'Ms Y continues to have frequent, recurrent episodes related to her pheochromocytoma'* [a tumour of the adrenal glands]. Ms Y confirmed that her condition is managed with medication but certain factors such as excessive heat can send *'[my] blood pressure to stroke level'*. Ms Y said that she is also a diabetic, but *'everything is in place here'* and she receives *'wonderful care'* from her medical specialists.

### *Attitude to removal*

16. DIAC advises that Mr X first arrived in Australia in the 1960s and has lived in Australia *'for some 40 years ... and has strong ties to the Australian community'*. Mr X said that if he were to be removed to New Zealand, *'it would be a disaster ... I've got no one in New Zealand'*.
17. Ms Y confirmed this, commenting *'it would be like popping him in Sweden or somewhere'*, and said she would be unable to follow him because of her medical condition. She said she tries to avoid thinking about the possibility of Mr X's removal as the feeling is too overwhelming, *'like a train coming at me'*. She stated that both her consultant physician and her neurologist have advised that she should not undertake air travel.
18. Mr X said that he and his wife care for their adult son Mr Z who lives with them. Ms Y said that following a psychotic episode at the age of 14 Mr Z has been *'very fragile ... [he] can work and cope and live life, provided we are there'*.
19. DIAC advises that in June 2008 psychologist Dr B wrote *'Mr X's Australian citizen son, Mr Z (aged 41 years), remains dependent on his parents and will do so for the remainder of their lives ... Mr X remains a central figure in maintaining Mr Z's psychological well-being, and that his mental state will be significantly affected if Mr X is no longer available'*.

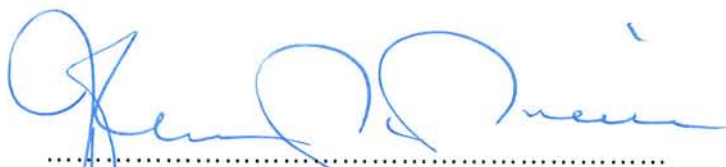
20. Mr X told Ombudsman staff that he opted not to sign for parole, instead choosing to serve his full three-year sentence because *'they might have sent me back to New Zealand'*. He confirmed that he preferred to stay in gaol than be returned to New Zealand.
21. In Mr X's s 417 submission of May 2008 Ms Y commented on Mr X's decision not to apply for Australian citizenship, *'we were from New Zealand and we always felt that the close ties between our two countries did not warrant a change in citizenship. When we migrated it was not the norm to take out Australian citizenship for this reason. I wish every day now that [he] had'*.

*Other detention issues*

22. Mr X said that his first period of detention at Villawood IDC in 2001 was *'a disaster'*, with what felt like *'about 50 of us in the one dormitory'*. However, during his second period of detention at Villawood IDC in 2006 he had his own room and it *'wasn't too bad'*. He said that the GSL staff *'were good'* and none of the detainees *'gave me any trouble'*.
23. Mr X said that his alternative detention arrangement is not restrictive and that he is able to regularly visit his brother and extended family in Melbourne. Ms Y commented that *'we are just living our life as we've always done, except with that terrible degree of uncertainty'*.
24. Mr X advised that he reports to DIAC staff once a week. Ms Y said there was a period when, due to under-resourcing, *'we didn't see [the DIAC staff] for quite a time because they just couldn't get here'*. She said that currently they visit once a month and *'they call us the fabulous Xs on Mondays'* because there are never any issues to address.

**Ombudsman assessment/recommendation**

25. Mr X has lived in Australia for over 40 years and has been in immigration detention for over two years. The DIAC decision that Mr X does not qualify for protection has been reviewed and affirmed. The Ombudsman has no further comment on this matter.
26. A further request for Ministerial Intervention was lodged in May 2008 and remains outstanding.
27. Mr X is an elderly man with no connections to New Zealand. He is the primary carer for his elderly invalid wife and dependent adult son, both of whom are Australian citizens. Ms Y's medical condition does not allow her to follow Mr X to New Zealand. It is apparent that if Mr X is to be removed from Australia, the hardship caused to Mr X, Ms Y and their dependent son will be significant. The Ombudsman notes that Mr X's convictions were for non-violent crimes and he did not have the opportunity to seek merits review against his visa cancellation.
28. In light of the above information, the Ombudsman **recommends** that Mr X be released from immigration detention and granted a suitable visa to allow for a permanent outcome to his immigration status.

  
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 Prof. John McMillan  
 Commonwealth and Immigration Ombudsman

  
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 Date