

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

*Under s 486O of the Migration Act 1958*

**Personal identifier: 517/09**

This is the third s 486O report by the Ombudsman on Mr X as he has been redetained in immigration detention since the Ombudsman's combined first and second report (395/08). The Ombudsman's report was sent to the Minister on 4 April 2008 and tabled in Parliament on 14 May 2008. This report updates the material in that report and should be read in conjunction with it.

## **Principal facts**

### *Personal details*

1. The Department (DIAC) advises that Mr X married an Australian citizen on 9 October 2008.

### *Detention history*

2. Mr X was released from immigration detention on 21 July 2008 as a person affected by the Full Federal Court decision in *Sales*<sup>1</sup> and his Transitional (Permanent) Visa was reinstated.
3. In September 2008 legislative amendments came into force validating the cancellation of Mr X's visa. Mr X was redetained and placed at Villawood Immigration Detention Centre (IDC) on 17 November 2008.

### *Visa applications*

4. In March 2008 Mr X lodged a Protection Visa (PV) and associated Bridging Visa (BV) application; BV deemed invalid under s 501E of the *Migration Act 1958* (March 2008), PV application refused (April 2008); Refugee Review Tribunal (RRT) affirmed DIAC's decision but referred Mr X's case to DIAC for possible consideration under s 417 (July 2008).
5. DIAC advises that Mr X's s 417 application was reactivated on his redetention and he has supplied further information regarding his circumstances.

### *Current immigration status*

6. Mr X remains an unlawful non-citizen detained at Villawood IDC.

### *Removal details*

7. DIAC advises that it has not progressed Mr X's removal while he has an outstanding s 417 request.

## **Ombudsman consideration**

8. DIAC's further report to the Ombudsman under s 486N is dated 22 December 2008.
9. Ombudsman staff spoke with Mr X by telephone on 13 February 2009.
10. Ombudsman staff sighted a medical summary report from International Health and Medical Services (IHMS) dated 26 November 2008.

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<sup>1</sup> *Sales v Minister for Immigration and Citizenship* [2008] FCAFC 132 (17 July 2008).

## Key issues

### *Health and welfare*

11. IHMS reports that a Mental State Examination was conducted on Mr X's redetention and no mental health issues were identified. It further advises that Mr X remains on a methadone program.

### *Post-release issues*

12. Mr X told Ombudsman staff that on his release, he moved to Grafton to live with his partner whom he married in October 2008. He said he tried to live a 'normal life' and was to start work in his father-in-law's apiary business. He said that as a teenager 'I strayed and took the wrong path', and became a drug addict, however, 'I made dramatic changes in my life and was getting somewhere'.

### *Redetention issues*

13. Mr X stated that he did not receive a warning from DIAC informing him that he was to be redetained. He said that on the evening of 16 November 2008 he was in his backyard when several DIAC and police officers appeared, shone a torch in his face and asked him to identify himself. He said he was taken to Grafton police station, locked in a cell for the night and taken to Villawood IDC the following day.
14. Mr X further commented that he felt 'defaced' after he had heard that DIAC officers had caused a 'commotion' in the street prior to his redetention by asking his neighbours questions about his wife, which he felt breached her privacy as an Australian citizen.

### *Placement issues*

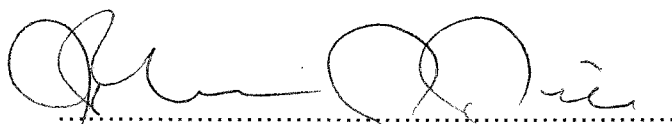
15. Mr X said he receives regular visits from his wife, who is experiencing financial difficulties travelling from Grafton to Sydney on a regular basis. He said he has submitted a request to be transferred to Community Detention to live with his wife. However DIAC advises that it 'has not received any requests for transfer to Community Detention from Mr X'.

## Ombudsman assessment/recommendation

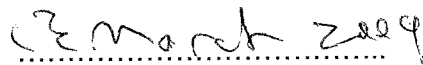
16. The DIAC decision that Mr X does not qualify for protection has been reviewed and affirmed. In July 2008 the RRT highlighted that, although it affirmed DIAC's decision not to grant a PV to Mr X because it was not satisfied that he is a person to whom Australia has protection obligations under the Refugees Convention, it noted several aspects:
  - that Mr X's case is particularly tragic and that '*in these circumstances the Minister may wish to exercise his discretion under s 417 ... and substitute the Tribunal's decision with a more favourable one*';
  - that Mr X will certainly be brought to the adverse attention of the authorities and it accepted the evidence from Mr X and his parents that if he is removed to Chile, it is possible that he could pay for those crimes he committed in Australia with his life; and
  - but for his failure to complete an application form for Australian citizenship, Mr X would not be in a situation where he has spent more than three years in immigration detention, nor would he be facing the prospect of returning to a country for which he holds a subjective fear of persecution and where he faces life threatening circumstances.
17. In Report 395/08 the Ombudsman made reference to a published report on the application of s 501 as it applied to long term residents. Recommendation nine was that DIAC consider releasing a person detained under s 501 on an appropriate visa in light of

the fact that permanent residents whose families are in Australia are unlikely to abscond. DIAC advised that in May 2007, the former Minister had decided not to intervene. The Ombudsman noted that *'it is regrettable that, despite the urgency implicit in the Ombudsman's recommendation, Mr X was detained for 15 months awaiting the outcome of his s 501 review'*. The Ombudsman recommended that the Minister grant Mr X Community Detention or an appropriate temporary visa so he may be close to his family while his ongoing immigration matters are resolved.

18. Almost 12 months have elapsed since Report 395/08 and not only is Mr X's immigration status no closer to being resolved, but he has been released for four months and redetained. The Ombudsman is not aware of any evidence indicating that Mr X is a risk to the Australian community. The Ombudsman also notes that while released from immigration detention Mr X married his partner and was successful in making a fresh start to his life with the prospect of employment as an apiarist.
19. The circumstances of the release and redetention of some people as a result of the *Sales* decision may be the subject of an Ombudsman own motion investigation.
20. The Ombudsman understands that a s 417 request is before the Minister. The Ombudsman noted in Report 395/08 that *'it is undesirable that Mr X remain in an immigration detention centre while his immigration status is resolved'*. The Ombudsman again **recommends** that the Minister grant Mr X Community Detention or an appropriate visa to allow him to remain in Australia with his family and Australian citizen wife while his ongoing immigration matters are resolved.



Prof. John McMillan  
Commonwealth and Immigration Ombudsman



Date