

REPORT FOR TABLING IN PARLIAMENT BY THE COMMONWEALTH AND IMMIGRATION OMBUDSMAN

Under s 486O of the Migration Act 1958

Personal identifier: 533/09

Principal facts

Personal details

1. Mr X is aged 42 and is a citizen of the United Kingdom. Mr X's parents and brother and sister are permanent Australian residents who live in Victoria. Mr X has a 17-year-old Australian citizen son.

Detention history

2. On 4 December 2006, Mr X was detained under s 189(1) of the *Migration Act 1958* after completing a custodial sentence and placed at Maribyrnong Immigration Detention Centre (IDC).

Visa applications

3. Mr X arrived in Australia in 1977 from Scotland at the age of 11 with his family and they were granted permanent residence. In September 1989 he was granted a Transitional (Permanent) Visa; deemed to be the holder of an Absorbed Person Visa (June 2006); the Department (DIAC) issued a Notice of Intention to Consider Cancellation of Mr X's visa on character grounds under s 501 (June 2006); Mr X's visa cancelled (December 2006).
4. Mr X appealed his visa cancellation to the Federal Court (December 2006) which affirmed DIAC's decision (May 2007); sought review in the Full Federal Court (FFC) (May 2007); s 197AB request initiated, did not meet the guidelines and was not referred to the Minister (May 2007); FFC affirmed DIAC's visa cancellation decision (August 2007) s 197AB request initiated but not progressed while s 417 submission was being drafted (September 2007); sought review of the FFC decision in the High Court (HC) which affirmed visa cancellation decision (May 2008); lodged a Protection Visa (PV) application (May 2008), refused (June 2008); sought review of the decision from the Refugee Review Tribunal (RRT) which affirmed DIAC's decision (July 2008); s 417 request lodged (August 2008), combined s 195A/417 submission drafted and referred to the Minister, ongoing.

Current immigration status

5. Mr X is an unlawful non-citizen detained at Maribyrnong IDC.

Removal details

6. DIAC advises that removal action will be progressed subject to the outcome of Mr X's s 417/195A request.

Ombudsman consideration

7. DIAC's report to the Ombudsman under s 486N is dated 20 November 2008.
8. Ombudsman staff interviewed Mr X on 24 March 2009 at Maribyrnong IDC.

9. Ombudsman staff sighted the following documents: medical reports from Dr A of International Health and Medical Services (IHMS) dated 4 April 2007 and 4 August 2008, medical reports from Dr Y dated 4 May, 2 August, 13 and 23 October 2007, 31 January, 26 June and 7 August 2008; a Statutory Declaration from Mr X dated 6 September 2007; a medical report from Dr Z dated 1 November 2007; a copy of a s 417 submission dated 22 August 2008; a psychological summary report from Professional Support Services (PSS) dated 4 November 2008; a medical summary report from IHMS dated 10 November 2008; and a DIAC summary of Mr X's suitability for Community Detention dated 2008.

Key issues

Criminal history and visa cancellation

10. Mr X was convicted of 50 offences between 1984 and 1999 including assault, injury, weapon, drug, traffic and property crimes. In March 2001 Mr X was convicted of manslaughter and sentenced to nine years imprisonment with a non-parole period of seven years. DIAC advises that Mr X's crime of manslaughter and the majority of his prior crimes were committed under the influence of alcohol.
11. At interview with Ombudsman staff Mr X said on arrival in Australia he was targeted for his Scottish accent and small stature. He began '*rebellious against my family and society in general*' by leaving school at the age of 14 and drinking alcohol. He said that it was not until his early 30s that he recognised that he had been an alcoholic for most of his teenage and adult life.
12. In a Statutory Declaration Mr X wrote '*All of my crimes were committed under the influence of alcohol, if I am not under the influence of alcohol, I would be a law abiding member of the community ... there is no hope in this world that I would re-offend or relapse*'. He further stated that he was willing to '*report to and be breathalysed at [the] nearest Police Station on a daily basis*'. Mr X further commented that he has completed cognitive therapy and drug and alcohol rehabilitation programs, and has not drunk alcohol for nine years.
13. DIAC confirms that there have been '*no reported incidents relating to substance abuse since being detained in MIDC in December 2006*'.
14. Mr X said that he was not notified of his visa cancellation and that he was to be transferred to immigration detention until he was going through release procedures from gaol. He said that '*my son and my brother-in-law were in the car park waiting for me ... I was just devastated*'. He further commented that he has now fully served his original sentence as his parole finished in December 2008.

Health and welfare

15. DIAC advises that while in gaol, Mr X was diagnosed with '*Fibromyalgia Syndrome (FMS), a condition involving widespread chronic muscular pain, Chronic Fatigue Syndrome and Hepatitis C*', and that this diagnosis was confirmed in 2007 by Dr A and Dr Y.
16. In March 2007 Dr A reported that Mr X had a hernia repair while in gaol, and in investigating this problem had '*detected an indirect hernia on the right side which is starting to cause symptoms*' and referred him to a specialist.
17. In April 2007 Dr A stated that '*providing for the needs of this man [Mr X] while in detention will be difficult logistically especially given the likelihood of multiple external visits and the chronic nature of the [fibromyalgia] illness ... I certainly have little prospect of his health improving under current conditions*'.

18. In May 2007 Dr Y stated *'I am strongly of the view that this man's [Mr X's] position at the Immigration Detention Centre is a major factor in preventing his improvement, as he is unable to obtain some of the necessary treatments to assist in regard to his improvement ... alternative options for his case need to be considered including change to a different environment'*. In October 2007 Dr Y wrote *'Until he can see there is some way out of his current dead end situation he cannot be better, either physically or psychologically'*. In June 2008 Dr Y wrote that Mr X *'suffers from depression and chronic fatigue syndrome. This medical situation is certainly currently being severely exacerbated by the circumstances of his life at present'* and in August 2008 confirmed *'His situation remains the same ... delay in resolution of these matters is also harmful to his condition generally'*.
19. In November 2007 Dr Z reviewed Mr X's pain medications and wrote *'Overall it is difficult to see how X's pain problems will significantly improve in his current environment'*.
20. At interview Mr X said that despite feeling that his health had improved recently in part due to a new energy supplement, *'I still suffer with pain on a daily basis but I've had to learn to deal with that'*. He finds daily tasks difficult and tiring and is awaiting a hernia operation. However he has stopped taking pain medication due to *'serious liver problems'* for which he is waiting to see a specialist. He tries to exercise *'three times a day'*, and relies on food brought to him by his family as he says he cannot digest the food provided by the detention centre.

Attitude to removal

21. At interview Mr X stressed that he has no relatives in Scotland and does not want to return because of *'what would happen to me health-wise if I'm dropped off in a foreign country with no support where I don't know even know the infrastructure ... I just cannot begin to even get my head around having no money and being destitute'*.

Community links

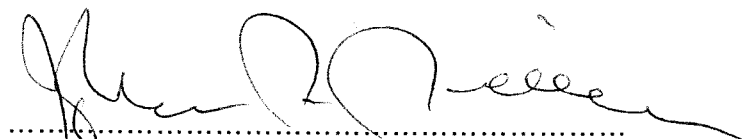
22. Mr X spoke of the support he receives from his family in Melbourne, and his desire to further strengthen his relationship with his son. Mr X said that his brother-in-law has offered him work in his family business and although Mr X recognises he will need support to manage his health, he is keen to take up his brother-in-law's employment offer.
23. Mr X's parents wrote in their letter of support in the s 417 submission that Mr X comes from *'a stable family, who all lead a normal close knit family life, and who are willing to provide support and assistance to him upon his release'*.

Community detention

24. The 2008 DIAC summary of Mr X's suitability for Community Detention states that *'Community Detention has been explored ... this would make it easier for Mr X to make and attend specialist appointments, have family nearby to support and assist him, and would allow him the freedom to maintain his own special diet and other considerations. It may also assist him to sleep better in a different environment'*. The summary concluded that the matter *'remains outstanding ... since September 2007 when it was assessed that this case did meet the guidelines for Community Detention'*.
25. At interview Mr X said that the Australian Red Cross (ARC) had met with him in 2008 to explore options for accommodation close to his family's residence. He said that the ARC had secured accommodation subject to his transfer to Community Detention, which has never eventuated.

Ombudsman assessment/recommendation

26. Mr X has committed a series of offences including manslaughter and has fully served his custodial sentence. Mr X has been in immigration detention for over two years and is awaiting the outcome of a s 417/195A submission. 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.
27. Mr X suffers from a chronic illness and requires specialist care to manage his health. Medical evidence from three doctors over two years indicates that Mr X's health is unlikely to improve while he remains in a detention facility.
28. The Ombudsman notes that Mr X has lived in Australia for 32 years, has strong family connections in Australia and no ties to Scotland. Mr X has significant family support and employment prospects. He was assessed as meeting the guidelines for Community Detention in September 2007 and no adequate explanation has been provided as to the lengthy delay in progressing consideration of Mr X's transfer to Community Detention.
29. In light of this and in line with the Minister's Immigration Detention Values, the Ombudsman **recommends** that the Minister allow Mr X to live in a community detention arrangement as soon as practicable, while his immigration status is determined.



Prof. John McMillan
Commonwealth and Immigration Ombudsman

24 April 2009
Date