

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

*Under s 486O of the Migration Act 1958*

*Personal identifier: 578/10*

This is the second s 486O report by the Ombudsman on Mr X as he has remained in immigration detention since the Ombudsman's first report (566/09). The Ombudsman's first report was sent to the Minister on 10 August 2009 and was tabled in Parliament on 16 September 2009. This report updates the material in that report and should be read in conjunction with it.

## **Principal facts**

### *Visa applications*

1. Mr X has no applications or appeals before any court or tribunal. Mr X has made no requests for Ministerial Intervention.

### *Current immigration status*

2. Mr X remains an unlawful non-citizen detained at Villawood Immigration Detention Centre (IDC).

### *Removal details*

3. The Department (DIAC) proposes to remove Mr X to Cambodia.
4. On 14 December 2009 DIAC advised that Mr X has refused to engage with DIAC staff 'to make a decision about his pathway'. DIAC has been unable to obtain a travel document from Cambodia and has acknowledged that such a document may never be obtained.

## **Ombudsman consideration**

5. DIAC's report to the Ombudsman under s 486N of the *Migration Act 1958* is dated 24 August 2009.
6. Mr X declined to be interviewed by Ombudsman staff.
7. Ombudsman staff sighted an International Health and Medical Services (IHMS) medical summary report dated 27 August 2009.

## **Key issues**

### *Health and welfare*

8. The IHMS report states that Mr X has received treatment for lower back pain. The report also states that, although he reported a history of trauma in Cambodia, Mr X has declined counselling from the Service for the Treatment and Rehabilitation of Torture and Trauma Survivors. The NSW District Court earlier noted that six of his eight siblings are reported to have been killed in Cambodia.

9. The IHMS report also states that a further Mental State Examination was conducted on 14 May 2009 and that *'no mental health issues were identified'*. However, the s 486N report from DIAC mentions that a *'noose'* was discovered in Mr X's room on 9 May 2009. When asked whether the information regarding the noose was available to the IHMS staff conducting the Mental State Examination, DIAC replied that the information had not been conveyed to the Detention Health Service (DHS). DIAC also reported that the DHS later stated that *'in the Mental Health Examination of the 14/5/09 Mr X stated that he has had no thoughts of self harm since his detention'*.

#### *Preferred language*

10. The second s 486N report records Mr X's preferred language as *'Khmer Kampuchean/Cambodian'*. However, in the first s 486N report Mr X's preferred language was given as English. At interview with this office in April 2009 Mr X spoke colloquial English fluently and said that he did not speak Khmer. In response to a question about this inconsistency between the two reports DIAC advised Ombudsman staff on 14 December 2009 that it did not have an explanation about the *'conflicting information regarding Mr X's preferred language'*. It confirmed that *'ISIS (VIDC) records indicated that Mr X's primary language is Khmer Kampuchean/Cambodian, however, Mr X has previously advised that he does not speak Khmer and that his preferred language is English'*.

#### *Attitude to removal*

11. The DIAC report notes that Mr X remains unwilling to return to Cambodia voluntarily. Mr X has said that he has no family or contacts there.

### **Ombudsman assessment/recommendation**

#### *Mr X's health*

12. The NSW District Court referred in June 2002 to Mr X's alienation from his family and community, his sense of inadequacy and lack of personal self-worth. Although Mr X is reported as saying he has had no recent thoughts of self-harm, he is recorded as having attempted self-harm a number of times when previously in gaol, including at least one attempt at hanging. It is therefore of concern that, given his background and personality, the discovery of a noose in Mr X's room was not reported to IHMS. IHMS has thus not had an opportunity to express a view on the significance of the information or to make further enquiries about Mr X's mental state.

#### *Indefinite detention*

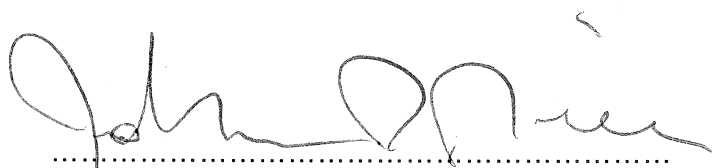
13. The second s 486N report states *'the Department's Phnom Penh post is investigating the possibility of obtaining a Family Book or similar Cambodian identity document for Mr X. This is likely to be a lengthy process which may further delay the time frame of his removal'*. Our previous s 486O report expressed concern about the *'possible indefinite nature of Mr X's detention'* in the light of the information provided by DIAC at that time. DIAC is now acknowledging that such a document may never be obtained, but has not indicated how it intends to deal with this situation, given the clear statement in the Immigration Detention Values that detention that is indefinite or otherwise arbitrary is not acceptable.

*Ministerial Directions*

14. In the Ombudsman's first s 486O report on Mr X attention was drawn to the Ministerial Directions on the cancellation of visas under s 501, which state *'In some circumstances it may be appropriate for the Australian community to accept more risk where the person concerned has, in effect, become part of the Australian community owing to their having spent their formative years, or major portion of their life in Australia'* (clause 5.2 (4)). This issue was not addressed in DIAC's first s 486N report, and, despite the Ombudsman's observation that it was a relevant consideration, it has not been addressed in the second DIAC report under s 486N.
15. Mr X has a criminal record and appears not to have responded well to attempts at rehabilitation. It nevertheless remains relevant that Mr X came to Australia as a child of nine, was raised and educated here, and, despite his poor record as a member of the community, has been part of the Australian community for almost 27 years.

*Future options*

16. Mr X has now spent two years and ten months in immigration detention.
17. In its summary regarding future management, DIAC considers that ongoing detention is appropriate for Mr X, although it has been prepared to consider recommending Community Detention as an alternative to detention in an IDC. In its update of 14 December 2009 DIAC advised that a submission under s 197AB proposing a Community Detention placement pending removal was being prepared for referral to the Minister.
18. While Community Detention would allow Mr X to live in the community, it means that he would be totally dependent on welfare for a possibly indefinite period, and it does not take account of the need to assist Mr X to rehabilitate himself. It is noted that no assistance of this nature has been available to Mr X while he has been in an IDC, and that there is a high risk that living in the community in these circumstances he will get into difficulty again without such assistance.
19. The Ombudsman notes that, while each case raises different issues, the Ministerial Directions provide a basic framework for dealing with difficult and unusual cases of this kind. With this in mind, the Ombudsman **recommends** that Mr X be considered for a suitable visa until a decision is made about his long term immigration status. At the same time DIAC may wish to consider what additional support Mr X will need if he is released into the community.



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Prof. John McMillan  
Commonwealth and Immigration Ombudsman

12 January 2010  
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Date