

REPORT FOR TABLING IN PARLIAMENT BY THE COMMONWEALTH AND IMMIGRATION OMBUDSMAN

Under s 486O of the Migration Act 1958

Personal identifier: 221/07

Principal facts

Personal details

1. Mr X is aged 35 and is a citizen of Sri Lanka. He has four brothers and two sisters in Sri Lanka.

Detention history

2. In April 2001 Mr X arrived in the Cocos (Keeling) Islands by boat, as a crewmember along with 24 other unauthorised arrivals. He was detained under s 189(1) of the *Migration Act 1958*, transferred to Police custody and placed at the Bunbury Regional Prison. He remained in criminal custody until he completed a custodial sentence in January 2003 and was transferred to Perth Immigration Detention Centre (IDC). In February 2003 Mr X was transferred to Baxter IDC and on 28 July 2005 he was released on a Removal Pending Bridging Visa (RPBV).

Visa applications

3. Mr X applied for a Protection Visa (PV) (April 2003), PV application refused on the basis that he had committed a serious non-political crime (July 2003); sought review at the Administrative Appeals Tribunal (AAT) (August 2003), decision set-aside and remitted to the Minister (March 2004); fresh PV application allowed and refused (September 2004); the Refugee Review Tribunal (RRT) affirmed the decision (October 2004); applied for judicial review in the Federal Magistrates Court (December 2004), application dismissed; applied to the Full Federal Court (November 2005), application dismissed (June 2006).
4. Section 417 requests initiated seeking favourable exercise of the Minister's humanitarian discretion (November 2004, May 2005 and June 2005), requests deemed inappropriate to consider (June 2005); s 417 request lodged (August 2006), Minister declined to intervene (February 2007).

Current immigration status

5. Mr X lives lawfully in the community on a RPBV.

Removal details

6. The Department (DIAC) advises that Mr X has been uncooperative with removal efforts. In September 2005 he requested to return to Sri Lanka after his brother was killed but he later retracted that request. Removal options were put on hold while the s 417 request was ongoing.

Ombudsman consideration

7. The DIAC report to the Ombudsman under s 486N is dated 23 November 2005.
8. Ombudsman staff interviewed Mr X on 7 July 2006.
9. Ombudsman staff sighted the following documents: medical summary reports by Dr A, GP, from Qirch Clinic, dated 20 July 2006, by Dr B from International Health Medical Services (IHMS) dated September 2006, and by Ms C from Mater Audiology Department dated 17 October 2006; psychological medical summary reports from Mr D from the Adelaide Clinic dated 11 May 2005, Dr E, Consultant Psychiatrist, dated 27 May 2005,

Professional Support Services (PSS) dated 6 December 2005, and Dr F, Consultant Psychiatrist, dated 5 November 2006; and a s 417 submission to the Minister from the Refugee and Immigration Legal Service (RAILS) dated 31 August 2006.

Key issues

Criminal history

10. Mr X was convicted in August 2001 of assisting in the *'bringing to Australia of a group of five or more people'* (people smuggling) contrary to the Act. As a crewmember who had not cooperated with the police but had promptly pleaded guilty, he was sentenced on 19 September 2001 to three and a half years imprisonment with a 21 month non-parole period.
11. The AAT decision notes that Mr X contacted the Australian Federal Police (AFP) in January 2002 and subsequently made a statement in March 2002 identifying people involved in the people smuggling operation in Australia and Sri Lanka. Subsequently, one person was imprisoned in Australia and another in Sri Lanka.
12. Mr X and his lawyers claim that he was given an undertaking by the AFP that his information would be confidential and not released to Sri Lankan authorities.

Health and welfare

13. DIAC advised that Mr X was placed on Suicide and Self Harm observation on six occasions between November 2003 and May 2005. IHMS advised that in early 2005 he was referred to an external Neuro Psychologist to address memory loss. He was diagnosed with an Adjustment Disorder associated with moderate depression and frustration.
14. The psychiatric report by Dr E noted that in November 2004, Mr X was diagnosed by the visiting psychiatrist at Baxter IDC with *'narcissistic personality traits and delusional symptoms'*. In February 2005 he was diagnosed with Somatization Disorder [a disorder characterised by multiple recurrent changing physical symptoms and the absence of physical disorders that can explain them¹]. Dr E diagnosed a *'Major Depressive Disorder, recurrent, moderate without psychotic features'* and noted he also suffered from ongoing tinnitus and otalgia (ear pain), which was perpetuating his depressive condition. Dr E noted that he had *'no genetic predisposition to developing a mental illness and started experiencing depressive symptoms over the last two years'*.
15. Dr A noted that she had been treating Mr X since his release from detention for *'quite severe psychological distress and depression which are a consequence of his incarceration and the uncertainty of his status following his release'*. The most recent psychiatric assessment is from Dr F (November 2006) and was undertaken when Mr X had been living in the community. Dr F's opinion was that *'I don't feel he presented with significant depressive symptoms or Post Traumatic Stress symptoms'* and noted that the chronic ear pain is mostly psychosomatic and diagnosed him as suffering from chronic (psychosomatic) pain syndrome. Dr F stated that if Mr X achieves *'Acceptance into the community as a resident the process of integration should improve further. To successfully address his symptoms his visa situation needs to be resolved'*.
16. In regards to his physical health, Mr X advised that he had been experiencing pain in his ear since allegedly being assaulted in detention by guards in November 2003. In a letter

¹ *Glossary of Mental Health Terms*, pg. 38, 2000, Queensland Transcultural Mental Health Centre www.health.qld.gov.au

of complaint to the DIAC manager, Mr X wrote that he was assaulted after a verbal altercation with the detention supervisor. He claimed that 10 to 15 guards *'tortured me until [it was] difficult [for] me to breath'*. He said that after this event he was placed in the Management Unit. He requested to see the nurse after his body began aching, and he said that one of his hands was numb and swollen and that he had an earache. At interview Mr X said that during this event *'I thought I was dying'*. DIAC advised that on 17 November 2003, Mr X *'became aggressive and assaulted detention service provider staff. He was moved to the management unit'* and remained there until his behaviour stabilised on 25 November 2003. This issue has not been the subject of a complaint to the Ombudsman and has not been raised with DIAC but is included in this report for the sake of completeness.

17. DIAC advised that Mr X first complained of ear pain in early 2004 and was referred to specialists and was prescribed eardrops. Dr A advised that, since being in the community, Mr X has been referred to an Ear, Nose and Throat (ENT) specialist. In an October 2006 Audiologist's report, it is noted that Mr X has *'a mild high frequency sensorineural hearing loss in the right ear'* and that he was to be reassessed later that month by an ENT consultant. Mr X expressed concern to Ombudsman staff that if he is returned to Sri Lanka he will not receive adequate medical treatment for his ear pain.

Attitude to removal


18. Mr X came to Australia as a crewmember of a boat that was transporting people for money. At interview he said that he was unwittingly recruited by the boat's captain. The RRT accepted that Mr X had thought he was going on a fishing trip and it was not until they were out at sea that he became aware of the reality of the operation.
19. Mr X further said that he fears for his safety if returned to Sri Lanka due to his cooperation with authorities on the people smuggling matter. He said that his family has advised him that people in Sri Lanka are angry with him and will try to kill him if he returns. Furthermore Mr X said that he had already received verbal abuse in gaol as a result of this cooperation, a claim that was accepted by the RRT, and apparently lead to a relocation within the prison system.

Ombudsman assessment/recommendation

20. Mr X spent 21 months in criminal detention then two years, six months in immigration detention. Mr X has now been living lawfully in the community on a RPBV for 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. In February 2007 the Minister declined to consider a combined s 417/48B request.
21. The Ombudsman draws attention to Mr X's various medical conditions mentioned in this report. The most recent medical report, dated November 2006, is from a Consultant Psychiatrist who diagnosed chronic (psychosomatic) pain syndrome and noted that integration into the community would help Mr X. In particular, to successfully address his symptoms, his visa situation needs to be resolved. As Mr X is on a RPBV, the Ombudsman is not aware of any barriers to his removal. Mr X acknowledges that he is not a refugee but is keen for a resolution to his immigration status so that he can move on with his life.
22. There are various factors the Minister may consider when determining a permanent solution for Mr X:
 - the length of time Mr X spent in immigration detention; his mental state which appears to have developed while in detention; and the possible connection between his ear problems and the alleged assault in detention

- that although Mr X was convicted of people smuggling, the RRT accepted that his involvement was non-voluntary
- Mr X ultimately cooperated with the AFP and Sri Lankan authorities identifying several people smugglers. Mr X claims that as a result, he was abused and threatened in jail, and has received warnings from his family that he is in danger of being killed if he returns to Sri Lanka.

23. In the interim, it is apparent that Mr X may need ongoing psychiatric assistance and DIAC will need to consider what continuing role it plays in providing this assistance to Mr X, especially during the period that he is the holder of a RPBV.



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Prof. John McMillan
Commonwealth and Immigration Ombudsman



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Date