Commonwealth
OMBUDSMAN

Department of Immigration and Citizenship

REPORT INTO REFERRED IMMIGRATION CASES: OTHER LEGAL ISSUES

June 2007

Report by the Commonwealth and Immigration Ombudsman,
Prof. John McMillan under the *Ombudsman Act 1976*

REPORT NO. 10|2007

Reports by the Ombudsman

Under the *Ombudsman Act 1976* (Cth), the Commonwealth Ombudsman investigates the administrative actions of Australian Government agencies and officers. An investigation can be conducted as a result of a complaint or on the initiative (or own motion) of the Ombudsman.

The *Ombudsman Act 1976* confers five other roles on the Commonwealth Ombudsman—the role of Defence Force Ombudsman, to investigate action arising from the service of a member of the Australian Defence Force; the role of Immigration Ombudsman, to investigate action taken in relation to immigration (including immigration detention); the role of Postal Industry Ombudsman, to investigate complaints against private postal operators; the role of Taxation Ombudsman, to investigate action taken by the Australian Taxation Office; and the role of Law Enforcement Ombudsman, to investigate conduct and practices of the Australian Federal Police (AFP) and its members. There are special procedures applying to complaints about AFP officers contained in the *Australian Federal Police Act 1979*. Complaints about the conduct of AFP officers prior to 2007 are dealt with under the *Complaints (Australian Federal Police) Act 1981* (Cth).

Most complaints to the Ombudsman are resolved without the need for a formal finding or report. The Ombudsman can, however, culminate an investigation by preparing a report that contains the opinions and recommendations of the Ombudsman. A report can be prepared if the Ombudsman is of the opinion that the administrative action under investigation was unlawful, unreasonable, unjust, oppressive, improperly discriminatory, or otherwise wrong or unsupported by the facts; was not properly explained by an agency; or was based on a law that was unreasonable, unjust, oppressive or improperly discriminatory.

A report by the Ombudsman is forwarded to the agency concerned and the responsible minister. If the recommendations in the report are not accepted, the Ombudsman can choose to furnish the report to the Prime Minister or Parliament.

These reports are not always made publicly available. The Ombudsman is subject to statutory secrecy provisions, and for reasons of privacy, confidentiality or privilege it may be inappropriate to publish all or part of a report. Nevertheless, to the extent possible, reports by the Ombudsman are published in full or in an abridged version. Copies or summaries of the reports are usually made available on the Ombudsman website at www.ombudsman.gov.au. Commencing in 2004, the reports prepared by the Ombudsman (in each of the roles mentioned above) are sequenced into a single annual series of reports.

ISBN 978 0 9803878 1 0

Date of publication: June 2007
Publisher: Commonwealth Ombudsman, Canberra Australia

Requests and enquiries can be directed to the Director Public Affairs, Commonwealth Ombudsman, GPO Box 442, Canberra ACT 2601; mail ombudsman@ombudsman.gov.au or phone 1300 362 072. Copies of this report are available on the Commonwealth Ombudsman's website http://www.ombudsman.gov.au.

CONTENTS

PART 1—SCOPE OF INVESTIGATION

1.1 In 2005 and 2006 the Australian Government referred to the Commonwealth Ombudsman the cases of 247 people who had each been detained by the Department of Immigration and Citizenship [1](DIAC) and later released. This office agreed to investigate and report to DIAC about each individual's case under the Ombudsman's power to conduct an own motion investigation, as provided for in s 5 of the *Ombudsman Act 1976*.

1.2 For the purpose of analysis, the cases were divided into seven categories on the basis of preliminary information provided by DIAC.[2] This report addresses the detention of 33 people whose matters were classified as 'other legal issues'.[3] The cases in this category are disparate, but largely concern the detention of people following the cancellation or refusal of their visas. In many cases, the cancellation or refusal decision was later set aside due to a procedural deficiency or some other error of law. Cases of people who were detained and then released while subject to a deportation order are also included in this category.

1.3 An individual analysis of each of the 33 cases has been provided by the Ombudsman's office to DIAC, but these will not be published. Instead, the systemic issues concerning immigration administration that arise from the individual investigations are addressed in this consolidated public report.

1.4 The investigation of each case focused on the circumstances that led to the detention of the person and the process undertaken by DIAC to resolve their status or bring their detention to an end. This investigation also examined whether these cases provided any evidence of systemic issues impacting on DIAC's effective administration of the *Migration Act 1958* (Migration Act). The methodology included consideration of:

- DIAC client files for individual cases
- the Integrated Client Services Environment (ICSE)[4] records for individual cases investigated
- detention dossiers where applicable, for individual cases investigated
- relevant sections of the Migration Act and Migration Regulations 1994
- relevant DIAC policy documents
- briefings provided by DIAC.

---

1 During the period covered in this report, DIAC was known as the Department of Immigration and Multicultural and Indigenous Affairs, and then the Department of Immigration and Multicultural Affairs.

2 The cases were divided into the categories of mental health, children in detention, data problems, those affected by the Federal Court decision in *Srey*, notification issues, detention process and other legal issues: further, see C*ommonwealth Ombudsman Annual Report 2005–06* at p. 83–84.

3 One case has not been investigated as the parties to the matter are presently engaged in litigation.

4 ICSE is DIAC's primary database and provides a single reference point for all records of contact between clients and DIAC. The system supports onshore processing for citizenship, visas, assurance of support, sponsorship, nomination and compliance.

PART 2—OVERVIEW OF OTHER LEGAL ISSUES CASES

2.1 The cases in this report are discussed under three headings. The first category deals with eight cases in which people were released from detention following action by DIAC to revisit and set aside an earlier decision that had led to the person becoming an unlawful non-citizen and being detained. The second category deals with 13 cases in which a person was detained following a decision under s 501 to cancel or refuse the person's visa. The third category deals with four cases in which there was a long-standing but unexecuted deportation order applying to a person who was detained. (There were a further eight cases that raised similar issues, but there was no systemic error or other feature of the case that warrants criticism in this report.)

2.2 People in all three categories were detained under the Migration Act, either on the basis that the person was an unlawful non-citizen (s 189), or that a deportation order applied to the person (s 253). The decision by DIAC to detain was unexceptional in some cases. In others there was a flaw in the decision that made a person an unlawful non-citizen. If the process by which a person has become a non-citizen is defective, the later decision to detain the person is itself called into question.

2.3 The following is a general description of the 33 cases dealt with in this report (noting that not all the detentions were wrongful or inappropriate).

- The cases concern people who spent time in immigration detention between 1993 and 2007.
- The time people spent in detention varied from a few hours to a period in one case of six years, five months and three calendar days.
- In 26 cases the DIAC decision that caused a person to become an unlawful non-citizen was itself later set aside or revoked, either by DIAC or as a result of a tribunal or court decision.
- In eight of those cases DIAC set aside its earlier decision as being flawed, and in doing so released the person from detention.
- In four cases a person who was the subject of a deportation order was detained under s 253(1) of the Migration Act and then released. The deportation orders in those cases, issued between 1993 and 1997, remain in force and have not yet been executed.

PART 3—DECISIONS THAT WERE SUBSEQUENTLY SET ASIDE

3.1 In eight cases a person was released from detention after DIAC revisited and set aside an earlier decision by which the person had become an unlawful non-citizen. In effect, those people were returned to their pre-existing position of being lawful non-citizens.

3.2 In six of those eight matters, the decision set aside by DIAC had been made under s 116, which gives DIAC a general power to cancel a visa in certain circumstances. Among those circumstances are that the visa holder breached a condition attached to a visa, or the visa holder can no longer meet the requirements of a visa. In another case, the decision that was set aside was a decision made at the border to refuse a person a visa. In the other case the decision set aside was a decision to grant a temporary visa, the granting of which automatically ceased the more beneficial visa held by the person at that time.

3.3 The Migration Act provides DIAC with only limited power to revisit and set aside an earlier decision to grant, refuse or cancel a visa.[5] In the absence of such an express power, DIAC historically relied upon a principle derived from a decision of the Federal Court in *Kawasaki*[6] to review and remake problematic decisions. *Kawasaki* held that a decision made under statute that is affected by an error of law, and is not otherwise irrevocable, can be set aside with the consent of the decision-maker and the client.

3.4 The view was taken by DIAC that the *Kawasaki* principle was no longer available to officers following the amendment of the Migration Act in October 2001 to insert a privative clause in s 474. The purpose of s 474 was to limit judicial review of most administrative decisions made under the Migration Act, including decisions to grant or cancel a visa. DIAC took the view that a privative clause decision could only be set aside on a narrow basis, outlined in an earlier decision of the High Court in *R v Hickman; ex parte Fox and Clinton* (1945) 70 CLR 598 (*Hickman*).[7] The result was to reduce significantly the circumstances in which DIAC believed it could revisit and vary a decision, even if there was a perceived defect in the decision.

3.5 The nature and reach of the privative clause was the subject of High Court consideration in 2003 in *Plaintiff S157 of 2002 v Commonwealth of Australia* (2003) 211 CLR 476 (*Plaintiff S157*). In that decision the High Court held that the privative clause did not preclude judicial review of a decision that is affected by jurisdictional error. That is a broader concept than the principle as understood from *Hickman*.

3.6 Another decision of the High Court that is relevant to this issue was the decision in *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 (*Bhardwaj)* (decided in March 2002, prior to *Plaintiff S157*). The court in *Bhardwaj* held that the Immigration Review Tribunal (IRT) could revisit and vary an earlier purported decision if, as a result of legal error in that decision, the IRT had

---

5 For instance, there are specific provisions enabling DIAC to revisit certain cancellation decisions made under the automatic student visa cancellation power of s 137J and other cancellation decisions made under s 128 where the visa holder is overseas.

6 *Comptroller-General of Customs v Kawasaki* (1991) 103 ALR 661.

7 *Hickman* held that a privative clause protected a decision from being set aside if the decision was made in good faith, it related to the subject matter of the power being exercised, it was reasonably capable of reference to that power, and the decision did not exceed the limits of the Commonwealth Constitution.

failed to discharge its statutory duty to hear and decide an appeal. Some Justices reached this conclusion on the basis that the IRT had made a jurisdictional error, and that its decision therefore lacked any legal foundation or effect. Much of the reasoning in the case is specific to sections of the Migration Act that applied to the IRT, and that may not arise in other cases. Nevertheless, the case illustrates that there is a capacity at an administrative level to remake an earlier erroneous decision.

3.7 Several current DIAC policy documents give conflicting instructions about DIAC's ability to revisit decisions. Those most relevant to the matters investigated by this office are as follows:

- Migration Series Instruction (MSI) 368: *Visa cancellation under sections 109, 116 and 140* explains that there is no express power to 'revoke' a s 116 cancellation decision and refers officers to the *Kawasaki* principle. The MSI also instructs officers to seek legal advice from within DIAC, in light of the privative clause, before deciding to set aside a decision. The MSI explains that 'the setting aside of decisions by officers will be closely monitored'.

- MSI 392: *Resident return visas* states that in view of the privative clause, 'there is now less scope for the Department to revisit decisions to cancel, grant or refuse to grant a visa, even if that decision has resulted in a "wrong" outcome for the client or the Department'. This MSI does not take account of *Plaintiff S157* or *Bhardwaj* and erroneously advises that DIAC can only revisit a decision if an error of the type identified in *Hickman* occurred.

3.8 The legal complexity in the case law and policy advice has made it difficult for decision makers when faced with a questionable decision that has caused a person to be recorded as an unlawful non-citizen. This is illustrated by the following case study of Mr A. He spent several years in detention, notwithstanding that he was a permanent resident who had lost that status as a result of an administrative error by DIAC. Mr A's case also illustrates that actions taken by DIAC in this complex setting of law and policy can undermine the broader goals of Australian migration policy, especially the ability of permanent residents to travel to and from Australia.

Case study: Failure to review appropriateness of detention

Mr A was detained by DIAC in 2002, and was held in detention for a period of three years, two months and sixteen calendar days.

Mr A had been a permanent resident of Australia since 1989. He obtained a resident return visa (RRV) in 1991, which permitted him to travel to and from Australia within a specified time frame. On one occasion in 1995 when he returned to Australia, he produced his current travel document but not the travel document that evidenced the RRV. Mr A had left that travel document in Vietnam because it had expired, although the RRV granted in 1991 remained in effect.

Section 166 of the Migration Act placed an obligation on Mr A to provide evidence of his identity and a current visa in order to be allowed to enter Australia. There was information on DIAC's systems that indicated he was a RRV holder. Unfortunately, the DIAC officer at the airport failed to access the appropriate records for Mr A and did not realise that he was a permanent resident.

Believing Mr A to be without a visa, but noting his eligibility for a RRV, the officer issued him with a one month border visa to allow him to enter the country. While the decision to grant the border visa avoided sending Mr A out of Australia, the decision also had the effect under the regulations at the time of causing Mr A's permanent resident status to cease. Had the officer identified that Mr A was a RRV

holder, the officer could simply have re-evidenced the RRV in Mr A's travel document (in accordance with usual practice).

Although Mr A had limited English skills, an interpreter was not used to interview him or explain the situation. Mr A later stated that he did not know that he had been issued with a border visa or that he had to regularise his status within a month of his arrival.

Mr A became recorded as an unlawful non-citizen on DIAC's system after the border visa expired. That led to his detention in November 2002. An investigation officer from the Ombudsman's office commenced an investigation into Mr A's situation in June 2005 following receipt of a complaint. In February 2006, Mr A was released from detention after DIAC determined that the decision to issue him with a border visa was flawed and should be set aside, for the reason that there was no evidence that Mr A had lodged an application for a border visa. Without an application there was no lawful basis for such a visa to be granted.

3.9 The decision in Mr A's case to revisit and set aside the decision to grant a border visa provided a convenient basis on which to revive his immigration status as a lawful non-citizen. However, there were several earlier points when DIAC could have resolved Mr A's status and avoided or shortened his detention:

- during DIAC's preparation for Mr A's location and detention in October 2002, when officers first queried the unusual circumstances in which Mr A had lost his permanent resident status
- at the time of his detention, when it was again recognised that the grant of the border visa had led to his predicament
- in June 2005, when officers questioned whether the grant of the border visa was affected by jurisdictional error, with the consequence that the border visa should have been set aside. It appears that no action was taken at that time.

3.10 The over-arching problem in Mr A's case is that officers did not actively pursue alternative avenues to resolve his detention. Four months prior to Mr A's detention, the Migration Regulations had been amended so that a border visa could no longer trigger the cessation of a more beneficial visa. That was a clear legislative indication that the policy of the Migration Act was not served by depriving permanent residents of that status on the basis of a technical provision within the regulations. DIAC at that time could have reviewed the circumstances of people who were adversely affected by the previous regulations and resolved their consequential unlawful status.

3.11 Moreover, there is evidence in Mr A's files that at least one DIAC officer expressed the view that when faced with such situations DIAC would ordinarily set aside the grant of the border visa. Unfortunately, other advice provided during Mr A's detention by various legal officers centred upon whether there had been an error of law that amounted to a jurisdictional error. The legal advice did not take a broader view of the appropriateness or otherwise of Mr A's detention.

3.12 Two other issues of general concern arise from Mr A's case. The first is that there appears to have been inconsistent practice among DIAC officers concerning the review of decisions thought to be problematic. For example, in Mr A's case there were differing views internally on whether he could be released from detention and the legal basis for doing so. The view that prevailed—that the grant of a border visa

without the requisite visa application was a jurisdictional error—was adopted in February 2006, three years after the decision in *Plaintiff S157*.

3.13 In six other decisions examined by this office where a decision to cancel a visa had been made under s 116, DIAC officers took action to set those decisions aside by applying the *Kawasaki* principle. This was done on an ad hoc basis, often without legal advice, in revocation decisions that were made in 2002, 2003 and 2004. As noted earlier, the privative clause commenced operation in late 2001.

3.14 As those few cases show, there was inconsistent practice adopted by different officers in DIAC. The period of detention stemming from the six s 116 decisions that were set aside lasted only a day or two, with the longest period being five calendar days. The failure to take more timely action in Mr A's case, combined with an internal view based on legal advice that the temporary border decision could not be set aside, led to him being in detention for more than three years. Overall, the situation surrounding Mr A's detention was serious and alarming. In view of the exceptional nature of this case, DIAC should give consideration to compensating Mr A. DIAC should also review the circumstances of this matter, having particular regard to the actions of its staff.

3.15 The second issue of general concern arising from Mr A's case is that there is no express power in the Migration Act that permits decisions of the type discussed above to be reviewed and set aside. This has led to the inconsistent practice that officers occasionally rely on the *Kawasaki* principle, sometimes without recording the basis for doing so. In other cases officers have gone down a path of greater complexity to see if there is a jurisdictional error that will facilitate a decision being set aside. If no such error can be found, the view taken is that there is no legal capacity to set the decision aside, notwithstanding an apparent error, or unintended or harsh consequence arising from the decision.

3.16 This could all be avoided if there was an express power in the Migration Act that permitted any decision made under the Act to be set aside and varied. If necessary, the power could be qualified to reduce the scope of the discretion and limit the prospect of judicial review of a refusal to invoke the power. For example, the power could be limited to setting aside a decision based upon a factual or legal error. Another approach already taken in other sections in the Migration Act is to provide that a power is exercisable only by the Minister personally, and that there is no duty on the Minister to make a decision.

3.17 More important though is the point of general principle that urgent consideration should be given to amending the Migration Act to introduce a power of this kind. The cases examined for this report (especially Mr A's case) show the need for such a power. A specific power to correct decisions that are flawed or inappropriate would fit appropriately into the complex scheme established by the Migration Act. Such a power would also ensure that members of the public are not deprived of their rights and liberties by errors and consequences that were accidental or unforeseeable and beyond their control.

PART 4—SECTION 501 MATTERS

4.1 Thirteen of the cases in this report concern decisions made under s 501 of the Migration Act that resulted in the detention of those persons. Section 501 empowers the Minister or a delegate to cancel or refuse to grant a visa to a non-citizen, including a long-term resident, who does not pass the character test stipulated in the Migration Act. This usually arises where a non-citizen has been convicted of serious or repeat criminal conduct. A person whose visa is cancelled becomes an unlawful non-citizen, liable to immigration detention, and ultimately subject to removal from Australia.

4.2 The s 501 cases were referred to this office for analysis because in each case the person was later released from detention, either as a result of a court decision that rendered invalid the s 501 decision in their case (seven matters), a procedural deficiency that caused DIAC to settle a court or tribunal challenge to the s 501 decision (five matters), or the Administrative Appeals Tribunal (AAT) set the s 501 decision aside on review (one matter).

4.3 Prior to examining these cases, the Ombudsman's office conducted an own motion investigation into the exercise of the s 501 power and published a report in February 2006, *Administration of s 501 of the Migration Act 1958 as it applies to long-term residents* (s 501 report).[8] Many of the issues highlighted in that report apply to the cases considered in this report. This is to be expected as these cases relate to numerous detentions, spanning some six years, that occurred during the same period as the cases in the s 501 report. That report was critical of inadequate administrative practices that had gone unchecked for many years.

4.4 The s 501 report made several recommendations to improve administrative decision making processes. DIAC accepted the Ombudsman's recommendations and has commenced a reform program to implement them. The cases examined in this report reinforce those recommendations and highlight two main issues: the importance of procedural fairness in decision making, and the need to recognise and respond to the implications of judicial determinations in a timely manner.

Procedural fairness

4.5 A decision of a Minister or a delegate under s 501(1) or (2) must be made in accordance with the requirements of procedural fairness, unless the Minister personally decides that the cancellation or refusal of a person's visa is in the national interest (s 501(3)). In the s 501 report, this office examined two key elements of procedural fairness: whether DIAC afforded those persons affected by the s 501 decision, including immediate family, a proper opportunity to inform DIAC of their views about a proposed cancellation decision; and secondly, whether DIAC's procedures took account of the difficulties people facing s 501 cancellation decisions may encounter in attempting to put their case to DIAC.

4.6 The importance of ensuring that a person has an appropriate opportunity to comment and to draw attention to their particular circumstances is shown in the case of Mr B.

[8] Report No 1/2006.

Case study: A lack of procedural fairness

Mr B was a New Zealand citizen who first came to Australia at the age of 17. Mr B returned to Australia in early September 2003 after a visit to New Zealand, and upon entry his visa was cancelled under s 501 as he was associated with a group that was suspected of being involved in criminal conduct.

The s 501 cancellation process took place while Mr B was in immigration clearance at the airport, and he was only given half an hour to prepare information for DIAC as to why his visa should not be cancelled. Before the decision was made to cancel Mr B's visa, DIAC learned that he was in receipt of a disability pension as a result of a motor vehicle accident.

Later the same day, but after Mr B's visa had been cancelled, his stepfather made contact with DIAC and explained that he had been granted power of attorney over Mr B's affairs as Mr B had suffered brain damage in the motor vehicle accident. However, it was not until December 2003, in the course of litigation in the Federal Court, that DIAC agreed to set aside the s 501 decision on the basis that there had been an error of law in the decision making process. Mr B spent almost three months in immigration detention before his visa was restored and he was released into the community.

4.7 This case highlights the importance of DIAC recognising that a person's individual circumstances and ability directly impact upon whether they are in a position to adequately respond to an intended cancellation under s 501. Importantly, DIAC has since recognised that it is not appropriate to make a s 501 cancellation decision while a person is in immigration clearance, with very limited time and no opportunity to seek assistance from family, friends, or a professional representative. The appropriate policies have been amended and now instruct officers not to take s 501 decisions in such circumstances.

Delay in applying case law

4.8 Migration law is constantly refined through frequent litigation. This adds additional complexity to the task of administering the Migration Act. Nonetheless, where court decisions affect the immigration status of people who have been detained or may be liable to detention, DIAC is obliged to implement those decisions as a matter of priority. It is imperative that DIAC's practices conform with contemporary case law and that DIAC is resourced to enable it to respond rapidly to changes as they occur. The case of Ms C provides an example of the consequences that can flow from a failure to keep abreast of court decisions that affect s 501 processes.

Case study: Delay in applying case law

Ms C was a New Zealand citizen who moved to Australia in 1979 at the age of one. By operation of law, Ms C came to hold an absorbed person visa, although DIAC incorrectly assumed that she was a special category visa holder. Between August 1993 and August 2004, Ms C was convicted of a series of criminal offences. In July 2004, a delegate of the Minister decided that Ms C did not pass the character test and purported to cancel the special category visa under s 501.

In February 2004, five months before the cancellation decision was made, the Federal Court delivered its decision in *Johnson v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCA 137 (25 February 2004), which made it clear that persons in Ms C's circumstances could not be special category visa holders. Nineteen months elapsed before DIAC applied the *Johnson* case to Ms C, by which time she had spent almost a year in immigration detention. She was released from detention as she had never held the visa that the delegate had purported to cancel.

4.9 Another area of delay was in DIAC's implementation of the Full Federal Court decision in *Nystrom v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCAFC 121 (1 July 2005) (*Nystrom*). In that case, the Full Court, by majority, ruled that it was a jurisdictional error for a decision-maker, when deciding to cancel a transitional (permanent) visa under s 501, to fail to take into account the fact that the non-citizen concurrently held an absorbed person visa that would also be cancelled by virtue of that decision. Consequently, all s 501 cancellation decisions in which the same error was made were rendered legally ineffective, entitling those people to be released from detention. Six cases in which people were released as a consequence of the *Nystrom* decision were referred to the Ombudsman's office for investigation.

4.10 DIAC appealed the Full Federal Court decision in *Nystrom* to the High Court, which ultimately overturned that decision in November 2006.[9] This had the effect that people who had been released following the Full Court decision once again became unlawful non-citizens and therefore liable to detention and removal from Australia, provided there was no other bar to their detention. By way of illustration, of the six matters referred to this office where the person had been released from detention between the Federal Court and High Court decisions in *Nystrom*, one person was re-detained and remains in detention, one person remains unlawfully in the community, two people are lawfully in the community after reaching an agreement with DIAC in the course of litigation, and two are lawfully in the community after it was determined that they were affected by another Federal Court decision delivered in December 2006.

4.11 During the period of 15 months following the Full Federal Court decision and before it was reversed by the High Court, DIAC was obliged to apply the Full Court finding to gauge if other people in detention were affected by the *Nystrom* ruling. Although the Full Court decision was delivered on 1 July 2005, it was not until September 2005 that the first person (of the six *Nystrom* affected cases covered by this report) was released from immigration detention. Four more people were released in October 2005, and another person was released in November 2005. While there would necessarily be a period of time while DIAC gathered information and assessed whether each person held an absorbed person visa, the delay in some cases invites criticism.

4.12 This is illustrated by the case of Mr D whose transitional (permanent) visa was cancelled in August 2005, after the Full Federal Court *Nystrom* decision was delivered. DIAC did not take the Court's decision into account in cancelling Mr D's visa and repeated the very error that the court had identified less than a month earlier. Mr D was eventually released from detention in October 2005 on the basis that the *Nystrom* decision applied to him.

4.13 The failure to implement judicial rulings in a timely manner is the subject of detailed discussion in Part 2 of the Notification issues report,[10] concerning the management of cases affected by C*han Ta Srey v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 134 FCR 308. Some of the cases in this report confirm the problem addressed in the Notification report and reinforce the recommendation that DIAC ensures that it is responsive to court decisions.

---

9 *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* [2006] HCA 50 (8 November 2006).

10 Commonwealth Ombudsman, *Report into referred immigration cases: Notification issues*, Report No 9/2007.

PART 5—DEPORTATION CASES

5.1 Four of the cases in this report concern the detention of people who were, and remain, the subject of deportation orders under ss 200 and 201 of the Migration Act. These sections enable the Minister to deport a non-citizen who has committed an offence, within their first ten years of permanent residence in Australia, for which they have received a term of imprisonment of one year or more. Once a person is deported from Australia, their permanent visa ceases and they are permanently barred from returning to the country.

5.2 The deportation process, as outlined in a DIAC policy, is similar to the s 501 process. A person facing deportation is first interviewed, as are any close friends or family; material is gathered and submissions are prepared that address considerations such as the expectations of the Australian community, the seriousness and nature of the offence, the risk of further criminal conduct, hardship to persons affected and the best interests of any child. Reflecting the gravity of a deportation decision and their relative infrequency, only the Minister and four senior delegates are able to issue or revoke a deportation order. However, several key features distinguish the deportation process from the s 501 process:

- A deportation order does not render the person an unlawful non-citizen; rather it entitles the Minister or delegate to detain the person pending deportation (s 253(2), (8)).
- Detention is not mandatory and the Minister or delegate retains the discretion to release the person from detention at any time and to impose reporting conditions (s 253(9)).

5.3 The Migration Act provides that unless the deportation order is revoked, the subject of the deportation order shall be deported accordingly, but the validity of the deportation order shall not be affected by any delay in the execution of the order (s 206).

5.4 A point of concern in the four cases in this study is the lengthy time that has passed since the deportation orders were issued. All four deportation orders remain current although they were variously issued in 1993, 1996, and 1997. During the intervening years the people have been in immigration detention, some times on several occasions. Although there has been litigation in some cases, there have also been periods of complete inactivity on DIAC's part, extending over several years. The period of time spent by the four people in detention since the deportation orders were issued varies from 128 calendar days in one case to more than six years and five months in another.

5.5 The period of time that has passed since the deportation orders were issued, together with each person's evident suitability for release into the community, begs the question whether deportation is appropriate in these cases.

5.6 The deportation power has largely been superseded in practice by s 501. The Ombudsman understands that it has rarely been used since s 501 was amended in 1998. Numerous policy documents address ss 200 and 201—there are no less than seven deportation MSIs presently available to DIAC staff.[11] In comparison, there is only one MSI governing the exercise of the s 501 power.[12] Taken as a whole, the deportation MSIs are dense, repetitive, contradictory, and even inaccurate (one incorrectly advises that prison officers are not officers under the Migration Act).

5.7 Only the latest MSI has been updated to reflect Direction 9 issued by the Minister in 1998, which specifically addresses deportation decisions under ss 200 and 201. Even MSI 223*: Review of deportation orders*, which was issued after Direction 9, and is most likely to be used in reviewing unexecuted deportation orders, bears the warning that it does not take account of Direction 9. The case of Mr E demonstrates the need for comprehensive information for DIAC officers, particularly given the desirability of resolving outstanding deportation matters and ensuring that appropriate detention decisions are made.

Case study: Continuing detention and confusion about deportation processes

Mr E fled Iran as a refugee and arrived in Australia in 1991 as a permanent resident. Shortly afterwards he was convicted of several drug related offences, the most serious of which involved a 1995 prison sentence of two years and three months. After the sentence was completed in 1997, the Minister's delegate signed a deportation order. The AAT affirmed the order in 1999.

Mr E was taken into immigration detention in September 2000, and was held in a State correctional facility. Mr E asserted that his life would be at risk if he was returned to Iran and refused to sign Iranian travel documents. This prevented DIAC from executing the deportation order.

Mr E was transferred to a dedicated immigration detention facility in February 2002. The Minister subsequently affirmed the deportation order in 2004.

The files show that, during Mr E's detention, there was considerable confusion about his status. Some officers even assumed that Mr E had become an unlawful non-citizen and that his detention was therefore mandatory under s 189. It appears that there was little, if any, action taken by DIAC in respect of the deportation order between early 2001 and July 2004. In March 2005, Mr E's solicitor requested that he be released from detention pursuant to s 253(9). The files show that DIAC officers were at a loss as to how s 253(9) operated, and which area within DIAC was responsible for responding to such a request. In August 2005, DIAC was provided with a comprehensive psychiatric report that detailed the serious and deteriorating state of Mr E's mental health. This information coincided with a change in some of DIAC's detention practices and in November 2005, after more than five years in detention, Mr E was released under s 253(9).

In March 2006, an Ombudsman report on Mr E prepared under s 486O of the Migration Act was tabled in Parliament. That report recommended that the Minister consider revoking the deportation order under s 206. The Minister tabled a statement in Parliament acknowledging the Ombudsman's recommendation, stating that 'the issue of possible revocation remains under active consideration'. The office is awaiting an update on the progress of the review. Mr E remains a permanent resident in the community.

---

11 MSI 24: *Preparation of deportation orders*, issued in 1994; MSI 26: *Revocation of deportation orders*, issued in 1994; MSI 34: *Deportation submissions*, issued in 1994; MSI 167: *Detention of deportees*, issued in 1997; MSI 171: *Deportation—General policy*, issued in 1997; MSI 223: *Review of deportation orders*, issued in 1999; MSI 277: *Advice of decision to deport*, issued in 2000.

12 MSI 254: *The character requirement: Visa refusal and cancellation under s 501.*

5.8 The MSIs envisage that deportation would ordinarily occur at the end of a term in prison, or shortly after a person's release from prison. Nevertheless, this did not occur in the four cases in this report, particularly in the case of Mr F whose deportation order has been in place for almost 14 years. During this time he has been detained and released on three separate occasions.

Case study: Multiple detentions and poor deportation processes

Mr F was born in Romania but arrived in Australia as a refugee with permanent resident status in 1987. In 1990 he was convicted of a drug related offence and sentenced to five years and seven months imprisonment. DIAC issued a deportation order in June 1993, and after his release from prison Mr F was taken into immigration detention. He was released after three days under stringent reporting conditions and following the lodgement of a bond. In October 1993 the AAT affirmed the deportation order.

It appears that DIAC did not take any action in respect of the deportation order until it interviewed Mr F in June 1997. Shortly afterwards, Mr F's lawyer raised concerns that Mr F's safety would be at risk if he was returned to Romania. In 1998 officers within DIAC noted that they could no longer locate Mr F's deportation file. In June 2000, officers again noted that Mr F's file could not be located, that the outstanding deportation order was not good for Mr F's mental state and consideration might be given to revocation of the order. DIAC later determined that Mr F was no longer a refugee and sought a Romanian travel document for him in early 2001.

Although Mr F had complied with his reporting conditions, in March 2001 he was detained under s 253 and held at the Perth Immigration Detention Centre. Mr F's lawyer requested that the Minister give consideration to revoking the deportation order. Although this request was subsequently refused, Mr F was again released from detention, in May 2001, on the basis of his previously compliant behaviour.

DIAC subsequently revisited Mr F's deportation order and, in August 2003, a senior executive officer purported to affirm the revocation order. This officer was not delegated to make such a decision. Mr F was re-detained the same month. DIAC arranged flights to take Mr F to Romania but they were cancelled after Mr F initiated legal action in the Federal Court. The Federal Court issued an injunction and Mr F was released from detention on 22 October 2003.

In June 2005, in recognition that the senior executive officer lacked the requisite delegation, DIAC decided to affirm the revocation order again. The Federal Court proceedings remain on foot.

5.9 The record keeping requirements for deportation matters are comprehensively detailed in MSI 277: *Advice of decision to deport*. This MSI, which was issued in 2000, makes it clear that original and certified copies of deportation orders must be maintained on files, along with the submissions that were considered in making the order. DIAC is unable, however, to locate Mr F's file containing the original deportation order or the documentation regarding the 2005 affirmation decision. Given the gravity of a deportation decision and its consequences for the person concerned, this is a serious record keeping deficiency.

5.10 A recommendation is made below that relates to long-standing deportation orders.

PART 6—CONCLUSIONS AND RECOMMENDATIONS

6.1 The cases in this report highlight the complexities inherent in the modern migration regime. It is a challenging area, fraught with factual and legal technicalities and made all the more demanding by the human implications of each decision. However, as illustrated by the detention of Mr A, the impact that a migration decision can have upon a person is a matter that must be kept prominently in mind at all times.

6.2 Many of the issues raised in this report—such as procedural fairness, record keeping and the need to apply case law in a timely manner—have been the subject of discussion and recommendations in previous reports. Only two additional matters of a systemic nature and that of the case of Mr A warrant a further recommendation in this report.

6.3 It is recommended that DIAC:

- Consider the desirability of a specific legislative power that would enable DIAC to revisit and set aside a flawed or inappropriate decision, particularly where the decision has resulted in an unintended or undesirable consequence.
- Review the circumstances surrounding the detention of Mr A and consider:
  - whether compensation is payable to him
  - the actions of its staff and whether there were lapses in professional standards in relation to the way this case was managed.
- Review all cases in which a person who is no longer serving a criminal sentence is the subject of a deportation order that remains unexecuted. The review of those cases should be centrally coordinated, take account of inconsistencies in existing policy and consider:
  - the circumstances of each case and any new information or events that have occurred since the order was issued
  - whether there are barriers to deportation, such as statelessness or ill health
  - whether the deportation order should be revoked
  - if the person is in immigration detention, whether they should be released from detention under s 253(9).

ATTACHMENT A—RESPONSE FROM DIAC

Dear Dr Thom

Thank you for the opportunity to comment on your draft *Report into Referred Immigration Cases: Other Legal Issues*. The observations that you make demonstrate the serious errors that have occurred in the past, which have directly impacted on many peoples' lives. Your report highlights the importance of maintaining high standards in decision-making, and my Department will continue to ensure this through the extensive programme of reform and improvement it has established over the last two years.

A key objective of my Department's reform agenda is sustained commitment to service excellence and high professional standards to ensure that clients continue to be treated fairly and reasonably. This objective is reflected in policies and decisions regarding the detention of clients, and also in the consideration of a client's possible removal or deportation. The work of the Department continues. Consistent with your recommendation, preparations are underway to identify and review the circumstances of all persons who are currently subject to an unexecuted deportation order and who are no longer serving a criminal sentence.

My Department fully endorses the existing processes for reviewing past decisions about clients, such as the merits review scheme and the ministerial intervention powers provided for in the *Migration Act 1958*. Consideration of a further specific legislative power to set aside decisions made in the past is, however, a matter for government.

A significant feature of my Department's change agenda is its continuing investment in staff training and support, and its commitment to addressing staff behaviours which do not demonstrate diligence and professionalism in dealing with clients. Accordingly, my Department will review in detail the actions of staff involved in managing the case of Mr A, noted in your report, to determine if there were lapses in professional standards. The case of Mr A is also being examined to determine appropriate reparation.

As this is the last of your published reports relating to the 247 Referred Immigration Cases, I would like to take the opportunity to thank you for your office's investigation into these matters. I would also like to thank you for your participation in the many fora within my Department that have played a part in facilitating the process of change. This report highlights the serious errors of the past, and it once more reinforces my Department's commitment to ensuring that no further mistakes could occur. My department is now well advanced in its organisational transformation, having already implemented initiatives such as:

- improvements to identity verification
- better recognition and management of client health and mental health needs
- establishment of alternative arrangements for accommodation of families with children
- the first release (in April 2007) of the $495 million Systems for People programme which has deployed new business processes, quality control,

record keeping, reporting and decision support for compliance and case management services and a new centralised business operating model for the management of movement alert lists
- strengthened training and instruction, particularly for compliance staff administering s189 of the *Migration Act 1958*
- leadership and ethical decision-making training through the IDEAL programme
- development of the overarching *DIMA Plan 2006/07*and *DIAC Plan 2007/08*, for strategic departmental planning
- reforms to detention services, and the establishment of case-management for complex and sensitive cases
- improvements to stakeholder engagement through establishment of the Stakeholder Engagement Taskforce
- improvements to client services through the Client Service Improvement Programme.

These reforms, and others, have all been implemented in the context of strengthened approaches to governance, risk management and quality assurance within the Department. This combination of sound measures and strong governance provides an assurance of my Department's continuing focus on being a high performing client-focused public sector organisation.

Yours sincerely

(Andrew Metcalfe)

ATTACHMENT B—GLOSSARY

AAT	Administrative Appeals Tribunal
DIAC	Department of Immigration and Citizenship
ICSE	Integrated Client Services Environment
IRT	Immigration Review Tribunal
Migration Act	*Migration Act 1958*
MSI	Migration Series Instruction
s 189	s 189 of the *Migration Act 1958*