

REPORT FOR TABLING IN PARLIAMENT BY THE COMMONWEALTH AND IMMIGRATION OMBUDSMAN

Under s 486O of the Migration Act 1958

Personal identifier: 234/07

Principal facts

Personal details

1. Mr X is aged 34 and is a citizen of Vietnam. Mr X's father, mother, Ms Y, siblings and an uncle reside in Australia; his paternal grandmother resides in Vietnam. Mr X's partner, Ms Z, and his stepson Master A, aged 10, are both Australian citizens.

Detention history

2. On 28 June 2005 a delegate of the Minister cancelled Mr X's visa under s 501 of the *Migration Act 1958*. Mr X's custodial sentence ended on 15 July 2005. He was detained under s 189(1) and transferred to Villawood Immigration Detention Centre (IDC).

Visa applications

3. Mr X arrived in Australia from a refugee camp in Hong Kong on a Refugee Visa (RV) (January 1993); granted a Transitional (permanent) Visa by operation of law (September 1994); visa cancelled s 501 (June 2005); decision affirmed by the Administrative Appeals Tribunal (AAT) (September 2005); judicial review transferred by consent from the Federal Magistrates Court (FMC) to the Federal Court (FC) (November 2005), dismissed (April 2006); application to the Full Federal Court (FFC) (June 2006), dismissed (August 2006); Protection Visa (PV) lodged (September 2006), refused, associated Bridging Visa (BV) refused (October 2006); refusal affirmed by the Refugee Review Tribunal (RRT) (January 2007); judicial review dismissed by the FMC (April 2007).
4. A s 195A submission referred to the Minister, who decided not to intervene (May 2007); a Departmental (DIAC) initiated combined s 417/195A request was referred to the Minister on 5 September 2007. On 11 September 2007, the Minister declined to consider Mr X's s 417 request but indicated he was inclined to consider the grant of a Temporary (Humanitarian Concern) Visa (THCV) under s 195A subject to health and character checks.

Current immigration status

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

Removal details

6. DIAC advises that Mr X will not be removed while the Minister is considering Mr X's s 195A request.

Ombudsman consideration

7. DIAC's report to the Ombudsman under s 486N is dated 5 July 2007.
8. Ombudsman staff interviewed Mr X on 10 September 2007 by telephone.
9. Ombudsman staff sighted the following documents: a letter from Pastor B dated 7 November 2006, a letter to the Minister from Ms Y dated 25 January 2007, a letter from Ms Z dated 2 February 2007, a letter from her son Master A dated 2 February 2007; a report from DIAC to the Ombudsman's office on the outcome of a review of Mr X's case in response to the Ombudsman's report on long-term residents whose visas had been

cancelled under s 501 of the Migration Act¹ dated 28 May 2007; an International Health and Medical Services (IHMS) report dated 25 June 2007, and a combined DIAC s 417/195A submission referred to the Minister on 5 September 2007.

Key issues

Criminal history

10. Mr X has a history of criminal offences from 1995 until 2004. The AAT indicated he had used 20 aliases. In October 1995 he was convicted of robbery in company, robbery with wounding, and robbery with striking, and was sentenced to a minimum term of two years. In October 2000 he was sentenced to four months imprisonment for possessing a prohibited drug. In April 1997 DIAC warned Mr X that he had been considered for criminal deportation and any further conviction would lead to criminal deportation being reconsidered. The AAT reported *'he was also warned that any disregard of the warning would weigh heavily against him'*.
11. In June 2004, Mr X was sentenced to three years with a non-parole period of 18 months for supply of a prohibited drug on an ongoing basis. Mr X has other various convictions. DIAC records indicate he has been imprisoned on five occasions for a total period of 46 months.

Health and welfare

12. The IHMS report indicated that Mr X was treated with medication for insomnia, epigastric discomfort and reflux, and for wrist and ankle pain. The report stated Mr X *'has a history of substance abuse but declined participation in the Methadone Program'*.
13. Mr X stated he had attended a six-month drug education program at Bathurst Gaol and that he had been drug free since he commenced his gaol term three years ago. He stated he has been taking a prescribed sleeping tablet for the last few months and experiences insomnia as he ruminates on his impending removal.

Attitude to removal

14. Mr X told Ombudsman staff that he is worried about returning to Vietnam. He is unsure of his grandmother's whereabouts and has no plans. He said he has nowhere to stay and fears discrimination due to his Chinese-Vietnamese descent.

DIAC's review of s 501 visa cancellations

15. In February 2006 the Ombudsman published a report on the application of s 501 as it applies to long-term residents. Recommendation 8 of that report was that DIAC review the specific cases considered in the course of the Ombudsman's investigation. Recommendation 9 was that DIAC consider *'whether to continue the detention in immigration detention centres of all non-citizens to whom these recommendations might apply, taking account of the range of alternatives now available'*.
16. DIAC advised in May 2007 that its review of Mr X's case had been completed and that the Minister had decided not to intervene.

Links to the Australian community

17. Mr X's immediate family all live in Australia, including his partner and his stepson, Master A. DIAC indicates that the nature of this relationship was not detailed in the submission to the Minister when Mr X's visa cancellation was reviewed. Mr X has been in a relationship with his partner since 2000 and DIAC considers that the relationship

¹ *'Administration of s 501 of the Migration Act 1958 as it applies to long-term residents'*, February 2006, Report by the Commonwealth and Immigration Ombudsman, Prof. John McMillan, Report No. 01/2006, Commonwealth Ombudsman, Canberra, Australia.

between Mr X, his partner, and Master A was genuine and close. For example, Villawood IDC visit records indicated Ms Z visited Mr X every second day and Master A had visited seven times this year. Ms Z had indicated that if Mr X was removed she was considering going to Vietnam with her son. The s 417/195A submission currently before the Minister addresses Mr X's long term relationship with an Australian citizen and that her son recognises Mr X as his father.

18. Ms Z stated to Ombudsman staff that she had visited Mr X daily, for four to five hours, since he was detained at Villawood IDC. Pastor B, of the St Stephen Vietnamese Anglican Church at Villawood supplied a letter of support, attached to Mr X's, his mother Ms Y's and Ms Z's s 417 request of February 2007. Pastor B indicated he had seen Mr X on a weekly basis at Villawood IDC.

Ombudsman assessment/recommendation

19. Mr X has been in immigration detention for two years and two months. He arrived in Australia at 19 years of age as a refugee, having spent the previous four years in a refugee camp in Hong Kong. He began offending approximately two years after arriving in Australia. Mr X received a warning in 1997 that he had been considered for deportation and faced deportation if he continued to offend.
20. A delegate of the Minister cancelled Mr X's permanent visa in June 2005, and the decision was affirmed by the AAT. He was unsuccessful in his application for a PV, and an application for judicial review by the FMC. Mr X's case is being considered by the Minister following a s 417/195A submission for Ministerial intervention.
21. Of concern in Mr X's case is the amount of time that he spent in immigration detention while a review of his case was undertaken pursuant to the Ombudsman's report on the visa cancellations of long-term permanent Australian residents. In the report the Ombudsman recommended that DIAC consider whether to continue the detention in immigration detention centres of people who were subject to review while the reviews were undertaken. This recommendation was made in light of the fact that the reviews could take some time, that indefinite detention is undesirable and that the people subject to visa cancellations who had already completed their criminal sentences would, but for the fact of the visa cancellation, otherwise be free in the community. The report noted that a range of alternatives to detention facilities are now available and that permanent residents whose families are in Australia are unlikely to abscond.
22. It is regrettable that, despite the urgency implicit in the Ombudsman's recommendation, Mr X has remained in immigration detention for 19 months following the release of the Ombudsman's report. The Ombudsman notes that Mr X's case was considered in the DIAC s 501 Case Review and that DIAC supplied the Ombudsman's office with an individual report setting out the review outcome for Mr X in May 2007. The subsequent s 417/195A submission to the Minister notes a significant omission from the information provided to the Minister as part of the s 501 Case Review, it advises, *'the section 501 [Case Review] submission did not detail that Mr X has an Australian citizen de facto spouse and stepson, nor did it highlight the frequent and regular visits his defacto spouse makes to the detention centre'*.
23. The Ombudsman notes that the Minister is considering granting a THCV, subject to health and character checks. The Ombudsman makes no recommendations in this report.



Prof. John McMillan
Commonwealth and Immigration Ombudsman



15 Feb 2007
Date