

REPORT FOR TABLING IN PARLIAMENT BY THE COMMONWEALTH AND IMMIGRATION OMBUDSMAN

Under s 486O of the Migration Act 1958

Personal identifier: 225/07

Principal facts

Personal details

1. Mr X is aged 63 and is a citizen of India. Departmental (DIAC) investigations revealed that Mr X has a wife and adult children in India. At interview with Ombudsman staff Mr X claimed that his wife had re-married.

Detention history

2. Mr X was arrested by NSW Police in September 2003; in the same month he was released on bail and taken into immigration detention under s 189(1) of the *Migration Act 1958*. He was released into the custody of NSW Police to face criminal charges in November 2003. Mr X completed his criminal sentence in August 2004 and was returned to Villawood Immigration Detention Centre (IDC).
3. DIAC advised that *'In detailing Mr X's detention history, it is now apparent that Mr X also remained in immigration detention while serving his custodial sentence'*. Mr X has therefore been continuously in immigration detention since September 2003.

Visa applications

4. Mr X arrived in Australia (August 1991) on a Visitor Visa; applied for a Protection Visa (PV) (September 1991); applied for a combined Special Permanent and Highly Qualified Onshore Permanent Entry Permit (SP&HQ), BV granted (August 1994); a second BV granted (September 1994); SP&HQ refused (December 1994); applied for a third BV (February 1995); second BV expired, third BV granted (August 1995); PV refused (November 1995); appealed to the Refugee Review Tribunal (RRT) (December 1995); the RRT affirmed the decision (February 1998); third BV ceased and applied for a fourth BV (March 1998), fourth BV refused (March 1999); a fifth BV granted in association with legal proceedings (March 1999); a sixth BV granted in association with High Court (HC) proceedings (June 1999); fifth and sixth BVs ceased and Mr X departed Australia (July 1999).
5. Mr X re-entered Australia (under the alias of Y) (October 1999); Mr X (under the name of Y) applied to the Federal Magistrates Court (FMC) for review of the Minister's decision to remove him to India, FMC dismissed the application (October 2004).
6. Mr X appealed to the Migration Review Tribunal (MRT) in relation to the (1994) SP&HQ refusal (June 2005), the MRT affirmed SP&HQ refusal; a second PV application lodged (September 2005); PV refused and appealed to the RRT (October 2005); applied to the FMC for judicial review of the MRT decision (October 2005), the FMC dismissed the application (December 2005); the RRT affirmed the PV refusal decision (March 2006); applied to the FMC seeking judicial review of the RRT decision and applied for associated BV, refused (May 2006); appealed to the MRT in relation to the BV refusal, MRT affirmed refusal (June 2006); submission referred to the former Minister for the possible use of her detention intervention powers under s 195A (September 2006), the Minister declined to intervene (November 2006); the FMC dismissed the application (February 2007); combined s 417/48B request lodged, application to the Full Federal Court (FFC) for an extension of time to appeal the FMC decision (March 2007); the FFC

refused an extension of time (April 2007); s 417 request refused by the Minister, the s 48B request was assessed as not meeting the guidelines for referral to the Minister (August 2007).

Current immigration status

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

Removal details

8. DIAC's attempted removal of Mr X in October 2004 was aborted as a result of the FMC litigation. On 15 June 2005, DIAC referred Mr X's case to the Indian Consulate for the issue of a travel document. The Consulate advised that due to difficulties in establishing Mr X's identity, travel documents could not be issued. Mr X's identity has since been established and is discussed below. In May 2007 DIAC made a follow-up request for Mr X's travel documentation. The Consulate advised that they were unable to locate the previous application so in the same month DIAC lodged another application for Mr X.

Ombudsman consideration

9. DIAC's reports to the Ombudsman under s 486N dated 11 July 2006, 11 December 2006 and 20 June 2007.
10. Ombudsman staff interviewed Mr X at Villawood IDC on 3 August 2006 and his solicitor, Mr Z, made an oral submission on 14 August 2006.
11. Ombudsman staff sighted a number of documents: a DIAC submission to the Minister dated 31 August 2006; two International Health and Medical Services (IHMS) medical summary reports dated 2 November 2006 and 25 June 2007; two Professional Support Services (PSS) psychology summary reports dated 17 November 2006 and 12 June 2007; and letters of support from pastoral and community members.

Key issues

Criminal history

12. DIAC advised that Mr X was convicted of aggravated indecent assault of an intellectually disabled female in August 2004. He was sentenced to 18 months imprisonment with a non-parole period of nine months.

Identity issues

13. DIAC advised that Mr X left Australia in July 1999 and re-entered in October 1999 on an Australian passport under the name of Y. The MRT (June 2006) noted that DIAC found this Australian passport to be a fraudulent photo-substituted document. Mr X, under the alias of Y claiming to be an Australian citizen, sought judicial review in the FMC in October 2004 of the Minister's decision to remove him. DIAC agreed to halt removal attempts as a result of the identity issues raised.
14. DIAC advised that in June 2005 it confronted Mr X with a video from his wife in India and he admitted that he was Mr X from India. DIAC also advised that it has received an affidavit from a woman in India who claims to be Mr X's wife and that they have a daughter.

Health and welfare

15. PSS advised that while no formal diagnosis has been made, aspects of Mr X's presentation are consistent with Major Depression. PSS saw Mr X on average once every two months in the period August 2004 to May 2005 and then once a fortnight from May 2005 to November 2006. PSS noted that he presented in December 2004 with memory difficulties and anger, in January 2006 with a depressed mood, and in May

2006 with thoughts related to harming himself or others. Since then he presented with auditory hallucinations, poor concentration, increased hopelessness, increased isolation and decreased engagement in activities. Treatment interventions have predominantly consisted of supportive counselling, liaison with other health professionals and cognitive behavioural therapy. The PSS report of 2006 stated that *'The prognosis for a significant longer term improvement in Mr X's psychological health is poor. This is based on his presentation over the course of contact with PSS, the recent deterioration in his health ... including poor insight and difficulties undertaking psychological treatment'*.

16. The PSS report of June 2007 noted that Mr X *'appears to benefit from contact with PSS and has expressed thanks for support provided. Positive clinical outcomes also include facilitating referrals and engagements with psychiatric services and ongoing review of mental health. Mr X has had periods of improved mood and has reported a reduction in thoughts of harm and hallucinations'*.
17. Mr Z expressed concerns to Ombudsman staff about Mr X's mental health, commenting on Mr X's inconsistency, the difficulty of getting him to concentrate on the matters at hand and his apparent lack of understanding about the circumstances in which he is involved.
18. IHMS advised that Mr X has been consulted by members of the Mental Health Team for his depression and anxiety and has a history of osteoarthritis of the left knee, left shoulder pain, eyesight problems and is on antibiotics for testicular orchitis. IHMS further advised that Mr X has a history of *'hearing voices and depression and is currently on medications ... there is nothing to indicate that this client's medical conditions could be better managed in a setting other than an IDC'*.

Attitude to removal

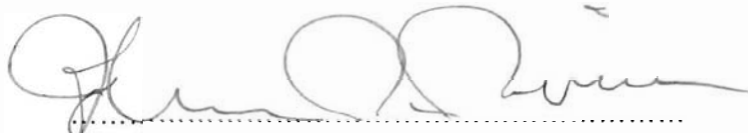

19. At interview with Ombudsman staff Mr X indicated that he feared for his life if returned to India. He claimed that he falsely admitted to murder to help his political party and faces gaol if he goes back. The RRT (March 2006) did not accept that he either killed or was implicated in the deaths of two policemen as he had claimed.
20. At both hearings, the differently constituted RRTs found that Mr X lacked credibility. The RRT (March 2006) said it found his evidence *'evasive, contradictory, irrational and highly implausible'* and stated *'I do not accept that the difficulties with his evidence can be explained by age, memory loss or illness'*.

Ombudsman assessment/recommendation

21. Mr X has spent nearly four years in immigration detention, of which nine months was also criminal detention. Mr X's claims were heard by the RRT on two occasions, which concluded he was not owed protection from Australia. The Ombudsman has no further comment to make in relation to his claims for a PV.
22. The current issue for consideration is whether Mr X should remain in detention. The Minister recently declined to intervene in Mr X's case which means that the removal process is likely to recommence. DIAC has applied for travel documents and it is not known how long it may take for them to be issued. Mr X is aged 63 and suffers from poor health. The medical evidence is that Mr X displays symptoms consistent with Major Depression, his mental condition has deteriorated while he has been in detention and his prognosis is poor. However, there is no evidence before the Ombudsman that indicates that his condition cannot be suitably managed in the detention environment.
23. The length of Mr X's detention, together with Mr X's age, are matters of increasing concern. On the other hand, Mr X's poor immigration compliance record means that it is

difficult at this stage to make a recommendation that he be released from detention while plans are implemented for his removal from Australia. That situation could change if he remains in detention without any reasonable prospect of his situation being promptly resolved.

24. The Ombudsman notes that if Mr X remains in detention, a fourth report under s 486N will fall due in January 2008. At the time of completing the next report on Mr X, the Ombudsman will review his circumstances, considering again the impact of detention upon his health and the suitability of continued detention in an immigration detention facility.


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Prof. John McMillan
Commonwealth and Immigration Ombudsman
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Date