

REPORT FOR TABLING IN PARLIAMENT BY THE COMMONWEALTH AND IMMIGRATION OMBUDSMAN

Under s 486O of the Migration Act 1958

Personal identifier: 358/08

This is the combined fourth, fifth and sixth s 486O report by the Ombudsman on Mr X as he has remained in immigration detention since the Ombudsman's combined second and third report. The Ombudsman's first report (26/06) was sent to the Minister on 9 January 2006 and tabled in Parliament on 29 March 2006. The Ombudsman's combined second and third report (115/06) was sent to the Minister on 29 December 2006 and tabled in Parliament on 21 March 2007. This report updates the material in those reports and should be read in conjunction with them.

Principal facts

Visa applications

1. A request under s 195A of the *Migration Act 1958* was initiated (January 2007), and although the request met the guidelines for referral, Mr X's case was not referred to the Minister as the s 501 submission had included a s 195A option that the Minister had declined to consider (February 2007); s 197AB request lodged and assessed as not meeting the guidelines for referral to the Minister (May 2007); Minister declined to intervene in case following the Department's (DIAC) s 501 review (June 2007); Mr X lodged a Protection Visa (PV) application and the associated Bridging Visa (BV) application was found to be invalid (July 2007); PV application refused, appeal to the Refugee Review Tribunal (RRT) (August 2007) was unsuccessful (October 2007); s 417 application (October 2007) and s 195A application (November 2007) ongoing.

Current immigration status

2. In December 2006 Mr X was transferred to Port Augusta Immigration Residential Housing (IRH). In April 2007 he was transferred back to Baxter Immigration Detention Centre (IDC) at his request. In August 2007, two weeks before the closure of Baxter IDC, Mr X was transferred to Maribyrnong IDC.

Removal details

3. DIAC advises that due to the strict guidelines in DIAC's Memorandum of Understanding with Vietnam, removal processes could take several months. DIAC obtained travel documents for Mr X valid until October 2007, however removal plans were suspended until an outcome had been reached in his PV processes.

Ombudsman consideration

4. DIAC's further reports to the Ombudsman under s 486N are dated 28 December 2006, 4 June 2007 and 26 November 2007. The Minister's Statement to Parliament in response to the Ombudsman's last report on Mr X is dated 20 March 2007.
5. Ombudsman staff interviewed Mr X by telephone on 17 April 2007 and have spoken with him on several occasions since that date.
6. Ombudsman staff have sighted the following documents: a psychiatric report by Dr A dated 27 February 2007; a medical summary report from International Health and Medical Services (IHMS) dated 17 April 2007; a psychological summary report from Professional Support Services (PSS) dated 18 April 2007; and 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.

Key issues

Health and welfare

7. Dr A's psychiatric report noted that *'Mr. X suffers from significant depression and anxiety ... As would be expected prolonged indeterminate detention is beginning to take a psychiatric toll and his capacity to think and participate in life has been significantly compromised. At the moment I could not find evidence of compromised mental capacity but I do think it is a matter of urgency for his situation to be resolved. Continued indeterminate detention will almost certainly lead to further significant deterioration of his mental state'*.
8. The PSS report noted that since the start of 2007 Mr X has been seen by PSS on a fortnightly basis. PSS diagnosed him with an anxiety disorder, noting a *'Favourable decision from DIAC and ultimate release into Australian community is the most likely predictor of Mr. X's resolution of anxiety'*.
9. At interview Mr X said that he has received good advice from the psychologists, however he feels that he cannot *'get away from the problem'*. He said that he does not feel any better having moved to Port Augusta IRH or to Maribyrnong IDC and that he does not care where he is placed as it is all the same to him because he is still detained.
10. Mr X said that he is not taking any medication at the moment, and that he spends his time sleeping and reading. He said that he feels *'very sick right now'*. DIAC advises that *'Despite his anxiety, Mr X has attended education sessions and participates in various activities. He has a positive attitude and is setting goals for his future. Mr X interacts well with staff and fellow detainees, and he attends most excursions. However, recently Mr X's positive attitude and participation in activities has been inconsistent due to his anxiety'*. DIAC also advises that recently Mr X had been declining to participate in religious and external opportunities, which *'does not reflect his normal disposition'*.

Attitude to removal

11. Mr X maintained that he does not want to return to Vietnam as he left when he was a child and does not know anyone there. He also said that he has been doing a mechanic's course and hopes to work as a mechanic if released into the Australian community. He said that there would be no opportunity for him to work in that field in Vietnam and that he *'would have to fight for life ... nothing would ever come true over there'*. In October 2007, the RRT noted that a DFAT cable on criminal deportations to Vietnam stressed *'the importance of familial and community support in ensuring the availability of accommodation upon return and obtaining employment opportunities. The Tribunal acknowledges that the Applicant faces a difficult life in Vietnam'*.

Other issues

12. Mr X said that he has requested that DIAC grant him permission to undertake voluntary work in the community, however DIAC advises that this has been refused due to security reasons. Mr X said that although he had been undertaking a mechanic's course while in Port Augusta, DIAC have yet to advise him as to whether he will be allowed to continue this course now that he has been transferred to Maribyrnong IDC.

Community links

13. Mr X said that he regularly spoke to his father by telephone while he was in South Australia and now that he is at Maribyrnong IDC he is able to see his father each week.

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.


Mr X added that as his father is recently divorced and in poor health, he would like to care for him in the community.


DIAC's review of s 501 visa cancellations

14. In February 2006 the Ombudsman published a report on the application of s 501 as it applies to long-term residents. Recommendation eight of that report was that DIAC review the specific cases considered in the course of the Ombudsman's investigation. Recommendation nine was that DIAC consider releasing people from detention while their cases were being reviewed. DIAC accepted both of these recommendations.
15. 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. DIAC stated although *'Mr X was not accorded the highest standard of procedural fairness (as defined and set out in the Ombudsman's report) in the process of the cancellation decision ... the issues that have been identified are regarded as not serious enough to have led to a legal basis to set the visa cancellation decision aside'*. Mr X was notified of this outcome in June 2007.

Ombudsman assessment/recommendation

16. Report 115/06 recommended that the Minister consider granting Mr X a BV, noting *'in light of the concerns about Mr X's mental health and the length of his detention, the case for releasing Mr X is now more compelling than at the time of completing Report 26/06'*. The Minister's *Statement to Parliament* in March 2007 noted that Mr X had been moved to IRH and DIAC was considering his case for possible Ministerial intervention under s 195A. It also stated that DIAC was continuing to seek a travel document to effect his removal. The Ombudsman notes that Mr X was in IRH for a period of four months and then transferred at his own request back to Baxter IDC. He remains in detention at Maribyrnong IDC.
17. Given that Mr X has not sought judicial review of the RRT decision, it is possible that his immigration status may be resolved in the near future. He may become eligible for removal if the s 195A and s 417 submissions are refused. At the same time, recent psychiatric and psychological evidence notes that Mr X has been diagnosed with significant depression and anxiety, which is related to his prolonged detention. The medical evidence notes it is a matter of urgency for his situation to be resolved before his mental state deteriorates further.
18. Mr X's permanent visa was cancelled under s 501 in February 2003. He had been a lawful Australian resident since 1990, though he had spent some time in prison for offences committed in Australia. He has been in immigration detention for over four and a half years since he finished serving his criminal sentence. The period that he has spent in immigration detention is considerably longer than the non-parole period of 31 months he spent in imprisonment. Mr X was taken into immigration detention in preparation for his deportation, which has not yet occurred. It is now two years since the Ombudsman first recommended that Mr X be considered for release on a visa pending any definite arrangement for his removal from Australia. Taking into account these considerations, the Ombudsman again **recommends** that Mr X be granted a suitable visa with work rights.


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Prof. John McMillan
Commonwealth and Immigration Ombudsman


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Date