

REPORT FOR TABLING IN PARLIAMENT BY THE COMMONWEALTH AND IMMIGRATION OMBUDSMAN

Under s 486O of the Migration Act 1958

Personal identifier: 277/07

Principal facts

Personal details

1. Mr X is aged 33 and advises that he was born in Kuwait to Sudanese parents who were foreign workers in Kuwait. He said that in 1992, after the Iraqi invasion of Kuwait during the Gulf war, he and his mother relocated to Sudan. His father, brothers and half sister remained in Kuwait. He stayed in Sudan with his mother until 1993 when he moved to Syria to avoid military service. Mr X's nationality has not been established and is discussed further below.

Detention history

2. In October 2000, Mr X arrived in Australia by boat. He was detained under s 189(2) of the *Migration Act 1958* and placed at Port Hedland Immigration Reception and Processing Centre. He was removed to Tanzania in December 2003 however he was returned to Australia in December 2003 and detained again under s 189 and 196(1) and placed at the Perth Immigration Detention Centre. Mr X was released from immigration detention on 23 August 2005 on a Removal Pending Bridging Visa (RPBV).

Visa applications

3. Mr X applied for a Protection Visa (PV) (January 2001), PV application refused (June 2001); Refugee Review Tribunal (RRT) affirmed refusal (October 2001); applied for judicial review of the RRT decision by Federal Magistrates Court (FMC) (October 2001), application unsuccessful (May 2002); request under s 417 rejected (September 2002); appealed to the Federal Court (FC) (January 2004), application discontinued (May 2004); s 48B request refused (April 2005); s 48B/417 requests refused (May 2005); invited to apply for a RPBV (June 2005); s 48B request refused (July 2005); three s 417 requests refused (August 2005); combined s 417/48B request lodged (August 2006), request refused (January 2007); s 417 request lodged (April 2007), request ongoing.

Current immigration status

4. Mr X resides lawfully in the community on a RPBV.

Removal details

5. DIAC advises that Mr X has consistently maintained that he is a citizen of Sudan. In 2003, he unsuccessfully applied for third country visas to go to Syria, India, Sri Lanka and Hong Kong. In June 2003 Mr X requested removal in writing under s 198(1) and in December 2003 he was removed to Tanzania, with the intention of seeking travel documents for Sudan. On arrival in Tanzania Mr X was interviewed by Sudanese authorities, not accepted as a Sudanese citizen and was returned to Australia.
6. DIAC advises that Mr X's nationality has still not been verified and his case was referred to the National Identity Verification and Advice Section (NIVA) in September 2005. DIAC will not seek to remove Mr X while his identity remains unresolved and it advises that *'removal to Sudan is considered unlikely due to the political unrest in that country'*.

Ombudsman consideration

7. DIAC's report to the Ombudsman under s 486N is dated 3 March 2006.
8. Ombudsman staff interviewed Mr X on 4 April 2006.

9. Ombudsman staff sighted various documents: a language analysis assessment from A, dated 14 April 2001; a counsellor's report from Mr B from the Asylum Seekers Resource Centre (ASRC), dated 5 June 2006; a psychological report from Professional Support Services (PSS) dated 20 June 2006; letters of support from ASRC; a s 417/48B request by ARSC, dated 24 August 2006; a NIVA identity progress report dated 18 September 2007; and documents from DIAC's files on Mr X.

Key issues

Health and welfare

10. DIAC reported that Mr X is a type two diabetic and suffered from headaches and elevated blood pressure. The PSS report notes that Mr X was diagnosed with Major Depression while in detention and experienced insomnia and *'some trauma related symptoms – nightmares. Suicide and Self-harm ideation ... He retained a sense of hopelessness throughout his time in detention'*. DIAC advises that from 19 March 2005 until 6 May 2005, Mr X was placed under Suicide and Self Harm observation after experiencing a period of depression.
11. Since being released Mr X has been attending sessions with an ASRC counsellor, who notes *'the impact on his mental health of past detention and current uncertainty has been considerable and is consistent with a person suffering from depression'*. The ASRC counsellor further notes that Mr X experiences *'constant headaches, high blood pressure, wrist, elbow and ankle pains. It is the writer's opinion that these somatic symptoms are related to the deterioration in mental state over a long period of time due to ongoing emotional stress'*.
12. The ASRC counsellor's report advises against removing Mr X to Sudan, noting *'Mr X would suffer adverse significant mental health consequences if returned to his country of origin'*.

Removal attempt

13. Mr X appears to have been available for removal from September 2002. He requested to be removed to a third country and pursued this option himself throughout 2003. The FC noted that during this period it seems to have been left to Mr X to make his own arrangements for resettlement elsewhere.
14. DIAC documents indicate that in April 2003 it began actively pursuing Mr X's removal to Sudan yet it appears that he had not been accepted as Sudanese during his PV application process and the RRT review.
15. DIAC advises that in June 2003, Mr X requested removal to Sudan in writing under s 198. According to DIAC documents, shortly after this request, Mr X retracted his consent to go to Sudan and stated several times over the following months that he was unwilling to co-operate with this process. DIAC advises that Mr X had become very uncooperative at the time of the removal. His nationality at this date had still not been confirmed. The Sudanese Consul advised they needed to interview him personally before they could identify him as a Sudanese national and the Sudanese mission in Dar es Salaam advised they were willing to assist with the issue of a travel document. DIAC appears to have relied upon information from the contracted removal company that identification would be achievable in Tanzania, which has a seven-day transit period and Sudanese Consular representation. Consequently, Mr X was provided with an Australian Certificate of Identity by the Department of Foreign Affairs and Trade and removed to Tanzania on 13 December 2003. Sudanese authorities interviewed Mr X in Tanzania, and did not accept him as a Sudanese citizen. Mr X arrived back in Australia on 25 December 2003.
16. The relevant DIAC policy on the removal of unlawful non-citizens states:

'Before making any arrangements for enforced departure, it is important to establish: whether the deportee/removee has a valid travel document and/or entry visa if the proposed receiving country requires one; (and) whether the proposed receiving country will accept the person'.¹

There is some doubt in this case as to whether DIAC met these requirements as it appears DIAC did not do all it could to verify Mr X's nationality. DIAC's records show that any foreign national who has been granted an ID card in Kuwait must also have a certified copy of a foreign passport, which would be held in Kuwait City. As Mr X held an ID card from Kuwait, the passport may have contained information proving that his father was a Sudanese citizen and therefore that he is Sudanese. DIAC did not seek these documents until February 2004.

17. Mr X expressed concern to Ombudsman staff about several aspects of his physical removal and claimed that he was forcibly removed by DIAC staff without warning and while at the Tanzanian airport, he sat for *'three days at a table at the airport, without food, without nobody's care about what is going on'*; and he was then taken to the police station for a further three days after being told that there was no place to stay at the airport.
18. In response, DIAC's contract company stated *'our escorts ... delivered him to Dar [Dar es Salaam] where our Dar office (P&I Tanzania) took over responsibility ... to provide him with all care he may require ... his meals, refreshments and necessities that he has enjoyed thus far in Dar have been provided at our expense and at his demand'*.

Nationality issues

19. Since the December 2003 removal attempt, DIAC has continued to pursue Sudanese travel documents for Mr X. In the initial six months of 2004, DIAC began making inquiries to ascertain what documentary records relating to Mr X's birth and citizenship were held in Kuwait and it requested the assistance of the Embassy of the State of Kuwait in identifying Mr X. The Sudanese Consul accepted that Mr X may be a Sudanese citizen, however they requested a certified copy of his identity documents so they could verify that the photo displayed was that of Mr X. As he had no original copies of the document the Consul requested a face-to-face interview. Mr X refused to meet with officials, saying he was still fearful of returning to Sudan. DIAC suggested a facial recognition analysis be undertaken, but again a certified copy of the ID card was needed to do this, which was unavailable. In September 2005 his case was referred to NIVA.
20. DIAC advises in September 2007 that as Mr X is considered a lawful non-citizen, *'NIVA is unable to issue notices under section 18 ... requiring third parties in Australia to provide information'*. The searches and checks that have been undertaken have failed to determine his nationality to date, however his identity documents have been determined to be legitimate.

¹ Migration Series Instructions 376 (1.12.03 to 31.12.03) – *Implementation of Enforced Departures – Planning* - 4.3.1

Attitude to removal


21. At interview Mr X stated that he wants to stay in Australia, however he is willing to be removed to any third country that is able to provide protection for him. He does not wish to be returned to Sudan, as he is fearful of mistreatment because he avoided military service.
22. ASRC also advised that Mr X is a practising Christian (having been baptised in May 2005) and has therefore committed the offence of apostasy under Sudanese law.

Post release issues

23. Mr X expressed concern about being a RPBV holder. Although he had secured employment, working part time for a caterer and as a teacher's aide, he has found it difficult to secure a full time position on this visa.
24. Mr X's current employer, ASRC's Catering Service, advises that it is likely that he will be offered the position of head chef. The Coordinator of this project describes Mr X as 'a key and virtually irreplaceable part' of the company.

Ombudsman assessment/recommendation

25. Mr X spent nearly five years in immigration detention before being released on a RPBV in 2005. For the initial two years of his detention he had ongoing litigation relating to his unsuccessful attempt to obtain protection by Australia. It appears that although he was available for removal from September 2002, little was done until the aborted removal in December 2003. Although there has been some discrepancy in DIAC's records regarding Mr X's cooperation, the most recent advice from DIAC is that Mr X has cooperated with the removal process while he was detained and continues to abide by the conditions of his RPBV.
26. It appears that Mr X cannot be removed due to nationality issues: Kuwaiti authorities have stated that he is not a Kuwaiti citizen; and removal to Sudan remains unlikely as no travel documents are able to be obtained.
27. Mr X's case raises a number of competing but compelling considerations. On the one hand, he arrived in Australia unlawfully and has been unsuccessful in gaining protection in Australia. On the other hand, the continuing uncertainty about his future are matters of concern and the Ombudsman draws attention to the following aspects of Mr X's case:
 - his nationality has been unresolved for some time with no clear resolution in sight and he appears to be stateless, given that neither Sudan or Kuwait will recognise him as a citizen. Consequently, it is unlikely that DIAC will be able to remove him in the foreseeable future
 - the length of his detention and that he was diagnosed with Major Depression in detention
 - he has demonstrated skills in settling into the Australian community, has gained employment and is planning to study.
28. Considering the above issues, the Ombudsman **recommends** that the Minister consider granting Mr X a permanent visa on compassionate grounds.


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Prof. John McMillan
Commonwealth and Immigration Ombudsman


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Date