

REPORT FOR TABLING IN PARLIAMENT BY THE COMMONWEALTH AND IMMIGRATION OMBUDSMAN

Under s 486O of the Migration Act 1958

Personal identifier: 336/07

This is the combined third and fourth s 486O report by the Ombudsman on Mr X as he has remained in immigration detention since the Ombudsman's second report (102/06). The Ombudsman's second report was sent to the Minister on 24 October 2006 and tabled in Parliament on 5 December 2006. This report updates the material in that report and should be read in conjunction with it.

Principal facts

Current immigration status

1. Mr X remains in detention at Villawood Immigration Detention Centre (IDC).

Removal details

2. The Department (DIAC) advises that Mr X has lost his Turkish citizenship because he failed to do his military service. To have his citizenship re-instated, Mr X must make an application to the Turkish Consulate in Sydney and give an undertaking that he will do military service on his return to Turkey. Mr X refuses to engage with the Turkish authorities to reacquire his citizenship.

Visa applications

3. DIAC applied to the NSW Guardianship Tribunal for a guardian to be appointed for Mr X (November 2006); Guardian appointed (February 2007); Mr X filed a Notice of Appeal in the Administrative Decisions Tribunal (ADT) of NSW regarding the appointment of a guardian (April 2007); ADT dismissed the appeal (August 2007); Mr X filed an appeal to the NSW Supreme Court challenging the decision of the ADT (November 2007).
4. A combined request under s 195A/197AB was sent to the former Minister for possible consideration of her detention intervention powers (November 2005); the Minister requested further information in regards to the combined request (May 2006); the Minister declined to intervene under s 195A/197AB (July 2006); s 351 request lodged (January 2007), s 351 request assessed as not meeting the guidelines for referral to the Minister, s 197AB Residence Determination submission initiated by DIAC (February 2007); DIAC initiated a s 195A submission (June 2007); DIAC advises that the s 197AB submission is on hold while efforts were made to communicate with Mr X but he refuses to speak to his guardian or DIAC about the option of Community Detention; s 195A submission ongoing.

Ombudsman consideration

5. DIAC's further reports to the Ombudsman under s 486N are dated 15 December 2006 and 18 June 2007. The Minister's Statement to Parliament in response to the Ombudsman's Report 102/06 is dated 4 December 2006.
6. Mr X elected not to be interviewed by Ombudsman staff in June and October 2007.
7. Ombudsman staff sighted the following documents: a copy of the application for Guardianship Order dated 15 November 2006; a summary sheet of the application to the Guardianship Tribunal dated 19 December 2006; letters from Mr X to: the Guardianship Tribunal dated 18 January 2007, psychiatrist Dr B dated 7 February 2007, the Guardianship Tribunal dated 21 December 2006, 16 February 2007 and 26 February 2007, a migration agent dated 26 February 2007, the NSW Ombudsman dated 1 March 2007, and the Commonwealth Ombudsman dated 28 March 2007.

Key issues

Guardianship issues

8. Report 102/06 noted that Mr X had been diagnosed as having a Chronic Delusional Disorder with persecutory beliefs and that he lacked the capacity to consent to or to refuse treatment. It also noted that psychiatric advice indicated that remaining in a detention centre may be exacerbating his emotional distress and contributing to his disorder.
9. DIAC advises that in November 2006 it lodged an application for a Guardianship Order with the NSW Guardianship Tribunal. DIAC stated in the application that *'Mr X has consistently refused medical treatment. DIMA is unable to provide appropriate medical and mental health care for Mr X. [Psychiatrist Dr A] states an immigration detention environment is not appropriate in regard to managing Mr X's psychiatric condition. DIMA is unable to consider alternative detention arrangements until Mr X engages in appropriate medical treatment. Mr X has had 2 previous admissions to hospital under the Mental Health Act'*.
10. DIAC advises that in December 2006 the Guardianship Tribunal adjourned the hearing to allow Mr X time to obtain an independent medical assessment. Mr X refused to provide his authority to the detention health service providers to release his medical history to an independent psychiatrist appointed by the Guardianship Tribunal. Later that month Mr X refused to meet with the psychiatrist.
11. The Guardianship Tribunal appointed a lawyer for Mr X to represent him at the hearing, however Mr X advised the NSW Ombudsman that he dismissed his representative in February 2007 as he believed *'she is acting against me'*.
12. DIAC advises that an order was made in February 2007 to appoint a Guardian for Mr X. Mr X unsuccessfully appealed that decision to the ADT. He now has an appeal before the NSW Supreme Court challenging the findings of the ADT.

Health and welfare

13. DIAC advises that Mr X refuses to be seen by the detention health service providers. He saw an external Turkish-speaking psychologist in February 2007 and also attended an appointment with an external psychiatrist in March 2007. Mr X has not consented to the reports from these consultations to be given to the detention health service providers.
14. DIAC's Detention Health Services advises that a Community Treatment Order under the NSW *Mental Health Act 1990* does not operate to enable involuntary psychiatric treatment in Villawood IDC because the centre is on Commonwealth land.

Ombudsman assessment/recommendation

15. Report 102/06 recommended that DIAC pursue the issue of guardianship for Mr X to ensure that he obtained the treatment trial recommended by a psychiatrist. The former Minister responded that *'if granted, a guardianship order will help facilitate treatment and possible alternative detention'* for Mr X. In February 2007 a guardianship order was made which was contested by Mr X. He has recently appealed to the NSW Supreme Court. Given that Mr X opposes the treatment trial recommended by Dr A, this undertaking has limited DIAC's options to pursue treatment in line with Dr A's recommendations. The guardian may be able to consent to involuntary treatment on Mr X's behalf, but there remains the difficulty of jurisdiction when Villawood IDC is on Commonwealth land.
16. Report 102/06 recommended that the Minister consider making a Residence Determination (Community Detention) to enable Mr X's release from Villawood IDC while providing him with the support that he needs. DIAC subsequently initiated s 195A and s 197AB submissions but these submissions are on hold because Mr X has refused to discuss options for alternative accommodation with DIAC or his guardian. The Ombudsman understands that Mr X has indicated that he wants to stay at Villawood IDC

unless he is allowed to work. Additionally, DIAC advises that Mr X needs to be mentally stable before he can be released from detention.

17. The Ombudsman expresses concern that Mr X's mental illness is impeding or delaying his movement out of an immigration detention centre. Mr X's illness may mean that he will continue to refuse to speak to DIAC or his guardian. His cooperation should not be essential to DIAC making arrangements to move him. He has now been in detention for over four years and psychiatrist Dr A reports that the detention centre is *'in all probability exacerbating his emotional distress and contributing to his paranoid delusional disorder'*.
18. The Ombudsman is of the view that it has reached the stage that it is now inappropriate for Mr X to remain in immigration detention. The Ombudsman **recommends** that DIAC take steps to arrange his release on an appropriate basis and with whatever community support he will accept as soon as possible.
19. There is the further issue of whether a permanent decision needs to be made regarding Mr X's immigration status. Mr X has not made any applications to DIAC or the Minister for a permanent visa to remain in Australia. At the same time, he will not engage with the Turkish Consulate for the restoration of his Turkish citizenship.
20. It is possible that his guardian may do either of these things on his behalf if the guardianship order remains in place. However, if the guardianship order is overturned, it is possible that Mr X's illness will prevent him from making a constructive contribution to the resolution of his case. There is the related question of whether Mr X is fit enough to travel if DIAC obtain a travel document to return him to Turkey. The Ombudsman **recommends** that DIAC obtain a medical opinion on whether Mr X is well enough to return to Turkey, and the possibility of his condition improving with or without treatment. If Mr X is too ill to cooperate and his lack of cooperation prevents his removal, or if he is unlikely to be well enough to return to Turkey, the Minister may wish to consider whether it is an appropriate case for the exercise of his discretion under s 195A to grant Mr X a temporary or permanent visa.



Prof. John McMillan
Commonwealth and Immigration Ombudsman



Date