

## ASSESSMENT BY THE COMMONWEALTH AND IMMIGRATION OMBUDSMAN FOR TABLING IN PARLIAMENT

*Under s 486O of the Migration Act 1958*

This is the first s 486O assessment on Mr X who has remained in restricted immigration detention for more than 30 months (two and a half years).

<b>Name</b>	Mr X
<b>Citizenship</b>	Country A
<b>Year of birth</b>	1969
<b>Ombudsman ID</b>	1002480-O
<b>Date of DIBP's reviews</b>	25 August 2016 and 23 February 2017
<b>Total days in detention</b>	912 (at date of DIBP's latest review)

### Detention history

26 August 2014	Detained under s 189(1) of the <i>Migration Act 1958</i> after being released from Correctional Facility C. He was transferred to Maribyrnong Immigration Detention Centre (IDC).
22 September 2014 – 16 October 2015	Transferred five times between various immigration detention facilities.
27 January 2016	Transferred to Facility D.

### Visa applications/case progression

<p>The Department of Immigration and Border Protection (the department) advised that Mr X's case is complex as he arrived in Australia and applied for protection before the <i>Migration Reform Act 1992</i> and the <i>Migration Legislation Amendment Act 1994</i> came into effect. These amendments made significant changes to how a person applied for protection and how pending applications were managed during the changeover period.</p> <p>The department advised that it is considering the resolution of Mr X's immigration status.</p>	
3 October 1991	Arrived in Australia as a visitor. The department advised that, at that time, he was a permanent resident of Country B after being found to be a refugee. Mr X's Country B permanent residency permit expired in October 1992 while he resided in Australia.
30 December 1991	Mr X applied for permanent residency in Australia under the family stream, however his application was refused after sponsorship was withdrawn.
7 September 1992 – 29 October 1992	Mr X was held under a deportation order at Villawood IDC on two occasions during this period. On 12 August 1993 the deportation order was revoked. <sup>1</sup>
15 June 1993	Lodged a Domestic Protection (Temporary) Entry Permit application. The application was converted to a Transitional (Temporary) visa application following legislative amendment.

<sup>1</sup> The department advised that as Mr X was not detained under s 189 during these periods they were not added to his reportable days in immigration detention for the purpose of s 486N review.

9 August 1993	Refugee Status Assessment found Mr X to be a refugee.
30 May 1994	Lodged a Protection (Permanent) Entry Permit application. The application was converted to a Transitional (Permanent) visa application following legislative amendment.
1 September 1994 – 29 July 2013	Granted a number of Bridging visas to regularise his immigration status. The most recent was granted in association with criminal detention and ceased on 30 June 2014.
21 August 2009	Transitional (Permanent) visa application refused under Public Interest Criterion 4002.
17 September 2009	Appealed to the Refugee Review Tribunal (RRT).
22 December 2009	The RRT remitted Mr X's Transitional (Permanent) visa application with direction.
7 January 2013	Transitional (Temporary) visa application was considered refused by operation of law under s 501.
15 January 2013	Appealed negative Transitional (Permanent) visa application outcome to the Administrative Appeals Tribunal (AAT).
25 March 2013	AAT affirmed original decision.
7 May 2013	Requested judicial review by the Federal Court (FC).
16 October 2013	The FC dismissed the application for judicial review.
6 November 2013	Appealed to the Full Federal Court (FFC).
24 March 2014	The FFC dismissed the appeal.
14 May 2015	The department commenced an International Treaties Obligations Assessment (ITOA) to assess whether the circumstances of Mr X's case engage Australia's <i>non-refoulement</i> obligations.
26 August 2015	The department finalised the ITOA, determining that Mr X met the definition of a refugee in Article 1A of the Refugee Convention but Article 33(2) applied. Consequently his case did not engage Australia's <i>non-refoulement</i> obligations.
25 February 2016	The department revised the ITOA, finding that Mr X was a person in respect of whom Australia had <i>non-refoulement</i> obligations under international treaties and was owed complementary protection.
3 March 2016	The department determined that Mr X was excluded from protection under s 5H(2).
8 April 2016	The Minister declined to consider Mr X's case under s 195A for the grant of a Bridging visa.
23 August 2016	Mr X's case was found not to meet the guidelines for referral to the Minister under ss 195A, 351, 417 and 501J.
23 February 2017	Mr X's case has been identified for assessment against the guidelines under s 195A.

## Criminal history

The department advised that Mr X has been convicted of numerous offences including disorderly or offensive behaviour, resisting and hindering police, property damage and criminal trespass in both Country B and Australia. He was sentenced to 12 months imprisonment or more on nine occasions between May 1992 and August 2014 and received a number of additional convictions resulting in suspended sentences, bonds or fines.

## Health and welfare

The department reported that Mr X has impaired cognitive skills related to a prior head injury. No further information was provided.

International Health and Medical Services (IHMS) advised that Mr X disclosed a history of torture and trauma and received treatment for a personality disorder and anxiety. He attended regular psychological counselling and was prescribed with medication. His condition continued to be monitored by the IHMS mental health team.

IHMS further advised that Mr X received treatment for multiple physical health conditions, including migraines and respiratory abnormalities.

## Other matters

30 April 2015	The department advised that Mr X lodged a complaint with Serco in relation to time allocated to the internet and lack of activities. He complained to the Ombudsman's office on 1 May 2015 and on 18 June 2015 the Ombudsman's office advised that no further investigation was warranted.
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## Information provided by Mr X

During a telephone conversation with Ombudsman staff on 1 June 2017 Mr X advised that his case is managed by the department's complex cases team given his complicated immigration history. He said that his case manager is unable to provide information about the progress of his case and he was only advised to wait for an outcome. He raised concerns about the significant length of time he has remained in restricted detention while he waits for his case to be resolved.

Mr X advised that he is receiving pro bono legal assistance and is in contact with a refugee advocate. He said that his legal representative has been unable to significantly progress his case, but they are considering pursuing legal action in the High Court.

Mr X reported that the department refused to grant him a visa on character grounds, despite him being found to be owed protection. He stated that he regrets his criminal past and wished to emphasise that he committed minor offences only and does not believe this should mean he is considered to not be of good character.

Mr X also advised that he feels unmotivated and anxious in restricted detention and is frustrated about the uncertainty of his immigration pathway. He said that he is taking medication for anxiety and sleeping concerns and attends regular psychological and psychiatric counselling. He also said that he finds it stressful in to constantly be exposed to other detainees with significant mental health conditions and incidents of self-harm.

### **Ombudsman assessment/recommendation**

Mr X has remained in restricted detention for more than two and a half years.

Mr X has been found to be owed protection, however his Transitional (Permanent) visa application and Transitional (Temporary) visa applications have been refused under s 501. Further, an ITOA found that Mr X's case did engage Australia's *non-refoulement* obligations, but he was excluded from protection under s 5H(2).

The Ombudsman notes the department's advice that Mr X's case is complex as he arrived in Australia and applied for protection before the *Migration Reform Act 1992* and the *Migration Legislation Amendment Act 1994* came into effect. The Ombudsman further notes that the department is considering the resolution of Mr X's immigration status.

The Ombudsman notes with concern the Government's duty of care to detainees and the serious risk to mental and physical health prolonged restricted immigration detention may pose. The Ombudsman further notes with concern advice from IHMS that Mr X receives treatment and psychological counselling for mental health conditions.

In light of the protracted and complex nature of Mr X's immigration pathway, the Ombudsman recommends the department refer his case to the Minister under s 195A for consideration of the grant of a Bridging visa while he awaits the resolution of his immigration status.

The Ombudsman further strongly recommends that priority be given to the resolution of Mr X's immigration status.