

REPORT FOR TABLING IN PARLIAMENT BY THE COMMONWEALTH OMBUDSMAN

Under s 486O of the Migration Act 1958

Personal identifier: 002/05

Principal facts

1. *Personal details:* Mr X is a single man aged around 24. The Government of the Islamic Republic of Afghanistan has recently advised that he is recognised as a citizen of Afghanistan, though this issue was earlier in contention. Ms X has brothers and sisters in Afghanistan and his father is in Iran.
2. *Detention history:* Mr X arrived in Australia by boat in December 2000 and was detained under s 189(2) of the Migration Act. He has since been in immigration detention at Woomera IRPC (2000-03), and Baxter IDF (2003-05). On two occasions in June 2003 he was arrested following disturbances at Baxter and taken to the South Australian Police Watch House (for 2 days) and to the Port Augusta Gaol and Adelaide Remand Centre (for 3 months).
3. *Visa applications:* application for a protection visa (PV) lodged in Feb 2001; refused by Department (DIMIA) (April 2001); refusal affirmed by Refugee Review Tribunal (RRT) (June 2001); appeal to Federal Court dismissed (August 2001); appeal to Full Federal Court dismissed (Feb 2002); 5 unsuccessful applications made to the Minister between April-June 2002 and in August 2004 seeking the exercise of the Minister's humanitarian discretion under s 417; an unsuccessful application made in July 2004 to the Minister under s 48B for approval to make a further PV application; further applications (presently unresolved) were made under ss 48B and 417 in July 2005, and a combined s 48B/s 417 application was made in August 2005.
4. *Current immigration status:* Mr X is presently in Baxter IDF. His s 48B and s 417 applications are currently before the Minister. In addition, there are two DIMIA submissions before the Minister (dates not provided) requesting the Minister to consider making a decision under s 48B or s 417, and to consider inviting Mr X to apply for a Return Pending Bridging Visa (RPBV).
5. *Removal details:* Mr X has twice been offered a re-integration package for travel to Afghanistan – in June 2002, which lapsed, and in May 2005, which he declined. Although there does not seem to be any legal impediment to Mr X being removed from Australia to Afghanistan, the Ombudsman understands that there is no present proposal to do so, at least not while there are unresolved submissions before the Minister. As matters presently stand, Mr X is not prepared to leave Australia voluntarily.

Ombudsman consideration

1. The DIMIA report to the Ombudsman under s 486N of the Migration Act was received on 30 August 2005 (dated 15 August).
2. Ombudsman staff interviewed Mr X at Baxter on 22 September 2005, with an interpreter.
3. At Mr X's request, Ombudsman staff spoke on 30 September 2005 to two people who have befriended and who visit him, Ms Y and Ms W. Ms Y confirmed that she is willing to have Mr X stay with her if he is released. Ms W said that she has been in contact with Mr X for around 3 years and she is willing to provide him with

accommodation and other support. Both expressed their view that he would make an excellent Australian citizen.

4. The Ombudsman has been provided with a medical summary from the Immigration Health Medical Service (IHMS) dated 26 August 2005, and a report from Professional Support Services dated 30 August 2005.

Key issues

Nationality

1. Mr X claimed to be an Afghan national, who experienced persecution as a Shi'a Muslim of Hazara ethnicity. The RRT rejected his claim to be a citizen of Afghanistan. A delegation from the Government of Afghanistan later interviewed Mr X, and subsequently advised on 6 July 2005 that it recognises him as a citizen of Afghanistan.
2. Mr X was also interviewed by a delegation from the Government of Pakistan in April 2005 to decide whether he was a citizen of that country. No further advice has been received from that Government. Consequently, the operative fact is that Mr X is a citizen of Afghanistan. The submission to the Minister (undated) notes that the advice from the Government of Afghanistan "is authoritative and fundamentally contradicts the findings upon which earlier refusals of PVs [to Mr X and four others] were based".
3. As noted above, an option the Minister has been requested by DIMIA to consider is to permit Mr X to lodge a fresh PV application, in light of the confirmation of his Afghan nationality. The submission further notes that the United Nations High Commission on Refugees (UNHCR) has conveyed information that supports the claims of Hazara Shi'as.

Health and welfare

1. The IHMS report of 26 August 2005 advises that Mr X suffers from depression, for which he is receiving anti-depressant medication, and that his condition is being reviewed regularly by medical staff at Baxter, by a mental health team and by a specialist psychiatrist. The report notes that he requires ongoing review by psychiatrists, and that "it is possible that this man's depression and anxiety may be better managed in a setting other than a detention centre". The PSS report notes that Mr X has declined counselling support from PSS staff, stating that he had support from his friends. Ms Y said that she was very worried about Mr X's condition and that he had gone through a bad patch a few months ago. The main issues causing distress that he mentioned in his interview with Ombudsman staff were the failure of DIMIA to identify him as Afghani and the length of his detention.
2. The IHMS report also notes three other medical conditions (dyspepsia, tinnitus and pterygia) for which he is receiving medication, and which can be managed adequately in the detention environment.
3. Mr X said that he has been short-listed for voluntary admission into Glenside Hospital, but is still waiting for admission.
4. The Immigration Detention Advisory Group (IDAG) requested in July 2005 that he be referred to the Mental Health Multi Disciplinary Team for assessment. The only assessment viewed by the Ombudsman's office is the IHMS report of 26 August.

Security and safety

1. The DIMIA report to the Ombudsman classifies Mr X as having a "low" security assessment but notes he has been involved in a number of incidents. In 2003 he was charged with striking a Commonwealth Officer while attempting to escape but

was acquitted of the charge. In the same year, he was charged with damaging property. He pleaded guilty and received an 18-month good behaviour bond.

2. These incidents do not seem to bear on Mr X's suitability to be released into the community. He was acquitted of the charge of striking an officer; and although convicted of the charge of property damage, this was some time ago and he has served his period of good behaviour.

Attitude to removal

1. Mr X declined an Afghan reintegration package in 2002 and 2005. He believes that his safety is at risk if he is removed to Afghanistan because he is a Hazara Shi'ia and has experienced persecution.

Other detention issues

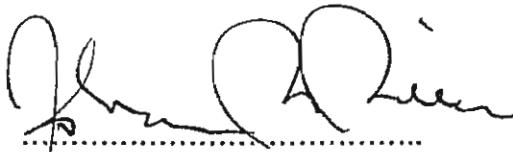
1. Since Mr X is presently in detention at Baxter, it is proper in this report to record the comments he made in his interview with Ombudsman staff about the conditions in Baxter. Among the complaints he made are: the GSL staff at Baxter are stricter in dealing with detainees than some of the staff he has previously encountered; some of the officers provoke the detainees; the officers do not always carry through on the promises they make to detainees; he needs medication for a bad stomach condition; the constant change of medical personnel is disruptive to good health care; there is a particular problem with one of the woman medical staff who is nasty to detainees; and his main concern is his lack of freedom. The Ombudsman's attention was also drawn to the experience of his solicitor, who was given the file of a different X in response to an FOI request.

Ombudsman assessment/recommendation

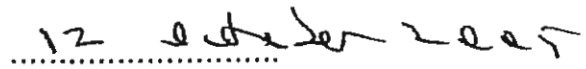
1. In the Ombudsman's view, the options that warrant consideration by the Minister are presented in the two DIMIA submissions to the Minister. Those options are to grant Mr X a humanitarian visa under s 417, to grant approval under s 48B for Mr X to make a fresh PV application, and to grant him an RPBV to reside in the community pending any final decision on his resident status. It is **recommended** that the Minister make a decision on those options as soon as possible, and in any case not later than the statutory period prescribed in s 486P of the Migration Act for the tabling of this report to Parliament (viz, within 15 sitting days of receiving the report).
2. The Ombudsman is of the view that there are a number of factors in this case that incline in favour of the Minister making a decision under s 417 to grant a permanent resident visa (either a Subclass 202 Global Special Humanitarian (Class XB) visa, or a Subclass 866 Protection (Permanent) (Class XA) visa). These factors are set out in the DIMIA submission (dated 12/9/05) to the Minister, and are as follows: that the confirmation of Mr X's Afghan nationality is a fundamental change in his case; that there is support for his claim to refugee protection in the recent information from the UNHCR; that he has already spent a long period in detention; and that the alternative of inviting a fresh PV application under s 48B may, because of its uncertain outcome and possible delay, have a significant and psychological impact on Mr X and create a significant management risk if he is to remain in detention. To that summary can be added that Mr X has good community support if he is released. (It is acknowledged that the grant of a humanitarian visa would be subject to health and character clearance.)
3. If there is likely to be any delay in a decision being made under s 417, or if an adverse decision is made under that section, the Ombudsman **recommends** that a decision be made to invite Mr X to apply for an RPBV. He has been in detention for a long period; many other detainees in the same position have been granted

an RPBV; the possibility of a deterioration in his condition is acknowledged by DIMIA; he has good community support; and there do not appear to be any safety or behavioural reasons that point against this outcome. (It is acknowledged once again that the grant of an RPBV would be subject to health and character clearance.)

4. Mr X is being actively treated for depression and other health conditions. The adverse impact of a long period of detention upon him has also been noted in this report, and it would therefore be appropriate for DIMIA to consider what continuing role it should play in providing assistance to Mr X in the event that he is granted a visa to reside in the community.



Prof. John McMillan



Date