

REPORT FOR TABLING IN PARLIAMENT BY THE COMMONWEALTH AND IMMIGRATION OMBUDSMAN

Under s 486O of the Migration Act 1958

Personal identifier: 352/08

Principal facts

Personal details

1. Mr X is aged 39 and is a citizen of New Zealand. His ex-wife and two children, aged ten and seven, reside in New Zealand.

Detention history

2. Mr X entered Australia on 18 October 2004 on a Temporary Special Category Visa (TSCV – subclass 444). On 12 October 2005, Mr X was detained under s 189(1) of the *Migration Act 1958* after completing a five-month sentence at Port Phillip Prison, Victoria. He was placed at Baxter Immigration Detention Centre (IDC) and in December 2006 was transferred to Maribyrnong IDC at his request. He was transferred to Villawood IDC on 31 August 2007.

Visa applications

3. Mr X's TSCV was cancelled under s 109 on 2 June 2005 as he had provided incorrect answers on his passenger card; visa cancellation decision affirmed by Migration Review Tribunal (MRT) (August 2005); sought judicial review at Federal Magistrates Court (FMC) (September 2005); Bridging Visa (BV) application refused (November 2005), refusal affirmed by MRT (December 2005); Protection Visa application (December 2005), BV application invalid, PV application withdrawn (January 2006); DIAC withdrew from FMC and matter remitted to MRT (March 2006); MRT affirmed visa cancellation (June 2006); judicial review sought at FMC, DIAC withdrew and matter remitted to MRT (October 2006); MRT affirmed visa cancellation (January 2007); judicial review sought at FMC, dismissed by FMC (August 2007), appeal to Full Federal Court (FFC) was dismissed (November 2007).
4. DIAC initiated a s 197AB assessment which was assessed as not meeting guidelines for referral to the Minister (March 2007).

Current immigration status

5. Mr X is an unlawful non-citizen detained at Villawood IDC.

Removal details

6. DIAC advises that Mr X is to be removed on 18 January 2008.

Ombudsman consideration

7. DIAC's report to the Ombudsman under s 486N is dated 8 October 2007.
8. Ombudsman staff interviewed Mr X at Villawood IDC on 24 October 2007.
9. Ombudsman staff sighted an International Health and Medical Services (IHMS) report dated 4 October 2007; and several written submissions from Mr X.

Key issues

Visa cancellation

10. Mr X arrived in Australia on a TSCV. His visa was cancelled under s 109 as DIAC determined that he had entered incorrect information on his passenger card. Mr X sought

review at the MRT, FMC, and FFC (including three MRT decisions) and was unsuccessful. Mr X now states that his visa cancellation in June 2005 may be affected by the *Veau* decision¹. DIAC advises that Mr X is not affected by the *Veau* decision.

11. Ombudsman staff sighted a DIAC file note that states Mr X was given a copy of the cancellation notice by hand on 3 June 2005, to remedy an incorrect notification of 2 June 2005. Mr X disputes the accuracy of that DIAC file note, stating he was not notified. Mr X's legal representative applied for merits review at the MRT on 9 June 2005.

Health and welfare

12. DIAC advises that Mr X injured his left knee while in Baxter IDC. In September 2006 he reported pain again in his knee, however DIAC advises that Mr X *'had been going to the gym daily, against medical and physio advice'*. The IHMS report states he had *'an anterior cruciate ligament reconstruction on 28/3/06. Follow-up treatment included physiotherapy, exercises and swimming'*. Mr X was treated for a fall in February 2007 and slipped and twisted his left knee in May 2007. Mr X had his knee reviewed by a specialist in October 2007. The Ombudsman's office understands that Mr X is pursuing a compensation claim regarding this injury.
13. The IHMS report also stated, *'he has been consulted by the Psychiatrist in the past and has a history of alcohol dependence and a personality disorder'*. Mr X had complained to the Ombudsman's office about the treating psychiatrist, declined to see the Professional Support Services psychologist, and sought to see an external psychiatrist. The IHMS medical practitioner stated that Mr X did not require a psychiatric consultation as medical staff could manage his problems. The complaint was closed.

Attitude to removal

14. Mr X stated at interview with Ombudsman staff that he *'was fighting for my rights'* and for this reason had declined voluntary removal to New Zealand. More recently Mr X acknowledged that he could be removed to New Zealand and advised his ex-wife and children that he was in immigration detention.

Other detention issues

15. DIAC advises that Mr X allegedly assaulted other detainees in April 2007 and July 2007. Police were called in both instances and interviewed Mr X. DIAC reports that Mr X was transferred from Maribyrnong IDC to Villawood IDC Stage 1 in August 2007 due to his *'destructive and violent behaviour'*.
16. Mr X has claimed for property lost in the November 2005 fires at Baxter IDC. DIAC indicated they expected the matter to be finalised in June and then August 2007. In November 2007, DIAC indicated it is considering compensation and the matter is with its insurer.

Criminal history

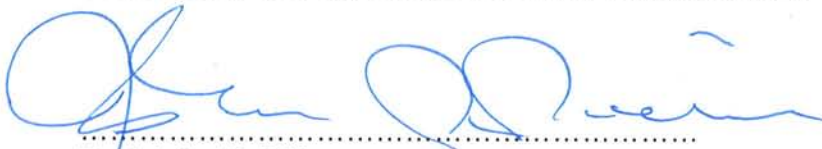
17. DIAC advises that Mr X has been convicted of a number of offences in Australia. In May 2005 he was sentenced to five months in prison for commercially dealing in drugs. On 12 September 2005 Mr X was convicted in Australia of offences including: possession of amphetamines; dealing in property; escape from lawful custody; two counts of assaulting police, and attempted theft from a motor vehicle. He was sentenced to five months imprisonment for each offence, to be served concurrently. He was released from prison and placed in immigration detention rather than serving these sentences.

¹ *Veau v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FCAFC 311 (23 December 2003).

18. DIAC advises Mr X's New Zealand criminal record spans from 1987 to 2004, with convictions for 131 offences. Mr X has served several terms of imprisonment with convictions for assault, drug offences, theft, sexual assault, wilful damage, escape custody, and other offences. Mr X acknowledged he had served four and a half years in prison.

Ombudsman assessment/recommendation

19. Mr X has remained in immigration detention for two years and two months as he sought review of the decision to cancel his visa. The decision to cancel Mr X's visa has been reviewed and the Ombudsman has no further comment to make on this matter. Mr X's possible compensation claim for an injury to his left knee can be managed from New Zealand and is not a bar to his removal. Mr X has been advised by DIAC that he will be removed soon.
20. Mr X appears to have lost personal property as a result of the fires at Baxter IDC in November 2005. The Ombudsman is advised that DIAC is still processing possible compensation for Mr X and others who lost their property. The Ombudsman **recommends** that DIAC does all that is reasonable to keep Mr X advised of the progress of this claim, and expedites fair compensation for Mr X.



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Prof. John McMillan
Commonwealth and Immigration Ombudsman

8 January 2008
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Date