

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

*Under s 486O of the Migration Act 1958*

*Personal identifier: 360/08*

## **Principal facts**

### *Personal details*

1. Mr X is aged 34 and is a citizen of the People's Republic of China (PRC). Mr X said that his parents and sister live in the PRC. Mr X married Ms Y, an Australian citizen, in December 2006 and has an Australian step-daughter.

### *Detention history*

2. Mr X was detained by the Department (DIAC) under section 189(1) of the *Migration Act 1958* as an unlawful non-citizen and was placed at Maribyrnong Immigration Detention Centre (IDC) (February 2004), then transferred to Baxter IDC (September 2004). The transfer from Melbourne to Baxter IDC has been the subject of complaints to the Ombudsman's office and is addressed separately in this report.
3. DIAC determined that Mr X held a valid visa due to the *Srey* case<sup>1</sup> and released him from Baxter IDC (May 2005). Two days later Mr X presented himself to DIAC compliance officers, as requested, and his Bridging Visa (BV) was cancelled under s 116(1)(e) and he was detained under s 189(1) and placed at Maribyrnong IDC and transferred to Baxter IDC the next day. He was transferred to Port Augusta Immigration Residential Housing (December 2006) and then to Villawood IDC (August 2007).

### *Visa applications*

4. Mr X arrived in Australia on a Short Stay Business Visa (SSBV) (February 1997) and was granted a further SSBV (February 1997); applied for a Long Stay Business Visa (LSBV), BV granted (May 1997) valid until October 1998; application for LSBV refused (June 1998); the Migration Internal Review Office (MIRO) affirmed LSBV refusal (September 1998); applied for a Protection Visa (PV), BVA and BVC granted (December 1998), PV refused (January 1999); BVA expired (January 1999), the Refugee Review Tribunal (RRT) affirmed PV refusal decision (December 1999); BVC expired (January 2000).
5. Mr X applied for a BV (February 2004), refused (March 2004); the Migration Review Tribunal (MRT) affirmed BV refusal (March 2004); DIAC recognised Mr X's notification of the MIRO decision was *Srey* affected and that he still held a valid BV so he was released from detention, BV cancelled and re-detained (May 2005); the MRT set aside BV cancellation (June 2005); the Minister cancelled the BV under s 501(3) (June 2005); Mr X invited under s 501C(3) to make representations to the Minister about the revocation; application for judicial review of Minister's decision in the Federal Court (FC) (October 2005); the Minister decided not to revoke BV cancellation (December 2005); the FC transferred the matter to the Federal Magistrates Court (FMC); the FMC dismissed the application (May 2006); the MRT found it has no jurisdiction to review the 1998 LSBV refusal decision (September 2006).
6. A request for Ministerial intervention under s 417 was lodged (March 2005); s 417 request deemed inappropriate to consider (November 2005), s 195A submission referred to the Minister (May 2006), refused (July 2006); DIAC initiated a s 417 request, s 417/48B request lodged (November 2006); an International Treaties Obligations

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<sup>1</sup> *Chan Ta Srey v Minister for Immigration & Multicultural & Indigenous Affairs*, November 2003.

Assessment (ITOA) and a DIAC s 197AB submission referred to the Minister (May 2007), Minister declined to intervene under s 417/48B or s 197AB (June 2007), s 417 request (August 2007) not referred to the Minister (September 2007).

#### *Current immigration status*

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

#### *Removal details*

8. DIAC advises that Mr X was due to be removed but as he self-harmed on 11 September 2007, the removal did not proceed. DIAC advises that Mr X's removal will proceed as soon as he is assessed as being fit to travel.

#### **Ombudsman consideration**

9. DIAC reports to the Ombudsman under s 486N are dated 13 March 2006, 6 September 2006, 7 March 2007 and 28 August 2007.
10. Ombudsman staff interviewed Mr X at Baxter IDC on 15 June 2006.
11. Ombudsman staff have sighted the following documents: Interpol Red Notice dated 10 March 2004; the Issues Paper for the s 501(3) visa cancellation dated 7 June 2005; Professional Support Services (PSS) psychological summary reports dated 24 March 2006, 7 February 2007 and 20 August 2007; International Health and Medical Services (IHMS) reports dated 4 April 2006, 29 August 2006, 30 January 2007 and 10 August 2007; correspondence in support of Mr X from members of the community; submissions from migration agent Ms A dated 22 November 2006 and 10 March 2007; and a copy of DIAC's ITOA undated.

#### **Key issues**

##### *Arrest warrant issued by the PRC and the ITOA*

12. DIAC advises that Interpol contacted the Australian Federal Police (AFP) in June 1997 regarding Mr X. In June 1998 the AFP received an arrest warrant for him from PRC authorities dated 26 May 1997 and passed this information to DIAC shortly afterwards. Mr X was advised of the warrant for his arrest in June 2004.
13. The Interpol Red Notice asserts that Mr X is wanted by PRC authorities for kidnap and murder in December 1996. The notice also indicates that the maximum penalty for this crime is life imprisonment, however, it was noted at the FMC hearing in May 2006 that the law of the PRC provides the death penalty as a maximum penalty in relation to the crime of murder.
14. The ITOA concluded that Mr X would not be at risk of being subjected to the death penalty if he was returned to the PRC because *'the Supreme People's Court, as the highest court in the Chinese judicial system, reviews all death penalty verdicts and has provided an assurance that it will not carry out the death penalty against Mr X'*.
15. The ITOA acknowledged there was some risk of Mr X being harmed if he was returned to the PRC but any risk did not invoke Australia's *non-refoulement* obligations under the *Convention Against Torture* (CAT) and the *International Covenant on Civil and Political Rights* (ICCPR). The ITOA observed that the lack of independent monitoring within the PRC meant that *'it is not possible to preclude torture as a possibility'*. The ITOA also stated that Mr X might be located on death row while the Supreme People's Court rules on his case. It noted that prisoners on death row are shackled with heavy leg irons, which constitutes a breach of Article 10 of the ICCPR, but it does not breach Article 7, which invokes Australia's *non-refoulement* obligations.
16. Mr X wrote to the United Nations Human Rights Committee (UNHRC) on 27 August 2007 seeking consideration under the optional protocol to the ICCPR. The

UNHRC issued an Interim Measures Request (IMR). DIAC advises that the Australian Government examined the IMR and decided to proceed with removal on the basis that no new information was presented.

#### *Visa cancellation*

17. It appears that Mr X may have been wrongfully detained between February 2004 and May 2005. Mr X's adverse MIRO decision in 1998 caused his BV to be recorded on DIAC's system as having ceased. However, in May 2005, DIAC acknowledged that the *Srey* case meant that Mr X still held a valid BV, and had probably held this BV throughout his detention. In its investigation of this case, the Ombudsman noted that there were a number of earlier points at which DIAC could have noticed that Mr X's case was *Srey* affected and that it is possible that some or all of Mr X's detention prior to May 2005 may have been invalid.
18. The Ombudsman's investigation raised a concern about DIAC's management of Mr X's release and further detention. Mr X was released from detention on 23 May 2005 with the intention of travelling to Melbourne. He was told to attend the Melbourne DIAC office where his BV would be evidenced and DIAC provided him with tickets to travel to Melbourne. On 25 May 2005, Mr X approached the DIAC office as requested. Instead of receiving evidence of his BV, he was interviewed, issued with a notice to cancel his visa, detained and returned to Baxter IDC the next day.
19. The delegate cancelled Mr X's visa under s 116(1)(e), on the grounds that he was a threat to the safety and good order of the Australian community. There appears to have been an alternative course of action open to DIAC. Once DIAC had determined Mr X's case was *Srey* affected, it could have continued to detain him under s 192 and assessed whether his BV was liable for cancellation. Instead, the action taken in this case was expensive and caused Mr X inconvenience and emotional hardship.

#### *Health and welfare*

20. The March 2006 PSS report noted that Mr X presented with symptoms consistent with an Adjustment Disorder and Major Depression and he was referred to the visiting psychiatrist. The April 2006 IHMS report noted that the psychiatrist diagnosed Mr X as having an Adjustment Disorder with reactive depression and an anxious mood.
21. The August 2007 IHMS report noted that Mr X was diagnosed with Major Depression and commenced on anti-depressant medication in April 2007. He was transferred to hospital on two separate involuntary mental health orders in July and August 2007 and returned to the IDC after several days of assessment. The PSS report of August 2007 stated '*he underwent psychiatric consultations, which revealed that his mental health issues were caused by frustration related to the detention process*'. In September 2007 Mr X underwent surgery to remove razor blades from his stomach and was hospitalised for four weeks after a self-harm attempt. In October 2007 Mr X was released from hospital and was transferred to Stage 1 at Villawood IDC.

#### *Attitude to removal*

22. Mr X said that he does not wish to return to the PRC as he may face a lengthy period of incarceration or the death penalty if found guilty of the crimes for which he faces charges. Mr X maintains that he did not commit the crimes he is accused of.

#### *Transfer from Maribyrnong IDC to Baxter IDC*

23. In September 2004, Global Solutions Limited (GSL) transferred Mr X, and four other detainees, from Maribyrnong IDC to Baxter IDC. The detainees were locked in the back

of the transporting van for what DIAC indicated was a 12-hour trip. DIAC subsequently commissioned an investigation into the matter conducted by Mr Keith Hamburger AM<sup>2</sup>.

24. The investigation reported that the 10 seat *Mercedes Sprinter* van used to convey the detainees between Maribyrnong and Mildura was totally unsuitable for the task. Mr X was located in a small one-person compartment (76cm long, 90cm wide and 145cm high) that did not allow adequate movement, sleep, driver or communication with others. The investigation report further found that the planning process for the escort was flawed, disregarded the dignity, privacy and care needs of individual detainees, and did not provide for their, humane, safe and secure escort. There were serious violations of the Immigration Detention Standards and of GSL's External Transport and Escort Services Generic Operational Procedures.
25. Mr X complained to a DIAC officer on arrival at Baxter IDC who made a record of the incident on 20 September 2004 and emailed details to various Managers and Directors in DIAC. When the investigator interviewed Mr X in March 2005 he said, *'it is a long time since this matter occurred but every time I think about it I feel very sad. I feel the treatment I received was very unfair and not a good example for GSL staff'*. Mr X received a letter about the incident from DIAC dated 29 July 2005, in which DIAC stated that it *'deeply regrets that this incident occurred'*. This incident remains the subject of an ongoing investigation by the Human Rights and Equal Opportunity Commission (HREOC).

#### **Ombudsman assessment/recommendation**


26. Mr X has been detained since February 2004. The DIAC decision that Mr X does not qualify for protection by Australia has been reviewed and affirmed. The Ombudsman has no further comment on this matter.
27. As noted in paragraph 17 of this report some of Mr X's detention may have been wrongful because he held a valid visa due to the *Srey* decision. The circumstances surrounding the DIAC process of releasing Mr X in May 2005, after having detained him for 15 months, only to detain him again after two days, is likely to have had a significant impact upon Mr X's already poor mental health. The PSS report of March 2006 noted that Mr X first made contact in January 2005, had received regular supportive counselling and presented with an adjustment disorder and major depression. The Ombudsman is of the view that this process should not have been necessary as Mr X's detention could have been continued under s 192.
28. During the investigation of the complaint into the transfer of the five detainees, the Ombudsman's office recommended to DIAC in December 2005 that reasonable compensation be offered to the five detainees based on the distress, loss of dignity, if not injury, during the course of the transfer. HREOC advised in April 2007 that a draft report was sent to DIAC for detailed comment and that DIAC had sought an extension to May 2007. In May 2007 DIAC advised that the matter of compensation for two detainees who had lodged complaints was still being considered by HREOC. Notwithstanding that this investigation has not yet been finalised, in light of the considerable distress experienced by Mr X, including his release and re-detention, the Ombudsman reiterates the recommendation made in December 2005, and **recommends** that DIAC offer Mr X a reasonable level of compensation and expedite this to occur prior to any removal.
29. The Ombudsman acknowledges that the issue of the PRC warrant for Mr X's arrest and return to the PRC has posed some difficulty for DIAC. If upon return to the PRC to face

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<sup>2</sup> *Report of Investigation on behalf of the Department of Immigration and Multicultural and Indigenous Affairs Concerning Allegations of Inappropriate Treatment of Five Detainees during Transfer from Maribyrnong Immigration Detention Centre to Baxter Immigration Detention Facility, July 2005, Keith Hamburger.*

trial, Mr X was found guilty and faced the death penalty, this would be in breach of Australia's obligations under the ICCPR and international *non-refoulement* obligations. The Australian Government has gone to considerable effort to ensure that Australia's international obligations are not breached and has obtained an assurance from the Supreme People's Court of the PRC that it will not carry out the death penalty if Mr X is found guilty of these offences. DIAC has determined that removal to the PRC would not breach Australia's *non-refoulement* obligations under the CAT and the ICCPR. However, the Ombudsman notes that the ITOA has commented that torture or poor treatment cannot be excluded as a possibility for inmates held on death row in the PRC.

30. DIAC attempted to remove Mr X in September 2007 when he self-harmed and was hospitalised. The Ombudsman understands that there are now no outstanding matters that would prevent Mr X's removal from Australia. The Ombudsman **recommends** that any fitness to travel assessment specifically address the impact of removal on Mr X's mental health and employ any appropriate strategies that may be necessary to ensure Mr X's safety and well-being.

  
Prof. John McMillan  
Commonwealth and Immigration Ombudsman

  
Date