

REPORT FOR TABLING IN PARLIAMENT BY THE COMMONWEALTH AND IMMIGRATION OMBUDSMAN

Under s 486O of the Migration Act 1958

Personal identifier: 236/07

Principal facts

Personal details

1. Mr X is aged approximately 26 and is a citizen of Afghanistan. He claims that his mother, sisters and brother still reside in Afghanistan and that his father has passed away. His wife Y and their one-year-old child are Australian citizens.

Detention history

2. In December 2000, Mr X arrived in Australia by boat. He was detained under s 189(1) of the *Migration Act 1958* and placed in Woomera Immigration Detention Centre (IDC). In March 2002, he escaped from Woomera IDC, returning voluntarily five days later. In April 2002, Mr X was transferred to the Port Headland Immigration Reception and Processing Centre (IRPC). In May 2002, he was returned to Woomera IDC. In June 2002, he escaped again and lived in the community unlawfully for 27 months. In September 2004, Mr X was located by the Department (DIAC) and detained under s 189(1) and taken to Maribyrnong IDC. In the same month he was transferred to Baxter IDC where he remained until released from detention in October 2005.

Visa applications

3. Mr X applied for a Protection Visa (PV) (February 2001) which was refused (May 2001); the Refugee Review Tribunal (RRT) affirmed the decision (July 2001); Mr X applied for judicial review by the Federal Court (August 2001), application dismissed (July 2002); two s 417 and one s 48B requests initiated (January 2005), s 417 requests refused and s 48B request allowed (May 2005); PV application lodged (May 2005), application refused (June 2005); review sought by RRT (July 2005), RRT set aside the decision and remitted the matter to DIAC for reconsideration (September 2005); Mr X was granted a Temporary Protection Visa (TPV) (5 October 2005).

Current immigration status

4. Mr X resides lawfully in the community on a TPV.

Ombudsman consideration

5. The DIAC report to the Ombudsman under s 486N is dated 22 September 2005.
6. Ombudsman staff interviewed Mr X, together with his wife Ms Y, in Melbourne on 16 November 2005.
7. The Ombudsman considered the following documents: a medical summary report from the International Health and Medical Services (IHMS) and a psychological summary report from Psychological Support Services (PSS), both dated 27 September 2005; and a letter to the RRT from Mr X's migration lawyer, Z, dated 26 August 2005.

Key issues

Criminal history

8. Mr X was charged in relation to his escapes from detention in March 2002 and June 2002. He was convicted and released on a good behaviour bond of 18 months.

Health and welfare

9. The IHMS report notes that in July 2005, Mr X was diagnosed with an adjustment disorder, exhibiting symptoms of anxiety and depression. He was prescribed anti-depressant medication and IHMS recommended ongoing psychological review, noting that *'the visiting psychiatrist has advised that resolution of his detention issues will be necessary for him to achieve maximal therapeutic response. This would therefore be more likely in the community'*. The PSS report notes that from October 2004, until his release from detention, Mr X had daily to fortnightly contact with a psychologist. He presented as highly anxious and restless, and at times agitated. Mr X was provided with anger management techniques and was encouraged to become involved in activities. The report further notes that there was a reduction in his symptoms with this treatment.
10. The PSS report notes that Mr X's long-term prognosis is good, provided that he has access to adequate mental health support. At interview, when asked about his mental state he answered *'when I was in my country I had a hard life and now I am in this country I have a hard life too'*. He said he had not continued to see a psychologist or doctor now that he is in the community.

Transfer from Maribyrnong IDC to Baxter IDC

11. Mr X expressed frustration that DIAC elected to move him from Maribyrnong IDC to Baxter IDC, as he wanted to remain close to Ms W who lived in Melbourne. He stated that DIAC did not discuss the transfer with him and only gave him three hours notice before he was transferred. He said *'they didn't ask me, I talked with psychologists and I said "I no want to go to Baxter because I have my girlfriend here, she comes and visits me and it is good to see her", they said "we can't keep you here as your process will take so long"'*. Ms Y moved to Port Augusta in order to maintain regular contact with Mr X.
12. At interview Mr X also drew attention to the trauma he suffered during the road transfer between Maribyrnong IDC and Baxter IDC. This incident became the subject of a complaint by others to the Ombudsman and the Human Rights and Equal Opportunity Commission (HREOC). An independent investigation was also conducted on behalf of DIAC by Mr Keith Hamburger AM of Knowledge Consulting Pty Ltd.
13. Finding 2 of Mr Hamburger's report noted: *'the planning process for this escort was a flawed process that had no regard to basic planning principles...the outcome of this disregard was a plan that did not provide for the dignity, privacy and care needs of individual detainees and did not provide for the humane, safe and secure escort of the five (5) detainees between MIDC and Mildura'*. Finding 24 noted: *'Concerning amenities provided to detainees during the escort between MIDC and Mildura, serious violations occurred of the Immigration Detention Standards and of GSL's [Global Solutions LTD] External Transport and Escort Services Generic Operational Procedure No. 12.5 as follows:*
 - *Failure to provide medical assessment and/or treatment for detainees upon whom force had been used and who may have been injured prior to them being placed in the escort van;*
 - *Non-provision of basic amenities including food and fluids;*
 - *Sensory deprivation;*
 - *Denial of access to toilet facilities resulting in detainees having no option but to urinate in their compartments;*
 - *Denial of rest and exercise;*

- *Failure to meet the special needs of detainees, that is, detainees who could not understand or speak English, by non provision of interpreter services during the escort;*
- *Disregard of appeals for assistance from detainees in obvious distress;*
- *Treating detainees in an inhumane and undignified manner;*
- *Not affording detainees as much personal privacy as is practicable;*
- *Humiliation of detainees; and*
- *Placing the health and safety of detainees at risk'*¹.

14. Mr X stated that back pain and mental health issues arising from the incident still affect his feeling of wellbeing.

15. In investigating the complaints relating to the transfer of detainees to Baxter IDC, the Ombudsman's office made a number of recommendations to DIAC, including that the individual detainees be compensated for the way they were treated. Mr X stated that he received an apology from the manager of GSL. DIAC advised in May 2007 that Mr X received a formal apology for this event in July 2005 from DIAC. It further advised that HREOC was preparing a report on the issue of compensation for two other complainants in the transfer case and that it is yet to be determined by DIAC if compensation will apply to all five people who were transferred. It is understood that Mr X did not lodge a formal complaint with HREOC.

TPV issues

16. Mr X expressed frustration about the limitations of being on a TPV. He stated that he would like to sponsor relatives to Australia, as his *'family has problems and I am thinking about how I will help my family, now I have to wait for three years more which is nearly eight years (since arriving in Australia) it is going to take'*. He stated he would like to see them in the near future *'before something happens, make sure everything is all right, this is my big wish, to see my family'*.

Attitude to removal

17. The first RRT affirmed DIAC's decision to refuse Mr X's PV application, as it was not satisfied that he was a citizen of Afghanistan. Mr X said that the language analysis process that DIAC commissioned was partly flawed by their use of a Tajik interpreter and also it did not allow for the idiomatic regional variations in Afghanistan, due to the existence of different tribes and the impact of outside linguistic influences.


18. At the second RRT hearing, it was accepted that he was from an ethnic minority in Afghanistan, could potentially be at risk of ethnic persecution, and that the Afghan authorities would be unable to protect him.

Ombudsman assessment/recommendation

19. Mr X spent two years in immigration detention before he was granted a TPV, which is valid until 2008. Although the RRT did not accept he was an Afghan national in 2001, the Embassy of the Islamic Republic of Afghanistan issued him a passport in February 2003. Given this confirmation of citizenship, it is possible that Mr X was potentially eligible to be released from detention earlier than October 2005.

¹ *'Findings and Recommendations from 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

20. The primary issue for consideration by the Ombudsman is whether the Minister should consider waiving the 30 month waiting period for Mr X to apply for a permanent visa. On the one hand, the medical evidence available to the Ombudsman indicates that Mr X was diagnosed as having an adjustment disorder, with symptoms of anxiety and depression. Allowing Mr X to apply for a permanent PV would release him from the restrictions associated with a TPV, thereby assisting him in recovering his mental health. On the other hand, it is noted that Mr X twice escaped from detention and on the second occasion lived unlawfully in the community for over two years before being re-detained. Bearing these considerations in mind, the Ombudsman does not make any recommendations about Mr X's visa status.
21. During the investigation of the complaint into the transfer of the five detainees from Maribyrnong IDC to Baxter IDC, 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 until 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, however, DIAC has not yet determined if Mr X, who is not one of the two who lodged complaints, will receive compensation. Notwithstanding that this investigation has not yet been finalised, in light of the considerable distress experienced by Mr X during this transfer, the Ombudsman reiterates the recommendation made in December 2005, and **recommends** that DIAC offer Mr X a reasonable level of compensation.



Prof. John McMillan
Commonwealth and Immigration Ombudsman

15 Feb 2007
Date