

REPORT FOR TABLING IN PARLIAMENT BY THE COMMONWEALTH OMBUDSMAN

Under s 486O of the Migration Act 1958

Personal identifier: 014/05

Principal facts

Personal details

1. Mr X is a man of unknown nationality.

Detention history

2. The NSW police referred Mr X to the Department of Immigration and Multicultural and Indigenous Affairs (DIMIA) in September 2002. Information on the DIMIA file indicates that he had been taken into custody at Matthew Talbot Lodge in Sydney (a lodge for homeless men) after asserting to police that he had arrived in Australia seven years previously and was an unlawful non-citizen. He was taken into immigration detention under s 189(1) of the *Migration Act 1958* and placed in Villawood Immigration Detention Centre (IDC). He was transferred to Baxter Immigration Detention Facility (IDF) in March 2004, but returned to Villawood IDC in July 2005.

Visa applications

3. DIMIA advise that Mr X has not made any visa applications in Australia – at least, none that are known. In 2002, he asked to see an immigration officer to apply for '*permanent citizenship*'. In 2004, he asked again for '*Australian citizenship*'. DIMIA claims that he has talked about having applied for a protection visa.

Current immigration status

4. Mr X was referred to the Minister for consideration of an exercise of her detention intervention powers earlier this year. In August 2005, Mr X was offered a Removal Pending Bridging Visa (RPBV) and wrote in reply that he would accept the offer on the condition that he is able to '*stay for at least 100 years*' and he '*not be removed to any deadly foes*'. DIMIA reports that the processing of the RPBV has been deferred because Mr X will not comply with medical and psychological assessments.

Removal details

5. DIMIA has not attempted to effect Mr X's removal from Australia, as it does not know where he is from. He is currently housed in Stage 1 at Villawood IDC.

Ombudsman consideration

6. The DIMIA report to the Ombudsman under s 486N was received 14 October 2005, (dated 22 September 2005).
7. Ombudsman staff arranged an interview with Mr X at the Villawood IDC on 3 November 2005, however on arrival he declined to be interviewed, therefore, Ombudsman staff have not spoken with Mr X.
8. On 8 November 2005, Ombudsman staff viewed a number of DIMIA files relating to Mr X (CLF 2005/51886; CLF 2005/90728; and CLF 2005/90728). Material viewed included a submission to the Minister, dated 19 August 2005, and legal advices to DIMIA from the Australian Government Solicitor, dated June and July 2005.
9. Ombudsman staff have sighted various medical reports from International Health and Medical Services and Professional Support Services (PSS), together with independent

reports from psychiatrist, Dr A, dated 25 July 2005, and psychologist, Ms B, dated 5 August 2005.

Key issues

Nationality

10. DIMIA's briefing to the Minister of 19 August 2005 states '*we believe the prospects of identifying the men [X and Y] are slim and we recognise there is a chance they may never be identified*'. The briefing suggests that the only way of progressing the investigations into Mr X's identity is to publicly release his photograph. The submissions seek legislative amendment to allow DIMIA to publish Mr X's photo.
11. DIMIA advises that throughout his detention Mr X has refused to cooperate with attempts to identify him. On the DIMIA files there are records of a number of interviews with Mr X where he is recorded as replying '*it's a secret*' to questions about his identity. Mr X is reported as having said that he is unlawfully in Australia.
12. Mr X is of Asian appearance and thought to be between 25-30 years old. He has said that his surname 'X' is a combination of 'M' and 'N'. He signs himself 'XX, the WW'. DIMIA reports that he is religious, reads from a bible, and has visitors and friends from many different churches. DIMIA has obtained positive identification of Mr X from a church group in Sydney.
13. From observations, DIMIA is aware that he has talked about fishing with his mother in Indonesia and told another acquaintance that he is from Thailand. He is reported to be an excellent chess player and have an extensive knowledge of advanced mathematics. His writings in Chinese have been analysed and are consistent with him learning the language. He is also reported as having conducted conversations with other detainees in Khmer and Punjabi (fluent).
14. On the basis of the DIMIA files viewed by Ombudsman staff, a number of factors indicate that Mr X may have spent considerable time in Australia:
 - He has an excellent command of written and spoken English. His accent is reported to be neutral. The Deputy Manager of Baxter IDF says that he speaks with an Australian vernacular;
 - The Deputy Manager of Baxter IDF says he has specific knowledge of sites in Australia, inner-city Sydney, and outback regions; and
 - An interview with an associate at the Matthew Talbot Hostel in April 2005 identified that Mr X told him that he had family in Adelaide.
15. DIMIA has variously speculated that Mr X may be from Canada, Malaysia, Thailand, Indonesia, or England.
16. In recent months DIMIA has taken a number of steps to identify Mr X. In August 2005, they took fingerprints (with the use of restraints due to his resistance to cooperate). A number of interviews have been conducted with Mr X and former acquaintances at Matthew Talbot Hostel and St Michael's Anglican Church. DIMIA has sent a number of requests for information to purported acquaintances. It has conducted inquiries with the Department of Foreign Affairs and Trade's passport database, Births Deaths and Marriages, the Australian Electoral Commission, Centrelink, HIC, Police Phototrak, NSW RTA, Homeless Persons Information, missing persons in each jurisdiction, as well as other agencies. The Ombudsman is advised that investigations are continuing.

Health and welfare

17. Ombudsman staff have sighted medical information which suggests that Mr X may have a mental health illness.

18. The DIMIA report notes that a mental health assessment was conducted on Mr X in October 2002, and more recently, a psychiatric assessment was carried out in September 2005. The report indicates Mr X refused to see a psychiatrist on two occasions in February 2005, and attempts by a GP and a psychiatrist to assess him in June and July 2005 were unsuccessful. Psychologist, Ms B, attempted to see Mr X on three occasions in mid 2005 and notes in her report of 5 August 2005 that she was only able to have a short conversation with Mr X and view some of his writings. She speculates the reasons *'why he would want to try and hide his true identity, one of which may be that he has a mental illness that is preventing him appropriately making decisions about revealing his identity. However, there are numerous other reasons why Mr X may not want his true identity revealed'*.
19. The PSS report dated 1 July 2004 observes: *'cannot recommend psychological treatment at this time as Mr X appears to be in very good spirits and mental health generally. It is my opinion that Mr X does not suffer from a diagnosable mental disorder'*.
20. In contrast, the DIMIA file refers to a mental health report on 17 October 2002, which notes that Mr X may suffer from periods of mania with psychotic elements. The PSS report of 5 August 2005 (prepared after assessment of Mr X's writings) states that he may be grandiose and be displaying delusional behaviour. Dr A's report of 25 July 2005 (while limited because of Mr X's refusal to participate and lack of corroborative information) states that *'possibly he had chronic schizophrenia'*.
21. The DIMIA file notes that Mr X is familiar with some psychiatric medicines and has indicated he does not agree with some treatments, including 'Lithium'.
22. Mr X has generally been uncooperative in assessments of his health and unwilling to speak to health professionals. Aside from a psychologist's assessment of Mr X's letters, the DIMIA report indicates that health professionals have been unable to compile a collateral medical history for Mr X. A collateral history could include information from staff, DIMIA files, and Mr X's visitors. Dr A's report of 25 July 2005 notes this limitation, commenting, *'My assessment was limited by Mr X's refusal to be seen, and by the lack of any corroborative information'*.

Security and safety

23. The DIMIA report indicates that Mr X has not been involved in any adverse incidents while in detention and participates in recreational and educational activities. The Deputy Manager of Baxter IDF observed Mr X as polite, well adjusted, social and interactive, intelligent and active.
24. The DIMIA files contain some information that could be construed as inappropriate behaviour by Mr X towards young people. The information has not been included in this report, because of its equivocal, yet potentially prejudicial nature, and because Mr X has not had an opportunity to comment on this information.

Attitude to removal

25. Mr X has said that he does not want to be removed, however, if he is removed he has said he wants to go to Australia, Prince Edward Islands in Canada, or California, in order of priority. When first detained he is reported as having said he should be deported to *'Zimbabwe or any other country'*.

Other detention issues

26. Mr X has lodged a number of complaints while in detention. Some of these complaints are about conditions at Villawood IDC (eg. overcrowding, insufficient ventilation and food), and the use of restraints to take his fingerprints. He has also made requests to be able to go on outings, and for detainees to receive an allowance.

Legal issues

27. DIMIA obtained a legal advice from the Australian Government Solicitor in June 2005, with a follow-up short advice in July 2005. DIMIA sought confirmation as to whether a 'reasonable suspicion' continued to exist for Mr X's ongoing detention under s 189. The legal advice says:

'While DIMIA might be criticised for taking too long to make some [of] these checks, I don't think one can say that the checks have diluted the suspicion that X is an unlawful non-citizen. He has continued to assert in no uncertain terms that he is unlawful and there are enough hints in the information DIMIA has collected of foreign connections (at various times, Indonesian, Punjabi, Cambodian and Thai) to give these assertions some credibility, given that DIMIA has not been able, through its inquiries, to confirm his identity or his lawful status. Moreover, X has refused to provide fingerprints ... or to provide any personal information about himself.'

The legal advice canvasses some further options for establishing Mr X's identity, including a psychiatric assessment, issuance of notices under s 18 to people known to him (particularly people who have visited him in detention), and publication of his photograph.

Ombudsman assessment

Discussion of legal issues

28. The recent DIMIA reports on Mr X indicate that DIMIA has not been able to identify Mr X or his nationality, or determine whether he is an unlawful non-citizen. This squarely raises the issue of whether Mr X either should have been taken into immigration detention or should remain in detention. This is a mixed legal and factual issue. Ultimately it is for a court to resolve any legal doubts about the power to detain a person; and, failing any definitive court ruling, for DIMIA to obtain legal advice on any issues before it. As noted earlier in this report, DIMIA has obtained legal advice from the office of the Australian Government Solicitor concerning Mr X's case. My view is that the legal issues need further examination, and a recommendation to that effect is made below. I will set out briefly the basis for my concern.
29. Mr X was detained under s 189, which provides that a person must be taken into detention if an authorised officer 'knows or reasonably suspects' that the person is an unlawful non-citizen. It is probable – though there is no authoritative court ruling to this effect – that implicit in s 189 is a requirement that the DIMIA officer responsible for supervising a person's detention *continues* to hold a reasonable suspicion that the person is an unlawful non-citizen. This is implicit in s 196(2), which provides that the exhaustive statement in that section of the different ways a person can be released from detention (removal, deportation, or being granted a visa) 'does not prevent the release from immigration detention of a citizen or a lawful non-citizen'. In short, a person who is being wrongly detained should be released.
30. The same view of s 189 was taken in the report by Mr Mick Palmer AO, *Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau*. The report spoke (at p 23) of s 189 being used 'to detain only people who are genuinely "reasonably suspected" of being unlawful non-citizens and for only as long as is justified and necessary in the circumstances'. The Palmer Report drew attention to a decision of the Full Federal Court in *Goldie v Commonwealth* (2002) 188 ALR 708, in which the Court spoke of s 189 as imposing an undefined duty upon an officer invoking that section to make 'efforts of search and inquiry that are reasonable in all the circumstances' to support a decision. This is consistent with the view that a person lawfully detained under s 189 should later be released if there are no continuing grounds to support a reasonable suspicion that the person is an unlawful non-citizen.

31. An official who has to decide whether the 'reasonable suspicion' test in s 189 is satisfied, either initially or on a continuing basis, should take account of the public law context in which s 189 operates. Inherent in the rule of law, which is a bedrock principle of Australian law and government, is that an individual in Australian society has freedom of movement, action and thought, except as limited by law. Absent any statutory control to the contrary, a person is under no compulsion to answer a question posed by a government official, or to give a frank or truthful answer to any such question. Nor is a person obliged to reveal their identity, to maintain a consistent identity, to disclose who they are, or to explain how they happen to be in a particular location. There is both a right of silence and a freedom of self-expression.
32. Statute can provide to the contrary, both by restricting a person's freedom of action and by obliging them to respond to a government inquiry. A few sections of the Migration Act do so, but in a limited manner. Section 188 provides that if an officer 'knows or reasonably suspects' a person is not a citizen, the officer may require the person to show the officer evidence either of the person's identity or of being a lawful non-citizen. A person is obliged to comply within 5 minutes (if the requirement is given orally) or within 48 hours (if the requirement is given in writing). A person can also be required to provide a personal identifier, such as a photograph, signature, or passport details. There is no penalty for non-compliance with a requirement to provide identification under s 188, though a person failing to comply would be at heightened risk of being detained under s 189. That section provides that an officer *must* detain a person if the officer 'knows or reasonably suspects' the person to be an unlawful non-citizen. Once a person is in immigration detention, they can be formally directed by an officer under s 257 to answer 'such questions as the officer considers necessary' for the purpose of determining whether the person is an unlawful non-citizen or liable to removal or deportation from Australia; failure to provide a truthful answer is an offence, punishable by six months imprisonment.
33. This is not the place for an extended legal analysis of those and other provisions of the Migration Act, but a few comments are in order. Those sections do not set at nought the common law right to individualism, discussed above. The necessary condition for being detained, initially and probably on a continuing basis, is that an officer has a reasonable suspicion that a person is an unlawful non-citizen. Failure by a person to have provided evidence of their identity when required to do so under s 188 will be a relevant consideration, but not a conclusive factor. It is perhaps to be expected that a person will be formally cautioned of the risk they face by failing to provide evidence of their identity. And the weight that is attached to a person's failure to answer a question might lessen as the period of detention grows, and the onus on DIMIA to justify continuing and indefinite detention intensifies. A knowledge gap about a person – who they are, where they were born, and their residential history – might provide grounds for requiring the person to identify themselves under s 188. But the knowledge gap will not necessarily provide grounds for a continuing detention of the person under s 189. An unresolved doubt about a person's citizenship or residency status falls short of a reasonable suspicion that the person is unlawfully in Australia.
34. The serious consequences attaching to a finding that a person is an unlawful non-citizen underscore the care that should be taken in reaching such a finding and the strength of the case that should support it. If there is a reasonable suspicion that a person is an unlawful non-citizen, they *must* be taken into detention under s 189. The person must remain in detention (s 196), and can only be released from detention by removal from Australia (s 198 or s 199), by being deported (s 200), by being granted a visa, or in other limited circumstances.
35. If that analysis is applied to Mr X, it is in my view questionable whether – presently at least – his continuing detention is justified under s 189. Among the reasons given in

support of DIMIA's decision to continue detaining Mr X are that he has consistently asserted that he is an unlawful non-citizen; that he appears to have a connection with countries other than Australia; that DIMIA is unable to confirm his identity or his lawful status; and that he has declined to assist DIMIA in establishing his identity. My view is that those reasons are not compelling, either individually or together. There is no clear evidence of who Mr X is, or how or when he came to Australia. The fact that he has Asian ancestry, and knowledge of other countries and languages, does not distinguish him from many other people who were born in or reside lawfully in Australia. It is possible that Mr X, for reasons unconnected with his immigration status, has chosen to be deceptive. It is possible also that he is mentally unwell and that his answers are not to be accepted at face value. Or that he is mistaken about his own immigration status and fears unnecessarily that he is at risk of being removed from Australia if his identity is known. These possibilities are raised by Ms B's report of 5 August 2005.

Discussion of DIMIA's handling of Mr X's case

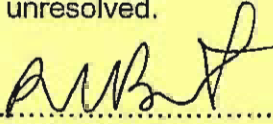
36. Some other aspects of Mr X's case require either comment or attention. First, it can be acknowledged that in recent months DIMIA has acted strenuously to identify Mr X, by way of database searches, contacts with previous associates, and visits to the place where he was detained. The same cannot be said of the efforts taken in 2003 and 2004, when seemingly little was done beyond interviewing Mr X. DIMIA failed to ask for his fingerprints from NSW police until January 2004 (by which time they had been destroyed) and failed to speak to the arresting police officer until 2005. Notwithstanding that Mr X had a number of regular visitors, little effort was made to obtain information from those visitors until 2005. On 14 July 2005, the DIMIA file notes that it is not clear whether Mr X had been directly asked if he was a citizen or a permanent resident.
37. Mr X's case worryingly suggests, as noted in the Palmer Report on Ms Rau, that there are systemic failures in the way that DIMIA investigates the circumstances of individuals who are uncooperative or confusing in disclosing their identity. A foreseeable consequence of a DIMIA failure of that kind is that a person may be held in immigration detention for a longer period than is necessary or lawful. As to Mr X, he has been in immigration detention for three years, although the question of his status as an unlawful non-citizen has not been resolved.
38. Mr X has recently been invited to apply for a RPBV. A person granted an RPBV is still in immigration detention for the purposes of the Migration Act, though not held at an immigration detention centre. If Mr X's circumstances do not meet the 'reasonable suspicion' test in s 189, there would be no lawful basis for his detention, under an RPBV or otherwise. He would be entitled to be released into and remain in the community, free of any restriction.
39. It may nevertheless be appropriate in other cases, where the 'reasonable suspicion' test is satisfied yet important questions about a person's identity remain unresolved, for the person to be granted a visa of some kind (such as a bridging visa or an RPBV) to enable the person to be released into the community. As Mr X's case illustrates, it is worrying that a person can be held in confined detention for an extended and indefinite period, because of an unresolved doubt as to their identity. Even assuming that Mr X's detention was authorised under s 189, the option of granting him a visa of some kind could have been considered much earlier, bearing in mind the unique mix of circumstances in his case. That would not have prevented DIMIA continuing its inquiries to establish his identity and citizenship or immigration status.
40. A special feature of Mr X's case is that he has not fully cooperated with health practitioners, who were thereby unable to give a definitive diagnosis of whether he was mentally unwell. I draw attention to the discussion of the same issue in the Palmer

Report, which suggested (at p 146) that DIMIA establish procedures for painting a 'collateral history' of a person's mental wellbeing:

'[Refusing to be seen by medical practitioners] made it difficult for the health practitioners involved to gain an understanding of the presence, level and extent of any mental illness. When an interview is not possible, it is necessary to rely on the observations of other people who have contact with the person being assessed ... It is a well-recognised medical principle that when an adequate history cannot be obtained from the 'patient' a collateral history should be sought from staff, concerned friends and others'.

Ombudsman recommendations

41. That DIMIA seek further high level legal advice on whether there are grounds to support the continuing detention of Mr X under s 189.
42. That pending the receipt of that legal advice, the Minister consider granting Mr X a visa to enable him to be released into the community.
43. That in light of the issues raised in this report, DIMIA review its procedures for dealing with cases in which the identity or immigration status of a person is unknown or unresolved.

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Prof John McMillan
Commonwealth Ombudsman

1 December 2005
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Date