

REPORT FOR TABLING IN PARLIAMENT BY THE COMMONWEALTH AND IMMIGRATION OMBUDSMAN

Under s 486O of the Migration Act 1958

Personal identifier: 224/07

Principal facts

Personal details

1. Mr X is aged 31 and a citizen of New Zealand. His mother, stepsister and stepfather reside in Australia. Mr X's estranged natural father also resides in Australia, as does his son Master Y, aged seven, who lives with his mother, Mr X's former partner.

Detention history

2. Mr X completed a term of criminal detention at Parramatta Correctional Centre. He was then detained under s 189(1) of the *Migration Act 1958* and placed at Villawood Immigration Detention Centre (IDC) (July 2005).

Visa applications

3. Mr X arrived in Australia as a 10 year old child with his family under the name Mr Z as the holder of a New Zealand passport (January 1987); Mr X was deemed to hold a Special Category Visa (SCV) by operation of law (September 1994), SCV cancelled under s 501 (March 2005); decision affirmed by the Administrative Appeals Tribunal (AAT) (June 2005); granted a Bridging Visa (BV) (June 2005) valid until release from gaol; further BV application deemed invalid (July 2005); AAT decision set aside by Federal Court (FC) and remitted to AAT (December 2005), cancellation decision affirmed by AAT (May 2006); application to FC (December 2006), FC application withdrawn by consent (February 2007); a s 195A submission seeking the Minister's discretion was considered as part of the s 501 review, the Minister decided not to intervene (May 2007); Protection Visa application commenced and aborted (June 2007); Mr X made a s 195A request (July 2007), the Minister declined to intervene (August 2007).

Current immigration status

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

Removal details

5. The Department (DIAC) advises that Mr X requested removal under s 198(1) and is scheduled to be removed on 31 August 2007.

Ombudsman consideration

6. The DIAC report to the Ombudsman under s 486N is dated 9 July 2007.
7. Ombudsman staff interviewed Mr X by telephone on 22 August 2007.
8. Ombudsman staff sighted the following documents: a report from DIAC to the Ombudsman's office on the outcome of a review of Mr X's case in response to the Ombudsman's report on long-term residents whose visas had been cancelled under s 501 of the *Migration Act*¹ dated 28 May 2007; an International Health and Medical

¹ *'Administration of s 501 of the Migration Act 1958 as it applies to long-term residents'*, February 2006, Report by the Commonwealth and Immigration Ombudsman, Prof. John McMillan, Report No. 01/2006, Commonwealth Ombudsman, Canberra, Australia.

Services (IHMS) report dated 25 June 2007; and a Professional Support Services (PSS) psychology summary report dated 9 July 2007.

Key issues

Health and welfare

9. The IHMS report stated that Mr X *'has a history of depression and more recently has experienced anxiety and panic attacks'*. Mr X was receiving supportive counselling from the Mental Health Team and was on anti-anxiety medication. At interview with Ombudsman staff Mr X indicated that his legal options were exhausted and as a result *'I'm getting more depressed than I normally am, I'm not exercising, I'm hardly eating, I'm losing weight, my health is suffering, I'm stressed out'*.
10. The report also indicated that Mr X had a *'history of poly substance dependence'* and had been in the Buprenorphine and then Methadone treatment programs as well as attending an alcohol and drug therapy group.

Attitude to removal

11. Mr X told Ombudsman staff that he had requested to be removed from Australia in mid-August 2007, as he wanted his freedom. However he said he was scared to return to New Zealand. He had no concrete plans other than to contact his grandmother, whom he had not seen since age 11 or 12, and that he hoped to live with her.

Criminal history and s 501 visa cancellation

12. A delegate of the Minister formed the view that Mr X did not pass the character test because he had a substantial criminal record within the meaning of s 501, and cancelled his visa in March 2005. Mr X had been given a warning of possible cancellation under s 501 two years earlier. Mr X's criminal history commenced in December 1994 and continued until May 2005 and includes robbery, stealing offences, break enter and steal and assault occasioning actual bodily harm. The AAT in May 2006 indicated he had been sentenced to a term of imprisonment of 12 months or more and had served a total of *'approximately five years in prison'*.
13. The AAT considered the risk of recidivism in the May 2006 hearing and noted *'the applicant has been given many opportunities, in the form of probation, discharge without conviction, community service orders and warnings, to rehabilitate himself, but has thrown away every one of them ... the rest of his evidence of rehabilitation consists of words rather than deeds ... the fact that ... he made multiple attempts to mislead the tribunal at the present hearing does not suggest that the applicant is a reformed and rehabilitated man'*.

DIAC's review of s 501 visa cancellations

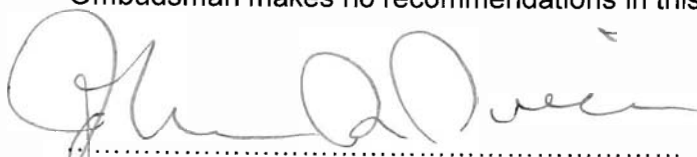
14. In February 2006 the Ombudsman published a report on the application of s 501 as it applies to long-term residents. Recommendation 8 of that report was that DIAC review the specific cases considered in the course of the Ombudsman's investigation. Recommendation 9 was that DIAC consider *'whether to continue the detention in immigration detention centres of all non-citizens to whom these recommendations might apply, taking account of the range of alternatives now available'*.
15. DIAC advised in June 2007 that its review of Mr X had been completed and that the Minister had decided not to intervene in Mr X's case.


Ombudsman assessment/recommendation

16. Mr X has resided in Australia for 21 years, has family ties here and no similar ties to New Zealand. He was detained in July 2005 following the cancellation of his visa on character grounds and he was unsuccessful in appealing that decision to the AAT. The

Ombudsman notes that the decision to cancel his visa on character grounds was affirmed by the AAT in June 2005 and the FC quashed that decision in December 2005 on the basis that the tribunal failed first to identify the best interests of Mr X's child before balancing his interests against the other considerations and remitted the matter back to the AAT. In May 2006, the AAT found that the considerations of community protection and expectations outweigh the best interests of the child and affirmed the decision to cancel his visa. The decision to confirm Mr X's visa cancellation has been made by the Minister and the Ombudsman has no further comment to make on that matter.

17. Of concern in Mr X's case is the amount of time that he spent in immigration detention while a review of his case was undertaken pursuant to the Ombudsman's report on the visa cancellations of long-term permanent Australian residents. In the report the Ombudsman recommended that DIAC consider whether to continue the detention in immigration detention centres of people who were subject to review while the reviews were undertaken. This recommendation was made in light of the fact that the reviews could take some time, that indefinite detention is undesirable and that the people subject to visa cancellations who had already completed their criminal sentences would, but for the fact of the visa cancellation, otherwise be free in the community. The report noted that a range of alternatives to detention facilities are now available and that permanent residents whose families are in Australia are unlikely to abscond.
18. It is regrettable that, despite the urgency implicit in the Ombudsman's recommendation, Mr X has remained in immigration detention for 18 months following the release of the Ombudsman's report, while waiting for the outcome of his assessment.
19. The Ombudsman understands that Mr X's voluntary removal is imminent. The Ombudsman makes no recommendations in this report.


.....
Prof. John McMillan
Commonwealth and Immigration Ombudsman


.....
Date