

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

Under s 486O of the Migration Act 1958

Personal identifier: 113/06

Principal facts

Personal details

1. Mr X is aged 62 and a citizen of Fiji. He has two sisters who live in Australia. Mr X advised Ombudsman staff that he is separated from his wife and has two sons in Fiji, aged 30 and 36, who are married with children. He claims he is not in contact with them. The Department (DIMA) advised that Mr X has six children living in Fiji.

Detention history

2. In July 2004 Mr X was located by DIMA and detained under s 189(1) of the *Migration Act 1958*. He was placed at Villawood Immigration Detention Facility (IDF).

Visa applications

3. Mr X entered Australia on a Tourist Visa (TV) (short stay) (April 1998); long stay TV granted at short stay TV expiration (July 1998); long stay TV ceased, third TV granted (January 1999); TV ceased, application made for Family (Residence) Visa (FV) (April 1999); FV refused (February 2000); various BV's granted from April 1999 until 14 December 2001 when Mr X became unlawful.
4. FV refused (February 2000) and the decision affirmed by the Migration Review Tribunal (MRT) (November 2001); s 351 request made on Mr X's behalf seeking exercise of the Minister's discretion (March 2003); Minister declined request (June 2003).
5. Applied for a BV on the basis that he intended to lodge an application for a Remaining Relative visa (August 2004), refused (August 2004); MRT affirmed refusal (October 2004); s 351 request lodged and found not to meet the guidelines (September 2004); series of BV applications lodged that were deemed invalid or refused (November 2004 – May 2005); judicial review of MRT decision sought in Federal Magistrates Court (October 2004), dismissed (February 2005); appealed to the Full Federal Court (FFC) (March 2005); FFC set aside MRT decision (October 2005); matter remitted to MRT which reaffirmed decision; s 351 request lodged (November 2005); applied for and refused BV (January 2006); s 351 request declined, MRT affirmed refusal (February 2006); s 351 request initiated, application to FMC seeking review of the MRT decision (March 2006); s 351 request deemed inappropriate to consider (May 2006); Mr X filed a notice of discontinuance; s 351 request lodged (June 2006), request ongoing.

Current immigration status

6. Mr X is an unlawful non-citizen currently detained at Villawood IDF.

Removal details

7. DIMA advised that in October 2004 Mr X completed a Fijian passport application. A Fijian travel document was received in April 2005. DIMA will undertake Mr X's removal subject to the outcome of the ongoing s 351 request.

Ombudsman consideration

8. The DIMA report to the Ombudsman under s 486N was dated 14 August 2006.

9. Ombudsman staff interviewed Mr X on 29 September 2006.
10. Ombudsman staff sighted a number of documents: a medical report from Dr A from a diagnostic centre dated 27 July 2006; medical reports from Dr B, Orthopaedic Surgeon, dated 21 September 2006 and 20 October 2006; and a letter from Mr X dated 9 November 2006.

Key issues

Health and welfare

11. Mr X advised Ombudsman staff that since entering detention he has felt depressed, he has been experiencing headaches and difficulty sleeping, his short-term memory has deteriorated, and he suffered a knee injury following a fall. He said that being in detention has placed a *'lot of stress on my brain'* and that he has subsequently developed high blood pressure.
12. DIMA advised that Mr X injured his knee in February 2006 when he slipped in the mess area. The doctor prescribed analgesia and treated it with ice packs. Mr X said that he had been given cream that was ineffective in treating the pain. He said that the doctor had chosen not to refer him for an x-ray and it was subsequent treatment from the physiotherapist that identified the extent to which his knee was injured. DIMA advised that Mr X requested an x-ray of his knee on 20 July 2006. One was arranged for 27 July 2006 and a report provided by Dr A. DIMA further advised in the s 486N report that IHMS had advised that *'Mr X has been referred to a specialist orthopaedic surgeon for further investigation'*.
13. In August 2006 Mr X lodged a complaint with the Ombudsman office, as he was unhappy with the diagnosis and treatment of his knee. The office investigated the matter and DIMA advised that *'Mr X was reviewed by an external orthopaedic surgeon on 30 May 2006. ... Although degenerative changes only were identified, the possibility of him being reviewed again by the orthopaedic specialist with regard to treatment options for his degenerative knee disease will also be discussed with him. ... If Mr X is dissatisfied with the opinion of the first specialist he is welcome to request a second opinion ... however ... the final opinion of the first specialist has not yet been reached'*.
14. Dr B noted in September 2006 of Mr X's twisting injury to his right knee that *'this gentleman has gross advanced degenerative changes in his right knee way out of proportion to his age. ... there is no doubt eventually he will need to have a total knee replacement however for now the best option is to do an arthroscopy to try and clean up as much damage as we possibly can'*. Dr B reported in October 2006 that he has performed the arthroscopic chondroplasty/osteoplasty procedure.

Attitude to removal


15. Mr X said that he initially came to Australia to care for his sister's ailing brother, who died in late 2000. Mr X applied for a permanent visa in April 1999, on the basis of providing this care to his brother-in-law, which was refused in February 2000. Mr X said that he does not want to return to Fiji, as he believes he is too old to find employment and, as there is no social security system, he will suffer financial hardship. He said *'I am over 60 now I have to start again with zero to get a life'*.

Other detention issues

16. Mr X said that being in detention is like being in a prison. He said that the guards are sometimes unfair, that they enter his room late at night without explanation and search his room regularly. Mr X also said that there is nothing to do in the detention centre, saying 'I just want to sit down in my room and read my Bible. Only my Bible can help'.
17. Mr X expressed frustration at continual meals of rice and spicy curry served at Villawood IDF, as they make him feel 'bad'. He said that the food is very different to Fijian food so he often skips meals and just drinks tea.

Ombudsman assessment/recommendation

18. Mr X has been in immigration detention for over two years, primarily due to ongoing processes relating to his applications for a BV. Mr X advises that he originally wished to stay in Australia in order to care for his brother-in-law. He applied for a permanent carer's visa and was unsuccessful. His brother-in-law has since died.
19. In the seven years since applying for the carer's visa, Mr X has not applied for another permanent visa, instead applying for a series of BVs. The current submission before the Minister is a further request for her to substitute a more favourable decision in relation to his January 2006 BV refusal. The Ombudsman notes that Mr X's continued applications for BVs are not serving to resolve his ongoing immigration status. Mr X's situation has not been helped by the fact that he has either been unassisted or, as found by the FMC, poorly served by his former migration agent, in making successive unsuccessful applications for Ministerial intervention. The Ombudsman **recommends** that the Minister make a decision on the current s 351 submission as soon as possible, and in any case, not later than the statutory period prescribed in s 486P for the tabling of this report in Parliament (*viz*, within 15 sitting days of receiving the report).
20. The Department has concluded that Mr X does not have valid claims to remain permanently in Australia. The Ombudsman does not have any evidence that would lead to a different conclusion.
21. The Ombudsman **recommends** that DIMA conduct further discussions with Mr X, noting the conclusions reached by the Ombudsman in this report, to assist him in understanding his situation. The Ombudsman makes no further recommendation at this stage but notes that it is not desirable that Mr X remain in detention for an indefinite period. The current s 351 submission before the Minister may result in Mr X being provided with a visa. Alternatively, he may again be unsuccessful and there would be no impediment to removing Mr X to Fiji without delay. While there is no current medical evidence available to the Ombudsman indicating that detention is having an adverse impact on Mr X's mental health, the risks of this occurring must increase with continued detention. If satisfactory progress in resolving this matter has not been achieved by the time of the Ombudsman's six monthly review of Mr X's case, we foreshadow that, barring any other relevant change in circumstances, the Ombudsman's recommendation will be that he should be released.


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Prof. John McMillan
Commonwealth and Immigration Ombudsman


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Date