

REPORT FOR TABLING IN PARLIAMENT BY THE COMMONWEALTH AND IMMIGRATION OMBUDSMAN

Under s 486O of the Migration Act 1958

Personal identifier: 120/07

Principal facts

Personal details

1. Mr X is aged 32 and claims to be from Kashmir in India. His parents died when he was young and he does not believe that he has any siblings. He currently resides in the community, after being in immigration detention for six years and seven months.

Detention history

2. Mr X came to Australia by boat in September 1998. The Department (DIMA) placed him in immigration detention, pursuant to s 189(2) of the *Migration Act 1958*, which relates to people who arrive in Australia outside the migration zone. He was initially placed at Port Hedland Immigration and Reception Processing Centre (IRPC). He escaped from detention for a day (April 1999). When he was recaptured he was taken to Reoburne Prison, Western Australia. He was sentenced to three months for escaping, which he served in prison. Upon the conclusion of his criminal sentence, he was transferred to immigration detention at Casurina Prison (July 1999); to Perth Immigration Detention Centre (IDC) (September 1999); he was transferred a number of times between Perth IDC and Bentley Hospital (1999-2001); to Curtin IRPC (November 2001); to Woomera IRPC (September 2002); to Baxter Immigration Detention Facility (IDF) (April 2003); and to Glenside Hospital (June 2005). He was released from immigration detention on 16 July 2005.

Visa applications

3. Mr X applied for a Protection Visa (PV) (September 1998), refused (October 1998); appeal to the Refugee Review Tribunal (RRT), unsuccessful (January 1999); application for judicial review to the Federal Court (FC) withdrawn (August 2000); applications to the Minister under s 417 (February 1999 – May 2000), refused; application to the Minister under s 48B (October 1999), refused (November 1999); applications to the Minister under s 417 (October 2000 – May 2004), refused; applications to the Minister under s 417 (August 2004 – May 2005); Minister granted Mr X a Removal Pending Bridging Visa (RPBV) (16 July 2005). A further s 417 application was lodged on 8 November 2006, which remains outstanding.

Current immigration status

4. Mr X has a RPBV and resides in the community.

Removal details

5. DIMA states that it has sought travel documents for Mr X from the Indian High Commission on a number of occasions, however the Indian authorities are not satisfied regarding Mr X's identity.

Ombudsman consideration

6. The DIMA report to the Ombudsman under s 486N is dated 11 August 2005.
7. Ombudsman staff interviewed Mr X on 28 October 2005 in the community.
8. Ombudsman staff sighted a number of documents: medical reports including a summary medical report from Professional Support Services (PSS) dated 30 August 2005; an

International Health and Medical Services (IHMS) summary report dated 26 August 2005; a psychiatric report from Dr Y dated 1 December 2004; and a psychiatric report from Dr Z dated 17 May 2005.

9. Ombudsman staff sighted submissions from Mr A dated 5 March 2005, and the Southern Communities Advocacy, Legal and Education Service Inc (SCALES), dated 23 February 2006. Ombudsman staff spoke to Ms B from the Coalition Assisting Refugees and Detainees (CARAD) on 28 October 2005, 15 February 2006 and 5 January 2007. Ombudsman staff perused DIMA's files on Mr X on 10 March 2006.

Key issues

Health and welfare

10. The medical reports prepared on Mr X in 2004 and 2005 concluded that he suffered from major depression, psychosis and suicidal ideation. In 2000, Mr X had a number of admissions to Bentley Psychiatric Hospital. Dr Y's report in 2004 notes *'The discharge summary from Bentley Hospital dated 20/10/2000 covers five separate admissions'*. He goes on to write *'Mr X has a severe depressive illness and if circumstances do not change is highly likely to commit suicide'*. Dr Z's 2005 report states *'He scored 43 on the Hamilton Depression Rating Scale (24 is usually regarded as severe depression)'*. He goes on to say *'Since Dr Y's assessment there has been further deterioration so that Mr X is acutely unwell with severe psychomotor retardation (ie. slowing of physical and mental functioning) and requires urgent hospitalisation'*. In July 2005, Mr X was transferred to Glenside Hospital. In August 2005, PSS stated he *'presented with depressive and anxiety symptoms including loss of appetite and amotivation and despair. He has also presented with stress reactions and hopelessness helplessness'*. Mr X expressed a desire to commit suicide on a number of occasions, at one time setting fire to a bed and lying down on it while it was burning.
11. The medical evidence indicates that immigration detention is a major contributor to Mr X's illness. Dr Y's report in 2005 states *'The more recent deterioration, dominated by themes of hopelessness, is typical of those who find themselves in circumstances where their own actions have no influence on the outcome. In that respect it particularly derives from the specific circumstances of his own indeterminate detention. This is the "learned helplessness" model of depression proposed by Seligman who demonstrated that animals exposed to pain in circumstances where they cannot escape eventually cease to struggle and indeed continue to remain passive even when the restraints are removed ... Detention, whilst certainly not the sole cause of his depression, was and is making a substantial contribution to it, and is effectively a barrier to its proper treatment'*.
12. These reports suggest that it will take a long time for Mr X to recover from his illnesses. Dr Y's report states *'Such depressions are difficult to treat even [when] circumstances have changed because motivation has been so seriously undermined'*. Ombudsman staff interviewed Mr X in October 2005 after his release from detention, and noted that he did not appear to be coping. Mr X said he had *'lost his personality'*. After the interview, Ombudsman staff spoke to CARAD about arranging for Mr X to see a psychologist. Ms B has since reported that he consulted with a psychologist at the Association for Services to Torture and Trauma Survivors.
13. On 5 January 2007, Ms B confirmed that Mr X remains unwell, continues to need anti-depressant medication and support from CARAD, and is unable to work full time.

Identity issues

14. Mr X claims to be from Indian Kashmir. DIMA's language testing has concluded that he is from Indian Kashmir but the Indian government declines to recognise that he is an Indian citizen.

15. DIMA's report states that *'Mr X has been consistently uncooperative in effecting his removal'*. Until August 2003, Mr X refused to complete applications for an Indian travel document or passport. He claimed he would be subjected to persecution in India because he was associated with a Kashmiri separatist organisation, a claim that the RRT rejected. DIMA reported Mr X told them *'he could only [fill in a passport application] if DIMIA could guarantee that he would not be harmed if he returned to India'*. In his affidavit of 14 November 2003, Mr X states he told DIMA *'I've told you everything. You have all the information. You can fill it out yourself'*.
16. DIMA considers that Mr X gave *'inconsistent and contradictory information to the Department regarding his birth, residence, educational history and profession'*. Mr X's advocate, Mr A, refutes this allegation, stating *'He has truthfully answered to the best of his ability all questions put to him by DIMIA for the purpose of his removal ... There are inconsistencies in the information in Mr X's departmental file, primarily for two reasons: Mr X has been interviewed, and has filled out forms, in English, which is not his first language; the complexities of Mr X's life as an orphan and itinerant have not been amenable to the brief descriptions required on various official forms'*. Mr A writes that Mr X gave different answers to the question about his occupation because *'Mr X's activities from 1992 through to 1997 included cleaning, some informal studies, some trading of goods and livestock, and some farm work'*. Mr A states that DIMA told the FC that Mr X had given different answers to the question about his last address in India, when in fact Mr X's different responses had been to three different questions, namely, *'permanent address'*, *'at which address were you living before you left your country of origin?'* and *'where do your parents live / last known address in full'*. Mr A writes *'there is no reason why a truthful person ... would necessarily give the same answers to these three different questions'*.
17. While Mr X did not fill out an application for a travel document, he participated in a number of interviews with DIMA, in a bio-data interview in November 2001, in language analysis tests, and he consented to photos being taken of him.
18. DIMA states that investigations based on Mr X's history failed to confirm his identity. DIMA has undertaken extensive inquiries into Mr X's claims, including contracting an agent in March 2005 to visit villages in Indian Kashmir to show photos of Mr X to people and attempt to locate records about him. The agent either could not find people named by Mr X, or people who were found did not recognise Mr X. Pakistani Government officials suggested to DIMA that *'villagers in the areas [they] checked could be giving false information about not knowing Mr X, and that this sort of thing could happen if Mr X was orphaned at a young age as he claims and an uncle or guardian had stolen his land'*. This echoes Mr A's suggestions that the failure to verify Mr X's identity is likely to be the result of several factors, namely that Mr X is from a conflict zone where there are poor record keeping practices, people in the area have been forced to move around as the security situation changes, Mr X was orphaned and could not afford to attend an official school so there are few official records about him, people who assisted Mr X would generally be unwilling to admit it to officials, and *'after being detained and tortured as a young man, all of Mr X's adult years in India were spent as an itinerant, deliberately avoiding contact with authorities'*. In response to the Pakistani officials' suggestions, a DIMA official states *'[this] would require a well-orchestrated plan by people from various villages to deceive Indian authorities and the DIMIA investigator. It does not explain why no record could be found of any of Mr X's friends'*. The Ombudsman does not comment on the varying views relating to the issue of Mr X's identity, noting only that there is evidence that Mr X is from Indian Kashmir as claimed, even though attempts to confirm this through interviews with local people have been inconclusive.
19. Another contentious issue in Mr X's case has been whether his medical condition impacted on his capacity to cooperate with identification efforts. In April 2005, a DIMA

officer conducted a lengthy interview with Mr X about the results of the on-the-ground investigations in Indian Kashmir. The officer concluded '*The provision of new information about ... indicates that Mr X is able to provide more information if he chooses to do so*'. A differing view was expressed around the same time in the two medical reports by Drs Y and Z. Dr Y reported in December 2004 about Mr X '*He finds it increasingly difficult to remember things or to concentrate ... His mind feels blank but never stops thinking. He feels dead ... He wonders constantly when it will end and how he can kill himself*'. In May 2005, Dr Z wrote '*I confirm that Mr X remains in an extremely disabled state ... [there is an] apparent deterioration in his cognitive functioning ... He paused at length before responding to most questions and seemed to be in pain and distress for much of the time ... I formally tested his cognitive functioning and he did not know the day or date He performed poorly at serial tasks ... On memory testing he was able to register three items but could recall only one*'.

20. DIMA records indicate that it believes Mr X may be able to provide further information to assist in confirming his identity. On the other hand it may be that Mr X is simply unable to provide any additional information. If his history as he claims it is correct, he would not have any identity documents, and people from his area may not necessarily confirm to outsiders that they knew him. Further, given the substantial deterioration in Mr X's mental status, it may be unrealistic to expect that he is now able to give any further information to prove his identity.

Release into the community

21. Mr X reported to Ombudsman staff in October 2005 that, despite being released into the community, he is finding life difficult. He says he doesn't feel like himself and doesn't know how to talk or interact with people. His temporary status makes him feel like he can't think about marrying or having children and can't work toward the future.

Attitude to removal

22. In his interview with Ombudsman staff, Mr X said he had applied for entry to over 80 countries but no-one would accept him. He said he just wants to stay permanently somewhere so that he can start building a future.

Ombudsman assessment/recommendation

23. Two matters concerning Mr X will be taken up in this report for further consideration by DIMA and the Minister. The first is his poor medical condition and need for ongoing medical and psychiatric support. The second is his current immigration status as the holder of a RPBV. An issue common to both matters, and that will first be discussed, is the length of time that Mr X spent in detention.
24. Mr X spent six years and seven months in immigration detention, some of that period in immigration detention in a correctional facility, and a further three months in criminal detention. The DIMA files indicate that it holds Mr X largely responsible for the difficulties that led to his lengthy detention. The chief difficulty was that DIMA found it difficult to identify him and to obtain travel documents from India for his removal. Mr X was thought to be uncooperative, and refused to sign travel documents until August 2003.
25. In the Ombudsman's view, the justification for Mr X's lengthy and continuing detention is not as clear-cut. The discussion earlier in this report raised the alternative suggestion that Mr X's medical condition may have diminished his capacity to cooperate helpfully in confirming his identity. It is also questionable whether he should have been detained for so long while inquiries about his identity were being undertaken. As early as June 2000, following his admission to Bentley Hospital, DIMA emails indicate that concerns were held about the impact on him of continuing detention. An option that warranted consideration at that time was his release on a BV, rather than being detained for

another five years while inquiries continued. To have released him at that stage or soon after would have been a pragmatic recognition that some cases are difficult to resolve.

26. The first issue flagged above is that Mr X remains unwell and is in need of ongoing medical and psychiatric support. The Ombudsman **recommends** that DIMA consider what role it should play in providing that support. The medical evidence is that indeterminate detention has been a major contributor to his poor mental health and that it will take some time for him to recover.
27. The second issue is that Mr X holds a RPBV. On this visa, DIMA is able to remove him from Australia at any time. DIMA advises that *'The Department continues to pursue a travel document to effect Mr X's future removal. The Principal Migration Officer (Compliance) in New Delhi and the National Identity Verification and Advice Section in Canberra continue to investigate information provided by Mr X in relation to his birthplace'*. DIMA has already gone to considerable efforts to try and identify him on the basis of the information he has provided, but has been unsuccessful. DIMA has verified that he is from Indian Kashmir but the Indian Government has declined to recognise him. In the Ombudsman's view, it is now appropriate to conclude that returning Mr X to India in the foreseeable future is unlikely. Nevertheless, the continuing uncertainty of a RPBV is likely to be exacerbating his illness and to impede full recovery. He has considerable community support and there is no evidence to indicate that he poses any security risk to Australian society. For those reasons, the Ombudsman **recommends** that the Minister consider exercising her discretion under s 417 to grant Mr X a permanent visa, to provide him with some certainty and to assist in enabling him to recover his mental health.

V. Thom

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Dr Vivienne Thom
Acting Commonwealth and Immigration
Ombudsman

9 January 2007

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Date