

REPORT FOR TABLING IN PARLIAMENT BY THE COMMONWEALTH OMBUDSMAN

Under s 486O of the Migration Act 1958

Personal identifier: 016/05

Principal facts

Personal details

1. Mr Y is a 39 year old man of unknown nationality. The Department of Immigration and Multicultural and Indigenous Affairs (DIMIA) suspects that he is from Malaysia, however to date investigations have not produced any evidence to confirm his nationality.

Detention history

2. The NSW police referred Mr Y to DIMIA in November 2001 after he was reportedly found wandering the streets of Sydney, believed to be homeless. However, Mr Y informed Ombudsman staff that he was taken into police custody because he was walking in a cycle lane, not the walking lane, in a park. He disputed that he was homeless, stating he was not allowed to return to his accommodation to collect his belongings. He was taken into immigration detention under s 189(1) of the *Migration Act 1958* and placed in Villawood Immigration Detention Centre (IDC).

Visa applications

3. Mr Y has not lodged any visa applications since his detention at Villawood IDC, because he does not believe that he is eligible.

Current immigration status

4. The Minister declined to consider Mr Y for a Removal Pending Bridging Visa (RPBV) earlier this year, however she has asked DIMIA to prepare a further submission for possible consideration of residential determination. This submission is currently before the Minister.

Removal details

5. DIMIA has indicated that removal from Australia will not be possible until Mr Y's true identity is established.

Ombudsman consideration

6. The DIMIA report to the Ombudsman under s 486N is dated 14 September 2005, received 19 September 2005.
7. Ombudsman staff interviewed Mr Y at Villawood IDC on 14 October 2005. He is very proficient in English and did not require an interpreter.
8. On 8 November 2005, Ombudsman staff viewed a number of DIMIA files relating to Mr Y (CLF 2005/51863, CLF 2005/71056, CLF 2005/75916 and CLF 2005/71506). Material viewed included information submissions to the Minister, dated 20 July 2005, 19 August 2005 and 24 August 2005, and a legal advice to DIMIA from the Australian Government Solicitor, dated 22 July 2005.

Key issues

Nationality and identity

9. DIMIA advises that throughout his detention Mr Y has refused to cooperate with DIMIA to identify his nationality. DIMIA reports that when police picked him up, Mr Y advised the police that he came to Australia in 1987 with his parents LL and TT. Knowledge of the

events that transpired between the time police first detained Mr Y and the time he was transferred to VIDC is limited, due to the absence of an official police report.

10. DIMIA searches have not produced any records confirming the arrival of D and LL or TT in Australia, or the grant of visas to these individuals. While DIMIA searches have focussed on D and LL, particularly D, there appears to be limited attention to searches for TT. Ombudsman staff recently reviewed several DIMIA files and did not locate any reference to TT.
11. In early 2002, DIMIA staff followed some leads provided by Mr Y and issued a number of s 18 notices to employers, banks, superannuation funds and government agencies. While these checks produced some information about Mr Y, the information obtained was not pursued and possible leads were left unchecked.
12. Medicare Australia (formerly Health Insurance Commission) advised that a Mr YY was issued with a Medicare card in February 1984, however further checks to identify doctors visited by Mr Y was not addressed, nor were questions asked about Medicare's identity requirements in 1984. The NSW RTA confirmed that Mr Y was issued with a NSW drivers' licence in August 1987, but it advised that it did not hold any further identity information about Mr Y. DIMIA obtained positive confirmation from the Australian Electoral Commission (AEC) that it held three electoral registrations for a Mr YY dating between 1986 and 1991. On each of these forms Mr Y declared that he is an Australian citizen, and in the most recent form, he advised that he was 'recently naturalised'. Information obtained from the Australian Taxation Office identified two employers, however contacts with the employers were intermittent and leads not initially pursued. From one employer, DIMIA identified that Mr Y held an ANZ bank account and made contributions to a superannuation fund. This information prompted further searches, but did not produce any confirmation of his identity.
13. In December 2003, when questioned whether he was of Chinese or Malaysian background, DIMIA reports that Mr Y replied he was a Chinese Malaysian, but not a Malaysian citizen.
14. In January 2004, Mr Y agreed to provide his fingerprints and complete travel documents for a Malaysian passport. However, the forms were not completed because Mr Y claimed he could not understand them because they were in Malaysian. He agreed for the release of his fingerprints to foreign embassies and police services for analysis. The fingerprint release has not produced any results.
15. DIMIA advises it conducted linguistic tests in July 2004 and March 2005. The results were inconclusive, revealing that his accent could be from a number of Asian countries, including Malaysia, Indonesia or Singapore.
16. In April 2005, DIMIA commenced identity checks with missing persons registers in each state. No positive matches were made.
17. Between mid 2002 and April 2005 DIMIA performed little investigation on Mr Y's case. The case was only picked up again in 2005 after it was referred to the National Identity Verification and Advice Section for investigation. Searches and activities since this time have followed up on incomplete checks conducted in 2002, including handwriting analysis of documents held by the AEC. This analysis proved inconclusive due to the poor quality of the original specimen.
18. In an email dated 20 July 2005, a DIMIA Compliance Officer from the Parramatta office, comments that, *'Further checks are still being conducted at this time, however it is not anticipated that these will yield any positive results.'* This uncertainty of outcome continues to be expressed by DIMIA and in an information brief to the Minister dated 19 August 2005 DIMIA notes *'while all leads are still being vigorously pursued, we*

believe the prospects of identifying the men [Y and X] are slim and we recognise that there is a chance they may never be identified.'

19. Information recently obtained from DIMIA files suggests that comprehensive searches of DIMIA's TRIM and CAS databases (of data not migrated to ICSE) was not conducted until August 2005. While these searches did not produce any information to assist in the identification of Mr Y, it is of concern that these searches were not conducted at an earlier time.
20. Mr Y declined to provide Ombudsman staff with any further information about his identity or nationality.

Health and welfare

21. Mr Y does not appear to have any significant health issues. He was recently seen by a doctor in relation to complaints about high blood pressure, and was prescribed medication.
22. DIMIA advises that two psychologist reports on Mr Y found no symptoms of psychiatric or psychological illness.

Security and safety

23. The DIMIA report indicates that Mr Y is compliant and friendly to staff and detainees, and interacts well with others. DIMIA records suggest that Mr Y often provides Mandarin translation to Chinese detainees in Villawood IDC.
24. DIMIA does not hold any records of any criminal activity by Mr Y.
25. At interview, Mr Y advised that he was a devout Buddhist. He presented as a calm, accepting person and did not have any negative things to say about anyone. He indicated that he wants to be a monk and spend his time praying and living like a hermit.
26. On a number of occasions, including at interview with Ombudsman staff and in discussions with a detention service provider psychologist, Mr Y has expressed that his detention is a form of self-imposed punishment and that he will serve 10 years in detention. Mr Y reports that as a child he kept a caged bird for 10 years. The suggestion has been levelled that his detention may be a way of reversing the bad karma caused through incarceration of the bird, before he approaches his next life. DIMIA inquiries with several Buddhist Monasteries suggest that this form of punishment is harsh and there are a number of other ways to reverse bad karma.

Attitude to removal

27. Mr Y does not wish to leave Australia. He believes that it is his destiny to live a life of solitude in Australia. He indicated that he wished to live in a cave and immigration detention is akin to living in a cave.

Other detention issues

28. At interview, Mr Y indicated that too much Indian style curry was served at Villawood IDC. He did, however, preface this comment by stating that it is impossible to please everyone.

Legal issues

29. DIMIA obtained a legal advice from the Australian Government Solicitor in July 2005 seeking confirmation that a 'reasonable suspicion' continued to exist, enabling Mr Y's ongoing detention under s 189. While the legal advice suggests that *'the suspicion that Mr Y is an unlawful non-citizen probably continues to be a reasonable suspicion'*, the advice is critical of the efforts carried out by DIMIA to determine his identity. *'What is troubling here is that it has taken so long to come up with what seems to be very little.*

Nor do the inquiries seem to have been conducted in a very ordered or systemic way.'
The legal advice suggests that *'unless the checks made with the Malaysian authorities can quickly confirm that he is a Malaysian citizen ... urgent consideration should be given to getting Mr Y out of the detention centre environment.'*

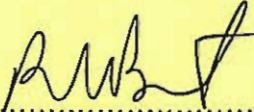
Ombudsman assessment

30. The issues raised in Mr Y's case are similar to those discussed in a separate report on Mr X. I will summarise that discussion and indicate its relevance to Mr Y.
31. Mr Y 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. The view I expressed in the X report is that it is implicit in s 189 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. While the Migration Act confers statutory authority on DIMIA to elicit evidence from a person of their identity and immigration status, a failure by a person to respond, either truthfully or at all, does not necessarily support a reasonable suspicion that the person is an unlawful non-citizen. Possibly, too, a person should be formally cautioned that their failure to cooperate will be taken into account in deciding whether they will be detained under s 189. I recommended in the X report that DIMIA obtain further legal advice on these issues, and that DIMIA review its procedures for dealing with cases in which the identity or immigration status of a person is unknown or unresolved.
32. If that analysis is applied to Mr Y, it is in my view questionable whether – presently at least – his continuing detention is justified under s 189. The decision under s 189 is based upon some fragments of information – that he was homeless, that he does not claim to be born in Australia, that his identity and immigration movements cannot be established, and that he has not cooperated with officials in resolving those issues. Other information known to DIMIA dilutes the reasonable suspicion that he is an unlawful non-citizen – he is not registered in immigration records under the names he has given, he has held Australian drivers' licences and received Medicare benefits, and he has been registered on Australian electoral records.
33. It may be that Mr Y is an unlawful non-citizen and that he is successfully evading detection by DIMIA. But other explanations are equally plausible – among them, that he is mentally unwell, that he has no wish to be released from detention, that he chooses not to cooperate with government officials, or that he prefers to exercise to the fullest his common law right to silence and freedom of self-expression. Whatever the reality, it is difficult to see that there are grounds for a reasonable suspicion that he is an unlawful non-citizen.
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. Mr Y has now been in detention for four years. The Ombudsman notes that DIMIA has obtained legal advice that supports his continuing detention under s 189. The Ombudsman considers that the issue be reconsidered as a matter of urgency, taking into account the discussion in this report and the X report.

Ombudsman recommendations

36. That DIMIA seek further high level legal advice on whether there are grounds to support the continuing detention of Mr Y under s 189.

37. That pending the receipt of that legal advice, the Minister consider granting Mr Y a visa to enable him to be released into the community.
38. That in light of the issues raised in this report and also in the X 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

for



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Date