

REPORT FOR TABLING IN PARLIAMENT BY THE COMMONWEALTH OMBUDSMAN

Under s 486O of the Migration Act 1958

Personal identifier: 020/06

Principal facts

Personal details

1. Mr X is a male aged 42. He is a citizen of the People's Republic of China (PRC). His wife, 16-year-old son, father and three siblings reside in the PRC.

Detention history

2. Mr X has been detained since 13 March 2002 in Villawood Immigration Detention Centre (Villawood IDC).

Visa applications

3. Mr X entered Australia in December 2000 on a tourist visa. In March 2001, he applied for a protection visa. The Department of Immigration and Multicultural and Indigenous Affairs (DIMIA) refused this in May 2001, and the Refugee Review Tribunal (RRT) affirmed this decision in August 2002. Prior to the RRT's decision being made, Mr X's associated bridging visa A (BVA) was cancelled by DIMIA in March 2002 when he was found to be working and therefore in breach of his no work condition. In March 2002, Mr X lodged an appeal with the Migration Review Tribunal (MRT) against the BVA cancellation but withdrew it a week later.

Current immigration status

4. Mr X is currently detained in Villawood IDC.

Removal details

5. DIMIA advises that Mr X did not present any identification documents when he was first located, which has impeded the removal process. However, two expired passports in Mr X's name were located on another person in 2004. These have been used by DIMIA in two attempts to obtain travel documents from the Chinese Consulate, in October 2004 and June 2005, with a follow up request being made in August 2005. Mr X is scheduled for removal to the PRC on 10 January 2006.

Ombudsman consideration

6. The DIMIA report to the Ombudsman under s 486N of the Migration Act was received on 19 September 2005 (dated 8 September).
7. Mr X was interviewed by Ombudsman staff at Villawood IDC on 14 October 2005 with the assistance of an interpreter.
8. Mr X presented Ombudsman staff with a medico-legal report dated 24 May 2005, which his solicitors obtained for the purposes of a personal injury claim.

Key issues

Personal Injury Claim

9. Mr X has an outstanding personal injury claim for damages against the Commonwealth of Australia and The GEO Group Australia Pty Ltd (formerly Australasian Correctional Management Pty Ltd (ACM)), in response to a transfer incident in Villawood IDC in April

2002. He has claimed that officers of the former detention service provider ACM injured him during this internal transfer. The action was commenced on 13 April 2005.

10. While it is beyond the scope of this reporting function to assess Mr X's personal injury claim, it should be noted that an investigation was conducted by this office into the incident that is the subject of Mr X's claim. It was concluded by Ombudsman staff that force had been used on Mr X by ACM officers during the transfer process.

Health and Welfare

11. The DIMIA report advises that Mr X complains of ongoing back pain (which may have preceded his period of detention, but is alleged to have been exacerbated by the transfer incident in April 2002). Mr X is being treated with painkillers and physiotherapy. The medico-legal report states that Mr X has a '*permanent partial disability of the back and a percentage loss of function has been quantified as 25 per cent*'.
12. Mr X elaborated to Ombudsman staff that his weekly physiotherapy sessions do not assist in alleviating the pain, and that he has been taking painkillers twice a day for the last three years. He advised that he has no problems with the doctors at Villawood IDC but has raised concerns about the difficulty in accessing them. He says that before he can see a doctor, he is required to obtain a nurse's approval at the Medical Centre first.
13. Mr X expressed concerns about how he would be able to cope outside of detention without access to a similar level of medical assistance that he is currently receiving.
14. Mr X advised Ombudsman staff that he has had gastric problems for the past three years, for which he receives medication, and which he attributes to the type of food available at Villawood IDC.

Attitude to removal

15. The DIMIA report states that Mr X advised the Chinese Consulate that he will not return to the PRC '*until his demands are addressed*'.
16. During his interview with Ombudsman staff, Mr X advised that he did not wish to return to the PRC until the personal injury claim was finalised.

Ombudsman assessment/recommendation

17. Mr X has been in immigration detention for over three years, and the only impediment to his removal to the PRC appears to have been the absence of a valid travel document. Mr X does not have any outstanding immigration matters that would prevent DIMIA from actioning his planned removal to the PRC on 10 January 2006.
18. Mr X's personal injury claim has a bearing on his planned removal, and requires comment. On the one hand, the fact of the unresolved claim is not a reason in itself for the Ombudsman to recommend that he not be removed. The Ombudsman is not aware of any submission being made either by Mr X or by his solicitors that he not be removed until the claim is resolved. It may still be possible for the claim to be resolved (either by trial or by agreement) after he has been removed. If a trial is necessary it may be some time before a trial date is set. Weighing against those considerations is the fact that Mr X's personal injury claim stems from an incident that occurred in detention; that DIMIA (representing the Commonwealth) is a defendant to the claim; and that action by DIMIA to remove Mr X from Australia may inhibit the claim being heard. The Ombudsman notes that the matter was set down for a status conference between the parties in the District Court on 16 November 2005. The Ombudsman is not aware of the outcome of those proceedings. The Ombudsman **recommends** that before any action is taken by DIMIA to remove Mr X, it clarify the status of the proceedings and consider the impact that removal might have on the continuation of the proceedings. Specifically, DIMIA should consider whether removal of Mr X should be deferred to enable an early trial of the matter, or

whether other action should be taken to facilitate the resolution of his claim (for example, permitting Mr X's limited return to Australia to give evidence at a trial).

19. In the event that DIMIA does consider it appropriate to defer removal action, the Ombudsman **recommends** that the Minister consider granting Mr X a Return Pending Bridging Visa (RPBV), with appropriate reporting and surety provisions if considered necessary, pending the finalisation of his personal injury claim. In support of this recommendation the Ombudsman notes that Mr X has been in detention for over three years, that he is not considered a threat to the Australian community, and that he does not appear to present a security risk.



Prof. John McMillan
Commonwealth and Immigration Ombudsman

4 January 2006

Date