

REPORT FOR TABLING IN PARLIAMENT BY THE COMMONWEALTH OMBUDSMAN

Under s 486O of the Migration Act 1958

Personal identifier: 025/06

Principal facts

Personal details

1. Mr X is a 35 year old male from the People's Republic of China (PRC). His wife (Ms Y) lives in Australia with two children who were born in Australia. The Ombudsman understands that they do not have a valid Australian visa or citizenship. A third child, aged 8, lives in the PRC with Mr X's eldest sister. Mr X's parents are deceased and his extended family live in the PRC.

Detention history

2. Mr X arrived in Australia with his wife on a short stay visitor visa (issued offshore and valid until 8 May 1999) on 24 April 1999. Department of Immigration and Multicultural and Indigenous Affairs (DIMIA) officers located Mr X at a residential address in May 2003. He was detained under s 189(1) of the Migration Act 1958 and placed in Villawood Immigration Detention Centre (VIDC).

Visa applications

3. In January 2000, Ms Y lodged a protection visa (PV) application, naming Mr X as her dependent. Mr X was granted an associated bridging visa (BV). The PV application was refused in March 2000 and the Refugee Review Tribunal (RRT) affirmed DIMIA's decision in January 2001. Mr X lodged an application for review of the RRT decision by the Federal Magistrates Court in June 2005; the application was dismissed in August 2005. Mr X's associated BV expired in March 2001.
4. Section 417 requests were initiated on Mr X's behalf in March 2001 and June 2003. DIMIA deemed both requests inappropriate to consider. Mr X applied for a BVE in June 2003, which DIMIA refused. This decision was affirmed by the Migration Review Tribunal later the same month.
5. In July 2003, Mr X's infant son, lodged a PV application naming his sister and his father, Mr X, as dependents. This application was deemed invalid because the associated fee payment was dishonoured. The infant son lodged a further PV application in April 2004, naming his parents, and sister, as dependents. This application was accompanied by a s 48B request asking that his parents be allowed to be included in the new PV application. The s 48B request was deemed inappropriate to consider by DIMIA and a decision to refuse the PV application was made by DIMIA in April 2004. A request for review of the decision was lodged with the RRT in May 2004; the RRT affirmed DIMIA's decision in April 2005.
6. A further s 48B request was lodged on Mr X's behalf in June 2005 and found to be inappropriate to consider by DIMIA in October 2005.

Current immigration status

7. Mr X is currently detained at VIDC.

Removal details

8. DIMIA reports that Mr X has indicated to DIMIA staff that he will cooperate with its efforts to obtain a travel document and arrange for his family's removal from Australia. However, despite this comment, Mr X has not voluntarily completed a travel document application form. A form was completed by DIMIA in January 2005 and sent to the PRC Consulate.

9. DIMIA also confirmed that Mr X's removal cannot be effected until it receives a valid travel document for him.

Ombudsman consideration

10. The DIMIA report to the Ombudsman under s 486N is dated 13 October 2005, received 24 October 2005.
11. Ombudsman staff interviewed Mr X on 4 November 2005 at VIDC.

Key issues

Health and welfare

12. The DIMIA report indicates that Mr X was placed on suicide and self harm watch in February 2005 after he commenced voluntary starvation for three days.
13. Mr X advised Ombudsman staff that he has seen a psychiatrist on four occasions. He explained that he was not aware that he could request to see a psychologist or a psychiatrist until shortly after a fire in the children's playground at VIDC. Mr X advised that this incident disturbed him and brought into reality life without his children.
14. He advised that he has been prescribed medication to help him sleep, but is unsure what the medication is. He says that he does not know what is happening regarding his detention arrangements and possible removal and this is having an impact on his sleep. He also informed Ombudsman staff that he has had a ringing noise in his right ear for more than a year. Mr X advised that this matter has been drawn to the attention of the visiting doctor, but after further examinations, Mr X was advised that it was nothing to worry about. The problem still remains and causes Mr X much concern.

Attitude to removal

15. At interview with Ombudsman staff, Mr X advised that he and Ms Y have two children who were born in Australia, as well as another child in the PRC. He fears that the PRC one-child policy will cause his family to suffer economically and the (Australian born) children will have limited access to education, medical services, and social welfare, as well as restrictions on their employment opportunities. Mr X claims that life for daughter and son in the PRC will be dire, because they will be 'blacklisted'. He says that he and his wife cannot afford the fines imposed by the PRC government for having more than one child and he fears that they will face a life of hardship if returned to the PRC.
16. Mr X also advised Ombudsman staff that he does not want to return to the PRC because he fears persecution due to the proscription of Falun Gong. Mr X says that he and Ms Y actively practised Falun Gong when in the PRC, and are aware that many leaders have been gaoled, and practitioners threatened since 1999. Mr X says that neither he nor Ms Y continue to practise Falun Gong. In fact he advised that Ms Y has become a Christian since arriving in Australia, attending church regularly. However, despite the change in faith, he continues to fear persecution for previous spiritual practices.
17. During the interview with Ombudsman staff, Mr X was asked whether his family would return to the PRC with him. He advised that he did not believe so, citing that they would be illegal in Australia and illegal in the PRC. He advised that the children can receive education in Australia, but will be unable to do so in the PRC.

Family situation

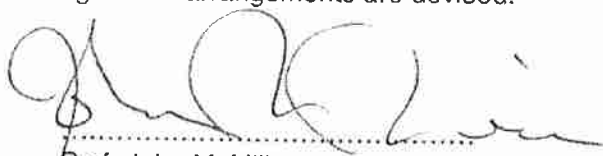
18. At interview, Mr X commented that his wife and two youngest children do not visit him at VIDC, for fear of being detained as unlawful non-citizens. He receives some telephone contact from them. Mr X cried when he advised that he could not remember the last time he

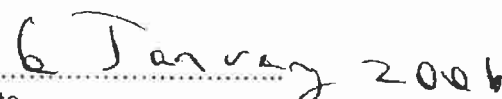
saw his family. He says that if he is released from detention he will be able to be a father, and wants the best for his family.

19. Mr X presents as a dedicated family man and says he desperately misses his wife and children. His desire is to be reunited with his family in Australia and be granted permanent residency. He fears that if he is deported to the PRC he may never see his family again.

Ombudsman assessment/recommendation

20. The Ombudsman has no recommendation to make in relation to Mr X. A few comments can however be made about the situation in which he and his family are placed.
21. Mr X arrived in Australia in April 1999 on a short stay visitor visa that was valid for two weeks. For part of the subsequent period (January 2000 – March 2001) he held an associated bridging visa, but for the remainder of the period since 1999 he has not held a substantive visa. Applications have been lodged intermittently during the period by Mr X and members of his family for one or other kind of visa or Ministerial concession. All those applications have been unsuccessful, and for the most part they were dealt with expeditiously. Proceedings have been initiated unsuccessfully for tribunal and judicial review of the DIMIA decisions.
22. Mr X has been in immigration detention at VIDC since May 2003, facing the prospect of removal from Australia to the PRC. The length of the period of detention, now approaching three years, is unfortunate. Partly this stems from the action taken unsuccessfully by Mr X and his family to seek an Australian visa, and from Mr X's failure to complete a travel document to the PRC. DIMIA's inability to make an arrangement more expeditiously with the PRC for Mr X's removal seems also to be a contributing factor to the length of detention.
23. The Ombudsman has been advised that DIMIA is awaiting advice from the PRC on a request that was made in January 2005 for the issue of a travel document for Mr X. If a travel document is not soon issued, it would be appropriate for the Minister to consider granting Mr X a Removal Pending Bridging Visa (RPBV) so that his period of detention does not continue indefinitely. During Mr X's detention he has not had physical contact with his family. Mr X has advised Ombudsman staff that his wife has difficulties making ends meet and caring for their children. He has further advised that his mental and physical health is suffering from the lack of physical contact with his family and the uncertainty of his future.
24. Some consideration needs also to be given to the position of Ms Y and the two children residing in Australia. They face an uncertain future. It has been reported to the Ombudsman that they do not currently hold an Australian visa. It is possible that they will choose not to return to the PRC voluntarily with Mr X, fearing that their children will face hardship or discrimination under PRC government policy. A decision will ultimately have to be made, either by the family or by DIMIA or the Minister, as to whether they are to remain in Australia or return to the PRC. Given that inevitability, it is undesirable that the family is presently in a situation of limbo, apprehensive that they will be detained if they establish physical contact with Mr X. It would be preferable if DIMIA was to initiate discussions with Ms Y as to her situation and her options. As part of that process it may be appropriate for the Minister to consider granting an RPBV to Ms Y and the children to resolve their present dilemma while longer term arrangements are devised.


Prof. John McMillan
Commonwealth and Immigration Ombudsman


Date