

REPORT FOR TABLING IN PARLIAMENT BY THE COMMONWEALTH OMBUDSMAN

Under s 486O of the Migration Act 1958

Personal identifier: 029/06

Principal facts

Personal details

1. Mr X is a 34 year old man from the People's Republic of China (PRC). Even though Mr X is mentioned in the Refugee Review Tribunal's (RRT) decision as having a wife and son, he advised Ombudsman staff that he has neither.

Detention history

2. Mr X was taken into immigration custody under s 189(1) of the *Migration Act 1958* in November 2002 after being located by NSW Police as part of a highway patrol operation. NSW Police referred Mr X to the Department of Immigration and Multicultural and Indigenous Affairs (DIMIA) and he was placed in Villawood Immigration Detention Centre (Villawood IDC).

Visa applications

3. Mr X arrived in Australia on a short stay business visa in October 2000. In November 2000, Mr X applied for a Protection Visa (PV), which was refused by DIMIA in February 2001. The RRT affirmed DIMIA's decision in May 2001, causing his associated bridging visa to expire in June 2001.
4. In May 2005, Mr X lodged a request under s 417 with the Minister, which was refused. In June 2005, Mr X lodged a further request with the Minister under s 48B to allow him to make a second PV application. In November 2005, DIMIA decided that this request did not meet the guidelines for referral to the Minister.
5. In September 2005, DIMIA put a submission to the Minister seeking the exercise of her detention intervention powers. The Minister declined to use her powers in October 2005.

Current immigration status

6. Mr X is currently detained in Villawood IDC.

Removal details

7. DIMIA advises that Mr X has been uncooperative in all attempts to remove him from Australia, refusing to complete any travel documents or bio data documents. In February 2005, a travel document application was completed by DIMIA on Mr X's behalf and lodged with the PRC Consulate. In May 2005, Mr X was positively identified as a PRC citizen by PRC Consular officials. Mr X's removal from Australia was deferred in May 2005 awaiting the outcome of the s 417 and s 48B applications. Given the recent adverse decisions in relation to these applications, DIMIA advises that it has lodged a further travel document request with the PRC Consulate (November 2005).

Ombudsman consideration

8. The DIMIA report to the Ombudsman under s 486N was received 14 October 2005 (dated 26 September 2005).
9. Mr X was interviewed by Ombudsman staff at Villawood IDC on 4 November 2005.
10. The Ombudsman has sighted progress notes recorded by Professional Support Services (PSS) on 11 November 2005.

Key issues

Health and Welfare

11. In its report, DIMIA advises that it is not aware of Mr X having any significant health issues. However, during his interview with Ombudsman staff, Mr X advised that he has mood swings; poor appetite, sometimes resulting in periods of non-eating; sleeping problems; and periods of high irritability. He said that he suffers from great stress and finds that *'sometimes when he leans on the fence, tears would fall down'*. He said that whenever a detainee is removed to the PRC or transferred to the Baxter Immigration Detention Facility, he does not sleep for several nights. He claims he has never experienced these problems before and has never been bad tempered. He advised that he had not consulted a psychologist or counsellors about these problems, as there are no interpreters present. Mr X stated that, *'There is only a limited amount a person can sustain, and I cannot foresee how I would fare.'*
12. A psychologist from PSS saw Mr X on 11 November 2005 (after his interview with Ombudsman staff). In her report, Ms P noted *'[Mr X] appeared dysthymic and affect somewhat flat ... he is now having problems trying to control his emotion and difficulties regulating his mood. Anxiety symptoms noted, including increased frustration and anger volatility ... having sleeping difficulties. Said that he is now startled by everything that goes on around him, eg: loud speakers, officers calling him etc. He feels scare[d] ... I've also advised him to go to medical to see if medication could assist his sleep issues.'* Ms P concluded that, *'There will be some ongoing contact but there were no mental health problems.'*

Protection visa application

13. During his interview with Ombudsman staff, Mr X elaborated on his reasons for leaving the PRC. Some of Mr X's claims differed to those outlined in the RRT decision. Ombudsman staff questioned Mr X on why he had written to the RRT refusing its invitation to attend a hearing to present further information. Mr X denied that he wrote this letter. As such, it was thought appropriate to include Mr X's claims in this assessment report.
14. Mr X claimed that he was a newspaper reporter when he lived in the PRC. He said that he wrote three articles about the Falun Gong faith, but two were suppressed. Mr X went on to say that he himself did not practise Falun Gong, but that such articles could be seen to be promoting the faith. Mr X said he was in a constant state of fear and stress when living in the PRC, as he *'knew it was a just a matter of time before the Chinese Government would deal with his case.'*

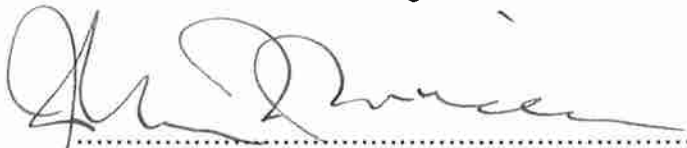
Attitude to removal

15. Mr X advised Ombudsman staff that he does not wish to return to the PRC, as he believes *'only bad things would happen. There is no democracy and human rights in China.'* Mr X advised that the PRC's stance against the Falun Gong faith remains the same as before he left.

Ombudsman assessment/recommendation

16. Mr X has been in immigration detention for over three years. His PV claims have been reviewed by the RRT and he has been found not to satisfy the tests for protection. The Ombudsman does not hold any information to the contrary (other than Mr X's concerns mentioned in the body of this report) and notes that Mr X has not sought judicial review of the RRT's decision. The Ombudsman does not, therefore, wish to comment on the decision to remove Mr X from Australia.

17. However, the Ombudsman's assessment of Mr X's detention arrangements has brought to light the limited action taken by DIMIA to effect Mr X's removal. Information before the Ombudsman indicates that Mr X was eligible for removal from Australia as early as 11 November 2002 (his initial detention), due to his earlier unsuccessful application to the RRT and his choice not to initiate judicial review. This period extended through to May 2005, when Mr X lodged a request with the Minister under s 417, preventing further processing of his removal until recently. It is acknowledged that Mr X has been obstructive to DIMIA's initiative to obtain travel documents, by refusing to complete travel document forms and bio-data questionnaires. However, our examination of relevant material suggests that DIMIA did not take any proactive action to seek travel documents for Mr X from the PRC Consulate until February 2005, two years and three months after Mr X was first detained and this action could have been initiated. In hindsight, it is regrettable that Mr X has spent such a long period in detention, perhaps unnecessarily. The Ombudsman draws attention to this issue because of its continuing relevance to Mr X, but also its relevance more generally to immigration detention policy and practice.
18. The Ombudsman notes that, with the Minister's recent decision to decline to exercise her detention intervention powers in Mr X's case, Mr X should now be available for removal to the PRC. The Ombudsman notes, however, that a travel document is not yet available from the PRC. If there is to be any further delay in removing Mr X, the Ombudsman **recommends** that the Minister consider granting him a Removal Pending Bridging Visa (subject to conditions that DIMIA deem necessary to ensure that he does not abscond) while the issues concerning his removal from Australia are resolved.



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Prof. John McMillan
Commonwealth and Immigration Ombudsman

17 January 2006
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Date