

**REPORT FOR TABLING IN PARLIAMENT BY THE  
COMMONWEALTH OMBUDSMAN**  
*Under s 486O of the Migration Act 1958*

Personal identifier: 032/06

**Principal facts**

*Personal details*

1. Mr X is a male aged 59. He is a citizen of the Hong Kong Special Administrative Region of the People's Republic of China (HK). His former wife and three children are believed to be residing in HK. Mr X has advised Ombudsman staff that he has not maintained contact with them. He has a cousin in Australia.

*Detention history*

2. Mr X was detained on 13 March 2002 under s 189(1) of the *Migration Act 1958* (the Act), when he was identified by the Department of Immigration and Multicultural and Indigenous Affairs (DIMIA) as a visa over-stayer (since 1983). He has been in Villawood Immigration Detention Centre (Villawood IDC) since that time.

*Visa applications*

3. Mr X entered Australia on a one-month visitor visa (Temporary Entry Permit, TEP) in January 1983. In February 1990, he applied for and was refused an Extended Eligibility Temporary Entry Permit on Economic Grounds; DIMIA's refusal was affirmed by the Immigration Review Tribunal in February 1992. He applied for and was refused a Protection Visa (PV) in April 1993; the refusal was affirmed by the Refugee Review Tribunal in June 1994.
4. In May 2003, Mr X lodged a s 417 request with the Minister, but that was refused in June 2003. Mr X sought to be considered as an absorbed person pursuant to s 34 of the Act. DIMIA advised Mr X that he is not an absorbed person as he was a prohibited immigrant at the applicable date. The Minister has recently decided not to exercise her detention intervention powers in this case.

*Current immigration status*

5. Mr X is currently detained in Villawood IDC, as an unlawful non-citizen.

*Removal details*

6. DIMIA advises that an application for Mr X's travel document was lodged with the PRC Consulate in April 2002, and his thumbprint forwarded to the Consulate in November 2002. Follow-up inquiries were made by DIMIA in July and December 2003, and April 2004, and a second application was lodged in November 2005. DIMIA further advises that the PRC has sought to discuss the application with Mr X, but he has refused to do so.

**Ombudsman consideration**

7. The DIMIA report to the Ombudsman under s 486N was dated 9 September 2005 (received 19 September 2005).
8. Mr X was interviewed by Ombudsman staff at Villawood IDC on 3 November 2005, with the assistance of an interpreter.
9. On 30 November 2005, Ombudsman staff viewed a number of DIMIA files relating to Mr X.

## Key issues

### *Absorbed Persons visa*

10. Mr X arrived in Australia in 1983. His former migration agent had argued that Mr X is an absorbed person as defined in s 34, due to his level of integration into the Australian society. He maintained that such integration is evidenced by the following factors: fostering relationships with his family in Australia; contributing to the Australian economy, by working and paying taxes; holding a driver's licence and a Medicare card; having a bank account; and registering with a number of social/sporting clubs.
11. Mr X's migration agent concluded '[Mr X] *has claimed his place in this country and basically, his period of settlement here gives him the deeming right to be a permanent resident [in] Australia under section 34 of the Migration Act.*'
12. After obtaining legal advice, DIMIA advised both Mr X and his agent that Mr X does not satisfy the absorbed persons criteria, as he was a prohibited immigrant at the relevant legislative date of 2 April 1984, having been a prohibited immigrant from when his TEP expired in February 1983. The Federal Court has supported this interpretation in similar cases.

### *Health and welfare*

13. DIMIA advises that Mr X is currently receiving medication for diabetes. During his interview with Ombudsman staff, Mr X elaborated on his diabetes, stating that most of his teeth have fallen out as a result of this. He also mentioned that he is being treated for a sore foot and high blood pressure.
14. In March 2003, Mr X's cousin, Mr Y provided a letter of support to DIMIA. Mr Y stated '*I am willing to support him – to provide him with foods, accommodation and meet his medical and other expenses, as well as to offer his [sic] a job as a cook in my restaurant ... That if the Minister would consider him under compassionate grounds, my family and I are most willing to take care of his bond and expenses and ensure that he continues to contribute to the Australian community with his skills and experience as a Chinese cook.*' There is no current information available to confirm whether Mr Y's view remains the same. During his interview with Ombudsman staff, Mr X did not discuss his strong ties with his cousin and stated that they visit him very little. However, DIMIA advises that his cousins visit on a monthly basis.
15. In a departmental letter to the PRC Consulate regarding Mr X's travel document application dated April 2004, the DIMIA officer noted '*Both detainees [Mr X included] are aged people and not quite suitable to be detained in the detention environment for a long period of time.*'

### *Attitude to removal*

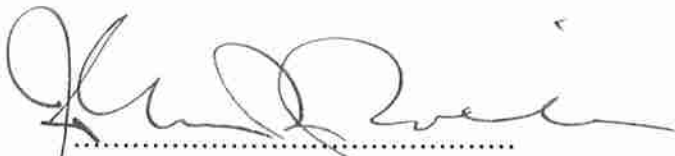
16. During his interview with Ombudsman staff, Mr X raised a number of concerns about his removal to HK. Essentially, Mr X conveyed that he does not wish to return to HK, and claims he will not be able to survive as he has no home, knows no one, has no money and will be unable to earn enough to take care of himself, especially to buy medication for his diabetes. He stated he would probably end up as a '*street sleeper*', and commented that removal to HK would be his '*road to death*'.

## Ombudsman assessment/recommendation

17. Mr X has been in immigration detention since 2002. His claim for a PV was unsuccessful, as was his request to the Minister for her to exercise her public interest powers. There are no outstanding immigration matters before the courts, with DIMIA or the Minister that could hinder Mr X's removal from Australia. Nevertheless, his removal cannot occur until a travel document has been obtained from the PRC Consulate. The history of delays in

this case give cause for concern that there is unlikely to be a speedy resolution of the apparent impasse in obtaining a travel document for Mr X.

18. The issue of current concern in Mr X's case is whether he should remain in detention while DIMIA awaits advice from the PRC Consulate about his removal to the PRC. Mr X has been in detention at Villawood IDC for almost 4 years, and there does not seem to be an immediate prospect of his removal from Australia. Mr X suffers from a number of medical ailments. While there is no medical evidence suggesting that Mr X's ailments are not currently being successfully treated in detention, the risks to his physical and mental health must increase with continued detention, especially when there is no end date in sight. Concern already exists within DIMIA that the detention centre environment is not suitable for Mr X due to his age. Mr X had not obstructed DIMIA's efforts to arrange for his removal from Australia early on in his detention with respect to providing his HK identification documents and thumbprint. Moreover, prior to his detention he had lived in Australia for 20 years; he worked, developed relationships, and had been active in the community. He is not considered a threat to the Australian community and he does not appear to present a significant security risk. He has community ties and guarantees of support in Australia.
19. Bearing these matters in mind – especially his age and length of detention - the Ombudsman **recommends** that the Minister grant Mr X a Removal Pending Bridging Visa while the issues concerning his removal from Australia are resolved.



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Prof. John McMillan  
Commonwealth and Immigration Ombudsman

17 January 2016  
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Date