

REPORT FOR TABLING IN PARLIAMENT BY THE COMMONWEALTH OMBUDSMAN

Under s 486O of the Migration Act 1958

Personal identifier: 037/06

Principal facts

Personal details

1. Mr X is a male aged 52. He is a citizen of the Peoples Republic of China (PRC). He is married and his wife, daughter and two siblings live in the PRC.

Detention history

2. Mr X arrived in Australia in March 1997 on a short stay business visa that expired in June 1997. He failed to depart Australia and was unlawful in the community for approximately six years. He was detected by the Department of Immigration and Multicultural and Indigenous Affairs (DIMIA) compliance staff in July 2003 while working on a building site and was detained in accordance with s 189 of the *Migration Act 1958*. He has been at the Villawood Immigration Detention Centre (IDC) since July 2003. DIMIA had considered transferring Mr X to the Baxter Immigration Detention Facility (IDF), however he requested to remain at Villawood IDC, mainly due to the presence of many Chinese detainees at Villawood IDC, with whom he could communicate.

Visa applications

3. Applied for and refused a Protection Visa (PV) (November 2004); refusal affirmed by Refugee Review Tribunal (RRT) (December 2004); application for review by Federal Magistrates Court dismissed (April 2005); application for extension of time to appeal to Federal Court dismissed (June 2005).
4. Two requests to the Minister, to consider intervention under s 417 and to allow a fresh PV application under s 48B, were deemed inappropriate to consider in July 2005. A further two s 417 requests were initiated in May and July 2005. In September 2005 the Minister requested further information on a number of PRC cases with similar circumstances. The Department advised that the s 417 of July 2005 remains under consideration.

Current immigration status

5. Mr X is currently detained at Villawood IDC. Except for the two s 417 submissions before the Minister, he has no other tribunal or court action pending. DIMIA advised that Mr X has not been considered for release against the criteria for a Removal Pending Bridging Visa (RPBV).

Removal details

6. The Department advised that Mr X has consistently failed to cooperate with removal efforts, failed to attend interviews on several occasions and claimed he was unable to present his passport to DIMIA. In February 2004, a travel document application was submitted by DIMIA to the Chinese Consulate in Sydney, however this was not actioned at that time. Mr X was interviewed and identified as a Chinese national by a Chinese delegation visiting Australia in May 2005. In August 2005, the PRC Consulate was contacted to seek the issue of a travel document. The Department advised that a travel document, valid for three months, was issued on 1 December 2005; however, no removal action will occur until the s 417 request is resolved.

Ombudsman consideration

7. The DIMIA report to the Ombudsman under s 486N of the Migration Act was received on 22 July 2005 (dated 12 July 2005).
8. Mr X was interviewed by Ombudsman staff at Villawood IDC on 29 July 2005. Ombudsman staff have also paid some attention to the substance of Mr X's application for a PV.
9. Ombudsman staff sighted a submission from the Falun Dafa Association NSW Inc to DIMIA (May 2005).

Key issues

Basis of PV application

10. Much of the interview between Ombudsman staff and Mr X at Villawood in July 2005 dealt with the details of his application for a PV. The Ombudsman's office is not in a position to express a view on the merits of that claim, but the nature of Mr X's claim will be noted briefly because it bears on his failure to cooperate with removal to China.
11. Mr X claimed during the interview to be a Falun Gong practitioner and that he (and many other detainees) was interviewed by Chinese officials at Villawood IDC in May 2005. He stated that the officials asked why he came to Australia and how he came to be detained. He told the officials that he had a wife and child in the PRC and provided their address and told them that he was a practitioner of Falun Gong. He claimed that the Chinese officials told him that Falun Gong was not allowed to be practised in China and that they were very intimidating in their questioning. Mr X also claimed that he signed travel documents the Chinese officials had brought with them.
12. Section 91R(3) of the Act provides that, in determining whether a person has a well founded fear of being persecuted for one or more of the Convention reasons, any conduct engaged in by the person in Australia must be disregarded unless the person satisfies the Minister that he or she engaged in the conduct otherwise than for the purpose of strengthening his or her claim to being a refugee.
13. Mr X's claim that he has been a Falun Gong practitioner for many years was not accepted by the RRT. It expressly found that Mr X's knowledge of the theory and practices of Falun Gong was limited; the Tribunal was *'not satisfied that he had ever been a Falun Gong practitioner, in Australia or in China'* (despite his freedom to practise in Australia since he arrived in 1997). However, the Tribunal did accept that Mr X may have practised Falun Gong while in detention after arriving in Australia and this could have been in order to strengthen his claim to being a refugee. The RRT did accept Mr X's claims that his wife has practised Falun Gong in the PRC since 1992 as it helped to relieve her back and shoulder pain.
14. In concluding that Mr X's refugee application failed, the RRT said it was not satisfied that he would suffer persecution if returned to the PRC. The RRT accepted independent country information from the Department of Foreign Affairs and Trade and the Australian Embassy in Beijing which indicated that ongoing interest in failed asylum seekers by the Chinese authorities would largely depend on their subsequent behaviour on return to the PRC. A 1995 report from the Australian Embassy in Beijing, noted by the Tribunal, commented that *'Chinese authorities are well aware that most Chinese nationals from Australia and other countries are failed refugee claimants. From our contact with Chinese officials over several years, they appear to take the view that such claimants are seeking to take an advantage of an opportunity presented by western legal systems, and therefore pay little or no attention to the claims. We are not aware of any substantiated claims of mistreatment of failed refugee claimants who have returned to China'*.

Health and welfare

15. DIMIA advised that Mr X commenced voluntary starvation on 16 February 2005 and was placed on Suicide and Self Harm (SASH) observation. He recommenced eating on 18 February and was removed from SASH observation. There are no other reported health issues. During the interview, Mr X mentioned to Ombudsman staff that he did not have any major health problems while he had been detained and has had adequate access to medical and other services at Villawood. However, he did mention that there could be more Chinese food provided.
16. Mr X stated that because he has been detained for so many years, he is not as mentally well as he used to be. He said that he sometimes has trouble sleeping when he gets stressed about his detention situation, particularly about not knowing when he is likely to be removed. He stated that he has not recently seen a psychiatrist at Villawood IDC.

Attitude to removal

17. As previously mentioned, Mr X has not cooperated in relation to his removal to China as he feels that he will be detained and persecuted on his return due to his claimed Falun Gong practices. His forced removal would likely be problematic.

Community support

18. Mr X stated during the interview with Ombudsman staff that he has few friends in the Australian community. However, he mentioned that Falun Gong practitioners visit the detention centre on a weekly basis and that he would be able to contact them if he were to be released into the community.

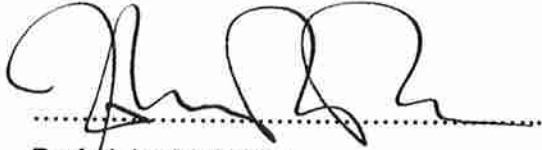
Detention issues

19. Mr X claimed that due to being interviewed by the Chinese officials in May 2005, about 40 Chinese detainees were separated from other detainees, and not allowed access to telephone calls, visits by family, friends or supporters and put into what he described as 'the jail in jail' for up to two weeks. He stated that 'everybody felt dangerous, disappointment and fear accompanied us every day and night. I couldn't sleep or eat well everyday because of fear'.

Ombudsman assessment/ recommendation

20. Mr X's refugee claim has been well tested in the RRT and rejected and it is not for the Ombudsman to question that finding.
21. The issue of current concern in Mr X's case is whether he should remain in detention while his outstanding applications under s 417 are resolved. Mr X has been in detention at Villawood for over two years; a date for his removal from Australia has not been set. Though there have been periods of delay in DIMIA's handling of Mr X's case, the delay is not of the same kind that has attracted criticism by the Ombudsman in other reports of this kind. Mr X's failure to cooperate with removal efforts has also been a significant factor in the continuation of his detention.
22. Bearing those considerations in mind, the Ombudsman does not at this time make any recommendation about Mr X's release, apart from noting that it is undesirable that he remain indefinitely in immigration detention. Moreover, it is open to the Minister to consider granting Mr X a RPBV (subject to conditions that DIMIA deem necessary to ensure that he does not abscond) while the issues concerning his immigration status and removal from Australia are resolved. The Ombudsman will consider making a recommendation to that effect if Mr X is still in immigration detention when his case is soon reconsidered in accordance with s 486O of the Migration Act.

23. The Ombudsman further **recommends** that the Minister make a decision on Mr X's s 417 applications as soon as possible and in any case not later than the statutory period prescribed in s 486P of the Migration Act for tabling this report in Parliament (viz, within 15 sitting days of receiving the report).



Prof. John McMillan
Commonwealth and Immigration Ombudsman

18 January 2006

Date