

REPORT FOR TABLING IN PARLIAMENT BY THE COMMONWEALTH OMBUDSMAN

Under s 486O of the Migration Act 1958

Personal identifier: 039/06

Principal facts

Personal details

1. Mr X is a male aged 29. He is a citizen of the People's Republic of China (PRC). Mr X claimed during the Refugee Review Tribunal (RRT) hearing that his wife and five year old daughter live in a rural area of the PRC. He claimed that his father died in 1993 and his mother lives in rural China. He does not have family in Australia. Initially, DIMIA reported that Mr X had originally told them his name was Mr X Y Z (born 25 March 1973), however he has subsequently claimed his real name is Mr K L R (born 24 August 1976), but prefers to be known by his alias, Mr X.

Detention history

2. Mr X arrived in Australia at Port Adelaide in February 2003 as a marine engineer on the 'Maratine Master'. The Master of the vessel reported him as deserting on 24 February 2003. In March 2003, NSW Police referred Mr X to the Department of Immigration and Multicultural and Indigenous Affairs (DIMIA). He was detained under s 189(1) of the *Migration Act 1958* as an unlawful non-citizen and placed at Villawood Immigration Detention Centre (Villawood IDC). In July 2005, he was transferred to Baxter Immigration Detention Facility (Baxter IDF).

Visa applications

3. Applied for a Protection Visa (PV) and associated Bridging Visa E (November 2004); refused by DIMIA (in the same month); Refugee Review Tribunal (RRT) affirmed the refusal (March 2005); application to the Federal Magistrates Court (March 2005); discontinued (May 2005); three requests under s 417 (May to August 2005); request under s 48B (July 2005). DIMIA assessed s 417 and s 48B requests as not meeting the guidelines for referral to the Minister (December 2005), however, DIMIA recently advised that the Minister is further considering the s 48B and s 417 requests.

Current immigration status

4. Mr X is currently detained in Baxter IDF.

Removal details

5. DIMIA advises that in October 2003 it lodged an application for a travel document for Mr X with the PRC Consulate. Pending the outcome of the s 417 and s 48B requests before the Minister, a travel document may be sought from the PRC Consulate to effect Mr X's removal. As DIMIA has referred Mr X's case to the Minister for consideration of her detention intervention powers, no removal action will be taken while those considerations remain outstanding.

Ombudsman consideration

6. The DIMIA report to the Ombudsman under s 486N was received 14 October 2005 (dated 29 September 2005).
7. Mr X was interviewed by Ombudsman staff at the Baxter IDF on 8 November 2005, with an interpreter.

8. Submission from Mr X to the Ombudsman's office of 10 November 2005, which includes a copy of a letter to DIMIA from the N, Falun Dafa Association of NSW, dated 29 July 2005, making representations on behalf of Mr X.

Key issues

Basis of PV application

9. Much of the interview between Ombudsman staff and Mr X covered his failed application for a PV. The Ombudsman is not in a position to express a view on the merits of that claim or the RRT decision, but the nature of Mr X's claims are noted briefly because it bears on his failure to co-operate with his removal to China.
10. Mr X claims to have been a Falun Gong practitioner since 1999 and that he fears persecution due to his Falun Gong practices by the Chinese authorities, if returned to China. The RRT found that Mr X *'has shown no dedication to Falun Gong such as would normally be associated with adherence to a religion. Less than two years ago, he felt he was committed to Christianity, but since December 2004, he claims to be a sincere follower of Falun Gong'*.
11. Mr X also claims that he has made public his political views while in Australia criticising China.
12. The RRT expressly found that Mr X's political comments against the Chinese Communist Party (CCP) (some of which were anonymous or not under his real name), and his Falun Gong activities, did not provide him with a significant profile that the authorities in China would have any adverse interest in him, or that he was at risk of punishment and abuse, such as that suffered by long-term high profile activists. The RRT found that the main concern relating to Mr X's return to the PRC are economic factors, including that he may be required to bear his repatriation costs and he may have some difficulty in gaining employment.

Health and welfare

13. DIMIA reported that it is not aware of Mr X having any significant health issues. Mr X stated during the interview with Ombudsman staff that he has had adequate access to medical staff (including psychologists) while detained at Villawood IDC and Baxter IDF. He also stated that he was not on any medication, but was under stress due to the long time he had spent in detention.
14. At interview, Mr X reported some difficulty with sleeping and stated that the environment at Baxter IDF is not good for him *'as it is in the desert'*. He stated that there are other Mandarin speaking detainees at Baxter IDF, however *'there are not as many Falun Gong practitioners as at Villawood IDC'*.

Attitude to removal

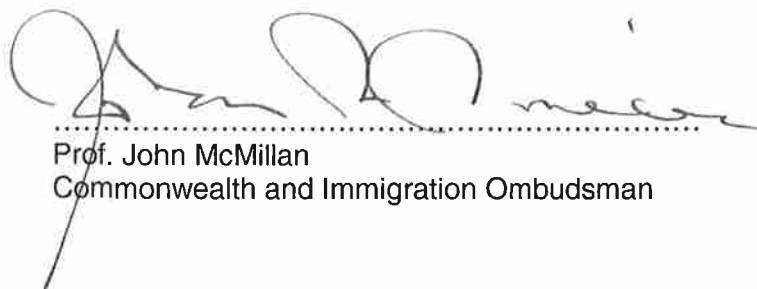
15. Mr X stated that he is fearful of being removed back to the PRC due to the consequences of him *'jumping ship'*, his alleged Falun Gong practices and his outspoken views about the CCP. He stated that if he couldn't stay in Australia, he would prefer to go to another suitable country rather than back to the PRC.

Community support

16. Mr X stated that he has no friends in the Australian community but if released, he would have the support of other Falun Gong practitioners, particularly those who had been at Villawood and have since been released. He stated that he was not sure what type of work he would seek if he were released into the community.

Ombudsman assessment/recommendation

17. Mr X has tested his claims for protection in the RRT and the Ombudsman has no comment to make on this matter.
18. The issue of current concern in Mr X's case is whether he should remain in detention while his outstanding applications under s 417 and s 48B are being resolved, and while DIMIA awaits advice from the Chinese Consulate about his removal to the PRC. If the Minister applies favourable discretion to the applications, this will end in the grant of a visa to Mr X or allow Mr X to lodge a new application for a PV. Mr X has been in detention at Villawood IDC and Baxter IDF for over 2 ½ years, and there does not seem to be an immediate prospect of his removal from Australia. While there are no reports that his physical or mental health has suffered while in detention, the risk of this occurring must increase with continued detention, especially when there is no end date in sight.
19. The Ombudsman **recommends** that the Minister make a decision on Mr X's s 417 and s 48B applications as soon as possible, and in any case, not later than the statutory period prescribed in s 486P for the tabling of this report in Parliament (viz, within 15 sitting days of receiving the report).
20. The Ombudsman further **recommends** that the Minister consider granting Mr X an appropriate visa, such as a Removal Pending Bridging Visa, with reporting mechanisms to reduce any risk of absconding, while the issues concerning his immigration status and removal from Australia are resolved.



Prof. John McMillan
Commonwealth and Immigration Ombudsman

17 Jan 2006
Date