

REPORT FOR TABLING IN PARLIAMENT BY THE COMMONWEALTH OMBUDSMAN

Under s 486O of the Migration Act 1958

Personal identifier: 047/06

Principal facts

Personal details

1. Mr X is a 27 year-old male citizen from the People's Republic of China (PRC). He does not have family in Australia and he says he has lost contact with his family in China. He is also recorded with having another name. Mr X says that he left China at the age of 15 years, arriving in Australia in 1995 when he was 17 years old on a false passport.

Detention history

2. The Department (DIMA) found Mr X working illegally in April 2003. He was detained under section 189(1) of the *Migration Act 1958* and placed in Villawood Immigration Detention Centre (IDC). He was transferred to Baxter Immigration Detention Facility (IDF) in March 2005.

Visa applications

3. Applied for a Protection Visa (PV) (December 2004) refused (December 2004); appeal to the Refugee Review Tribunal (RRT) unsuccessful (January 2005); appeal to the Federal Magistrates Court (FMC) unsuccessful (October 2005).
4. Applied twice for a bridging visa (BV), refused; appeals to the Migration Review Tribunal (MRT) unsuccessful (May 2003 and December 2004).

Current immigration status

5. Mr X is currently detained at Baxter IDF. DIMA advises that the Minister is considering a submission in relation to the use of her detention intervention powers.

Removal details

6. The FMC was critical of DIMA not having pursued removal of Mr X between April 2003 and December 2004. It stated (point 30), '*It is a matter of concern that the applicant was in detention for a period of 17 months before the applicant received any advice about lodging an application for visa. The fact that he could not obtain advice from a lawyer or a migration agent during that period does not adequately explain why he remained the [sic] detention centre for that length of time. If he was not going to apply for a visa, then the respondent Minister should have made arrangements for him to be removed from Australia.*' For a few weeks in that period, Mr X had applications for BVs pending before DIMA and the MRT, and could not have been removed.
7. DIMA states that Mr X was uncooperative with removal attempts prior to December 2004. Since then, a number of ultimately successful steps were taken to effect Mr X's removal; positive identification of Mr X by a Chinese delegation (May 2005), and referral of his case to the National Identity and Verification Advice Unit (September 2005). DIMA requested a travel document for Mr X from the PRC Consulate in December 2005.

Ombudsman consideration

8. Two reports from DIMA to the Ombudsman under s 486N dated 17 August 2005 and the six-monthly report dated 21 January 2006.

9. Ombudsman staff interviewed Mr X at Baxter IDF on 9 November 2005, with an interpreter. Staff also sighted medical summary reports from the International Health and Medical Service (IHMS) dated 19 December 2005 (received 3 January 2006) and Psychology Support Services (PSS) dated 13 December 2005 (received 3 January 2006).

Key issues

Health and Welfare

10. The IHMS report states that Mr X suffers from depression and is treated with medication. In his interview with Ombudsman staff, Mr X confirmed his stress and mentioned that he has trouble sleeping and has a poor appetite. He reports taking sleeping pills.
11. The IHMS report also states that Mr X has gastritis.

Attitude to removal

12. Mr X told Ombudsman staff that he does not wish to be removed to the PRC and that he does not wish to participate in processes that have that objective. The RRT commented that, *'his fears for his own ability to subsist in a country he left at 15 ... were very real to him'*. At a later point, the RRT comments, *'the Applicant's claims are (understandably) personal, emotional, psychological, and economic'*.
13. He said that he would consider relocating to another country if given the opportunity.

Issues in detention

14. In his interview with Ombudsman staff, Mr X discussed several issues about his detention. These have not been put to DIMA but are included in this report for the sake of completeness and for DIMA to consider them further.
15. Mr X said that it generally takes one to two weeks to see a medical practitioner at Baxter IDF. He said that he had not received any visitors while at Baxter IDF, because it is isolated, unlike Villawood IDC where he had a couple of people visit him. He also said that the food at both Baxter IDF and Villawood IDC was poor.
16. Mr X was worried about having been interviewed by representatives of the Chinese Consulate. Similar to other persons whose detention circumstances have been assessed by the Ombudsman, Mr X said that the officials did not identify themselves during the interview.

Childhood migration

17. Mr X claims that he came to Australia as a child. His evidence to the RRT was that his parents had physically abused him and he had run away from home when he was 15. His evidence to the FMC was that, *'the ill treatment that he suffered was quite severe to the extent that his leg was broken by his father.'*
18. He told the FMC that he spent some time in Cambodia after leaving the PRC. He further gave evidence to the FMC that he went to a few other countries and then travelled by air to Australia on a false passport. By contrast, his evidence to the MRT was that he arrived in Australia by boat. He told the MRT, *'[he] was forced to work on a farm for several years after his arrival'*.
19. Mr X then claims he moved to the town of Iluka, where he worked for several years. The MRT stated, *'There is no doubt that the people of Iluka where the visa applicant has resided for some time feel deeply for him. Their letters and declarations of support speak to the regard in which he is held [and] the Tribunal accepts this support for the visa applicant and the contribution he has made to that community'*. One person deposed in a

statutory declaration to the MRT that he was willing to pay a security of \$20,000 for Mr X's release, and another provided a letter that she would also contribute to a security.

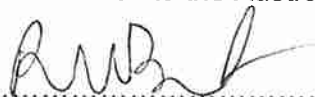
20. There is no independent corroboration of Mr X's account of his arrival in Australia. Neither the RRT, MRT, nor the FMC had to decide whether it accepted Mr X's claim that he arrived in Australia as a child.

Understanding of the outcomes of the FMC hearing

21. Mr X demonstrated poor understanding of the legal process and his rights of review. His application for judicial review at the FMC in October 2005 was dismissed by way of an *ex tempore* judgment on the day. Mr X said that he was not aware of the court having made a decision and thought that it was still outstanding. He also believes the court ordered him to pay \$4,000, when in fact Scarlett FM considered a costs order of \$4,000, but decided not to order any costs.

Ombudsman assessment/recommendation

22. Mr X has spent over two and a half years in immigration detention, partly because DIMA did not appear to take steps to effect his removal between April 2003 and December 2004. It is noted that Mr X was uncooperative with removal efforts at this time but also that the FMC said, *'It is not of any benefit to any party to spend time waiting in immigration detention any longer than is necessary in order to have a hopeless case finalised.'*
23. The Ombudsman considers there are grounds for special consideration of Mr X's case and refers to the suggestions made by the RRT that Mr X raise his case for humanitarian considerations separately with the Minister. Mr X has not applied to the Minister under s 417. The Minister might consider exercising her powers under s 195A to determine whether to grant Mr X a substantive visa (subject to health and character checks) in the public interest and on humanitarian grounds. The Ombudsman is of the view that the following issues could be considered:
- * If the Minister accepts that Mr X came to Australia as a child, then it is relevant that Mr X would have had limited capacity to engage in, and navigate his way through, the migration formalities and organise an authorised entry permit;
 - * Mr X has lost contact with his family in the PRC, claims to have no friends or other community support in the PRC, says he may face hardship if he were returned to the PRC, and the fact that Mr X suffers from depression may combine to make an involuntary return more difficult; and
 - * It appears that from 1995 until 2003, Mr X was able to integrate, get work, establish himself, and participate successfully in Australian society.
24. The Ombudsman **recommends** that, until Mr X's immigration status is determined, the Minister consider releasing him from immigration detention on an appropriate visa such as a Removal Pending Bridging Visa (subject to appropriate reporting or surety conditions) that would enable him to work. There is significant community support for him, especially from community members in the township of Iluka, and no evidence he would constitute a risk to the Australian community.



R I Brent
Acting Commonwealth and Immigration Ombudsman

6 February 2006
Date