

REPORT FOR TABLING IN PARLIAMENT BY THE COMMONWEALTH OMBUDSMAN

Under s 486O of the Migration Act 1958

Personal identifier: 056/06

Principal facts

Personal details

1. Mr X is a 49 year old male citizen of the Democratic People's Republic of Korea (North Korea). He claims that his real name is Mr Y. He believes his wife and 24-year-old son are living in the People's Republic of China (PRC), but he has not spoken with them for two and a half years. His other son (27 years old) lives with his sister in North Korea.

Detention history

2. In November 2002, Mr X arrived in Australia on an Electronic Travel Authority, using a fraudulent South Korean passport. He was granted a bridging visa (BV) in January 2003 in connection with his Protection Visa (PV) claim. He was located by the Department (DIMA) in May 2003, at which time his BV was cancelled under s 109 of the *Migration Act 1958* (use of a fraudulent document). He was detained under s 189(1) and placed in Villawood Immigration Detention Centre (Villawood IDC). He was transferred to Baxter Immigration Detention Facility (Baxter IDF) in July 2005.

Visa applications

3. PV refused (March 2003); associated BV cancelled (May 2003); BV cancellation affirmed by the Migration Review Tribunal and further BV application refused (June 2003); PV refusal affirmed by the Refugee Review Tribunal (RRT) (July 2003); requests under s 417 and s 48B (June 2005 and September 2005); s 417 request denied (March 2006); advice was received from DIMA on 14 March 2006 that the s 48B request has been granted, and a fresh PV application by Mr X will therefore be allowed; PV application lodged (March 2006), currently outstanding; associated BVE refused (March 2006).

Current immigration status

4. Mr X is currently detained in Baxter IDF.

Removal details

5. DIMA advises that it is still in the process of trying to establish Mr X's true identity. DIMA has not yet commenced discussions with the North Korean Consulate, but reports that it will do so once it has established his nationality and a decision is reached on his s 48B request (since approved). His case was referred to DIMA's National Identification Verification Advice Unit in January 2006 for identity investigation.

Ombudsman consideration

6. Two reports from DIMA under s 486N dated 29 September 2005 and 10 January 2006.
7. Ombudsman staff interviewed Mr X at Baxter IDF on 8 November 2005, with the assistance of an interpreter.

Key issues

Claim for a PV and nationality

8. Mr X's PV claims were based on his assertions that he was from South Korea, fleeing after he refused to pay bribes to corrupt government officers and fearing that he would be

detained and persecuted upon return. His PV claims in relation to his desire not to be returned to North Korea have not been considered.

9. DIMA advises that it is pursuing inquiries into Mr X's North Korean nationality claim. DIMA has received confirmation from the PRC Consulate and South Korean Consulate that Mr X is not a national of either of those countries. It reports that linguistic analysis finds that Mr X's language background is most likely from North Korea. If it is confirmed that he is from North Korea, his current s 48B request may receive favourable consideration. As noted above, his s 48B request has since been approved.

Health and Welfare

10. DIMA advises that it is not aware of Mr X having any significant health issues. However, at interview with Ombudsman staff, Mr X advised that he suffers from high blood pressure (for which he receives medication), has eyesight, memory and sleeping problems, and a stomach ulcer. He mentioned that he recently engaged in one counselling session.
11. Mr X advised that he is in regular contact with a Korean pastor and has also made friends with several people from a mission society.

Attitude to removal

12. Mr X advised that he has co-operated with DIMA by providing his North Korean identity card and family photographs. He advised Ombudsman staff that he does not wish to return to North Korea, as he fears that Government officials will kill him. He claims that he will be labelled a defector for leaving the country and asked Ombudsman staff not to disclose his details to the North Korean Consulate, fearing for his family's safety.
13. Mr X thought he could come to Australia and work to earn some money then return to his family, but he has since heard that the situation in North Korea has worsened. He regrets having broken Australian law and apologised.
14. The Ombudsman notes the potential dangers that would be associated with removing Mr X to North Korea, with recent country information from the Department of Foreign Affairs and Trade including *'International human rights groups have alleged [North Korea] executes political prisoners, opponents of the regime and repatriated defectors ... A principle of "collective retribution" is said to operate in [North Korea], where the families of transgressors are also subjected to punishment, imprisonment or relocation to remote areas.'*¹

Ombudsman assessment/recommendation


15. Mr X has been in immigration detention for almost 3 years. His removal is unlikely to be effected in the near future as his identity is yet to be confirmed, although both PRC and South Korean officials have confirmed that he is not from either of those countries. The current indicators are that he is North Korean, as he now claims.
16. The Ombudsman is not aware if DIMA has made any effort to negotiate Mr X's safe passage to South Korea, a country where he may be eligible for citizenship, by virtue of the South Korean Constitution. *'As a North Korean citizen would automatically and immediately be granted South Korean citizenship, that citizen has a right to enter and reside in South Korea for the purposes of s 36(3). An applicant has to arrive in South Korea and take up his or her entitlement to South Korean citizenship by establishing that he or she is a citizen of North Korea.'*² Mr X possesses a North Korean identity card, and

¹ http://www.dfat.gov.au/geo/dprk/dprk_brief.html

² Para. 23 Federal Magistrates Court *SZGKB V Minister for Immigration and Anor* [2005] FMCA 1544 (24 October 2005)

if it is proved to be genuine, he may be able to meet the conditions for re-settlement to South Korea. This issue has been highlighted in this report as one that may need further examination by DIMA.

17. The Ombudsman **recommends** that identity inquiries continue to be made by DIMA, if his identity or nationality still remain in doubt. Further, that Mr X's PV application lodged as a result of the decision under s 48B be processed as a matter of priority.
18. The issue of current concern in Mr X's case is whether he should remain in detention while his immigration status is resolved. While he does not currently appear to have any major health issues, the risk to Mr X's mental health must increase with continued detention. There is no evidence to suggest that Mr X is considered a threat to the Australian community if he were to be released from immigration detention. The Ombudsman **recommends** that the Minister consider granting Mr X an appropriate visa (subject to conditions that DIMA deems necessary to reduce the risk of absconding) while any fresh application that he makes for a PV is determined and the issues concerning his immigration status and removal from Australia are resolved.



Prof. John McMillan
Commonwealth and Immigration Ombudsman

5/1/06
Date