

REPORT FOR TABLING IN PARLIAMENT BY THE COMMONWEALTH OMBUDSMAN

Under s 486O of the Migration Act 1958

Personal identifier: 057/06

Principal facts

Personal details

1. Ms X is a 39 year old woman, reportedly from the Democratic People's Republic of Korea (North Korea). Ms X states that she fled North Korea to the People's Republic of China (PRC) in 1995, where she lived until her travel to Australia in 2001. She also claims that her parents are deceased and her younger sister resides in North Korea. She has not had contact with her sister since 1997. Ms X is in a committed relationship with another detainee, Mr Y. Their relationship formed prior to Mr Y's detention in June 2002.

Detention history

2. In August 2003, Ms X was located working in a restaurant by Department of Immigration and Multicultural Affairs (DIMA) officers and identified as an unlawful non-citizen. She was detained under s 189(1) of the *Migration Act 1958* and placed in Villawood Immigration Detention Centre (Villawood IDC).

Visa applications

3. Ms X entered Australia in October 2001 on an electronic travel authority visitor visa (valid for four months), using a false South Korean passport, in the name of Ms Z. Protection visa (PV) refused by DIMA (June 2005); refusal affirmed by the Refugee Review Tribunal (RRT) (July 2005); judicial review of the RRT's decision to the Federal Magistrates Court (August 2005) dismissed (November 2005); Bridging Visa E (BV-E) refused (February 2006); Migration Review Tribunal (MRT) (February 2006) affirmed decision (February 2006); application for a BV-E deemed invalid (March 2006); a s 417 request sent to Minister (December 2005) assessed as not meeting guidelines and referred to Minister's office on a schedule (February 2006); remains outstanding; submission sent to Minister for possible consideration of detention intervention powers (November 2005) remains outstanding; BV application refused (March 2006); MRT affirmed decision (March 2006).

Current immigration status

4. Ms X remains detained at Villawood IDC. DIMA and the detention service provider approved the request for Ms X and Mr Y to live together while in Villawood IDC and they currently share a room. DIMA advises that the Minister is currently considering a residence determination submission for both Ms X and Mr Y.

Removal details

5. DIMA advises that it has been unable to positively confirm Ms X's nationality, and therefore, cannot effect her removal from Australia at this stage. At the time of her detention, Ms X possessed an identity card showing her nationality as North Korean, however, this document has since been found to be fraudulent. DIMA conducted a bio-data questionnaire on Ms X in March 2004, but no tangible results were achieved. In August 2004, an official from the PRC Consulate concluded that Ms X is most likely a North Korean national. DIMA advised that other biometric methods to identify Ms X are being considered.

Ombudsman consideration

6. Two DIMA reports to the Ombudsman under s 486N dated 14 September 2005 and 9 March 2006.
7. Ombudsman staff interviewed Ms X at Villawood IDC on 4 November 2005, in the company of Mr Y. An interpreter was present.

Key issues

Health and welfare

8. DIMA advises that Ms X complained of stomach and throat problems in March 2005, for which she receives ongoing medical treatment. Ms X advised Ombudsman staff that she also suffers from severe headaches and has low blood pressure. When asked whether she has reported this to medical staff at Villawood IDC, Ms X stated that the doctor has not given her any medication, instead telling her to drink more water. She said the only medication she is given is Panadol and commented that it no longer works. Ms X also advised that the Mylanta she is taking for her stomach problems is not working.

Attitude to removal

9. At interview with Ombudsman staff, Ms X advised that she recently viewed a television programme on North Korea, which showed the Government persecuting North Korean defectors who returned after some time abroad. The programme also suggested that North Korean officials regularly track down defectors in third countries and return them to North Korea. Prior to viewing this programme, Ms X indicated that she would have been prepared to consider removal to a third country, however, she now fears she will meet the same fate as those in the programme and indicated she is afraid of returning to North Korea.
10. Ms X also expressed concern that her younger sister will be at risk of persecution from the North Korean Government if Ms X is returned. She says the Government will punish the whole family, not just the individual. Ms X commented, *'if Australia does not allow us to stay – we have no where else to go.'* The RRT decision indicates that Ms X fears returning to North Korea because, *'she would be regarded as impure because she would have been contaminated by western ideas while she was living in Australia and would be punished harshly for this.'*

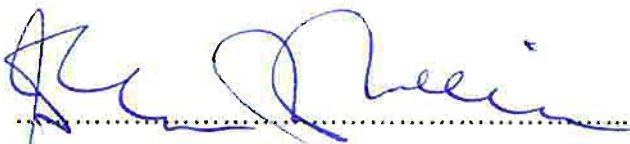
Ombudsman assessment/recommendation

11. Ms X has been in immigration detention for two years, five months. She met her partner, Mr Y, while living unlawfully in the Australian community. Ms X and Mr Y are committed to staying together. It would therefore be preferable for DIMA and the Minister to consider these cases together.
12. Similarly to Mr Y, the Ombudsman is not aware if DIMA has made any effort to negotiate Ms X's safe passage to South Korea, a country where she 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.'*¹ While Ms X does not currently possess any identification confirming that she is a North Korean national, this matter is yet to be explored by DIMA. Pursuant to s 36(3) Australia is taken not to have protection

¹ Para. 23 Federal Magistrates Court, *SZGKB V Minister for Immigration and Anor* [2005], FMCA 1544 (24 October 2005)

obligations to Ms X if she can be resettled in South Korea. Although this option has not been discussed with Ms X, it has been highlighted in this report as an issue that may need further examination by DIMA.

13. Since her detention in August 2003, DIMA has been unable to finally confirm Ms X's nationality. While DIMA suspended its investigations into her identity following the lodgement of a PV application in May 2005, the Ombudsman is concerned that only limited attention was given to conducting inquiries into her identity between her detention in August 2003, and the lodgement of her PV application, 19 months later. DIMA's limited inquiries have concluded that Ms X is not from the PRC, and is likely to be North Korean, but did not produce any information which could assist in effecting her removal from Australia. It is likely that it will be some time before DIMA can positively identify Ms X, if in fact this is ever possible. Continued detention increases the risk of a negative impact on Ms X's mental health and it would therefore be beneficial for Ms X to be removed from that environment.
14. The Ombudsman notes that the Minister is currently considering a s 417 request for Ms X and a residence determination submission for both Ms X and Mr Y. A further option, which the Ombudsman **recommends** the Minister consider, is the grant to Ms X of a RPBV, with work rights, to enable her timely release from detention whilst her immigration status is determined. The grant of a RPBV would be a more beneficial visa type for Ms X than a residence determination, as it would allow her to become gainfully employed and self sufficient until such time as her nationality is determined, discussions are conducted with South Korea, and, if appropriate, she can be removed from Australia. While the possibility exists that Ms X may abscond after release from immigration detention, this risk can be managed by the normal DIMA reporting conditions.
15. A complicating factor in the Minister considering the grant to Ms X of a RPBV is that the Minister recently decided not to invite Mr Y to apply for a RPBV, and instead to consider a residence determination for both Mr Y and Ms X. Further, the Ombudsman has recommended above that Mr Y and Ms X's cases be decided together. That said, Ms X is still individually entitled to the most beneficial outcome that the Minister is prepared to grant in her case. For that reason it is recommended that she be considered for the grant of a RPBV.
16. It is further **recommended** that the Minister make a decision on the s 417 request, the residence determination and the grant of a RPBV 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



Date