

# REPORT FOR TABLING IN PARLIAMENT BY THE COMMONWEALTH OMBUDSMAN

*Under s 486O of the Migration Act 1958*

*Personal identifier: 058/05*

## **Principal facts**

### *Personal details*

1. Mr X is a 45 year old male, believed to be from the Democratic People's Republic of Korea (North Korea). Mr X claims he was taken from his family (by a friend of the family) when he was six years old and made to live with an old man in the mountains in the People's Republic of China (PRC). He states he has not seen his family since. He has not had any schooling, but can read and write a small amount. His mother tongue is Korean, however, he clearly understands and speaks Mandarin. Mr X is in a committed relationship with another detainee, Ms Y. Their relationship formed in Australia prior to his detention.

### *Detention history*

2. In June 2002, the Department (DIMA) located Mr X working at a construction site in Sydney. He was identified as an unlawful non-citizen and detained under s 189(1) of the *Migration Act 1958*. He was placed in Villawood Immigration Detention Centre (IDC).

### *Visa applications*

3. Mr X reports that he came to Australia by boat as a stowaway in September 1997. He remained unlawful in the Australian community for four and a half years and did not make any visa applications during this time.
4. Protection Visa (PV) application refused (August 2002); subsequent PV application lodged (September 2002); PV application refused (October 2002); PV refusal affirmed by the Refugee Review Tribunal (RRT) (December 2002) (the RRT found he was a PRC citizen, which has subsequently been proven incorrect); Bridging Visa (BV) request refused (February 2006); Migration Review Tribunal reaffirmed refusal (February 2006); BV requests refused (March 2006).
5. A request under s 417 was lodged with the Minister (May 2005) and the request remains outstanding.

### *Current immigration status*

6. Mr X remains detained at Villawood IDC, where he shares a room with his partner, Ms Y. DIMA advises that a submission was sent to the Minister (July 2005) for possible consideration of her detention intervention powers. The Minister decided not to invite Mr X to apply for a Removal Pending Bridging Visa (RPBV), but requested a further submission to consider a residence determination for both Mr X and Ms Y. This matter remains outstanding.

### *Removal details*

7. Mr X has not been able to present any documents to support his claim that he is from North Korea. He was interviewed by PRC Consular officials (May 2003), who confirmed that he is not a PRC citizen. Officials from the Embassy of the Republic of Korea confirmed that he is not a South Korean national (November 2004). In October 2005, Mr X's case was referred to the National Identity Verification Advice Unit for further

investigation of his identity. DIMA has advised that until such time as he is positively identified, removal from Australia will be difficult.

### **Ombudsman consideration**

8. Two DIMA reports to the Ombudsman under s 486N, dated 14 September 2005 and 10 January 2006.
9. Ombudsman staff interviewed Mr X at Villawood IDC on 4 November 2005, in the company of Ms Y. An interpreter was present.

### **Key issues**

#### *Health and welfare*

10. Mr X advised Ombudsman staff that he has not had any medical issues while in detention, with the exception of an eye operation. He is, however, concerned about Ms Y's health.

#### *Attitude to removal*

11. At interview with Ombudsman staff, Mr X advised that he does not wish to return to the PRC, believing that he will be in trouble because he has no identification showing that he is a PRC national. He also commented that Koreans resent him, because he is considered Korean-Chinese. He advised that he and Ms Y recently watched a television programme on North Korea, which showed the Government persecuting defectors who returned after some time abroad. Both Mr X and Ms Y expressed concern that they will meet the same fate as those in the programme and indicated that they are afraid of returning to North Korea.

#### *Other detention issues*

12. Mr X informed Ombudsman staff that another detainee in Villawood IDC assisted him in the preparation of his s 417 request. He says he has received a letter from DIMA asking for additional documents, but has not provided any further information and has not filled in the forms, because he does not understand them. Mr X commented that his DIMA case officer visits him approximately once a month but has declined to assist him complete the necessary forms.
13. Mr X expressed concern that there is no Korean food served at Villawood IDC and described the overall quality of the food as poor. He commented that some visitors bring him food, such as cabbages, but due to restrictions on cooking at Villawood IDC, Mr X is unable to consume many staple Korean foods.

### **Ombudsman assessment/recommendation**

14. Mr X has been in immigration detention for three and a half years. He met his partner, Ms Y, prior to being taken into immigration detention. They are committed to staying together. It would therefore be preferable for DIMA and the Minister to consider these cases together.
15. Several issues requiring comment arise in Mr X's case. First, 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 is considered to have 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.<sup>1</sup> There are doubts as to whether Mr X can prove that he is a North Korean citizen, especially as he does not possess any identification and was taken from North Korea as a small child and knows little about his place of birth. However, pursuant to s 36(3), Australia is taken not to have protection obligations to Mr X if he can be resettled in South Korea. Although this option has not been discussed with Mr X, it is in the public interest that this matter be explored by DIMA.

16. Secondly, it appears that Mr X has been eligible for removal from Australia for much of the time that he has been in detention; from December 2002 until May 2005. Even though his move from North Korea to the PRC as a young child has made it difficult for DIMA to confirm his nationality, Mr X has always maintained that he is North Korean. Despite this, DIMA has not made any approaches to North Korean authorities to confirm Mr X's identity or to obtain travel documents. Other inquiries made by DIMA to date have not brought it any closer to confirming his nationality. It is likely that it will take DIMA some time to determine Mr X's nationality, and it is possible that his nationality will never be confirmed. This brings into question whether DIMA will be able to give effect to his removal from Australia. If not, the Minister may need to consider exercising her discretion to grant him a permanent visa to remain in Australia.
17. Mr X currently has an outstanding s 417 request before the Minister (lodged May 2005). The Ombudsman is aware that the Minister recently decided not to invite Mr X to apply for a RPBV, and instead requested that a residence determination submission be prepared. A decision remains pending on the latter submission. The Ombudsman **recommends** that the Minister reconsider granting Mr X a RPBV, or another visa with work rights, to enable his timely release from detention whilst his immigration status is determined. Mr X informed Ombudsman staff that he has friends in the community who are willing to assist him with accommodation and employment. While the Ombudsman acknowledges there is a risk of Mr X absconding after his release from immigration detention, this risk can be managed by the normal DIMA reporting conditions.



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Prof. John McMillan  
Commonwealth and Immigration Ombudsman



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Date

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