

# REPORT FOR TABLING IN PARLIAMENT BY THE COMMONWEALTH AND IMMIGRATION OMBUDSMAN

*Under s 486O of the Migration Act 1958*

*Personal identifier: 063/06*

## **Principal facts**

### *Personal details*

1. Mr X is a 48-year-old man from the People's Republic of China (PRC) (and a former resident of Hong Kong). His wife and two children (aged 6 and 17) live in Hong Kong.

### *Detention history*

2. Mr X held a series of visas between August 1999 and January 2002. In February 2002, the Department (DIMA) detained him under s 189(1) of the *Migration Act 1958* and placed him in immigration detention at Villawood Immigration Detention Centre (IDC).

### *Visa applications*

3. Arrived on a short stay visitor visa (August 1999); granted a Student Visa (SV) (November 1999); applied for a further SV (December 2000); original SV expired and he was granted a Bridging Visa (BV) (January 2001); the Minister refused further SV pursuant to s 501(3) and BV cancelled (January 2002); the Minister declined to revoke decision to refuse SV (May 2002); Minister presented with new character information (January 2005) but declined to re-examine decision, stating no power to review (April 2005).

### *Litigation in relation to the Student Visa*

4. Mr X lodged court actions against the decisions of the Minister made in January 2002 to refuse his SV application ('initial decision') and in May 2002 not to revoke that decision ('non-revocation decision'). His appeals to the Federal Court (FC) and the Full Federal Court (FFC) were unsuccessful, however an application to the High Court (HC) for constitutional relief resulted in the matter being remitted back to the FC. The 'non-revocation decision' was quashed by the FC on grounds that the Minister failed to give Mr X information referred to in s 501C. An order of *mandamus* was issued requiring the Minister to comply with obligations under s 501C. This decision was set aside by the FFC and an appeal to the HC for special leave was refused.
5. In February 2005, Mr X made a fresh application to the FC seeking a new hearing on the basis of new information; this proceeding remains outstanding.

### *Litigation in relation to access to information*

6. DIMA refused Mr X access to certain documents, claiming the information was protected under s 503A; application to the Administrative Appeals Tribunal (AAT) (September 2002); preliminary ruling that documents not protected by s 503A (August 2003); Minister attempted to seek judicial review at the FC but the FC held that it did not have jurisdiction to consider the appeal (February 2004); Mr X continued his action in the AAT in relation to other documents, the AAT has reserved its decision. In September 2004, Mr X was given access to some documents held by DIMA.
7. Mr X's solicitors have commenced an action seeking judicial review of a certificate issued by the Attorney-General in April 2004 under s 36 of the *Administrative Appeals Tribunal Act 1975*, denying Mr X access to documents, and preventing him from questioning witnesses.

### *Detention intervention powers*

8. DIMA states that the Minister declined to exercise her detention intervention powers in Mr X's case in October 2005. Mr X has made submissions to the Minister that he has a friend who is willing to offer \$100,000 (against his house), as security to ensure that he does not abscond if released into the community on a BV.

### *Current immigration status*

9. Mr X is an unlawful non-citizen detained at Villawood IDC.

### *Removal details*

10. DIMA has not taken any steps to remove Mr X due to the various matters before the courts. Mr X holds a current travel document, which is valid until June 2006.

### **Ombudsman consideration**

11. DIMA reports to the Ombudsman under s 486N dated 14 September 2005 and 10 January 2006.
12. Ombudsman staff interviewed Mr X at Villawood IDC on 14 October 2005.
13. Ombudsman staff have sighted several documents, including: medical summary reports from International Health and Medical Service (IHMS), dated 24 November 2005, and Professional Support Services (PSS), dated 1 December 2005; a psychological report dated 31 July 2003; a psychiatric report dated 13 August 2003; a psychological assessment dated 4 April 2006; and submissions from Mr X and his legal representatives, including copies of letters to the Minister and a letter to the PRC Consulate-General; and submissions from Mr X's friend.

### **Key issues**

#### *Prosecution in the PRC*

14. Mr X is charged with being part of the Yuan Hua smuggling conspiracy, allegedly evading customs duty on the import of oil between July 1996 and March 1998. His charges bear a maximum penalty of life in prison. Mr X has expressed concern that eight people linked to the Yuan Hua crime have already been executed in the PRC.
15. Mr X contends that he will not receive a fair trial in the PRC. His legal representative states in a letter to DIMA *'It is commonly believed that Australia has refused to enter into any extradition treaty with China by reason of the failure of officials of that country to meet basic human rights standards in relation to the treatment of alleged offenders'*. These concerns are further emphasised in a letter from his counsel: *'...depends upon whether any interrogation of him by PRC officials does not involve improper and inhumane treatment so as to induce a false confession and upon whether the judicial process in the PRC is such that he will be given a fair trial in the sense that such is known to our own legal system.'*
16. The Ombudsman has previously discussed the issue of DIMA obtaining assurances from the PRC Government in relation to the death penalty (Ombudsman's reports 043/06 and 041/06). A Country Information Report from the Department of Foreign Affairs (DFAT) dated 22 October 2002, (no.325/02) states *'Canadian media have reported that an individual whom Canadian authorities returned to China with an undertaking by the Chinese Government not to execute for the crime he was tried for in Canada was subsequently executed for a crime he was found guilty of committing in China before moving to Canada ... the Canadians and Chinese authorities have now resolved this issue of undertakings'*. It is important that DIMA and/or DFAT conduct a clear and definitive assessment of the potential risk to Mr X and obtain the necessary assurances from the PRC Government.

### *Obligation to give Mr X information*

17. Mr X's application for a further SV was refused under s 501(3) and he was issued with a notice of refusal. Section 501C requires the Minister to provide Mr X with all relevant information about the decision and give him the opportunity to make representations that he is of good character. The Minister allowed Mr X to make representations, but without the relevant information, claiming that the information was confidential subject to s 503A. The FC subsequently held that the information was not protected, commenting '*Without the particulars, Mr X was disabled from making representations effectively addressing the information which was the Minister's reason, or a part of the Minister's reason, for making the original decision.*' This decision was overturned on appeal, with the FFC holding that Mr X's arguments were subject to *Anshun estoppel* because he did not raise them in earlier FC applications. The FFC did not reach a finding on the s 501C and s 503A issues, but it did state that '*the construction questions concerning s 503A and the Notice are complex and the mistaken view upon which the Minister acted was understandable.*'
18. Much of the previously protected information has since been released to Mr X, enabling him to make a further submission to the Minister in response to her 'non-revocation decision'. However, in April 2005, the Minister determined that the Act did not afford an additional review of the refusal decision because the Minister had already reviewed the decision in May 2002. As noted, Mr X has commenced an action in the FC to have this matter further reviewed.

### *Improper purpose*

19. Throughout his litigation, Mr X has argued that the Minister's 'initial decision' and 'non-revocation decision' were incorrect because they were made for the improper purpose of returning him to the authorities in the PRC. He alleges that the Australian Government maintains a list of PRC nationals that the PRC wants returned, despite the lack of an extradition treaty between Australia and the PRC. Previous FC and FFC actions have considered this argument and the current FC proceeding may decide this issue.

### *Health and welfare*

20. PSS states that '*Mr X's presentation is consistent with a diagnosis of major depression and anxiety*', although this comment is qualified by the fact that a full psychological assessment and formal diagnosis has not been made. However, the Ombudsman is aware that a psychiatrist formally assessed Mr X in August 2003, diagnosing him with '*Major Depressive Disorder*' and '*Panic Disorder*'. The psychologist's recent report makes the same diagnosis, adding that Mr X has, '*post traumatic stress and psychotic symptomology*'.
21. The 2006 psychological assessment expresses reservations about Mr X continuing to stay in detention: '*It is strongly recommended that Mr X be managed outside the detention centre environment and released into the community... Continuing exposure to the way of life and conditions of detention would be expected to lead to the further aggressive deterioration of Mr X's now fragile mental state. At the very least continued detention would serve to maintain his current level of psychological distress resulting in further physical decline which is considered to be grossly unacceptable*'. This decline was predicted in 2003 in the psychological and psychiatric reports. The PSS report also comments on the impact of detention on Mr X's health, stating '*it is unlikely that there will be a significant improvement in his psychological state whilst he remains in detention.*'
22. The IHMS also lists Mr X as suffering from shingles, anxiety and dermatitis and notes these conditions can be appropriately managed within the detention environment. The 2006 psychological assessment comments that Mr X reported '*chronic pain, "weeping" eczema type sores and an extensive unrelenting itch "under my skin"*'.

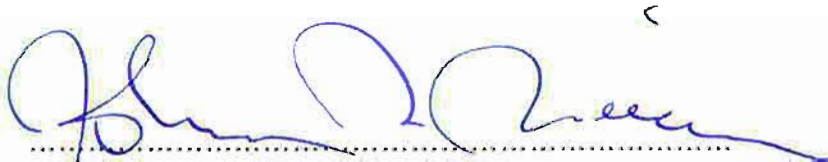
### *Attitude to removal*

23. Mr X told Ombudsman staff that he would like to return to his family in Hong Kong but the charges against him make it difficult and he is worried that he will not be allowed to remain there. This seems a real possibility as documents from the Department indicate that his residency permit for Hong Kong has been cancelled.

### **Ombudsman assessment/recommendation**

24. The chief concern in Mr X's case is that he has spent over four years in Villawood IDC and there is presently no end in sight. No steps have been taken to arrange for his removal to the PRC, because of unresolved litigation that he has commenced. It will possibly be some time before that litigation is finally resolved. In the meantime, the medical evidence indicates that Mr X's mental health is suffering and that it could worsen with continued detention.
25. Notwithstanding those concerns, the Ombudsman has decided that it is not appropriate at this stage to make a specific recommendation aimed at ending the current arrangements for Mr X's detention. In addition to the matters discussed below in para 26, the Ombudsman is aware that the Minister has declined as recently as October 2005 to exercise her detention intervention powers in Mr X's case. The more likely outcome too is that removal action will become necessary, and this would be more difficult to effect if Mr X is not under the effective control of DIMA. Nevertheless, it is undesirable in principle that Mr X should be kept in detention indefinitely at Villawood IDC when he has been there for four years already and has suffered ill-health as a consequence. His case should be actively managed to prevent his continuing and indefinite detention. To this end, DIMA and the Minister should give continuing consideration to whether an alternative form of detention with reporting and surety conditions for Mr X would be more suitable. He has considerable community support and pledges have been made to post substantial security bonds and provide him with accommodation. Another alternative that should receive continuing consideration is a community detention arrangement with appropriate oversight by DIMA. These matters will be considered afresh by the Ombudsman if a further report on Mr X's circumstances has to be prepared under s 486O.
26. The litigation and other proceedings that Mr X has initiated stem from a decision of the Minister in 2002 not to grant (or consider granting) a further SV to Mr X. There is no guarantee that if he is successful in that litigation that he will be granted such a visa, and even so a SV would only allow continued residence in Australia for a limited period, subject to conditions. Consequently, unless there is an intervening change, his return to the PRC appears inevitable. Lying behind the litigation, it seems, is Mr X's reluctance to return to the PRC because of the serious criminal charges that he may face upon return. Whether he should face those charges is irrelevant to this report, since Mr X is not the subject of an extradition request from the PRC. The point is relevant only inasmuch as he has expressed concern that he may face execution if convicted of the offences. He claims that eight other people connected to the Yuan Hua smuggling conspiracy have already been executed. The Ombudsman's office has been informed that the charges he face carry a maximum sentence of life in prison. Nevertheless, since this issue is so prominent in Mr X's reluctance to return to the PRC, the Ombudsman considers (as discussed in para 16) that DIMA should seek a reassurance from the PRC that Mr X will not face the death penalty. Once such an assurance is obtained, DIMA should notify Mr X in writing and take the necessary steps to monitor Mr X's circumstances after his removal to ensure that the PRC Government abides by the undertaking. In the absence of any assurances, the Ombudsman considers that advice should be sought from the Attorney-General's Department and/or the Department of Foreign Affairs and Trade as to what options remain available.

27. A prominent issue in Mr X's litigation is his desire to obtain information that was refused to him at the time that he was invited in 2002 under s 501C to make a submission about whether he is of good character. Mr X has now received some of the information he was earlier refused, but has been denied the opportunity to make a fresh submission to the Minister under s 501C. It seems to the Ombudsman that much could be gained by allowing Mr X to make a fresh submission to the Minister, either under s 501C or by executive permission if the view is taken that the opportunity presented by s 501C is spent. The resolution of his case is prolonged because of the litigation he has commenced, and yet that litigation is likely to provide only temporary assistance at best for Mr X. Consequently, it might resolve at least one issue more speedily in Mr X's case if he was given the opportunity that he claims was denied to him in 2002 to have the issue as to his character considered properly.

  
.....  
Prof. John McMillan  
Commonwealth and Immigration Ombudsman

24 April 2006  
Date