

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

*Under s 486O of the Migration Act 1958*

*Personal identifier: 070/06*

## **Principal facts**

### *Personal details*

1. Mr X is a male aged 33 from the Peoples' Republic of China (PRC). His parents and brothers reside in the PRC.

### *Detention history*

2. In January 2004, the Department (DIMA) placed Mr X in immigration detention under s 189(1) of the *Migration Act 1958* at Villawood Immigration Detention Centre (IDC).

### *Visa applications*

3. Mr X arrived in Australia on a short stay visitor visa (July 1998); departed Australia (July 1998) and returned (August 1998); visa ceased (November 1998); applied for a protection visa (PV) and granted bridging visa (BV) (May 2000); application for PV refused by DIMA (May 2000); appeal to the Refugee Review Tribunal (RRT) unsuccessful (January 2001); BV ceased (February 2001); joined a joint class action at the High Court (HC) (September 2001); granted BV (November 2001); failed to file an individual order *nisi* application as required by the HC and HC action concluded (June 2003); BV ceased (July 2003); sought judicial review of the RRT decision at the Federal Magistrates Court (FMC) (June 2005); application dismissed (August 2005).
4. Applied to the Minister under s 417 (March 2001); refused (May 2001); applied to the Minister under s 417 (June 2005); refused because still had case before the court (June 2005); applied to the Minister under s 48B (June 2005); refused (October 2005); application to the Minister under s 417 (March 2006); ongoing. DIMA advises that it is preparing a submission to the Minister for the possible use of her detention intervention powers.

### *Current immigration status*

5. Mr X is detained as an unlawful non-citizen in the Villawood IDC.

### *Removal details*

6. The PRC Consulate has not yet confirmed that Mr X is a citizen of the PRC. DIMA reports that they have taken a number of steps to effect Mr X's removal, including: he was asked to complete a passport application (February 2004); he completed a travel document application (October 2004); a delegation from the PRC interviewed Mr X (May 2005); the PRC Consulate advised DIMA that efforts to establish Mr X's identity are still continuing (January 2006); DIMA followed up the issue with the PRC Consulate (February 2006). DIMA advised that Mr X is eligible for removal to the PRC as soon as travel documents can be obtained.

## **Ombudsman consideration**

7. The DIMA report to the Ombudsman under s 486N is dated 20 January 2006 (received 3 February 2006).
8. Ombudsman staff interviewed Mr X at Villawood IDC on 20 February 2006 with an interpreter.

9. Ombudsman staff received a medical summary report from the International Health and Medical Service (IHMS) dated 13 March 2006.

### **Key issues**

#### *Health and welfare*

10. The DIMA report states that Mr X complained of sleep difficulties and chest palpitations in December 2005 and that he was referred to Mayne Health Diagnostic Centre for tests in January 2006.
11. Mr X said that he has not been able to communicate with the doctor in the detention centre because there was often no interpreter available.

#### *Attitude to removal*

12. In his interview with Ombudsman staff, Mr X said that he was fearful of being returned to the PRC. He claims to have been a practitioner of Falun Gong while in the PRC and he said that other members of the group '*disappeared*'. He said that he is fearful of being apprehended or beaten upon his return to the PRC.

#### *Other detention issues*

13. Mr X discussed the visit by officials from the PRC Consulate to Villawood IDC. He said he did not tell the officials the names of family members because he was afraid of the consequences, although he did tell them his home address. The circumstances of the interview of PRC nationals by the PRC delegation are being examined following several complaints to the Ombudsman's Office and to the Human Rights and Equal Opportunity Commission.

#### *Other issues*

14. Mr X was critical of his migration agent. He said that the agent told him he would assist at his RRT hearing, but did not. Mr X said that he did not attend the RRT hearing because of the lack of help, which meant that he did not know its location. His non-attendance was significant in the RRT finding against his application. The RRT stated: '*The Applicant was offered the opportunity to attend a hearing and give evidence. A response was received advising that the Applicant would attend a hearing. The Applicant did not attend a hearing arranged for him and no other information was submitted ... One would usually expect a person with a genuine fear of persecution and torture, a person in great danger should he return to China, to take more interest in this application than has the Applicant. There may be, of course, valid explanations for his failure to attend hearing arranged at his request ... No such explanations are before me however, and I am reluctant to conclude that the Applicant has a genuine fear of persecution.*' The FMC found that '*The applicant has today accepted that he was invited to a [RRT] hearing, that he did not attend, and that he had been told about the hearing by his agent. His reasons for not attending were unclear...*'. The FMC held that the RRT was entitled to make a decision without offering Mr X another hearing.

### **Ombudsman assessment/recommendation**

15. Mr X has been in immigration detention for two and a half years. He was ineligible for removal between June and October 2005 because his matter was before the courts and the Minister. For the rest of the time, it seems that DIMA has been pursuing options for his removal.
16. DIMA advises that it is to provide a submission to the Minister regarding the possible use of her detention intervention powers. The Minister is currently considering an application from Mr X under s 417. It is possible that Mr X will remain in immigration detention for some time to come because of the difficulties in obtaining a travel

document for him from the PRC Consulate. Despite his cooperation, to the extent of filling out a travel document application form in October 2004, the PRC Consulate advises that it has not been able to verify that he is a PRC citizen. Notwithstanding that the Minister has not yet been provided with the DIMA submission, the Ombudsman **recommends** that the Minister make a decision on the use of her detention intervention powers, as well as the s 417 application, within the statutory period prescribed in s 486P for the tabling of this report in the Parliament (*viz*, within 15 sitting days of the Minister receiving this report).

17. Given that Mr X may continue to remain in detention for an indefinite period, the Ombudsman **recommends** that the Minister consider exercising her power to grant Mr X a Bridging Visa with work rights, while arrangements for his removal are concluded. The Ombudsman notes that Mr X has previously absconded and so DIMA will need to consider appropriate reporting and surety conditions.



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R I Brent  
A/g Commonwealth and Immigration Ombudsman

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26/6/2008  
Date