

REPORT FOR TABLING IN PARLIAMENT BY THE COMMONWEALTH AND IMMIGRATION OMBUDSMAN

Under s 486O of the Migration Act 1958

Personal identifier: 071/06

Principal facts

Personal details

1. Mr X is a 44 year old male from the Republic of South Korea (RSK). He is also known by an alternate spelling of his name. He has an older sister and brother still residing in the RSK. His wife Ms Y, and daughter Miss A are in Australia as unlawful non-citizens. Ms B, who he claims is his adopted daughter, departed Australia in May 2005.

Detention history

2. Mr X has been in immigration detention on two occasions. In September 2002, the Department (DIMA) located Mr X, identified him as an unlawful non-citizen, and detained him under section 189(1) of the *Migration Act 1958* at Villawood Immigration Detention Centre (IDC). He was removed from Australia in October 2002.
3. Mr X returned to Australia in February 2003 and held several visas. He was detained again under s 189(1) in February 2004. He was placed at Villawood IDC, where he remains.

Visa applications

4. Mr X entered Australia on a short stay tourist visa (August 1996); departed Australia (September 1996); granted a visitor visa offshore and re-entered Australia (May 1998); granted an extended visitor's visa onshore (August 1998); visitor's visa ceased (November 1998); removed from Australia (October 2002).
5. Re-entered Australia on visitor's visa (using a different spelling of his name) (February 2003); granted an extended visitor's visa (April 2003); applied for a skilled Australian sponsored overseas student visa (July 2003); granted associated Bridging Visa (BV) (July 2003); BV cancelled under s 109 and Mr X detained (February 2004).
6. Student visa application refused under s 501 (November 2004); delegate of Minister refused skilled Australian sponsored overseas student visa (December 2004); refusal affirmed by Administrative Appeals Tribunal (AAT) (March 2005); judicial review to Federal Court dismissed by consent (June 2005); request for favourable exercise of the Minister's humanitarian discretion under s 417 (November 2005); refused (May 2006).
7. BV application refused (September 2002, February 2004, May 2004, October 2004, December 2004); Migration Review Tribunal affirmed refusal for BV (March 2004).
8. Application by Ms Y for Protection Visa (PV) naming Mr X and Miss A as dependants; Mr X refused associated BV (June 2005); PV application refused (July 2005); RRT affirmed refusal (October 2005).

Current immigration status

9. Mr X is currently detained in Villawood IDC. His wife and daughter are currently unlawful non-citizens living in the community and DIMA is unaware of their whereabouts.

Removal details

10. DIMA advised that Mr X has no outstanding litigation and is available for removal. DIMA's report states that Mr X has advised that he will only consider returning to the RSK after every available alternative to stay in Australia has been explored.

Ombudsman consideration

11. The DIMA report to the Ombudsman under s 486N was dated 25 January 2006.
12. Ombudsman staff interviewed Mr X at Villawood IDC on 20 February 2006, with the assistance of a Korean interpreter.
13. Ombudsman staff have sighted a medical summary report from International Health and Medical Services (IHMS) dated 4 April 2006, and a report from Mr X's solicitor, dated 16 March 2006.

Key issues

Visa Issues

14. Mr X stated that when he initially came to Australia in 1996 he claims he *'knew nothing'* about the migration system, about the function of migration agents or that they were supposed to be licensed. He claims that in August 1998 he paid \$8,000 to a person he believed was a legitimate migration agent and believed that his visa would be extended to one year. Mr X's visa ceased in November 1998. He stayed illegally in Australia for another four years until being located by DIMA officers in September 2002. Mr X claimed that his migration agent *'cheated me, each time I see him he always demanded money. I found out after my wife came to Australia my visa was only renewed for three months, my visa died without my knowledge. The issue is that my migration agent, he did the job wrongly, he did not carry out actions according to my word'*. He told the AAT he did not leave Australia when his tourist visa expired because he was unaware it had expired. The AAT found *'that answer cannot be true bearing in mind that he had previously sought an extension of his original tourist visa'*. Mr X was removed from Australia the following month.
15. In February 2003, Mr X re-entered Australia, and in July that year applied for an Australian sponsored overseas student visa. This application was subsequently refused on character grounds. Mr X had returned under a different spelling of his name. He claims to have inadvertently used this alternative spelling. The AAT noted, *'he was back in Australia with new documents having (according to his evidence) persuaded the Department of Foreign Affairs in Korea to assist him in his deception of the Australian authorities'*.
16. Additionally, Mr X did not declare that he had previously been refused an entry permit or visa, been previously removed from Australia, been excluded from returning to Australia or that he had outstanding debts to the Australian Government. Mr X held his migration agent responsible for these omissions, however the AAT made findings that *'the skills visa application and the 601 application were completed with considerable care ... the fact that the Applicant and his Wife were prepared to make allegations of this nature against a professional man who had served them well (and including of course his success in the MRT) reflects very badly on both of them'*.

Character refusal

17. The DIMA report notes that, on 25 November 2003, Mr X was convicted of obtaining/renewing his driver's licence by false statement (\$1,000 fine) and operating an account with a cash dealer without disclosing all of his names (50 hrs community service). Mr X was interviewed by departmental officers on 5 February 2004 and on the same date his bridging visa was cancelled and he was detained. In November 2004, Mr X's application for a sponsored overseas student visa application was refused under s 501. The AAT affirmed DIMA's decision.

Health and welfare

18. At interview, Mr X advised that he has been experiencing problems with his teeth and gums, and had reported this to a nurse at Villawood IDC but claimed there had been no action. The IHMS report notes that Mr X had been referred to a dentist for the appropriate treatment. Ombudsman staff referred this matter to DIMA.

Protection Claims

19. Mr X's claims for protection were rejected by the RRT, which found that his family were not at risk of persecution in the RSK and accordingly did not satisfy the criterion for a PV.

Attitude to removal


20. Mr X stated that the situation is 'hopeless' should he return to the RSK. He has no family there, and 'if I go back I have nothing'. Mr X is not sure whether his wife and daughter would return with him as 'we have nothing, I am doubtful they would agree to go back'. He is not confident that he will find employment, as he has heard that there is high unemployment in the RSK at the present time.
21. DIMA reports that Mr X agreed to contact his wife and ask that she seek a BV on the basis that there was a Ministerial intervention request on foot. It is not known to the Ombudsman whether this happened.

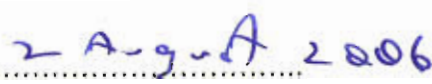
Other detention issues

22. Mr X's solicitor has submitted to the Ombudsman that Mr X's detention, although lawful, was 'completely unnecessary'. He argued that the circumstances of Mr X's detention in February 2004 were in effect an ambush, that Mr X's second entry into Australia was lawful and that he broke no law by changing his name, and that his failure to disclose his prior entry was likely to have been a clerical error by his agent. In addition, the submission notes that Mr X now has a huge debt, which will operate to permanently exclude him.

Ombudsman assessment/recommendation

23. Mr X has been in detention for three and a half years, primarily due to his ongoing litigation and his refusal to cooperate with the voluntary removal process. The DIMA decision that Mr X does not qualify for protection by Australia has been reviewed and affirmed. There is no evidence available to the Ombudsman that would lead to a different conclusion.
24. The Ombudsman understands that there is no outstanding litigation or requests before the Minister that would prevent Mr X's immediate removal from Australia and that DIMA is preparing to take removal action. The Ombudsman suggests that DIMA take steps to ensure that Mr X has every opportunity to inform his spouse of the removal action to allow her the opportunity to return to South Korea with her husband.


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Prof. John McMillan
Commonwealth and Immigration Ombudsman


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Date