

REPORT FOR TABLING IN PARLIAMENT BY THE COMMONWEALTH AND IMMIGRATION OMBUDSMAN

Under s 486O of the Migration Act 1958

Personal identifier: 083/06

Principal facts

Personal details

1. Mr X is aged 57 and states he is a North Korean national named Mr Y. He has a wife and two sons and believes they are residing in the People's Republic of China (PRC), although they may have been repatriated to North Korea. He has a younger brother who still resides in North Korea. He is not in contact with his family.

Detention history

2. In October 2003, Mr X arrived in Australia by plane, on a false South Korean passport. In February 2004, the Department (DIMA) located Mr X working illegally and identified him as an unlawful non-citizen, detaining him under s 189(1) of the *Migration Act 1958*. He was placed at Villawood Immigration Detention Centre (IDC).

Visa applications

3. Mr X entered Australia on a visitor's visa (October 2003); visa ceased (January 2004); Mr X detained (February 2004); applied for and refused Protection Visa (PV) (January 2005); Refugee Review Tribunal (RRT) affirmed the refusal (February 2005).
4. Applied to Federal Court (FC) seeking judicial review of RRT decision (March 2005); application dismissed (August 2005); appealed to Full Federal Court (FFC); application dismissed (December 2005); request for possible consideration of the Minister's detention intervention powers lodged (February 2006), submission being replaced with a DIMA group submission on North Korean nationals; s 48B request (July 2006) seeking exercise of the Minister's discretion to allow Mr X to lodge a further PV application.

Current immigration status

5. Mr X is an unlawful non-citizen, currently detained in Villawood IDC.

Removal details

6. DIMA advised that Mr X initially refused to voluntarily depart Australia and was uncooperative with efforts to establish his identity or apply for travel documents to facilitate his removal. Mr X stated that he was not intentionally uncooperative with efforts to establish his identity and claimed that *'I answered all the questions they wanted out of me, but they kept requesting me to supply them with an identity card or identity documents which I don't have ... I didn't have those documents in China ... the people who have escaped from North Korea get rid of everything that is North Korean because that can be used as evidence later on'*.
7. DIMA advised that Mr X has no outstanding litigation preventing his removal from Australia.

Identity issues

8. DIMA's report states that *'there is still doubt in respect of the true identity of Mr X, and his case is being considered'*. DIMA's first report to the Ombudsman did not identify what attempts it had made in the previous two years to establish his identity. The second 486N report indicated that Mr X's case had been referred to the National Identity Verification and Advice Section (NIVA) on 25 October 2005. It is noted that the RRT accepted that Mr X is from North Korea in February 2005.

Ombudsman consideration

9. Two DIMA reports to the Ombudsman under s 486N were dated 22 February 2006 and 17 August 2006.
10. Ombudsman staff interviewed Mr X at Villawood IDC on 27 April 2006, with the assistance of a Korean interpreter.
11. Mr X's solicitor has provided Ombudsman staff with information.

Key issues

Health and welfare

12. DIMA reports that Mr X has no significant medical issues. Mr X confirmed this at interview. He did say, however, that he has been experiencing difficulty sleeping, stating *'these days I can't get to sleep at night because of all the things to worry about. It is like that for a couple of days at a time ... [I am] nervous all the time, you really have to put yourself in my shoes, into that situation, otherwise you will not know what I think ... at the moment I feel safe here in Australia, here, but I would think in my head if I were to go I would have fear'*. Mr X has elected not to see a psychologist to discuss his anxiety.

Detention issues

13. Mr X stated that he has found his treatment by detention staff and the food provided satisfactory.

Attitude to removal

14. Mr X stated that he does not wish to be removed to North Korea. He initially fled to the PRC with many others in 1997 and is concerned that if his family had been repatriated from the PRC to North Korea they *'would be prosecuted, they would have been harmed'*, as his defection implied anti-government sentiment.
15. At the time of his RRT hearing, Mr X indicated that he did not wish to be removed to South Korea, as he feared for his personal safety. He expressed concern at interview that *'the situation there is very different ... there are two destinies for me. If North Korea and South Korea becomes one again I am worried about who will take over the Government ... If North Korea holds the government then [I] will be prosecuted for sure'*. Mr X also expressed concern about the existence of North Korean spies in South Korea, who he believes provide information to the North Korean government about its citizens who have sought protection in South Korea. He believes this may lead to his family being harmed, in the event that they have been repatriated to North Korea from the PRC.
16. The RRT accepted that as a defector from North Korea, Mr X faced the risk of imprisonment, torture and execution if returned there. It found that Mr X has a well founded fear of persecution within the meaning of the Convention and should not be returned there. The RRT did not, however, accept that Mr X would face persecution in South Korea, or that he had undertaken all possible steps to avail himself of the right to enter South Korea. Mr X stated at interview with Ombudsman staff that he has now reconsidered his options and is willing to be removed to South Korea, saying *'I do want to stay in Australia, I really do, but my options have run out so I have no choice'*.
17. On 5 June 2006 and 6 July 2006, Mr X met with a representative of the South Korean Consulate. As at the time of the second DIMA s 486N report to the Ombudsman, the outcome of the meetings was unknown.

Community support

18. Mr X stated that he received regular visitors from the One Family Presbyterian Church and that the Korean church community would provide him with support if he were to be released into the community.

Ombudsman assessment/recommendation

19. Mr X has been in detention for two and a half years, primarily due to ongoing litigation and delays in determining his nationality and identity. DIMA has not advised what investigations were undertaken to determine Mr X's identity before his case was referred to NIVA in late 2005. The Ombudsman notes that delays in establishing identity have been a feature of a number of cases that have been reported on; the establishment of NIVA is to be welcomed, enabling a more thorough and rigorous approach to identity testing. The RRT accepted that Mr X was from North Korea in February 2005 and it is regrettable that he has spent such a significant period in detention while identity issues continue to be unresolved.
20. In light of the RRT finding in February 2005 that Mr X should not be returned to North Korea, the only other option that appears to be under consideration is for Mr X to be removed, perhaps voluntarily, to South Korea. However, that option is still uncertain. A s 48B request (allowing a further PV application) is yet to be considered; a further submission to the Minister is being prepared by DIMA on North Korean nationals; and the response of South Korea is still unknown. The Ombudsman notes the potential for Mr X to remain in detention for a further indefinite period, particularly if he is given the opportunity to apply for a further PV. The Ombudsman **recommends** that consideration of the submissions be progressed without delay and, in any case, not later than the statutory period prescribed in s 486P for the tabling of this report in Parliament (*viz*, within 15 sitting days of the Minister receiving this report).
21. The Ombudsman also wishes to make some observations on the substantive issue of whether Mr X should be released from detention at Villawood IDC. As noted above, he has now been in detention at Villawood IDC for two and a half years. His immigration status is unresolved; a significant factor contributing to that difficulty is that he is believed to be a citizen of North Korea. There is uncertainty around whether, or when, he may be removed to South Korea following his discussions with the South Korean Consulate. Based on those considerations, the Ombudsman **recommends** that the Minister consider granting Mr X a RPBV, or other appropriate visa with work rights to enable his timely release from detention whilst his immigration status is determined. If the matters concerning Mr X's nationality and identity cannot be resolved within a reasonable time, consideration should also be given to whether he should be granted a permanent visa to remain in Australia.



Prof. John McMillan
Commonwealth and Immigration Ombudsman



Date