

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

*Under s 486O of the Migration Act 1958*

*Personal identifier: 092/06*

## **Principal facts**

### *Personal details*

1. Mr X is a male aged 53 years from the Peoples' Republic of China (PRC) and is of Korean ethnicity. He has no contact with his wife and two children, who are residing in the PRC.

### *Detention history*

2. The Department (DIMA) detained Mr X in September 2003 under s 189(1) of the *Migration Act 1958*. They placed him into Villawood Immigration Detention Centre (IDC).

### *Visa applications*

3. Mr X came to Australia on a visitors visa (April 1994); visa expired (May 1994); applied for a Protection Visa (PV) (May 1994); granted a Bridging Visa (BV) (May 1994); applied for a Class 828 Processing (temporary) Entry permit (July 1994) – discovered by DIMA as part of a data-purification exercise and refused (October 2005); DIMA refused his application for a PV (February 1995); appeal to the Refugee Review Tribunal (RRT) unsuccessful (September 1996); BV ceased (October 1996); application for judicial review in the Federal Magistrates Court (FMC) (August 2005) dismissed (November 2005); appeal to the Full Federal Court (FFC) (December 2005); successful (April 2006) and matter remitted to the FMC; pending.
4. Mr X made an application to the Minister under s 417 (October 1996); unsuccessful (June 1997); application to the Minister under s 48B (June 2005); unsuccessful (September 2005); DIMA initiated a s 48B assessment (May 2006); it did not meet the guidelines for referral to the Minister (July 2006).
5. The Minister declined to intervene in Mr X's case using her detention intervention powers (October 2005).

### *Current immigration status*

6. Mr X is an unlawful non-citizen, currently in immigration detention.

### *Removal details*

7. DIMA advises that it asked the PRC Consulate for a travel document for Mr X in June 2004 but has deferred making further applications until Mr X's litigation concludes. DIMA advises his case has been referred to the National Identity Verification and Advice Section.

## **Ombudsman consideration**

8. DIMA reports to the Ombudsman under s 486N are dated 14 September 2005, 5 April 2006, and 29 September 2006.
9. Ombudsman staff interviewed Mr X at Villawood IDC on 20 February 2006, with an interpreter.

10. The Ombudsman sighted a medical summary report from the International Health and Medical Service (IHMS) dated 14 March 2006.

## **Key issues**

### *Health and welfare*

11. In his interview with Ombudsman staff, Mr X said he feels a lot of worries and mental pressure because of his fears of returning to China. He said he is under '*constant pressure – sometimes my head feels like splitting – I walk around to ease the pressure.*' He said that he had not been to see a psychologist in detention.
12. The DIMA report states that Mr X was medicated for hypertension in October 2003, and was taken to Fairfield Hospital briefly for further medical assessment. He suffered elevated blood pressure in April 2006 and continues to be medicated.
13. In his interview with Ombudsman staff, Mr X reported having suffered back pain from heavy lifting during his work in the kitchen at the IDC. He said it took a couple of days to see a doctor, so he had taken Panadol for the pain. He said the back-pain was now much improved. The IHMS report confirmed he had suffered back-pain and stated that he was offered physiotherapy in addition to medication. Mr X has also suffered shortness of breath from inhaling oven cleaner in the kitchen (April 2006) and splashed bleach in his eyes while working in the mess (April 2006).
14. The IHMS report describes Mr X as having other medical issues, including tendonitis, osteoarthritis, and a pterygium in his right eye.

### *Attitude to removal*

15. The DIMA report states that '*Mr X has been uncooperative with removal attempts and is unwilling to return to China for fear of persecution.*' In his interview with Ombudsman staff, Mr X said that he feared being returned to the PRC because he thought he would be persecuted, probably jailed or killed, for his involvement in the Tiananmen Square incident. He also said that he thought he would be subject to harassment because of his Korean ethnicity. These claims were both considered by the RRT and rejected. Mr X said that he would be willing to go to a third country.
16. PRC officials interviewed Mr X in May 2005. DIMA investigated the circumstances of this interview following several complaints to the Ombudsman's Office and to the Human Rights and Equal Opportunity Commission. Mr X said he was worried that they would pass information about his case to the Public Security Bureau, and this might have repercussions for his family.

### *Other issues*

17. Mr X was critical of his migration agent. He said that he misrepresented his case and failed to explain matters to him. He said that he did not attend the RRT hearing because the notification of the hearing was sent to his migration agent, who did not pass the information onto him.
18. The FMC considered whether Mr X had been given an adequate opportunity to attend the hearing at the RRT. It said that the notice sent to Mr X (or his migration agent) had not been sufficient under the law at the time. If Mr X had appealed to the FMC in a timely way, he may have been entitled to have his matter remitted to the RRT. However, it held that his eight-year delay in commencing proceedings precluded him from receiving any relief. Since then, however, the FFC has upheld Mr X's appeal and returned the matter to the FMC.

### Ombudsman assessment/recommendation

19. Mr X has spent over three years in immigration detention, since September 2003. For much of this time, until June 2005, there were no matters before the courts or the Minister that would have prevented Mr X's involuntary removal. The length of his detention seems predominately related to the difficulty experienced by DIMA in removing him. DIMA reports that Mr X has contributed to this difficulty by failing to cooperate with removal attempts. However, delay or inability by DIMA to more quickly resolve Mr X's case also seems to be a contributor in this case.
20. The Minister considered whether to exercise her detention intervention powers in Mr X's case in October 2005 and declined to do so. Since then a year has passed, in which Mr X has remained in detention. It is possible that he will remain in detention for an indefinite period. He has ongoing litigation in the FMC, as a result of a successful appeal to the FFC. A possible outcome of that litigation is that Mr X will be permitted to make a fresh PV application. If, on the other hand, Mr X is unsuccessful in obtaining a visa, it is uncertain as to how long it may take DIMA to obtain a travel document for Mr X's removal from Australia. It is undesirable that Mr X remain in detention indefinitely while these matters are resolved. Furthermore, he has some health problems and he says he is under mental pressure as a result of his continuing detention and unresolved status. On the basis of those considerations, and the year that has elapsed since the Minister last considered this matter in October 2005, it is **recommended** that the Minister reconsider whether to exercise her detention intervention powers with a view to considering Mr X's release from detention while these other matters concerning his immigration status are resolved. It is acknowledged that Mr X has previously absconded while in the community, and that an issue for the Minister's consideration would be whether appropriate reporting and surety considerations could be put in place.



Prof. John McMillan  
Commonwealth and Immigration Ombudsman

18 October 2006  
Date