

REPORT FOR TABLING IN PARLIAMENT BY THE COMMONWEALTH AND IMMIGRATION OMBUDSMAN

Under s 486O of the Migration Act 1958

Personal identifier: 094/06

Principal facts

Personal details

1. The Department (DIMA) describes Mr X as a 47 year old male from North Korea. DIMA advises that he has the aliases of Mr A, Mr B and Mr C. Mr X told Ombudsman staff that his true name is Mr A, that he is a North Korean national, that he was born on 24 August 1963, and that he is 43 years old. His parents are deceased and he is an only child. He has no knowledge of other relatives in North Korea.

Detention history

2. In October 1997, Mr X arrived in Australia by plane, on a South Korean passport. In March 2004, he was referred to DIMA by police officers. DIMA identified him as an unlawful non-citizen, detaining him under section 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 Tourist Visa (TV), the TV ceased and he applied for and was granted a Long Stay TV in the same month (October 1997); granted associated Bridging Visa (BV), ceased (October 1997); Long Stay TV ceased (April 1998); Mr X detained (March 2004); applied for Protection Visa (PV) in the name of Mr A and BV; BV refused (March 2006); PV refused (May 2006); RRT commenced review of PV decision (May 2006); RRT remitted application back to DIMA, BV application lodged and withdrawn (September 2006); review of PV application ongoing.

Current immigration status

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

Removal details

5. DIMA states that Mr X refused to complete an application for a travel document for the Peoples Republic of China (PRC) (July 2004, February 2006). At interview with Ombudsman staff, Mr X stated that he had elected not to meet with PRC officials as he is not Chinese. DIMA advised that Mr X is unavailable for removal while his PV application is being reconsidered and his identity and nationality remain unknown.

Ombudsman consideration

6. The DIMA reports to the Ombudsman under s 486N, were dated 5 April 2006 and 21 September 2006.
7. Ombudsman staff interviewed Mr X at Villawood IDC on 27 April 2006, with the assistance of a Korean interpreter.

Key issues

Identity Issues

8. DIMA advised that Mr X's identity and nationality have not yet been positively established. In the initial s 486N report it is noted that DIMA had arranged for officials from the South Korean Consulate to interview Mr X in April 2004. The officials stated that they believed he is a national of the PRC and consequently confiscated his South Korean

passport in the belief that it was fraudulent. In the second s 486N report DIMA advised that in August 2006 the South Korean Consulate informed it of the following details: it has no record of this interview or receiving Mr X's passport; Mr X had advised the Consulate that he did not wish to communicate further with it; and that the actual Mr X currently resides in Korea. DIMA advised that it is investigating this matter, however reiterated that an interview did occur and that a South Korean passport was retained by Consulate officials.

9. In September 2004, DIMA arranged for Mr X to undertake a language analysis test. The tapes of the test were subsequently misplaced in transit between Australia and Sweden. In November 2005, the investigation of Mr X's case was referred to DIMA's National Identity Verification and Advice (NIVA) Section, and in February 2006 his case was escalated to an active referral. Another language test was carried out in March 2006. DIMA has requested that the South Korean Consulate provide a copy of Mr X's original passport and it also is sending his fingerprints and other biodata to both the PRC and South Korea for verification.
10. Mr X has continued to maintain that he is from North Korea. DIMA advised that the preliminary results of the language analysis test in March 2006 indicated that Mr X spoke Mandarin at a level that was consistent with that of a native speaker with an advanced education. DIMA further advised that *'Interviews with Mr X have been conducted through a Mandarin interpreter as Korean interpreters have difficulty understanding him'*. At interview with Ombudsman staff, Mr X acknowledged that he could speak Mandarin as he lived in the PRC for 13 years, saying *'I came to China when I was quite young, so I live in China all the time, so my voice changed and I learnt Chinese'*. The Korean interpreter, used for the interview with Ombudsman staff, considered that Mr X spoke fluent Korean.
11. The DIMA report advised that Mr X had claimed to have also lived in South Korea. Mr X advised Ombudsman staff that he had never lived in South Korea. The Korean interpreter noted that Mr X had used an old word for 'Korea', which another interpreter may have understood as 'South Korea', although the word refers to Korea before it was divided. This may have led to some of the confusion regarding DIMA's belief that Mr X had claimed to live in South Korea.

Health and welfare

12. DIMA advised that Mr X stated that he suffers from headaches, although he had not sought any treatment for this. At interview, he stated that this was the result of a head injury he sustained on a construction site while living in the community. He believes that this injury has resulted in him experiencing memory loss and dizziness. He stated that he didn't go to hospital at the time, as he was unlawful and worried that he would be arrested.
13. At interview Mr X showed evidence of anxiety and buried his face in his hands when questioned about the state of his mental health. He said that *'sometimes I don't feel like living'*. When questioned further he became distressed and said he elected not to discuss these feelings with a psychologist.

Attitude to removal

14. Mr X does not wish to be removed from Australia. He consistently contends that he is from North Korea. He claims he escaped with his father when he was 17 years old and consequently has no identification documents. He said he resided in the PRC for approximately 13 years and that during this time he learnt the local dialect. He left the PRC after becoming concerned that he may be arrested for being an unlawful citizen, due to the increased inspections being carried out by PRC officials in response to the escalating numbers of unlawful North Korean immigrants.


15. Mr X stated he was unaware that he was able to apply for a PV when initially residing in the Australian community and said that while in detention DIMA did not advise him about any entitlement to legal representation. He says he did not find out about his rights to apply from other detainees because he has poor English language skills and he says '*my memory became poor*' as a result of his head injury. He claims that, as a result, he delayed applying for a PV.
16. At interview Mr X declined to discuss his opinion on the option of being removed to South Korea, stating that he would prefer to live in Australia.
17. Mr X said that if he were to be released into the community on a temporary visa he would not be at risk of absconding, stating '*I don't wish to disappear because I want residence so I will keep in touch with Immigration*'.

Ombudsman assessment/recommendation

18. Mr X has been in detention for over two and a half years. His removal is unlikely to be effected in the near future as his identity is yet to be confirmed.
19. Much of Mr X's time in detention has been due to delays in determining his nationality and identity. While the Ombudsman recognises that DIMA began preliminary investigations into Mr X's identity in a timely manner, there were considerable delays in arranging subsequent tests and identification processes. As a result, Mr X has spent a significant time in detention while little progress appears to have been made towards identifying his nationality.
20. The Ombudsman expresses some concern about an apparent historical over-reliance on language analysis tests for people such as Mr X, who claim to have lived in border regions and to have been exposed to a range of dialects and languages. There is a risk that the conclusions reached about a person's nationality on this basis alone might be simplistic, imprecise and may potentially obstruct the person's legitimate claims to protection as a refugee. The Ombudsman notes that this has been a feature of a number of cases that have been reviewed; the establishment of NIVA to take a more thorough and rigorous approach to identity testing is to be welcomed. Inquiries should continue to be made by DIMA into Mr X's nationality, and further analysis should be undertaken into his Korean language.
21. If DIMA concludes that Mr X is a citizen of North Korea, an option that may merit consideration is whether he is entitled to reside in South Korea by virtue of the South Korean Constitution. As the Federal Magistrates Court noted in *SZGKB*, '*As a North Korean citizen would automatically and immediately be granted South Korean citizenship, that citizen has a right to enter and reside in South Korea for the purposes of s 36(3). An applicant has to arrive in South Korea and take up his or her entitlement to South Korean citizenship by establishing that he or she is a citizen of North Korea*'.¹ However, the difficulty with this option is that there is a current discrepancy between South Korean Consulate records and DIMA records in relation to whether Consulate officials interviewed Mr X and therefore, until DIMA completes its investigation into this matter, the view of the South Korean Consulate concerning Mr X's identity is unknown.
22. It is likely that it will take DIMA some time to determine Mr X's nationality, and in particular whether he is a national of the PRC, North Korea or South Korea. It is possible that his nationality will never be confirmed. This brings into question whether DIMA will be able to arrange his removal from Australia. If not, the Minister may wish to consider exercising her discretion to grant him a permanent visa to remain in Australia.

¹ Para. 23 Federal Magistrates Court *SZGKB V Minister for Immigration and Anor* [2005] FMCA 1544 (24 October 2005) at [23].

23. The issue of current concern in Mr X's case is whether he should remain in detention while his immigration status is resolved. While he does not appear to currently have any major health issues, the risk to Mr X's mental health must increase with continued detention. Mr X displayed considerable anxiety and distress during his interview with Ombudsman staff. There is no evidence to suggest that Mr X is considered a threat to the Australian community if he were to be released from immigration detention. The Ombudsman **recommends** that the Minister consider granting Mr X a Removal Pending Bridging Visa, or another visa with work rights (subject to conditions that DIMA deems necessary to reduce the risk of absconding), to enable his timely release from detention while identity issues and his immigration status are resolved.


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Prof. John McMillan
Commonwealth and Immigration Ombudsman


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Date