

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

*Under s 486O of the Migration Act 1958*

*Personal identifier: 096/06*

## **Principal facts**

### *Personal details*

1. Mr X is a 37 year-old male from the People's Republic of China (PRC). He states that he has a father, two siblings, a wife and two young children living in the PRC.

### *Detention history*

2. In July 2003, Department (DIMA) compliance officers located Mr X at a residential address in NSW. As a visa over stayer he was detained under s 189(1) of the *Migration Act 1958* and transferred to Villawood Immigration Detention Facility (IDF).
3. Mr X was granted a Bridging Visa (BV) in August 2003 and released from detention. Bond conditions attached to the BV included the payment of \$10,000 surety and his departure from Australia. Mr X failed to depart by the agreed date and, in February 2004, DIMA compliance officers located Mr X working as a painter in NSW. He was again detained under s 189(1) and transferred to Villawood IDF.

### *Visa applications*

4. Mr X arrived in Australia (March 2003) on a Visitor Visa (VV), which expired June 2003; he was granted a BV (August 2003) but absconded. After being taken into immigration detention again Mr X applied for a Protection Visa (PV) (August 2004); PV refused (August 2004); Refugee Review Tribunal (RRT) affirmed refusal (December 2004); BV application made and refused (December 2004); judicial review of RRT decision sought in Federal Magistrates Court (FMC) (January 2005); another BV application made (January 2005); BV refused (February 2005); Migration Review Tribunal (MRT) affirmed refusal (March 2005); BV application made and deemed invalid (March 2005).
5. Mr X's FMC application was allowed, matter remitted back to the RRT for reconsideration (22 August 2005); BV application made and refused (August 2005); Minister filed an appeal with the Full Federal Court (FFC) against the FMC decision (12 September 2005); BV application made (September 2005); BV refused (October 2005); MRT affirmed BV refusal (17 October 2005); s 48B request lodged (10 April 2006); FFC by consent dismissed the Minister's appeal (12 May 2006); PV application remitted to RRT (12 May 2006); s 48B request information forwarded to RRT for inclusion in its deliberations, therefore request finalised (31 July 2006); RRT affirmed DIMA delegate's decision not to grant a PV (4 August 2006).
6. DIMA advised in August 2006 that it is currently preparing a submission for the possible consideration by the Minister of her detention intervention powers.

### *Current immigration status*

7. Mr X is currently in detention at Villawood IDF.

### *Removal details*

8. DIMA reports that Mr X has been unco-operative with efforts to establish his identity and to obtain travel documents. Removal is currently deferred pending the possible consideration by the Minister of her detention intervention powers and the resolution of Mr X's real identity.

### *Ombudsman consideration*

9. Two reports from DIMA under s 486N to the Ombudsman dated 12 February 2006 and 11 August 2006.
10. Ombudsman staff interviewed Mr X with the assistance of a Mandarin speaking interpreter at Villawood IDF on 27 April 2006.

## **Key issues**

### *Identity*

11. Mr X claims that a business friend arranged a false Hong Kong passport for him to enter Australia. The DIMA reports note that Mr X has offered three aliases.
12. The decision record from the RRT hearing in December 2004 notes that in his PV application, Mr X stated that his real name was Mr Y and his date of birth is 25 September 1969. This is also the name he provided to Ombudsman staff at interview. Mr X said that he had submitted an application for a copy of his genuine PRC identity card, that it had been posted back to him, and that he had provided the documents to the RRT.
13. DIMA advises that it has referred this case to its National Identity Verification and Advice Section (NIVA). NIVA has established that Mr X is the same person who arrived in Australia in 2003 on a photo-substituted Hong Kong passport in the name of Mr Z, date of birth 16 April 1969. NIVA has confirmed, however, that identity issues still remain unresolved.

### *Health and welfare*

14. The DIMA report says that it is not aware of Mr X having any significant health issues and that he has participated in some educational and recreational activities.
15. At interview with Ombudsman staff Mr X said that he was managing his time in detention, and that his Falun Gong practice provides him with emotional and mental support and strength.

### *Attitude to removal*

16. Mr X said at interview with Ombudsman staff that if the PRC did not persecute Falun Gong followers that *'he would be happy to return' and 'I can survive in China, I do not have to stay here'*. He said that he gave false names because *'I was worried I would be deported by them to China, so I filled out a fraudulent name and address'*. He said that if he can stay here, he could get work, or live off his savings, and bring his wife and children to Australia. However, a statutory declaration Mr X provided to the RRT in August 2004 asserted that he was *'permanently separated from his wife and children'*. At interview with Ombudsman staff, Mr X said that he regularly phoned his wife.

### *Other detention issues*

17. At interview with Ombudsman staff Mr X was measured in his comments about DIMA and GSL staff, saying that some were good, some were not, but mostly they were fine. He said that he just does what he is told. He thought the food menu contained too much 'Korean curry'.

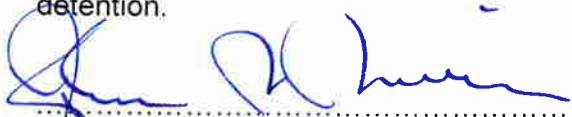
18. Mr X also commented on a visit from four 'unidentified' PRC officials in May 2005. He was suspicious of what DIMA might have told the PRC officials about his PV application. Although worried and concerned, he said there was no proof that DIMA had improperly provided information about him to the PRC officials. The Ombudsman notes that Mr X was not on the list of detainees who were interviewed by the PRC officials in May 2005.


*Other issues*

19. At the RRT hearing in December 2004, the Tribunal said *'In dealing with this application the Tribunal has formed the view that the applicant lacks credibility and his claims can not be accepted. The applicant's evidence is inconsistent and contradictory'*.
20. At the MRT hearing in March 2005, the Tribunal said *'However, the Tribunal does not accept that a security of \$10,000 will ensure that the visa applicant will abide by the condition attached to the visa. The visa applicant has already forfeited a security of \$10,000. There is no evidence before the tribunal that persuades it that the visa applicant would not forfeit a further sum of \$10,000, if he thought it would suit his purposes to do so. Further, the Tribunal has found on three occasions that the visa applicant's evidence is not reliable'*.

**Ombudsman assessment/recommendation**

21. Mr X's claims for protection have been tested in the RRT on two occasions, and he has not been successful. The Ombudsman has no comment to make on these matters.
22. Mr X has been in detention for two and a half years and the current issue of concern is whether he should remain in detention while his immigration status is resolved. The Ombudsman **recommends** that the Minister make a decision on the submission for the possible use of her detention intervention powers as soon as possible, 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 receiving the report).
23. The Ombudsman does not make any other recommendation at this stage about Mr X's detention. That Mr X arrived in Australia on a false passport, has previously reneged on the terms of his BV, forfeited a substantial bond and then absconded, in concert with his reluctance or inability to identify himself, does not assist his cause. Mr X's continuing detention is nevertheless a matter of concern. While there is no current medical evidence available to the Ombudsman that indicates that detention is having an adverse impact on his mental health, the risks of this occurring must increase with continued detention.
24. Mr X does not have any current litigation that would inhibit his removal. Subject to the outcome of the possible use of the Minister's detention intervention powers, the Ombudsman **recommends** that DIMA expedite the process of establishing Mr X's real identity and obtaining travel documentation for his removal. The Ombudsman will be required to prepare another report on Mr X's circumstances in six months time. If there are no significant changes in circumstances, the Ombudsman may need to reassess his recommendations as to his continued detention.

  
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Prof. John McMillan  
Commonwealth and Immigration Ombudsman

  
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Date