

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

*Under s 486O of the Migration Act 1958*

*Personal identifier: 438/08*

## **Principal facts**

### *Personal details*

1. Mr X and Ms Y claim that they are nationals of the Democratic People's Republic of Korea (North Korea), that they left North Korea in 1997 and that their respective spouses are deceased. Mr X and Ms Y advised that they met in China at the end of 2004 and started a *de facto* relationship in 2005.

### *Detention history*

2. Mr X and Ms Y arrived in Australia on 27 February 2006 as unauthorised air arrivals, travelling on photo-substituted South Korean passports and were detained under s 189(1) of the *Migration Act 1958* and placed at Villawood Immigration Detention Centre (IDC). They were then transferred to Baxter IDC (February 2006); to Port Augusta Immigration Residential Housing (IRH) (March 2006); to Perth IDC (June 2007); to Perth IRH (July 2007) and placed in Community Detention (Residence Determination) in June 2008.

### *Visa applications*

3. Mr X and Ms Y both arrived in Australia holding Visitor Visas (VV) in the names of Mr A and Ms B that were granted on 3 January 2006; VVs cancelled under s 116(1)(d) on their arrival (February 2006).
4. Mr X and Ms Y both applied for a Protection Visa (PV) (March 2006), refused (March 2006); sought merits review of the PV refusals with the Refugee Review Tribunal (RRT) (March 2006), decisions affirmed (June 2006); cases assessed by DIAC as not meeting the s 417 guidelines and were not referred to the Minister (November 2006); cases assessed by DIAC as not meeting the s 197AB guidelines (August 2007 and November 2007); combined s 417/195A submission referred to the Minister (January 2007), Minister declined to intervene (May 2007); s 417 request lodged (June 2007), request ongoing.

### *Current immigration status*

5. Mr X and Ms Y are unlawful non-citizens, currently living in Community Detention.

### *Removal details*

6. The identities of Mr X and Ms Y are yet to be confirmed. DIAC has stated that it does not conduct enforced removals to North Korea. The South Korean Government rarely accepts North Korean nationals who have not been positively identified as North Koreans, and who are not willing to go to South Korea. Without travel documents, DIAC states that it is unable to progress the removal of Mr X or Ms Y in the near future.

## **Ombudsman consideration**

7. The DIAC reports on Mr X and Ms Y to the Ombudsman under s 486N are both dated 21 February 2008.
8. Ombudsman staff interviewed Mr X and Ms Y on 14 April 2008 at Perth IRH.

9. Ombudsman staff sighted the following documents: a statement prepared by Mr X and Ms Y dated 12 September 2006; an undated report from Dr C, Consultant Psychiatrist; reports from International Health and Medical Services (IHMS) dated 20 and 21 February 2008; and Psychological Summary Reports from Professional Support Services (PSS) dated 24 and 25 February 2008.

## **Key issues**

### *Identity issues*

10. DIAC advises that although the identity of Mr X and Ms Y is unresolved, it accepts they are most likely North Korean nationals. DIAC's opinion is that their true identity may never be confirmed, but investigations are continuing.

### *Health and welfare*

11. The IHMS report of 20 February 2008 advises that Mr X *'has a history of depressed mood and suffers from Post Traumatic Stress Disorder'*. Dr C's report stated that Mr X *'is using his personality strength to contain his symptoms and distress'*.
12. The IHMS report of 21 February 2008 outlined that Ms Y has *'a history of depression, Post Traumatic Stress Disorder and self harm'*. PSS reported that Ms Y continues to present with *'symptoms of depression'*, which include *'difficulties maintaining and initiating sleep, intrusive memories, difficulty maintaining interest in activities and difficulty controlling her emotions with increasing levels of frustration with the length of detention'*. Dr C noted that Ms Y *'has features of Post Traumatic Stress Disorder similar to those exhibited by Mr X ... She also suffers from pervasive depressed mood, inability to have positive thoughts, and a general sense of despair. There is mild psycho-motor retardation'*.
13. Dr C stated that when consulting with Mr X and Ms Y, he *'avoided pushing for details of the trauma they suffered in the past; their distress indicated that there is a Pandora's Box, which once opened, will need a lot of therapeutic efforts to stabilise'*.
14. PSS advised that Mr X and Ms Y have attended marriage counselling both individually and as a couple. PSS also reported that the relationship *'has settled but still remains at risk'*, citing the length of detention, loneliness and reduced opportunity to socialise with similarly aged people as causes of the deterioration in their relationship.
15. Mr X and Ms Y both have a history of self-harm. Dr C advised that *'given [Mr X's] perception about the consequences of repatriation to North Korea, if the official decision is made in the near future to decline his visa application, he will need to be on constant suicidal watch after the decision is given to him. He will make a serious, possibly successful attempt'*. Dr C noted that with both Mr X and Ms Y there is a *'significant risk for completed suicide'* and that they have experienced a *'genuine wish to die'*.

### *Attitude to removal*

16. Mr X advised that he fled North Korea as his family was treated with suspicion due to his grandfather's service in the Police Force during the Japanese occupation. He stated that his family was placed under surveillance and he fears that he would be blamed for spreading anti-government sentiments and may be killed.
17. Ms Y claimed that she escaped from North Korea *'during the time of the long famine and everyone in North Korea was starving'*.
18. RRT commented that *'North Korea's human rights record is appalling'*. It further stated that the RRT *'is satisfied that the applicants have a well-founded fear of persecution in North Korea due to their imputed political opinion'*.

19. The RRT decided that *'the applicants have a right to enter and reside in South Korea. They are citizens under that Constitution, and the law provides for their protection and settlement in South Korea. They do not have to acquire the right: they simply have, as a practical measure, to satisfy the South Korean government as to their identity ... the question then is whether the applicants have a well-founded fear of being persecuted for a convention reason in South Korea, or of being returned to North Korea'*.
20. Mr X and Ms Y expressed their concerns about being removed to South Korea in their statement of 12 September 2006. They advised that they *'have both lived under the strict rule in North Korea and have experienced the constant surveillance of our lives. We don't want to go to South Korea and we feel like we are living under constant surveillance again and having to worry about the North Korean spies. We don't want to live like that forever and we chose to come to Australia so that we can live freely'*.
21. The RRT affirmed the decision not to grant protection visas as it was *'not satisfied that the applicants have a well-founded fear of persecution in South Korea'*. It concluded its decision by noting that *'even though Australia does not have protection obligations to the applicants, it is bound not to refole them to North Korea or to a place in which they risk being refoled to North Korea (i.e. China)'*.

### **Ombudsman assessment/recommendation**

22. Mr X and Ms Y have been in immigration detention for over two years. DIAC's decision that they do not qualify for protection by Australia has been reviewed and affirmed. The Ombudsman has no further comment on this matter.
23. The Ombudsman notes the cases of Mr X and Ms Y are two of those about which the Minister announced he would consult with the Ombudsman before making decisions. The Ombudsman notes the potential for Mr X and Ms Y to remain in detention for a further indefinite period. It is likely that it will take DIAC some time to determine the identity of Mr X and Ms Y, if at all, and it is possible that their nationality will never be confirmed. This brings into question whether DIAC will ever be able to arrange their removal from Australia. The Ombudsman understands that the Minister is considering a permanent solution for Mr X and Ms Y and meanwhile they have been placed in a Community Detention arrangement until their immigration status is resolved.



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Dr Vivienne Thom  
Acting Commonwealth and Immigration Ombudsman



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Date