

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

*Under s 486O of the Migration Act 1958*

*Personal identifier: 525/09*

## **Principal facts**

### *Personal details*

1. Mr X is aged 52 and is a citizen of the People's Republic of China (PRC). Mr X's ex-wife, two adult children, mother and siblings live in the PRC. In November 2007 Mr X married Ms Y, a former detainee of Villawood Immigration Detention Centre (IDC) and now the holder of a Protection Visa (PV).

### *Detention history*

2. In October 1992 Mr X was convicted in the New South Wales (NSW) Supreme Court on two counts of murder. Upon his release from gaol on 9 October 2006, Mr X was detained under s 189(1) of the *Migration Act 1958* and transferred to Villawood IDC.

### *Visa applications*

3. In December 1989 Mr X entered Australia as the holder of a Student Visa valid until 30 June 1990; applied for refugee status (June 1990), refused (December 1991). Mr X was granted a Bridging Visa (BV) on the grounds of his criminal detention (June 1996), BV cancelled under s 116 when he was released from criminal detention (October 2006).
4. In November 2006 Mr X applied for a PV, associated BV refused under s 501; PV application refused (December 2006); sought review by the Refugee Review Tribunal (RRT); RRT affirmed decision (April 2007); sought review by the Federal Magistrates Court (FMC) (May 2007), dismissed (July 2007); s 417 request lodged (September 2007), assessed as not meeting the guidelines, referred to the Minister on a schedule (October 2007); the Minister declined to intervene (November 2007).
5. The Department (DIAC) initiated a request under s 197AB; assessed as not meeting the guidelines for referral (February 2008); s 417 request lodged (March 2008); combined s 417/195A and 197AB submission lodged (October 2008); on 25 November 2008 the Minister agreed to consider placing Mr X in Community Detention subject to the completion of consent forms concerning Mr X's health and personal information, including his criminal history and convictions.

### *Current immigration status*

6. Mr X is an unlawful non-citizen detained at Villawood IDC.

### *Removal details*

7. DIAC advises that a tentative removal date for Mr X has been set subject to the outcome of the s 417 submission. It further advises that removal plans will have regard to Australia's obligations under the International Covenant on Civil and Political Rights and Convention Against Torture.

## **Ombudsman consideration**

8. DIAC's report to the Ombudsman under s 486N is dated 22 October 2008.
9. Ombudsman staff interviewed Mr X on 19 November 2008 at Villawood IDC. Ombudsman staff also spoke with Mr X by telephone on 15 and 18 December 2008 and with Ms Y on 1 and 15 December 2008.

10. Ombudsman staff sighted the following documents concerning Mr X: a Ministerial Intervention submission dated 17 March 2008; a psychological summary report from Professional Support Services dated 1 September 2008; a medical summary report from International Health and Medical Services (IHMS) dated 16 September 2008; a psychological report from Mr Z, psychologist, dated 27 October 2008; a Security Risk Assessment dated 21 January 2009 and several character references and letters of support for Mr X from members of the community (various dates). The following documents were sighted concerning Mr X's wife: medical reports from psychologist Ms A dated 7 and 11 July 2007 and 3 May 2008; a report from Ms B, Chatswood Low Vision Clinic dated 17 February 2009;

## **Key issues**

### *Health and welfare*

11. DIAC reports that on 5 April 2008 Mr X was assessed at Liverpool Hospital *'after he attempted self harm by hitting his head on the steel door frame of the interview room'*.
12. On 11 April 2008 Mr X lodged a complaint to the Ombudsman that on 5 April 2008 he was taken to an interview room by GSL (Australia) Pty Ltd (GSL) staff and informed that he was to be placed in a segregated dormitory. He claims he was assaulted by a GSL officer after he *'had done nothing wrong'* and sustained a head injury.
13. On 16 June 2008 DIAC advised the Ombudsman's office that Mr X was taken to an interview room on 5 April 2008 to discuss alleged threats he had made to other detainees. DIAC further advised that on being told he was to be placed in an observation room for the night, Mr X banged his head against a metal door frame. There was no closed-circuit television or security camera footage of the alleged assault incident and in the absence of clear evidence, the Ombudsman's office was unable to reach a conclusion and the matter was not investigated further.
14. IHMS reports that in August 2008, a Mental State Examination was conducted on Mr X and *'it was noted that he was anxious and his mood low but he expressed no thoughts of self harm or harm to others'*.
15. At interview with Ombudsman staff, Mr X said he has difficulty sleeping and spends his time in detention reading, cooking, exercising and attending Christian Church services.
16. Mr X said that his wife Ms Y tries to visit him every day and he is very concerned about her mental health and failing eyesight. In October 2008 Mr Z noted in his report that Mr X reported *'feeling increased levels of stress and anxiety as a result of detention and concerns about his wife's health'*. Ms Y's health is examined in further detail at paragraph 20.

### *Criminal history*

17. In October 1992 Mr X was convicted in the NSW Supreme Court of murdering two Chinese nationals and was sentenced to 20 years imprisonment with a non-parole period of 15 years. DIAC advises that PRC law permits PRC citizens to be retried in the PRC, even when they have been convicted and sentenced in another country. The crime of murder carries a possible death sentence in the PRC.

### *Attitude to removal*

18. Mr X claimed that should he be returned to the PRC he is fearful about the issue of being retried, saying *'China has capital punishment'*. He also said he would suffer reprisals from the family of the victims he was convicted of murdering in Australia.
19. Mr X stated that he wants to remain in Australia to support Ms Y, *'I can't just abandon her and go back to China—I have to take care of my wife'*. He further commented *'I don't*

*care about a visa ... it's very inhumane [of] the government to detain me in this centre for more than two years, and what I want is ... to go back into the community to take care of my wife'.*

#### *Other detention issues*

#### Ms Y's health

20. Ms A reported that Ms Y is suffering from *'an adjustment disorder with mixed anxiety and depressed mood'* and that she is receiving *'ongoing support in her crisis involving her eyesight'*. Ms B stated that Mr Y has been diagnosed with High Myopia and test results *'indicate a significant vision impairment and classifies [Ms Y] as legally blind in terms of her Visual Acuity and restricted visual field'*.

#### Home visits


21. Mr X said that Ms Y finds it very difficult to catch trains to Villawood IDC with her failing vision. Mr X has complained to the Ombudsman's office about DIAC's refusals to allow him home visits. He stated that these have been refused on the basis that his visa was cancelled under s 501 and therefore he is a *'high risk'* detainee. He claims that he has been *'well-behaved'* for the past 12 months and has asked that the decision to refuse his requests be reviewed.
22. Ombudsman staff obtained a copy of Mr X's Security Risk Assessment (SRA) from DIAC which shows that in January 2009 he was assessed as a *'High'* risk, due to a history of non-compliance, five reportable incidents of prohibited articles and an attempted escape from detention and/or custody (no date provided), resulting in the requirement for restraints when attending medical appointments.
23. The SRA also recorded that Mr X's last involvement *'in a disturbance'* occurred 23 months ago in May 2007, and that his last *'Assault Occasioning Actual Bodily Harm'* occurred 17 months ago in November 2007, resulting in his transfer to Stage One at Villawood IDC, where he remains.
24. In October 2008 Mr Z noted in his report that Mr X *'stated that because of his criminal history and misperception that he is a leader amongst some of the Chinese in detention he has been wrongly identified as an organiser in some of the disturbances within the centre'*.


#### Community detention

25. DIAC advises that on 25 November 2008, the Minister agreed to consider placing Mr X into Community Detention.
26. In January 2009 DIAC clarified that, in addition to the completion of standard consent forms for prospective Community Detention clients concerning the disclosure of health and personal information, Mr X is required to complete an additional consent form concerning his criminal history, and at this time the form had not yet been cleared by DIAC's legal area. This additional consent form allows DIAC to maintain its obligation to respect Mr X's privacy and for DIAC to discharge its duty of care to the Australian Red Cross (ARC). In April 2009 DIAC advised that all consent forms including disclosure of criminal history have been signed by Mr X and the ARC have been advised of Mr X's criminal convictions.
27. Mr X told Ombudsman staff that he wants to transfer to Community Detention so that he can take care of Ms Y while his immigration status is resolved. He also spoke of his concern for Ms Y, her failing vision and his intention to donate one of his eyes to her. He said he cannot understand why he is still in immigration detention as he has served his sentence and *'I'm a normal person—even the judge has decided I can have freedom'*.

**Ombudsman assessment/recommendation**

- 28. Mr X has been in immigration detention for over two years after being detained in October 2006 following his release from gaol. The DIAC decision that Mr X does not qualify for protection has been reviewed and affirmed. The Ombudsman has no comment on this matter.
- 29. The Ombudsman notes that Mr X has served his custodial sentence for his crimes and it is the Ombudsman's view that any new risk assessment for Mr X should focus on current evidence of his behaviour.
- 30. The Ombudsman further notes that in November 2008, the Minister agreed to consider placing Mr X in Community Detention. The Ombudsman's office was advised in April 2009 that Mr X had signed all requisite consent forms and the ARC have been advised of Mr X's criminal history.
- 31. The Ombudsman notes that if Mr X remains in detention, a second report under s 486N will fall due in May 2009. The Ombudsman will, at that time, review Mr X's circumstances, considering again the impact of detention upon him. The Ombudsman makes no recommendations in this report.

  
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Dr Vivienne Thom  
Acting Commonwealth and Immigration Ombudsman

  
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Date