

REPORT FOR TABLING IN PARLIAMENT BY THE COMMONWEALTH AND IMMIGRATION OMBUDSMAN

Under s 486O of the Migration Act 1958

Personal identifier: 577/09

This is the third s 486O report by the Ombudsman on Mr X as he has remained in immigration detention since the Ombudsman's first report (525/09). The Ombudsman's first report was sent to the Minister on 14 April 2009 and tabled in Parliament on 13 May 2009. The Ombudsman's second report (547/09) was sent to the Minister on 28 May 2009 and tabled in Parliament on 17 June 2009. This report updates the material in those reports and should be read in conjunction with them.

Principal facts

Visa applications

1. The Department (DIAC) advised that it received a combined s 417/195A/197AB request from Mr X's migration agent on 10 November 2009.

Current immigration status

2. Mr X remains an unlawful non-citizen detained at Villawood Immigration Detention Centre (IDC).

Removal details

3. DIAC advises that Mr X *'is on a removal pathway, however, the Department is exploring non-refoulement obligations before proceeding with removal plans'*. If the result of the International Obligations and Intervention Section and International Cooperation Branch's investigation is that international obligations would prevent Mr X's removal to the PRC, *'the Department may seek assurances from the PRC to address any international obligations'*.

Ombudsman consideration

4. DIAC's further report to the Ombudsman under s 486N is dated 29 September 2009.
5. Ombudsman staff spoke with Mr X by telephone in June, August, September, October, November and December 2009, using a Mandarin interpreter on most occasions.
6. Ombudsman staff sighted a number of documents including: parole documents relating to Mr X's discharge from gaol dated 25 September 2006; a record of discussions between DIAC staff and the NSW Probation and Parole Office dated 12 June 2009; a psychological assessment from Ms Z for Mr X's wife Ms Y dated 16 June 2009; a complaint from the Australian Human Rights Commission (AHRC) to the DIAC Secretary dated 23 July 2009; DIAC's response to the AHRC complaint dated 6 October 2009; DIAC's submissions to the Minister dated 20 October 2008, 11 May and 15 June 2009; a medical summary report from International Health and Medical Services (IHMS) dated 6 October 2009; a DIAC Client Placement Assessment (CPA) dated 13 October 2009; a draft combined Ministerial Intervention request from Mr X's migration agent dated 6 November 2009; and a psychosocial assessment from the Transcultural Mental Health Centre (TMHC) dated 13 November 2009.

Key issues

Issues stemming from previous s 486O report

7. On 11 June 2009 Mr X called the Ombudsman's office to express concerns about two separate incidents documented in DIAC's Security Risk Assessment of January 2009, referred to in paragraphs 22 and 23 of the Ombudsman's first report 525/09 (attempted escape and assault). Mr X said that he had been misrepresented in these incidents and disputes the truthfulness of the report.
8. Mr X said that he has never attempted to escape from the detention centre, *'as there would be no point in doing so when [I have] a wife who is nearly blind and needs [my] help'*. In a more recent CPA report dated 13 October 2009 it stated that there is no significant risk that Mr X will attempt to escape.
9. Mr X stated that he did not assault anyone in November 2007 and that the G4S Australia Pty Ltd (G4S) officer had mistaken him for another Chinese detainee. In the CPA report G4S maintains the incident report was accurate.

Health and welfare

10. IHMS conducted a Mental State Examination on Mr X in September 2009 and he *'was noted to be anxious and stressed regarding his immigration status, but no mental health issues were identified'*.
11. On 28 October and 3 November 2009 Mr X attended sessions with a TMHC consultant for a psychosocial assessment. Mr X had been referred to the TMHC by Mr A of the Australian Red Cross (ARC) Community Detention Program.
12. The TMHC consultant notes that Mr X reported that he *'is very nervous, frustrated, had sleeping difficulties, nightmares and his memories are impaired. These symptoms reportedly appeared three months ago, possibly triggered by the rejection of the application for community detention'*.
13. The TMHC consultant states that Mr X has seen a psychiatrist and has been taking medication, but *'he is experiencing dizziness and even more severe tiredness as a result'*. The consultant further states that Mr X's symptoms *'are perpetuated by social isolation, ongoing legal issues, and separation with and perceived caring responsibilities for his wife [Ms Y]'*.
14. Mr X's score in the Kessler-10 test (a measure of psychological distress) indicated that *'he may experience severe levels of distress consistent with a diagnosis of a severe depression and/or anxiety disorder'*. The report concludes with a recommendation that Mr X's *'suitability for community detention to be considered'*.

Ms Y's health

15. DIAC advises that in May 2009 Mr X's wife Ms Y travelled to Canberra by bus to protest silently outside Parliament House about Mr X's continued detention. DIAC staff visited Ms Y on numerous occasions *'to check on her welfare and counsel her as to the ineffectiveness of such a protest'*.
16. In June 2009 psychologist Ms Z reported that Ms Y *'was given some hope after visiting the Immigration Minister's office in Canberra'*. However, on her return she was *'suffering with Depression and issues of grief due to her loss of vision with lack of support on a practical and daily basis impacted by the stressor [sic] of her husband still being detained'*. Ms Y also stated her distress at DIAC's refusal to allow Mr X's transfer to *'the 4th house [Stage Four, Sydney Immigration Residential Housing (IRH)] where she felt she could have some normalcy with her husband i.e. it is like a home there hence her husband can cook and care for her'*.

Attitude to removal

17. Mr X told Ombudsman staff that he thinks he will die if he is returned to the PRC. He said that *'I know I'm a criminal but I've served my time'*. Mr X stressed that he did not want Australian citizenship or a visa, and that all he desires is to be able *'to live in Community Detention to care for [my] wife'*.
18. Mr X said that if assurances are sought from the PRC, he is not convinced that such assurances could guarantee that he would not be at risk of punishment by execution or torture and other cruel, inhuman or degrading treatment.

Other detention issues

Community Detention

19. On 25 November 2008, the Minister did not agree to grant Mr X a Removal Pending Bridging Visa (RPBV) but agreed to consider placing Mr X in Community Detention.
20. On 11 May 2009 DIAC referred a submission to the Minister. The Minister was not assured that the standard reporting conditions would provide enough protection given the risk of Mr X reoffending and requested further information on possible conditions that could be attached to a community detention placement. The Minister also asked if there were any other options that could be imposed including *'home detention'*.
21. DIAC submitted further information in July 2009, including that Mr X would be subject to a 6 pm to 6 am curfew and must comply with the conditions of his parole, current until September 2010. Extensive consultation was conducted with a range of stakeholders, including the NSW Probation and Parole Office, and the ARC secured accommodation where Mr X could live with his wife.
22. A representative of the NSW Probation and Parole Office confirmed that if Mr X was placed in Community Detention, *'the Probation Office would regard him initially as a "high risk" client who would be very closely monitored until an appropriate case plan was developed'* but that *'there are "no serious concerns"'*.
23. The term *'home detention'* used by the Minister in his response to the submission of 11 May 2009 is most commonly defined by the *Home Detention Act 1996 (NSW)*, whereby certain offenders can serve their sentences by way of home detention. These offenders are subject to intensive surveillance by way of electronic monitoring devices, visits from supervising officers, and drug and alcohol testing.
24. The DIAC submission states that DIAC sought legal advice as to what level of restrictions could be imposed on a client placed in Community Detention. This advice confirmed that these restrictions are limited by the conditions attached to residence determination, including that a person must be present at the specified residence during specified hours and must report to DIAC officers at specified times.
25. It is possible that the term *'home detention'* as applied to an immigration detainee, as opposed to an offender serving a sentence, could also refer to an Alternative Place of Detention (APOD) as defined in the Migration Series Instruction 371 where, in certain cases, a designated person is assigned to supervise a detainee in a private residence. Although it is recognised that there have been associated difficulties with some APOD arrangements involving designated persons, it would offer the option of full-time supervision of Mr X.
26. On 12 August 2009 the Minister declined to intervene to allow Mr X to be placed in Community Detention, requesting that DIAC *'provide advice ASAP on a strategy to gain Chinese agreement to not pursue charges against him'*.

AHRC


27. On 23 July 2009 the AHRC wrote to the DIAC Secretary to complain about a breach of human rights. DIAC's s 486N report makes no reference to this complaint but in response to a request from the Ombudsman's office DIAC provided a copy of the Secretary's response to the AHRC dated 6 October 2009. DIAC advises that the AHRC has requested responses to further questions and this response is currently being drafted.
28. The AHRC's letter included Mr X's complaint that *'his detention in an IDC rather than in the community prevents him from caring for his wife who is almost blind'*. Mr X claimed that this amounted to discrimination on the ground of being an associate of a person with a disability.
29. The Secretary's response explained that the decision not to permit Mr X to reside in the community *'was made on the basis of public interest considerations due to his substantial criminal record and patterns of behaviour while in detention. This does not amount to discrimination on the ground of being an associate of a person with a disability'*.

Patterns of behaviour while in immigration detention

30. DIAC advises that Mr X *'has been involved in one minor incident since the date of his last section 486N report. On 11 August 2009, a pair of scissors were found and confiscated from his room during a routine search'*.
31. DIAC advises that after Mr X's initial placement in Stage One at Villawood he was moved between Stage One and Stage Three on several occasions in response to his involvement in incidents in 2006 and 2007.
32. In February 2009 he was again transferred from Stage One to Stage Three while Stage One renovations were in progress. He was to return to Stage One on their completion. However, in November 2009 DIAC advised that Mr X was transferred to Stage Two on 17 October 2009 and *'there are no future plans to move Mr X to Stage One'*.
33. Ombudsman staff sighted a CPA dated 13 October 2009. This confirmed that Mr X has been involved in 31 reportable incidents since entering detention. However, the last incident where G4S documented that Mr X demonstrated aggressive, abusive and violent behaviour was in November 2007, although Mr X denies his involvement in this incident (paragraph nine refers).
34. The CPA assessment reports that although the Mental Health Team leader noted that Mr X *'displays an aggressive attitude towards MHT members'* G4S noted that *'[Mr X's] behaviour in Stage 3 has been good for some time'* and recommended that he transfer to Stage Two and follow a behaviour management plan. G4S states that it intends to review Mr X's risk rating at the conclusion of the plan.
35. Mr X stated that Stage Two is *'much better'* because there is *'more freedom'* and that it *'is like a big community'*. He said that since moving to Stage Two he has been on an excursion outside the IDC. He also said that he has been interviewed by DIAC and Detention Service Provider staff to discuss the possibility of home visits since Ms Y's volunteer-helper was no longer available to assist her on public transport to visit Mr X.
36. Mr X advised that, on the advice of his psychologist, he is exercising more and playing sport in an effort to combat his depression. He is also growing vegetables in the IDC gardens. However, Mr X said that if he is never going to be allowed to live in Community Detention he hopes he may be considered for transfer to *'Stage Four'* [IRH] so that he can cook for Ms Y when she visits.

Ombudsman assessment/recommendation

37. On 25 November 2008 the Minister declined to grant a RPBV to Mr X but agreed to consider placing Mr X in Community Detention and requested DIAC provide suitable conditions for this arrangement. In its submission DIAC outlined Mr X's parole conditions, valid until September 2010. However, in August 2009 the Minister declined to grant Mr X a transfer to Community Detention.
38. It would not appear to be in Mr X's interests to breach his parole conditions as he would be liable to serve the balance of his sentence in gaol and would then be unable to care for his disabled wife, whose welfare is his primary concern.
39. It seems there is little prospect that Mr X can be removed from Australia in the foreseeable future. The Ombudsman notes that DIAC is exploring *non-refoulement* obligations before proceeding with removal plans and if the result of its investigation is that international obligations would prevent Mr X's removal to the PRC, *'the Department may seek assurances from the PRC to address any international obligations'*.
40. The Ombudsman acknowledges that the issue of double jeopardy is posing difficulty for DIAC where it wishes to remove PRC citizens who have been sentenced for a crime in Australia or who are wanted for a crime in the PRC. Despite DIAC's efforts to seek similar assurances or an extradition treaty with the PRC, other long term detainees in this category remain in indefinite detention either in an immigration detention facility or in the community.
41. Recent independent medical advice suggests that Mr X's mental health may be deteriorating. The length of Mr X's detention in a confined facility is inconsistent with the Immigration Detention Values and the Ombudsman remains seriously concerned about its indefinite nature.
42. The last recorded management incident purportedly involving Mr X was in November 2007. In October 2009 Mr X was transferred to Stage Two, has been allowed on an external excursion and is in the process of requesting home visits.
43. It is now 12 months since the Minister declined to grant a RPBV but decided to consider Mr X's transfer to Community Detention which was then declined nine months later. The Ombudsman **recommends** that, until Mr X's immigration status is resolved, the Minister reconsider options for Mr X's immediate future to enable his release from Villawood IDC.
44. If the Minister is again not inclined to consider granting a RPBV or allowing Mr X to transfer to Community Detention to be monitored by his parole officer, an APOD private residence arrangement with full-time supervision by a designated person may provide assurance against the perceived risks associated with Mr X's release from a detention facility.
45. In the interim, the Ombudsman **recommends** that Mr X's suitability for transfer to Sydney IRH be reassessed following his positive pattern of behaviour in Stage Two in recent months.


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Prof. John McMillan
Commonwealth and Immigration Ombudsman


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Date