

REPORT FOR TABLING IN PARLIAMENT BY THE COMMONWEALTH AND IMMIGRATION OMBUDSMAN

Under s 486O of the Migration Act 1958

Personal identifier: 333/07

This is the combined third, fourth and fifth s 486O report by the Ombudsman on Mr X as he has remained in immigration detention since the Ombudsman's combined first and second report (63/06). The Ombudsman's first report was sent to the Minister on 24 April 2006 and tabled in Parliament on 20 June 2006. This report updates the material in that report and should be read in conjunction with it.

Principal facts

Detention history

1. On 16 October 2006 Mr X was transferred from Villawood Immigration Detention Centre (IDC) to Sydney Immigration Residential Housing and on 26 October 2006 he was placed in an Alternative Detention (AD) arrangement in the community.

Visa applications

2. A combined submission under s 195A/197AB of the *Migration Act 1958* was forwarded to the former Minister for possible consideration of her detention intervention powers (June 2006), submission returned to the Department (DIAC) for updating (February 2007); a s 197AB submission initiated by DIAC (March 2007); s 195A submission on hold pending the outcome of an ongoing Administrative Appeals Tribunal (AAT) hearing; s 197AB submission referred to the Minister (June 2007), Minister declined to intervene (July 2007).
3. Report 63/06 noted that the AAT had reserved its decision on whether to allow Mr X access to documents under Freedom of Information (FOI) legislation; the AAT decided that two of the various documents sought by Mr X were not exempt from disclosure (January 2006); Mr X applied to the Federal Court (FC) for judicial review of both the AAT decision and a certificate issued by the Attorney-General under s 36 and s 36A of the *Administrative Appeals Tribunal Act 1975*; Full FC decided issues of law (August and November 2006) and the matter continued at the FC; DIAC conceded the validity of Mr X's application and the FC remitted the matter to the AAT by consent (April 2007); AAT directions hearing held (July 2007), matter ongoing.
4. Report 63/06 noted that Mr X had made a fresh application to the FC in relation to the Minister's decision to refuse him the grant of a Student Visa (SV) (February 2005); FC adjourned proceedings to July 2007, thereby allowing time for the FOI matter to be re-decided by the AAT (April 2007).

Current immigration status

5. Mr X is an unlawful non-citizen residing in the community on an AD arrangement.

Removal details

6. DIAC advises that removal processes remain on hold pending the outcome of the FC litigation, and that it intends to pursue an International Treaty Obligations Assessment (ITOA).

Ombudsman consideration

7. DIAC's further reports to the Ombudsman under s 486N are dated 10 July 2006, 28 December 2006 and 1 June 2007. The Minister's Statement to Parliament in response to the Ombudsman's Report 63/06 is dated 14 June 2006.
8. Ombudsman staff interviewed Mr X by telephone on 15 November 2006.
9. Ombudsman staff sighted the following documents: a report from Mr Y, psychologist, from the Transcultural Mental Health Centre (TMHC) dated 20 November 2006; a dental report from

Dr Z dated 29 April 2007; medical reports by Dr A from Retina Consultants dated 12 December 2006 and 24 April 2007; a medical summary report by International Health and Medical Services (IHMS) dated 4 June 2007; a report by Ms B, Bilingual Counsellor, dated 11 September 2007; correspondence from Mr X's barrister Mr C; and numerous letters of support from people in the community. Ombudsman staff also spoke with Ms D, Mr X's 'designated person', on 29 November 2006.

Key issues

Health and welfare

10. Mr Y, psychologist from the TMHC, conducted a mental health state assessment in November 2006 and noted that Mr X presented with *'symptoms consistent with adjustment disorder with depressed symptoms due to the long-term detention and accusation process he described. It seems the symptoms will continue to be presented due to the continuation of Mr X's circumstances. It seems that Mr X would benefit from ongoing grief and supportive counselling in Chinese specific language for emotional support'*.
11. Mr X was referred to Ms B, Bilingual Counsellor in November 2006. Ms B reported that Mr X has always been punctual and attended all his appointments and that *'he has been depressed and has experienced severe emotional instability. His recent experience of the sudden rejection of the grant of permission to reside in community housing has been detrimental to his mental health. I urge that he be given consistent information and explanation about everything related to his well being'*.
12. Dr Z reported that Mr X has severely decayed teeth, a poorly fitting bridge and advanced bone loss. These conditions result from untreated decay and periodontal disease over a long period. The report noted that Mr X will require life long periodontal review and maintenance by a specialist, which he is currently receiving. If this treatment ceases Mr X is likely to lose many teeth. The report noted that DIAC have not granted *'permission for a new bridge ... the longer the old bridge remains the more likely there will be an escalation in treatment complexity and costs'*. The report further noted that Mr X has tried his hardest to ensure dental success, *'diligently followed advice on his oral hygiene and cessation of smoking'*.
13. At interview with Ombudsman staff Mr X said that his eyesight is getting worse. Dr A's medical report advised that Mr X *'has chronic retinal pigment epithelial changes in the right macula ... At this stage, Mr X's vision is essentially normal and no specific intervention is required'*.


Alternative detention arrangements

14. Mr X was placed on an AD arrangement in October 2006. The TMHC report noted that while Mr X initially felt a sense of relief at being released from Villawood IDC, he soon felt uncomfortable at having Ms D accompany him everywhere. Mr X told Ombudsman staff *'she is more than 70 years old ... if I go to see my friends, she would have to go along, and that makes me feel very guilty ... she has to follow me or otherwise she would be contravening the regulations'*. Ms D said that she was finding it onerous to accompany Mr X to social engagements, saying *'I was his friend in the beginning, now I am his guard'*. The Ombudsman notes that DIAC have since determined additional 'designated persons'.
15. Mr X said that he would prefer to hold a Bridging Visa (BV) with working rights, so that he could be more self-reliant and provide financial support to his family in Hong Kong. The Ombudsman has received numerous letters of support from people in the community attesting that Mr X is supported by We Care, St Vincent de Paul, a local doctor and friends.

Ombudsman assessment/recommendation

16. DIAC advises that it has given an undertaking to the FC that removal of Mr X will not occur until his litigation is resolved. Report 63/06 noted that, even if Mr X was successful in this litigation, there is no guarantee that he will be granted a SV, and even so a SV would only allow continued residence in Australia for a limited period, therefore his return to the PRC seems to be inevitable.

17. The Ombudsman in Report 63/06 noted Mr X's concern that he could face the death penalty in the PRC if convicted of the serious criminal offences that he may face upon return. The Ombudsman suggested that DIAC or DFAT conduct a clear and definitive assessment of any potential risk to Mr X on return and that an assurance be sought from the PRC that Mr X will not face the death penalty. Furthermore, that once such an assurance is obtained, that DIAC notify Mr X in writing and take the necessary steps to monitor Mr X's circumstances after his removal to ensure that the PRC Government abides by the undertaking. The former Minister noted in her Statement to Parliament that the issues in relation to Mr X's removal would be taken into account, dependant on the outcome of the litigation. It is further noted that DIAC advises that an ITOA will be pursued if removal is considered.
18. Mr X has been detained since February 2002. In Report 63/06 of April 2006 the Ombudsman suggested that DIAC and the Minister should consider an alternative form of detention. The Ombudsman notes that Mr X was placed in an AD arrangement in the community in October 2006 with a designated person required to supervise him 24 hours per day. The Minister considered a request under s 197AB that would allow Mr X to live in the community under a residence determination, which enables immigration detention on a less restrictive basis than in AD. The Minister declined to intervene on 3 July 2007. The Ombudsman notes that Ms B reported in September 2007 that this refusal was detrimental to Mr X's mental health and she believed it was important that he be allowed to live independently in the community.
19. As litigation remains active, there appears to be no immediate resolution in sight for Mr X's immigration status. In light of this and the information available to the Ombudsman that Mr X's mental health remains a concern, the Ombudsman **recommends** that the Minister consider a community detention arrangement or a suitable visa with work rights, (subject to conditions that DIAC deems necessary to reduce the risk of absconding).
20. It is noted that DIAC has a new case management approach which puts in place appropriate arrangements to assist clients with mental health issues in their transition into the community. If Mr X is granted a visa, the Ombudsman **recommends** that DIAC consider whether to provide him with appropriate case management to assist him with the transition from immigration detention to being lawful in the community.
21. The Ombudsman suggested in Report 63/06 that if the Minister allowed Mr X the opportunity to make a submission under s 501C or by executive permission about whether he is of good character, that it may circumvent the need for further litigation. It is possible that Mr X will get access to further information as a result of the current AAT proceedings. The Minister may wish to consider a submission from Mr X after Mr X has had a chance to consider any additional information about his case.


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Prof. John McMillan
Commonwealth and Immigration Ombudsman


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Date