

REPORT FOR TABLING IN PARLIAMENT BY THE COMMONWEALTH AND IMMIGRATION OMBUDSMAN

Under s 486O of the Migration Act 1958

Personal identifier: 233/07

Principal facts

Personal details

1. Ms X is aged 32 and is a citizen of the People's Republic of China (PRC). Her parents reside in the PRC. She claims her name is Ms Y, not Ms X.

Detention history

2. Ms X arrived in Australia in March 1997 on a false Thai passport in the name of Ms Z. In August 2004, the Department (DIAC) determined that Ms X had overstayed her visa and she was detained under s 189(1) of the *Migration Act 1958* and placed at Villawood Immigration Detention Centre (IDC).

Visa applications

3. Ms X entered Australia on a Short Stay Visitor's Visa (VV) (March 1997), VV expired (June 1997). DIAC advises that it believes that Ms X and Ms Y are the same person (discussed further below).
4. Under the name of Ms Y – applied for a Protection Visa (PV), granted associated Bridging Visa (BV) (August 1998), PV application refused; appealed to the Refugee Review Tribunal (RRT) (December 1998), refusal affirmed (July 1999); s 417 request seeking favourable exercise of the Minister's humanitarian discretion (August 1999), Minister declined to intervene (February 2000); applied to the Federal Magistrates Court (FMC) seeking judicial review of first RRT decision (May 2005), FMC application withdrawn (September 2005); combined s 417/48B request lodged (January 2007), assessed as not meeting the guidelines for referral to the Minister; applied again to the FMC to appeal the RRT decision, an associated BV application was lodged, refused, Ms Y appealed the BV refusal at the Migration Review Tribunal (MRT) (April 2007), MRT affirmed refusal (May 2007); FMC dismissed appeal, applied for leave to appeal to the Full Federal Court (FFC) (July 2007), matter ongoing; DIAC is currently assessing Ms Y against the Minister's draft s 195A detention intervention guidelines.
5. Under the name of Ms X - applied for a PV, refused associated BV (November 2000); PV application refused, appealed to the RRT (December 2000), RRT refusal affirmed (May 2001); s 417 request lodged (July 2001), request did not meet the guidelines for referral to the Minister however referred to Minister on a schedule (September 2001), Minister declined to intervene (October 2001); combined s 417/48B request was lodged (August 2005), assessed as not meeting the guidelines for referral to the Minister (April 2006); DIAC initiated a s 48B submission on Ms X's behalf as a result of the PRC delegation visit (May 2006), assessed as not meeting the guidelines for referral to the Minister (July 2006); s 48B request lodged (August 2006), assessed as not meeting the guidelines for referral to the Minister (September 2006); a combined s 417/48B application lodged on Ms X's behalf (December 2006), assessed as not meeting the guidelines for referral to the Minister (April 2007).

Current immigration status

6. Ms X is an unlawful non-citizen detained at Villawood IDC. DIAC advises that a Client Placement Assessment was undertaken in July 2007 and it recommended no change to Ms X's detention arrangements.

Removal details

7. Ms X has an ongoing complaint before the Human Rights and Equal Opportunity Commission (HREOC) and DIAC advises that it will notify HREOC before removing her.
8. DIAC advises that it is liaising with the PRC regarding the issue of a travel document, however future removal considerations will remain deferred until resolution of Ms X's identity and current litigation.

Ombudsman consideration

9. DIAC reports to the Ombudsman under s 486N are dated 17 August 2006, 13 February 2007 and 23 June 2007.
10. Ombudsman staff interviewed Ms X at Villawood IDC on 29 September 2006.
11. Ombudsman staff sighted the following documents: two DIAC Ministerial submissions relating to the PRC delegation cases dated 7 July 2006 and 26 July 2006; a combined s 417/48B request by solicitor Ms Michaela Byers dated 19 December 2006; medical summary reports from International Health and Medical Services (IHMS) dated 16 January and 13 June 2007; a psychological summary report from Professional Support Services (PSS) dated 25 July 2007; and numerous letters of support from people in the community.

Key issues

Identity issues

12. DIAC advises that it was told by Ms X in August 2004 that her real name is Ms Y and that Ms X is her cousin who lives unlawfully in the community.
13. DIAC advises that Ms Y was positively identified as a PRC national in May 2005 by PRC officials (as detailed below), although they also confirmed that there is another PRC national by the name of Ms X.
14. In October 2005 DIAC referred the case to the National Identify Verification and Advice Section (NIVA) to ascertain whether the person detained is Ms Y or Ms X. DIAC believe that Ms Y and Ms X are the same person, however it does not have sufficient evidence to state this definitively. As such, identity has not been established in accordance with Migration Series Instruction 409. NIVA is continuing identity investigations and in-country identity checks.
15. DIAC advises that while there is only one person in detention, Ms X has lodged requests and pursued litigation under both names *'at times simultaneously, and that these names and all other aliases relate to the Ms X currently in immigration detention'*. DIAC states, however, that *'any PV process commenced indicates that both Ms X and Ms Y are in detention and that the Department is currently treating them as separate identities in case either one is owed protection'*.

Health and Welfare

16. The PSS report noted that Ms X has attended six sessions between February and July 2007, presenting with depression and anxiety relating to the prospect of returning to the PRC. She was treated with cognitive behaviour therapy, re-presenting in July 2007 *'with symptoms of depression that so far have not improved'*. The July IHMS report noted that

Ms X also has a history of an adjustment order, and has consulted the GP about insomnia, poor sleep and appetite. She takes medication for her conditions, however has been non-compliant at times.

17. DIAC advised that Ms X has been placed on Suicide and Self Harm observation 19 times since April 2007, for periods ranging from one day to two weeks, due to suicidal ideation.

Attitude to removal

18. Ms X stated at the interview with Ombudsman staff that she does not want to return to the PRC, saying *'going back to China will be the dead-end of my life'*. She said that she feared being sent to gaol due to her involvement with a pro-democracy movement that she joined in 1995, in which she campaigned for equal rights for women. Ms X said that in 1997 her boyfriend was arrested for activities relating to the movement and she was forced to go into hiding. Her parents organised for her to go to Thailand and paid for her false passport and her passage to Australia. Ms X said that after arriving in Australia she found out that her boyfriend had received a gaol sentence.
19. The RRT considered Ms X's claims for protection in 1999 and found that she did not have a well-founded fear of persecution for a convention related reason, observing that she *'did not appear able to articulate information about her political activities and beliefs in a way which suggested that she had a leading role in any political organisation'*.

PRC delegation visit

20. DIAC advises that Ms X was one of a group who were interviewed by PRC officials in May 2005. The circumstances of this interview were examined following several complaints to the Ombudsman's office and to HREOC. Ms X said that this visit was *'very scary'* and that since she worries *'more and more and I know that if I was sent back to China what would happen to me'*.
21. The Ombudsman's office recommended that DIAC investigate the issues surrounding the visit and satisfy itself that the individuals interviewed were not exposed to a risk of persecution. DIAC's submission to the Minister in relation to the visit initially noted that Ms X is one of a group *'where the claims appear to be weaker [than others] but where we cannot give you assurances that protection issues may not have been raised'*. DIAC has since advised that *'Ms X's case was assessed as not raising any further issues'*. Ms X has an ongoing complaint before HREOC in relation to the PRC delegation visit.

Other detention issues

22. At interview Ms X expressed concern that two fellow female detainees had been verbally and physically threatening towards her. Ms X said that she had lodged a complaint with DIAC in September 2006. DIAC confirmed that Ms X suffered verbal abuse when an altercation broke out between two other detainees, and that the police attended this incident but no further police action has been reported. Ms X said that Global Solutions Limited staff had not provided her with sufficient protection.
23. Ombudsman staff has sighted numerous letters of support for Ms X from people in the community, testifying to her good character and offering her accommodation should she be released from detention.

Ombudsman assessment/recommendation

24. Ms X has been in immigration detention for three years primarily as a result of her applications to the Minister. The DIAC decision that Ms X does not qualify for protection has been reviewed and affirmed. The Ombudsman has no further comment on this matter.

25. DIAC determined in September 2006 that Ms X had not been exposed to any additional risk of persecution because of the PRC delegation visit. Her subsequent s 48B application was found not to meet the guidelines for referral to the Minister.
26. Ms X's case is currently before the FFC. Her removal is unlikely to be effected in the near future due to this ongoing litigation and because her identity has yet to be confirmed. Issues in relation to Ms X's identity were first raised in August 2004 when she claimed to be Ms Y. The PRC delegation accepted that she was Ms Y in May 2005 but confirmed at the same time that there is another PRC national named Ms X. Although her case was referred to NIVA in October 2005, it appears that little progress has been made towards resolving her identity.
27. The issue of current concern is whether Ms X should remain in detention while her identity and immigration status are resolved. Medical evidence notes that she presents with an adjustment disorder, depression and anxiety and her comments to Ombudsman staff suggest that her ongoing detention is causing her some concern. However there is no evidence before the Ombudsman that indicates that her medical conditions cannot be suitably managed in the detention environment. Likewise there is no evidence before the Ombudsman to suggest that Ms X is considered a threat to the Australian community if she were placed in community detention or released from immigration detention. Given the circumstances of her litigation and identity, it is unlikely an early resolution to her immigration status will be found.
28. The Ombudsman draws attention to a further consideration of growing importance in Ms X's case. A DIAC policy statement published in May 2006, *Detention Reforms*, lists the '*Detention Principles*' that are the new operating principles for onshore detention arrangements. Principle 1 provides in part that '*Immigration detention ... is not indefinite ... detention*'. Principle 6 provides that '*Clients are detained for the shortest practicable time, especially in centre-based detention*'. Consistently with those Principles, and for the reasons outlined in this report, the Ombudsman's view is that there is a strong case for Ms X to be released from detention at Villawood IDC while her immigration status is being resolved.
29. The Ombudsman **recommends** that the Minister consider alternative detention arrangements or granting Ms X a suitable visa with work rights, subject to appropriate health and security checks and conditions that DIAC deems necessary to reduce the risk of absconding.



Prof. John McMillan
Commonwealth and Immigration Ombudsman



Date