

REPORT FOR TABLING IN PARLIAMENT BY THE COMMONWEALTH OMBUDSMAN

Under s 486O of the Migration Act 1958

Personal identifier: 053/06

Principal facts

Personal details

1. Mr X is a 57 year old male from the People's Republic of China (PRC).

Detention history

2. In May 2002, Department of Immigration and Multicultural Affairs (DIMA) officers located Mr X working in breach of the 'no work' conditions of his bridging visa (BV). His visa was cancelled and he was detained under s 189(1) of the *Migration Act 1958* at the Villawood Immigration Detention Centre (Villawood IDC).

Visa applications

3. Mr X arrived in Australia in May 1999 on a tourist visa and applied for a protection visa (PV) that month, naming Ms Y as his wife and dependent. Ms Y abandoned her claim that she was legally married to Mr X at a hearing of the second review in the Refugee Review Tribunal (RRT). DIMA rejected PV claims (June 1999); RRT affirmed DIMA decisions (July 2000); Mr X was granted several subsequent BVs.
4. Joined a class action, *Nancy Lie and Others*, seeking the High Court's (HC) quashing of the RRT decisions of class action members (August 2002); class action ceased (June 2003); subsequent PV application (August 2000), rejected because of s 48A; subsequent request to the Minister for favourable consideration under s 48B; request deemed inappropriate to consider.
5. Appeal to the Federal Court (FC) against the original RRT decision (December 2003); appeal conceded - RRT erred in not accepting written submissions from applicants and by not taking into account matters relating to financial circumstances prior to departing China; FC remitted the matter back to the RRT for further consideration (March 2004); RRT again affirmed DIMA's decision (June 2004); appeal to the Federal Magistrates Court (FMC) (July 2004), dismissed (November 2005); referred to the Minister for consideration of her detention intervention powers (September 2005); Minister declined request (October 2005); appeal to the Full FC (FFC) (December 2005); matter set down for a directions hearing in February 2006.

Current immigration status

6. Mr X is currently detained in Villawood IDC.

Removal details

7. DIMA advised that Mr X has refused on numerous occasions to complete a travel document. Due to outstanding litigation, DIMA has not taken any steps to remove Mr X from Australia.

Ombudsman consideration

8. Two reports from DIMA to the Ombudsman under s 486N, dated 12 September 2005 and 10 January 2006.
9. Ombudsman staff interviewed Mr X at Villawood IDC on 3 November 2005, in the presence of Ms Y with the assistance of an interpreter.

Key issues

Health and welfare


10. DIMA is unaware of any ongoing significant health issues faced by Mr X. During the interview with Ombudsman staff, Mr X did not raise any health concerns.


Attitude to removal

11. Mr X advised Ombudsman staff that he fears persecution if returned to the PRC, claiming that he will be detained, treated as a traitor and afforded no protection by the Government on return. He stated that a civil court found he and Ms Y were financially liable for contractual breaches, after he pursued concerns about the quality of construction of a building by a Hong Kong (HK) company. Mr X said that their appeal was denied and he fears that the Government will now bring criminal charges against them. Mr X states that they lost their employment, received threatening calls and letters and have been blacklisted in the construction industry in the PRC.
12. In the RRT, some discussion focussed around Mr X's involvement in the Falun Gong movement. He stated that he practised in the PRC but only for health benefits and was not involved in any protests. At interview, Mr X advised Ombudsman staff that Falun Gong is *'now an integral part of his life and he practises daily.'* He says that his fear of returning to the PRC is increased because of his current Falun Gong practices.
13. Mr X advised that he would consider third country options, such as Canada, where he has relatives.

Ombudsman assessment/recommendation

14. Mr X has been in immigration detention for three and a half years, primarily as a result of his PV claims and ongoing litigation. In light of this, DIMA has not yet attempted to obtain travel documents for Mr X from the PRC Consulate.
15. Although Mr X personally harbours fears about reprisals and persecution if he is returned to the PRC, his protection claims have twice been heard by the RRT. Mr X remains critical of the RRT and does not agree with its decisions. He has however sought judicial review through the FFC; the Ombudsman has no comment to make on this issue.
16. Mr X's current litigation may take some time to be resolved and whatever the outcome, there could be a considerable delay before he is either released lawfully or removed to the PRC.
17. The question remains whether Mr X should remain in immigration detention while his immigration status is determined. If it is found that he is not entitled to remain in Australia, removal is likely to be problematical, as Mr X has shown a distinct desire to remain in Australia and he has been uncooperative with removal attempts to date by refusing to complete travel documents. While there are no reports that his physical or mental health has suffered while in detention, the risk of this occurring must increase with detention, especially when there is no end date in sight. Mr X is not considered a threat to the Australian community and does not appear to present a significant security risk.
18. Bearing those considerations in mind – especially the length and indeterminate nature of Mr X's detention - the Ombudsman **recommends** that the Minister consider granting Mr X an appropriate visa, such as a Removal Pending Bridging Visa, subject to conditions that DIMA deems necessary to ensure that Mr X does not abscond, while the issues concerning his immigration status and removal from Australia are resolved.


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Prof. John McMillan
Commonwealth and Immigration Ombudsman


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Date

NOTE: Since completing this report, the Ombudsman has been advised that DIMA has granted Mr X a BVE, based on his outstanding FFC matter. This is a similar course of action recommended by this report. The Ombudsman nonetheless submits this report unchanged, because of the general importance of the issue and the discussion.

gms - 6/3/06