

REPORT FOR TABLING IN PARLIAMENT BY THE COMMONWEALTH AND IMMIGRATION OMBUDSMAN

Under s 486O of the Migration Act 1958

Personal identifier: 118/06

Principal facts

Personal details

1. Ms X is aged 48 and is a citizen of the People's Republic of China (PRC). Her parents and two younger brothers reside in Hong Kong. Ms X said that her son lives with her younger sister in Indonesia and her daughter died in the PRC in 2002.

Detention history

2. In July 2004 the Department (DIMA) identified Ms X as an unlawful non-citizen and detained her under section 189(1) of the *Migration Act 1958*. She was placed at Villawood Immigration Detention Facility (IDF).

Visa applications

3. Ms X entered Australia on a Short Stay Visitor's Visa (VV) under the alias of Ms Y (November 1997); departed Australia (December 1997); re-entered Australia on another VV, again under her alias (March 1998); applied for a Protection Visa (PV), granted associated Bridging Visa (BV) under her alias (May 1998); PV application refused (September 1998); granted a further BV (December 1998); the Refugee Review Tribunal (RRT) affirmed the PV refusal (January 2000); BV ceased (February 2000).
4. Ms X applied to the Federal Magistrates Court (FMC) seeking judicial review of the RRT decision (April 2005), application dismissed; appeal to the Full Federal Court (FFC), dismissed (June 2005); applied for and refused BV; merits review sought and decision affirmed in the Migration Review Tribunal (MRT); further appeal to the RRT (December 2005), application deemed ineligible (January 2006).
5. Ms X lodged a s 417 request seeking favourable exercise of the Minister's humanitarian discretion (March 2000), refused (May 2000); combined s 417/48B requests received and refused (March 2005); s 48B lodged (May 2005); s 48B refused, combined s 417/48B requests received (August 2005); combined requests refused (September 2005); s 417 request lodged and refused (October 2005); combined s 417/48B requests lodged (November 2005); combined s 417/48B requests lodged (March 2006); requests ongoing.
6. Applied for four BVs (March - September 2005), all refused; three refusals contested in the MRT; one request remitted to DIMA and refusal upheld; applied for and withdrew application for BV (March 2006).

Current immigration status

7. Ms X is an unlawful non-citizen and is detained at Villawood IDF.

Removal details

8. DIMA advises that in January 2005 an attempt was made to remove Ms X under her alias of Ms Y. The attempt was aborted when she provided DIMA with a PRC passport, identifying her as Ms X. In February 2005, new travel documents were requested from the PRC Consulate and the following month a 'permit for entry' travel document was issued, which was valid for three months. In July 2005, fresh travel documents were sought, however removal of Ms X was put on hold while there were ongoing submissions before the Minister.

Ombudsman consideration

9. The DIMA report to the Ombudsman under s 486N was dated 31 July 2006.
10. Ombudsman staff interviewed Ms X at Villawood IDF on 29 September 2006, with the assistance of an interpreter, and Mr A attended as a support person.
11. Ombudsman staff sighted a number of documents: a psychological report by Ms B dated 7 January 2006; a submission for release on Residence Determination (RD) prepared by Ms C dated 12 March 2006; a combined s 417/48B request by Ms D from a Sydney church dated 5 December 2005; and letters of support.

Key issues

Health and welfare

12. Ms X said that her daughter developed leukaemia in 1996, while Ms X was in hiding from the PRC authorities, and that she died in 2002. At this time she started suffering from headaches but they became worse after she was detained in 2004 as she started to feel worried and anxious. Ms X said that she has taken medication for two years to manage these headaches and has seen the onsite Villawood IDF psychologist to address sleeping problems. At interview Ms X said *'sometimes I feel very upset and very depressed so I see the psychologist and it helps but after two or three days it would come over and over again. And at night I couldn't sleep well and every two or three hours I wake up and I would hear people talking. I would hear the guards on the walkie-talkies and I would jump up very stressed'*.
13. DIMA advises that Psychological Support Services (PSS) had informed the Department that Ms X was *'quite depressed'* and that she had been referred to the onsite psychiatrist and doctor. The psychological report by Ms B notes *'Ms X clearly suffers from extreme psychological states'* and meets the *'diagnostic thresholds for a severe depressive illness and post-traumatic stress disorder'*. It further noted that her mental state is *'rapidly deteriorating'* and *'it is my clinical judgment that any decision to facilitate deportation or to continue to maintain Ms X in a closed environment will further damage her delicate psychological balance. My clinical judgement suggests that continued detention will risk greater psychological harm'*.
14. Ms X says she does not take part in general activities as she continually feels dizzy, which she says is the result of anaemia. Ms X said that she has not been eating regularly as she does not like the curry that is served in the canteen. As a result she has developed anaemia, which has been treated with medication over the last year. Also, Ms X said that she has a rash on her neck and that she has seen a specialist, however it has not gone away.

Attitude to removal

15. Ms X stated at interview that she does not want to return to the PRC. Because Ms X submitted her PV claim in May 1998 under the alias of Ms Y, claiming to be an Indonesian national, her claims about fearing persecution in the PRC have not been tested by DIMA or the RRT. The FMC found that, as Ms X's claim was based on a false identity, she had undermined her claim that the decision not to grant her a PV should be reviewed. A later appeal to the RRT in January 2006 was deemed to be ineligible.
16. Ms D has lodged a combined s 417/48B submission on behalf of Ms X, contending that her initial PV claim was a misrepresentation of facts presented by her then migration agent. The submission states that Ms X will face persecution if removed as the PRC government now has *'harsher attitudes'* towards underground Christian church members. At interview Ms X stated that she was persecuted in the PRC for being a core member of an underground Christian evangelical church. She said her house had been

used as a gathering place for church members and this brought her to the police's attention, resulting in her being arrested on several occasions. On one of these occasions she claims that she spent 45 days in a prison cell and consequently she constantly moved around in 1995 and 1996 to avoid being recaptured.

17. Additionally, there is a new claim presented in the submission, stating that Ms X is now a follower of Falun Gong, which may increase her chance of persecution. Ms X did not refer to this development in her interview with Ombudsman staff.

Other detention issues

18. At interview Ms X complained that the Global Solutions Limited (GSL) staff had not provided her with adequate protection in response to being assaulted by several fellow detainees at Villawood IDF. On two occasions she claimed to have been verbally and physically assaulted by a fellow male detainee who, during both incidents, threw food in her face. On one of the occasions he was relocated to another stage at Villawood IDF. A second issue was with two female detainees who had verbally assaulted Ms X and threatened to kill her. Ms X said that the female detainees had tried to get into her room, despite the presence of the guards, and *'I just felt that some very serious incident will happen to me so that is why I kept in the room but they still came to me'*. Ms X said that she had stopped working in the canteen as a result of these events and that she felt so scared that *'I couldn't sleep at night, I couldn't go out of my room during the daytime, I couldn't even go to the canteen to have my meals, and the hot water was even delivered by the guards'*.
19. Following the interview, GSL detention service officers and Ombudsman staff spent considerable time talking with Ms X, seeking solutions that would best meet her needs and protect her safety. The officers were professional and caring in their contact with Ms X. While GSL staff were initially reluctant to continue with the services of the Ombudsman's interpreter, Ombudsman staff took the view that Ms X would better understand if the interpreter were to remain. The Ombudsman notes that the use of interpreters during such difficult discussions can be invaluable in resolving issues quickly and satisfactorily. Further, by using interpreters, GSL can be confident that a particular detainee has understood everything, thus removing room for future misunderstandings about the outcomes of such discussions. Mr A advised in October 2006 that this situation has improved and Ms X has returned to working in the canteen.

Community support

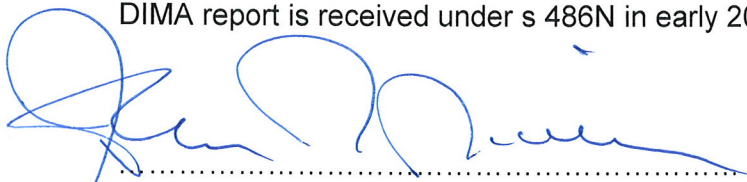
20. Ms X said that she goes to church two mornings every week and friends from church sometimes come to visit her. Mr A said at interview that Ms X is a very devout evangelical Christian and that *'everyone she comes into contact with holds [Ms X] in the highest esteem ... she has a strong Christian heart'*. He further said that he and other church members look forward to helping her if she is released from detention. Ms C, in the RD request, stated that she is willing to offer Ms X accommodation in her house if she is released.

Ombudsman assessment/recommendation

21. Ms X currently has a combined s 417/48B submission before the Minister. The Ombudsman **recommends** that the Minister reach a decision on this submission as soon as possible, but no later than the statutory period prescribed in s 486P for the tabling of this report in Parliament (viz, within 15 sitting days of receiving the report).
22. The Ombudsman notes that the s 48B application currently before the Minister is the fourth such application that Ms X has made, but it is the first time that the criteria for consideration by the Minister have been met. It is relevant to acknowledge that Ms X entered Australia on a false passport in November 1997, her initial claims for a PV were

considered under this false identity and it was decided that she was not owed protection. The most that the Ombudsman wishes to do at this stage is draw attention to issues that the Minister might consider in deciding the s 48B application.

23. The principle that ordinarily applies in administrative decision-making is that the dishonesty of a person in applying for a benefit may expose them to criminal prosecution, but is irrelevant to their entitlement to the benefit unless the legislation makes it a relevant consideration. Thus, it is ordinarily open to a person to reapply for a benefit that they have earlier been denied in circumstances marred by their dishonesty. The position is somewhat different under the Migration Act, since s 48A prevents a second application being made for a PV without the Minister's consent. The breadth of the Minister's discretion under s 48B to grant consent would include the earlier dishonesty of the applicant as a relevant consideration. Nevertheless, the person's dishonesty is neither the only nor necessarily the decisive consideration. The application must be considered on its merits.
24. Ms X's conduct was criticised by the FMC. There are, however, countervailing considerations that the Ombudsman thinks it appropriate to draw to the Minister's attention. Ms X now contends that if she is removed to the PRC she may be at risk of persecution due to her claimed involvement with an underground Christian evangelical church and this issue has not been assessed in the earlier RRT and court proceedings. If DIMA were to return Ms X to the PRC it would need to consider whether her *refoulement* was likely to breach Australia's international obligations, in particular whether she was likely to experience torture or ill treatment. Additionally, although it is important to apportion responsibility for the initial fraudulent PV application to Ms X, a countervailing consideration is that those who are new to Australia and applying for protection are likely to rely heavily on the advice of their migration agent.
25. Ms X has been in immigration detention for over two years. There does not appear to be any immediate prospect either of her removal from Australia or of her being granted a PV to remain in Australia. Her continuing detention is therefore an issue of concern. DIMA initiated action on a number of occasions in 2005 to arrange for Ms X's removal from Australia, but those arrangements were not concluded following Ms X's disclosure of her real identity and her lodgement of numerous s 417/48B requests. There is presently an unresolved s 417/48B request before the Minister. It is possible that the Minister's decision will not immediately resolve the issue of Ms X's detention, and that separate consideration will need to be given to that issue. It is undesirable that she should remain in detention for an indefinite period. The medical evidence before the Ombudsman is that Ms X is suffering from depression and Post Traumatic Stress Disorder and that continued detention will see a further deterioration in her mental health. If there is likely to be further delay in resolving Ms X's immigration status, consideration should be given as an interim measure to some alternative arrangement to detention at Villawood IDF. The Ombudsman will review this issue, with a view to making a more specific recommendation, if Ms X remains in detention and a further DIMA report is received under s 486N in early 2007.



Prof. John McMillan
Commonwealth and Immigration Ombudsman

29 December 2006
Date