



THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: HumanRightsCommittee:VK:1307537

13 July 2010

Senator the Hon. Chris Evans
Minister for Immigration and Citizenship
Parliament House
Canberra ACT 2600

Also by Email: minister@immi.gov.au

Dear Minister,

RE: Ms X – Report by Commonwealth and Immigration Ombudsman

The Human Rights Committee (the “Committee”) of the Law Society of New South Wales has responsibility to consider and monitor Australia’s obligations under international law in respect of human rights; to consider reform proposals and draft legislation with respect to issues of human rights; and to advise the Law Society Council on any proposed changes.

The Committee notes the terms of the Report of Professor John McMillan, the Commonwealth and Immigration Ombudsman dated 5 March 2010, a copy of which is **enclosed** for your convenience.

According to the Ombudsman in his enclosed Report, the assurance from the Chinese government that Ms X will not be killed or harmed if she is returned to China, has not been forthcoming in previous similar cases.

In these circumstances, the Committee supports the Ombudsman’s recommendation that Ms X be now granted an appropriate visa so that her nine-year detention, apparently in breach of international law in the view of UN Human Rights Committee and the Ombudsman, can conclude as soon as possible.

The Committee’s view is that the recent commitment by the Government in its Human Rights Framework to review all federal legislation to ensure that it complies with human rights standards should be applied to Australia’s immigration legislation as soon as possible. The Committee notes that on the basis of the attached Report, Australia’s immigration legislation would appear to be deficient.

Your comments on the enclosed Report and in relation to the question of long-term detention on immigration grounds would be appreciated.

The Committee thanks you for your time spent in consideration of this matter.

Yours faithfully,


Mary Macken
President

REPORT FOR TABLING IN PARLIAMENT BY THE COMMONWEALTH AND IMMIGRATION OMBUDSMAN

Under s 486O of the Migration Act 1958

Personal identifier: 583/10

This is the tenth s 486O report by the Ombudsman on Ms X as she has remained in immigration detention since the Ombudsman's ninth report. The Ombudsman's first report (41/06) was sent to the Minister on 17 January 2006 and tabled in Parliament on 29 March 2006. The Ombudsman's combined second and third report (104/06) was sent to the Minister on 31 October 2006 and tabled in Parliament on 5 December 2006. The Ombudsman's fourth report (206/07) was sent to the Minister on 20 June 2007 and tabled in Parliament on 15 August 2007. The Ombudsman's combined fifth and sixth report (390/08) was sent to the Minister on 31 March 2008 and tabled in Parliament on 14 May 2008. The Ombudsman's seventh report (457/08) was sent to the Minister on 5 September 2008 and tabled in Parliament on 15 October 2008. The Ombudsman's eighth report (513/09) was sent to the Minister on 10 March 2009 and tabled in Parliament on 13 May 2009. The Ombudsman's ninth report (562/09) was sent to the Minister on 4 August 2009 and tabled in Parliament on 16 September 2009. This report updates the material in those reports and should be read in conjunction with them.

Principal facts

Visa applications

1. On 23 October 2009 the United Nations Human Rights Committee (UNHRC) handed down its findings on Ms X's case (paragraph 5 refers).
2. In its report the Department (DIAC) advised that it was preparing a combined s 417/195A submission under the *Migration Act 1958* to the Minister for consideration of options for resolving Ms X's status. In response to an inquiry by Ombudsman staff concerning the status of this submission, DIAC advised in March 2010 that the submission *'has been placed on hold, pending the resolution of the issue of seeking assurances from the People's Republic of China'*.
3. The Attorney-General's (AG) Department is preparing Australia's response to the UNHRC's findings. DIAC stated in its report that this was due on 22 March 2010. In March 2010 DIAC advised that the response is now due in May 2010, and that its response may influence the submission to the Minister.

Current immigration status

4. Ms X remains an unlawful non-citizen detained in the community.

Removal details

5. The UNHRC has determined Australia to be in breach of Article 9(1) of the International Covenant on Civil and Political Rights (ICCPR), concluding that Ms X's detention in a detention centre in excess of four years without any opportunity for substantive judicial review to be arbitrary. It states that if Ms X is removed from Australia without adequate assurances that the People's Republic of China (PRC) will not subject her to the death penalty, torture or cruel, inhumane or degrading punishment, it would amount to a breach of Australia's non-refoulement obligations under Article 6 and 7 of the ICCPR.

Ombudsman consideration

6. DIAC's undated further report to the Ombudsman under s 486N was received by the Ombudsman's office on 17 December 2009.
7. Ombudsman staff sighted the following documents: a report from the UNHRC dated 23 October 2009 on Ms X's submission of 25 November 2005 and a medical summary report from International Health and Medical Services (IHMS) dated 23 November 2009.

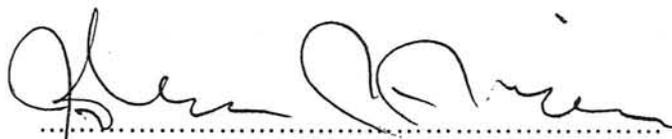
Key issues

Health and welfare

8. DIAC's report states that Ms X *'continues to suffer with anxiety and depression, which is being managed by prescription anti-depressants, as well as regular visits to her doctor'*.
9. IHMS advises that Ms X declined to sign the consent for the release of her medical information from her medical providers to IHMS on commencement of her transfer to Community Detention and it has had no recent contact with Ms X.

Ombudsman assessment/recommendation

10. Ms X has been in immigration detention for more than nine years and is currently the longest serving immigration detainee in Australia.
11. In Report 513/09 the Ombudsman commented extensively on the complexities of Ms X's case, highlighting that at every stage the foreshadowed development that might resolve Ms X's case had not eventuated. In this report the Ombudsman recommended that Ms X be released from immigration detention and granted a suitable visa to alter her immigration status.
12. In Report 562/09 the Ombudsman concluded that the length of Ms X's detention was inconsistent with the Immigration Detention Values and again recommended that the Minister grant Ms X an appropriate visa. The Ombudsman notes the findings of the UNHRC.
13. DIAC recently decided to place on hold its submission to the Minister to consider intervention under s 417 or 195A. However, it is not clear why intervention to release Ms X from detention, if only temporarily, should await resolution of the issue of PRC assurances and DIAC's completion of its response to the AG Department, which has already been delayed by two months.
14. The Ombudsman notes that, in similar cases of long term detainees wanted for crimes in the PRC, DIAC has been unsuccessful in seeking PRC assurances. DIAC has not indicated why it believes that Ms X's case will be resolved within a reasonable time. Ms X is unlikely to be removed from Australia and is unlikely to be released from detention while there is no active submission before the Minister. The Ombudsman again **recommends** that the Minister grant Ms X an appropriate visa.


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Prof. John McMillan
Commonwealth and Immigration Ombudsman


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Date