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Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

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Committee against Torture

Communication No. 417/2010

Decision adopted by the Committee at its forty-ninth session, 29 October to 23 November 2012

Submitted by:	Y.Z.S. (represented by counsel)
Alleged victim:	The complainant
State party:	Australia
Date of complaint:	30 March 2010 (initial submission)
Date of decision:	23 November 2012
Subject matter:	Deportation of the complainant to China
Substantive issue:	Risk of torture upon return to the country of origin
Procedural issue:	Non-substantiation of claims
Article of the Convention:	3

Annex

Decision of the Committee against Torture under article 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (forty-ninth session)

concerning

Communication No. 417/2010

Submitted by:	Y.Z.S. (represented by counsel)
Alleged victim:	The complainant
State party:	Australia
Date of complaint:	30 March 2010 (initial submission)

The Committee against Torture, established under article 17 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,

Meeting on 23 November 2012,

Having concluded its consideration of complaint No. 417/2010, submitted to the Committee against Torture on behalf of Y.Z.S. under article 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,

Having taken into account all information made available to it by the complainant, his counsel and the State party,

Adopts the following:

Decision under article 22, paragraph 7, of the Convention against Torture

1.1 The complainant is Y.Z.S., a national of China. He requested and was denied a Protection Visa under the Australian Migration Act 1958. At the time of the submission of the complaint he was detained in the Villawood Immigration Detention Centre in Sydney and was notified that he would be removed back to China on 1 April 2010. He claimed that his forced return to China would constitute a violation by Australia of article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The complainant is represented by counsel.

1.2 The complainant's request for interim measures under rule 114 (former rule 108) of the Committee's rules of procedure (CAT/C/3/Rev.5) was denied by the Rapporteur on new complaints and interim measures on 31 March 2010.

Factual background

2.1 The complainant is a 54-year-old Chinese citizen who claims to be a Falun Gong practitioner, a movement which he joined in 1996. He was working in a factory in China. He claims that he also invited others to join in Falun Gong practice in his factory in Shenyang. According to the complainant, he was arrested on 20 August 1999 and detained in Zhangshi Labour Camp until 19 August 2000 for practising Falun Gong. He contends

that he was tortured in detention, and that the trauma associated with this torture was such that he attempted suicide.

2.2 On 2 October 2002, the complainant arrived in Australia on a "676 Visitor Visa" (short stay) for New Zealand and Australia. He then left Australia on 9 October 2002. On 1 October 2003, he came to Australia for the second time (second visit) on another short-stay visa. On 10 October 2003, he applied for a Protection Visa on grounds of persecution as a Falun Gong practitioner. His application was refused by an officer of the Department of Immigration, Multicultural and Indigenous Affairs on 24 December 2003.

2.3 The complainant filed an appeal with the Refugee Review Tribunal. On 24 March 2004, the Tribunal rejected the appeal in his absence. It noted that the complainant failed to appear at a hearing scheduled on 18 March 2003, that he had advised the Tribunal that he did not want to give oral evidence, and that he had further consented that the Tribunal proceed to make a decision without his appearance. The complainant contends that he did not wish to attend the above-mentioned hearing as he had learned that the migration agent had fabricated some of the facts of his claim, and that he therefore feared to confront that agent during the hearing. In the complainant's absence, the Tribunal adopted a decision refusing protection on the ground that the complainant's application: (a) contained no details about the nature of his practice of Falun Gong; (b) gave no details of how he became organizer of his group; (c) lacked information about police violence; and (d) gave insufficient details of the brainwashing he was allegedly subjected to for three months.

2.4 It was not until May 2007 (i.e.. three years after the Refugee Review Tribunal's decision) that the complainant applied for judicial review before the Federal Magistrates Court of Australia, and explained that his migration agent had not given the correct factual information about his claims. On 10 September 2007, the Court dismissed his application, on the ground that the complainant would have had the chance to put the true facts to the Refugee Review Tribunal if he had attended the hearing. The complainant's appeal to the Federal Court of Australia against the Federal Magistrates Court decision was dismissed on 12 December 2008. The complainant mentions that he did not apply to the High Court of Australia for special leave to appeal the judgment of the Federal Court as it would not have constituted an effective remedy, because the Federal Court had already determined it was unable to consider merits arguments.

2.5 The complainant also sought seven ministerial interventions between 2004 and 2009, but all requests were refused. On 29 March 2010, his last ministerial intervention request was also refused and he was informed that he would be removed at noon on 1 April 2010.

The complaint

3. The complainant claims that if he were returned to China, he would be subjected to torture and his forcible return would constitute a breach by Australia of his rights under article 3 of the Convention.

State party's observations on the admissibility and the merits

4.1 On 3 November 2011, the State party submitted that the complaint should be ruled inadmissible as unsubstantiated or, should the Committee be of the view that the complainant's allegations are admissible, they should be dismissed as being without merit.

4.2 The State party further provides a summary of facts and allegations advanced by the complainant. The complainant is a Chinese national who arrived in Australia on a subclass 676 (Tourist) visa in Australia on 2 October 2002. He departed Australia on 9 October 2002 and then re-entered Australia on 1 October 2003 on a subclass 676 (Tourist) visa. On 10 October 2003, the complainant applied to the immigration department for a Protection Visa

under the Migration Act 1958, claiming the status of refugee under the Convention relating to the Status of Refugees 1951. In his Protection Visa application, the complainant claimed that he had started practising Falun Gong in China in 1997 and had been an organizer in his local area. He claimed that during 2003 he was arrested and detained for three months after printing Falun Gong pamphlets and distributing them in mailboxes. The complainant alleged that he was forced to attend "brainwashing" classes in a "re-education centre" for three months and was released with reporting conditions when he wrote a letter renouncing his beliefs.

4.3 On 24 December 2003, a delegate of the Minister for Immigration refused the complainant's Protection Visa application. The complainant sought a merits review by the Refugee Review Tribunal on 13 January 2004. On 25 February 2004, the Tribunal invited the complainant to give evidence at a hearing on 18 March 2004. On 16 March 2004, the complainant advised the Tribunal in writing that he did not wish to give evidence and consented to the Tribunal proceeding to make a decision in his absence. The Refugee Review Tribunal affirmed the immigration department's decision on 15 April 2004. The Tribunal concluded that the complainant's claims about his Falun Gong activities and practice were not credible. It was not prepared to accept the complainant's claims without the opportunity to test his claims at a hearing and due to the lack of detail in the complainant's claims. Specifically, the Tribunal did not accept that the applicant was a Falun Gong practitioner or that he had received adverse attention from Chinese authorities as a result of his activities.[1]

4.4 On 11 May 2007, the complainant sought judicial review of the decision of the Refugee Review Tribunal by the Federal Magistrates Court. The complainant sought an appeal on the grounds that he had never received a letter from the Tribunal notifying him to attend the hearing and he claimed that his migration agent had not informed him of the hearing. The Court found that he was aware of the date of the Tribunal hearing and that he had been invited to attend the hearing.[2] Because of the general unreliability of the complainant's evidence to the Court, the Court was not persuaded that the complainant did not attend the Tribunal hearing as a result of a fraudulent statement by his migration agent. On 19 September 2007, the Federal Magistrates Court dismissed the appeal on the basis that there was no jurisdictional error affecting the Tribunal's decision.[3] On 6 November

[1] According to the Refugee Review Tribunal decision (available on file), the complainant did not provide any details about the nature of his Falun Gong practice, or on where or how often he practised. He claimed that he was a Falun Gong organizer in his area but did not provide details about when or how he came to be an organizer, how many members were in his group or where the group practised. He also claimed that after the Government began to supress Falun Gong, the police caused his groups many problems, committed acts of violence and destroyed their books, tapes and documents. However, he provided no particulars about the nature of the violence committed by police or when the alleged incidents of violence and destruction of property had occurred.

[2] The Court found that the complainant had signed a "Response to Hearing Invitation", in which he had stated "I do not want to come to a hearing, I consent to the Tribunal proceeding to make a decision on the review without taking any further action to allow or enable me to appear before it".

[3] According to the immigration department minutes (available on file), the migration authorities pointed to a series of inconsistencies in the complainant's claims. He commenced judicial review at the Federal Magistrates Court in relation to the Refugee Review Tribunal decision on 11 May 2007, nearly three years after the Tribunal upheld the immigration department's decision. His ground of appeal was that he did not receive the notification letter inviting him to attend the Refugee Review Tribunal hearing. In another statement submitted to the Federal Magistrates Court on 27 August 2007, the complainant said that he did not learn, until shortly before commencing litigation, that there was a review application with the Tribunal that had failed. However, during the Federal Magistrates Court hearing held on 4 October 2007, the complainant admitted that he had signed all the documents in relation to his Protection Visa application and that he was aware at the time that his application was

2008, the complainant applied to the Federal Court of Australia for an extension of time to appeal the decision of the Federal Magistrates Court. The Federal Court dismissed the application on 12 December 2008.

4.5 The complainant's Bridging E Visa expired on 25 May 2005. He remained unlawfully in the community until 11 May 2007, when he was granted a new Bridging E Visa on the basis of his judicial review. He was granted successive Bridging E Visas, of which the most recent expired on 2 June 2008. The complainant remained unlawfully in the community until he was located by police on a traffic matter. As a result, he was detained at Villawood Immigration Detention Centre on 3 November 2008.

4.6 Between 7 May 2004 and 29 December 2009, the complainant lodged nine separate ministerial intervention requests under sections 48B and/or 417 of the Migration Act. The first section 417 Migration Act request was referred to the Minister on a schedule; the Minister declined to intervene in February 2005. Each of the subsequent requests was assessed as not meeting the ministerial guidelines for referral to the Minister.

4.7 In his request for ministerial intervention of 4 October 2007, the complainant raised claims that he had been held in a "re-education through labour camp" from 20 August 1999 to 19 August 2000 because he practiced Falun Gong. The complainant provided copies of some documents, namely a notice of release from the Zhangshi Labour Reform Centre from 20 August 1999 to 19 August 2000 and a copy of a medical report dated 28 August 1999 for a self-inflicted injury.[4] These documents were considered by the immigration department when provided in the complainant's ministerial intervention requests. The assessment of the ministerial intervention request dated 6 December 2007 found that the information contained in the notice of release from a labour reform centre contradicted his original claim made in his Protection Visa application that he had been detained for a three-month period sometime after March 2003. The assessment also noted that the complainant did not provide original documentation, which meant it was not possible to be certain of its authenticity.

4.8 In the ministerial intervention request of 6 December 2007, the complainant also submitted a translated copy of a business licence purported to have been issued by the Government of China in relation to his business, the Shenyang City Weil Li Compressor Accessory Factory. The licence states that the business was established on 18 May 2001. This contradicts information provided by the complainant in his Protection Visa application, in which he stated that he was a worker in the same factory from January 1980 until March 2003. The assessment of the ministerial intervention request found that the evidence concerning the complainant's business interests, including over the period of his alleged detention, would appear to undermine his claim of past persecution. The complainant did not provide any new information in support of his claims in his subsequent requests for ministerial intervention to alter these findings.

4.9 The complainant was removed involuntarily to China on 1 April 2010.

passing through a staged process of consideration. The evidence provided by the complainant during the Protection Visa process has proven to lack credibility, including his claim that his migration agent misrepresented him and advised him against attending the Refugee Review Tribunal hearing.

[4] The medical report of the Fourth Hospital affiliated with China Medical University refers to the following diagnosis: an incised wound in the left forearm, complete tear of the left thumb extensor and long muscles, complete tear of the left thumb's abducent and long muscles and separation of a nerve in the left forearm. The report indicates that these injuries were caused as a result of self-mutilation.

4.10 With regard to the admissibility and merits of the complaint, the State party submits that the complainant's claims are inadmissible, or, in the alternative, without merit, because he has not provided sufficient evidence to substantiate his claims. Should the Committee find that the allegations are admissible, the State party submits that the claims are without merit as they have not been supported by evidence that there is a real risk of torture as defined by article 1 of the Convention. The State party argues, with reference to the Committee's general comment No. 1 (1997) on the implementation of article 3 of the Convention in the context of article 22[5] and rule 113 (b) of its rules of procedure, that it is the responsibility of the complainant to establish a prima facie case for purposes of admissibility, and that the complainant has failed to substantiate that there is a foreseeable, real and personal risk that he would be subjected to torture by Chinese authorities if returned to China. The State party further submits that the obligation under article 3 must be interpreted with reference to the definition of torture set out in article 1 of the Convention.[6] The obligation of non-refoulement is confined to torture and does not extend to cruel, inhuman or degrading treatment or punishment,[7] this distinction being retained in the Committee's jurisprudence.

4.11 The State party submits that a State party would be in breach of its non-refoulement obligations under article 3 of the Convention when an individual is found to be *personally*[8] at risk of such treatment should he or she be returned to his or her country of origin. The existence in a country of a consistent pattern of gross, flagrant or mass violations of human rights does not in itself constitute a sufficient ground for determining that a particular person would be in danger of being subjected to torture on his or her return, therefore additional grounds must be adduced to show that the individual concerned would be personally at risk.[9] The onus of proving that there is "a foreseeable, real and personal risk of being subjected to torture" upon extradition or deportation rests on the applicant.[10] The risk need not be "highly probable", but it must be "assessed on grounds that go beyond mere theory and suspicion".[11] The Committee has expressed a view that while the risk does not have to meet the test of being highly probable, the danger must be personal and present.[12]

4.12 The Refugee Review Tribunal found that the complainant's claims were vague and un-particularized. The Tribunal was not satisfied that the complainant was a Falun Gong practitioner, because the complainant's claims lacked details in important aspects. The complainant had claimed that he had begun to practise Falun Gong at the end of 1997, however gave no details about the nature of his practice, or where or how often he practised. Furthermore, the complainant had claimed to be a Falun Gong organizer, however had not provided any further details about these activities. The Tribunal also noted that the complainant had made claims regarding suppression of Falun Gong by the police and "brainwashing classes" that he was forced to attend for three months. However, he had not provided particulars regarding the violence committed by the police or the brainwashing classes.[13] The Tribunal concluded that due to the lack of detail in the

[5] *Official Records of the General Assembly, Fifty-third Session, Supplement No. 44* (A/53/44 and Corr.1), annex IX), para. 4.

[6] Reference to communication No. 83/1997, *G.R.B.* v. *Sweden*, Views adopted on 15 May 1998, para. 6.5.

[7] Committee's general comment No. 1, para. 1.

[8] Emphasis as appears in the original submission.

[9] Reference is made to communication No. 177/2001, *H.M.H.I* v. *Australia*, Views adopted on 1 May 2002, para. 6.5.

[10] Communication No. 203/2002, *A. R.* v. *Netherlands*, Views adopted on 14 November 2003, para. 7.3.

[11] Ibid.

[12] Committee's general comment No. 1, para. 7.

[13] Refugee Review Tribunal Decision N04/48189, 24 March 2004, pp. 7-8.

complainant's claims and without the opportunity to test the claims at a hearing, it was not prepared to accept the complainant's claims that he was a Falun Gong practitioner and had come to the adverse attention of the Chinese authorities as a result of these activities. The Tribunal was not satisfied that the complainant was a person to whom Australia had protection obligations under the Convention relating to the Status of Refugees.[14] On appeal, the Federal Magistrates Court was not persuaded that the applicant had not attended the Tribunal hearing as a result of any fraudulent statement of his migration agent.[15]

4.13 Although the complainant provided information in the course of his domestic proceedings and ministerial intervention requests regarding details of past ill-treatment, this information has been duly assessed by domestic processes. The domestic legal system in Australia offers a robust process of merits and judicial review to ensure that any error made by an initial decision maker can be corrected. In this case, the complainant appealed to the Refugee Review Tribunal, the Federal Magistrates Court and the Federal Court of Australia and no error was identified. The documents provided by the complainant through ministerial intervention requests have been considered by the immigration department in the ministerial intervention assessment of 6 December 2007 as well as in subsequent assessments. Therefore, the State party submits that no new evidence has been provided in the complaint to substantiate the complainant's claims that has not already been considered in domestic processes.

4.14 Apart from allegations of past ill-treatment, which have been considered by domestic processes, the complainant's complaint also does not specify what treatment he might suffer under article 3 of the Convention; he does not provide any evidence regarding what form of torture he is likely to suffer in China. The State party therefore submits that the complainant has failed to provide sufficient evidence to substantiate his allegations regarding a potential breach of article 3 of the Convention. Therefore his complaint should be ruled inadmissible.

4.15 Should the Committee find the complainant's allegations admissible, the State party submits that there are not substantial grounds to believe that the complainant will be in danger of being subjected to torture upon return to China. His claims for protection in Australia have been properly determined according to domestic law. The complainant does not disclose any information in his complaint that has not already been considered in domestic processes. He has used a number of opportunities available to him to appeal the initial Protection Visa decision by the immigration department and no error was identified. The documents provided by the complainant, including the notice of release from the re-education through labour camp as well as the photocopy of a medical report dated 28 August 1999, although not provided in relation to the Protection Visa application, have been duly considered by the immigration department in previous ministerial intervention requests. The State party submits that there is no credible evidence provided by the complainant in his complaint to establish that he faces a personal and present danger of torture, therefore his claims under article 3 of the Convention should be dismissed for lack of merits.

The complainants' comments on the State party's observations

5.1 On 12 January 2012, counsel provided comments on behalf of the complainant. She submits that she has no further information about what happened to the complainant after he was removed to China on 1 April 2010.

[14] Ibid.

[15] *SZKPX* v. *Minister for Immigration and Anor* [2007] FMCA 1597, 10 September 2007.

5.2 Counsel challenges the State party's argument that the complaint is inadmissible for lack of substantiation of a foreseeable, real and personal risk of torture upon return of the complainant to China, and refers to the evidence already brought to the attention of the Minister or Ministerial Intervention Unit of the immigration department. She maintains that the following supporting documents present compelling evidence that the complainant has suffered serious persecution and fears similar persecution on his return to China: (a) the notice of release from Zhangshi Labour Reform Centre, confirming that the complainant had been imprisoned from 10 August 1999 to 20 August 2000; (b) the medical report of the Fourth Hospital affiliated with China Medical University;[16] (c) the report by the Commonwealth Ombudsman submitted to the Secretary of the immigration department, which indicates that during counselling sessions with the Service for the Treatment and Rehabilitation of Torture and Trauma Survivors, the complainant spoke of his torture and trauma in China and a report was sent informing the immigration department that he suffered from post-traumatic stress disorder; (d) the ministerial intervention request dated 23 July 2009 containing a description of the torture the complainant feared if he were to be removed to China, which is based on the torture he suffered during his year of hard labour and beatings as a prisoner in the "re-education through labour camp"; (e) the second ministerial intervention request dated 9 September 2009, in which the complainant reiterates his suffering and gives more details of his year-long persecution in the re-education through labour camp; (f) the ministerial intervention request dated 20 December 2009, containing more details of the complainant's ongoing trauma due to his detention for one year in the re-education through labour camp; (g) the diagram of the complainant's scars from 1999 (dated 10 September 2009).

5.3 Counsel further submits that an application for protection is first decided by the immigration department officer who is appointed as the delegate of the Minister. In the event the delegate refuses the application for protection, an application for review can be made to the Refugee Review Tribunal. She refers to the Tribunal's findings of 24 March 2004, as summarized by the State party in its observations, that due to the lack of detail in the complainant's claims and without the opportunity to test the claims at a hearing, the Tribunal was not prepared to accept that he was a Falun Gong practitioner and had come to the adverse attention of the Chinese authorities as a result of those activities. Counsel claims that the Tribunal came to this conclusion despite the absence of any new information or explanation other than the information before the delegate of the immigration department, which came to a different view, accepting the complainant's practice of Falun Gong. Neither the lack of detail in his claims nor his absence from the Refugee Review Tribunal hearing are justifications for finding that he was not a Falun Gong practitioner.

5.4 In response to the State party's statement that the domestic legal system offers a robust process of merits and judicial review to ensure that any error made by an initial decision maker can be corrected, counsel submits that judicial review is a very limited process and the above statement does not accurately reflect the reality that the Federal Magistrates Court has its hands tied in the process of judicial review. Nor do the discretionary and non-appellable powers of the Minister provide a robust process for merits review. The privative clause in part 8, division 1 of the Migration Act 1958 limits the Federal Courts to deciding jurisdictional error (legal error) and excludes courts from reviewing whether an asylum seeker is or is not a refugee under the Convention relating to the Status of Refugees. If jurisdictional error is found, the matter is remitted to another

[16] See footnote 4 above.

Refugee Review Tribunal. The privative clause of the Migration Act therefore removes from the courts the power to decide whether the Tribunal has made a fair decision about persecution claims or to remedy credibility issues. Time limits of 35 days to apply to the Federal Magistrates Court for review of a Tribunal decision exclude asylum seekers whose agents did not inform them they had been refused a Protection Visa by the Tribunal or who have no one to explain how to apply to a court or how to get a waiver of fees if they cannot afford the court costs.

5.5 Counsel further submits that ministerial intervention requests are discretionary and cannot be appealed in court. Adverse ministerial decisions do not include the reasons why the Minister or officers in his Ministerial Intervention Unit have declined to intervene, and merely state that "the request did not meet the guidelines" or "the Minister declined to intervene". The reasons for these decisions can be requested under freedom of information legislation, but this takes time and the delay often puts the asylum seeker in danger of removal. Those assisting asylum seekers to write ministerial intervention requests are often reduced to guesswork in the haste to submit a request to stop removals. Any request the Ministerial Intervention Unit refers to the Minister lists the history of decision-making and reasons why the different parties make their different claims as to why the Minister should or should not intervene. The Minister may decline even when there are strong reasons presented for his intervention. The Minister's guidelines specify that all first requests for ministerial intervention under section 417 are referred to the Minister for *possible* consideration (counsel's emphasis). This lack of ministerial accountability has been highlighted in many Parliamentary reviews.[17] Although the Minister intends to change this system of discretion in future, such changes were not available for the complainant. Counsel claims that the complainant's allegations have never been properly heard because of limitations in the ministerial intervention process, and reiterates that the complainant's allegations are corroborated by the evidence supplied.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering a claim contained in a communication, the Committee must decide whether it is admissible under article 22 of the Convention. The Committee has ascertained, as it is required to do under article 22, paragraph 5 (a), of the Convention, that the same matter has not been and is not being examined under another procedure of international investigation or settlement.

6.2 In accordance with article 22, paragraph 5 (b), of the Convention, the Committee does not consider any communication unless it has ascertained that the complainant has exhausted all available domestic remedies. In the absence of any objection from the State

[17] Counsel submits that the most thorough review by the Senate Legal and Constitutional References Committee, in its June 2000 report *A Sanctuary under Review: An Examination of Australia's Refugee and Humanitarian Determination Processes*, refers to the shortcomings of ministerial discretion, indicating that some aspects of the present structure of ministerial discretion under section 417 seem to run counter to the absolute nature of the non-refoulement obligation under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The Minister may choose to exercise his discretion to allow a person who has established a case under the Convention to stay, but equally he or she may not. Furthermore, the discretionary power granted to the Minister is to be exercised only "if the Minister thinks it is in the public interest to do so". Theoretically, the Minister could decide that it is not in the public interest to exercise his discretion so as to allow a person fearing torture in his or her home country to remain in Australia.

party in this respect, the Committee finds that the complainant has complied with article 22, paragraph 5 (b) of the Convention.

6.3 The Committee takes note of the State party's argument that the complaint should be declared inadmissible for lack of substantiation. The Committee however considers that the arguments before it raise substantive issues under article 3 of the Convention which should be dealt with on the merits and not on admissibility considerations alone. As the Committee finds no further obstacles to admissibility, it declares the present complaint admissible.

Consideration of the merits

7.1 In accordance with article 22, paragraph 4, of the Convention, the Committee has considered the present complaint in the light of all information made available to it by the parties concerned.

7.2 The issue before the Committee is whether the removal of the complainant to China violated the State party's obligation under article 3 of the Convention not to expel or to return (*refouler*) a person to another State where there were substantial grounds for believing that he or she would have been in danger of being subjected to torture. The Committee must evaluate whether there were substantial grounds for believing that the complainant would have been personally in danger of being subjected to torture upon return to China. In assessing this risk, the Committee must take into account all relevant considerations, pursuant to article 3, paragraph 2, of the Convention, including the existence of a consistent pattern of gross, flagrant or mass violations of human rights. However, the Committee recalls that the aim of such determination is to establish whether the individual concerned would be personally at a foreseeable and real risk of being subjected to torture in the country to which he or she would return.

7.3 The Committee recalls its general comment No. 1, that "the risk of torture must be assessed on grounds that go beyond mere theory or suspicion. However, the risk does not have to meet the test of being highly probable" (para. 6), but it must be personal and present. In this regard, in previous decisions, the Committee has determined that the risk of torture must be foreseeable, real and personal.[18] The Committee further recalls its general comment No. 1, paragraph 5, according to which the burden to present an arguable case is on the complainant. The Committee notes the complainant's claims under article 3 and his argument that he produced sufficient evidence corroborating his allegations of past torture suffered as a result of his Falun Gong activities in China, and that any inconsistencies in the account of facts is due to fabrication of some of the facts by his migration agent at the time of submission of his Protection Visa application.

7.4 The Committee also takes note of the State party's arguments that the complainant failed to provide any details about the nature of his activities as a Falun Gong practitioner in China and regarding the violence allegedly committed by police against him in his Protection Visa application, that the version of facts regarding his detention in China advanced in his ministerial intervention requests is in contradiction with his original claim made in the initial application, and that he had the opportunity to clarify such inconsistencies and provide further details and evidence about his claims by attending the hearing of the Refugee Review Tribunal, but declined the invitation and requested the Tribunal to take a decision in his absence. The State party also argues that the information and evidence provided by the complainant in support of his allegations, including as part of

[18] See, inter alia, communications No. 203/2002, *A.R.* v. *Netherlands*, Views adopted on 14 November 2003, paragraph 7.3; No. 285/2006, *A.A. et al.* v. *Switzerland*, decision adopted on 10 November 2008, para. 7.6; No. 322/2007, *Njamba and Balikosa* v. *Sweden*, decision adopted on 14 May 2010, para. 9.4.

his numerous ministerial intervention requests, had been reviewed in the course of domestic proceedings and was deemed neither credible nor sufficient in order to establish that the complainant faced a personal and present danger of torture upon return to China.

7.5 The Committee recalls that under the terms of its general comment No. 1, it gives considerable weight to findings of fact that are made by organs of the State party concerned, while at the same time it is not bound by such findings and instead has the power, provided by article 22, paragraph 4, of the Convention, of free assessment of the facts based upon the full set of circumstances in every case.[19]

7.6 In the instant case, the Committee notes the lack of details provided by the complainant concerning his Falun Gong activities and several inconsistencies in his account of facts that undermine the general credibility of his claims, as well as his failure to provide any compelling evidence corroborating his claims. In the light of this, the Committee agrees with the determination of the State party's competent authorities that the complainant's arguments concerning the inconsistencies in his claims, his delayed application for judicial review of the Refugee Review Tribunal decision, his failure to attend the Tribunal hearing, and his claim about the alleged fraudulent behaviour of his migration agent lack credibility. The Committee further observes that the complainant was able to leave China freely on two occasions and travel to Australia, and that in such circumstances it is difficult to conclude that he was of interest to the Chinese authorities.

7.7 Taking into account all the information made available to it, the Committee considers that the complainant has failed to provide sufficient evidence to demonstrate that he faced a foreseeable, real and personal risk of being subjected to torture at the time he was deported back to China.

8. The Committee against Torture, acting under article 22, paragraph 7, of the Convention against Torture and Other Inhuman or Degrading Treatment or Punishment, concludes that the deportation of the complainant to China did not constitute a violation of article 3 of the Convention.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

[19] See, inter alia, communication No. 356/2008, *N.S.* v. *Switzerland*, decision adopted on 6 May 2010.