



## International Covenant on Civil and Political Rights

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### Human Rights Committee

#### Communication No. 1957/2010

#### Views adopted by the Committee at its 107th session (11–28 March 2013)

<i>Submitted by:</i>	Z.H. (represented by counsel, Simon Leske, Asylum Seeker Resource Centre)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Australia
<i>Date of communication:</i>	14 July 2010 (initial submission)
<i>Document references:</i>	Special Rapporteur's rule 97 decision, transmitted to the State party on 16 July 2010 (not issued in document form)
<i>Date of adoption of Views:</i>	21 March 2013
<i>Subject matter:</i>	Deportation to China
<i>Substantive issues:</i>	Right to life, right to protection from cruel, inhuman or degrading treatment or punishment; right to be free from arbitrary detention; right to protection from interference with the family and home
<i>Procedural issues:</i>	Insufficient substantiation; inadmissible <i>ratione materiae</i>
<i>Articles of the Covenant:</i>	6, 7, 9, 17 alone and read in conjunction with 2, para. 1
<i>Articles of the Optional Protocol:</i>	2; 3

\* Reissued for technical reasons on 2 June 2016.



## Annex

### **Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights (107<sup>th</sup> session)**

concerning

#### **Communication No. 1957/2010\***

*Submitted by:* Z.H.(represented by counsel, Simon Leske, Asylum Seeker Resource Centre)

*Alleged victim:* The author

*State party:* Australia

*Date of communication:* 14 July 2010 (initial submission)

*The Human Rights Committee*, established under article 28 of the International Covenant on Civil and Political Rights,

*Meeting* on 21 March 2013,

*Having concluded* its consideration of communication No. 1957/2010, submitted to the Human Rights Committee by Z.H. under the Optional Protocol to the International Covenant on Civil and Political Rights,

*Having taken into account* all written information made available to it by the author of the communication and the State party,

*Adopts* the following:

#### **Views under article 5, paragraph 4, of the Optional Protocol**

1.1 The author of the communication, dated 14 July 2010, is Z.H., a Chinese national born on 18 May 1969. The author claims that his rights under articles 6, paragraph 1; 7; 9, paragraph 1; and 17 alone and read in conjunction with article 2, paragraph 1, of the Covenant will be violated if he was returned to China. The author is represented by counsel, Simon Leske from the Asylum Seeker Resource Centre.

1.2 On 16 July 2010, the Chair, acting on behalf of the Committee, requested the State party not to deport the author to China while his communication is under consideration by the Committee. He noted that the request for interim measures might be reviewed once the State party's observations had been received.

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\* The following members of the Committee participated in the examination of the present communication: Mr. Yadh Ben Achour, Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Ahmad Amin Fathalla, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Ms. Zonke Zanele Majodina, Mr. Kheshoe Parsad Matadeen, Ms. Iulia Antoanella Motoc, Mr. Gerald L. Neuman, Mr. Nigel Rodley, Mr. Victor Manuel Rodríguez-Rescia, Mr. Fabian Omar Salvio, Ms. Anja Seibert-Fohr, Mr. Yuval Shany, Mr. Konstantine Vardzelashvili and Ms. Margo Waterval.

1.3 On 27 October 2010, the Special Rapporteur on new communications and interim measures acting on behalf of the Committee decided, in accordance with rule 97, paragraph 3, of Committee's rules of procedure, to examine the admissibility of the communication together with its merits.

### **Factual background**

2.1 The author is a Falun Gong practitioner and originates from Fuqing in Fujian province of China. He is married and has a son. Both his wife and son remained in China.

2.2 On 15 December 2005, the author arrived in Australia on a tourist visa. He continues to practice Falun Gong in Australia. On 4 January 2006, he applied for a protection visa under the 1958 Migration Act mentioning that he has been a Falun Gong practitioner for five years and that he feared imprisonment or losing his life in China as he would not relinquish his belief in Falun Gong. On 8 February 2006, the Department of Immigration and Multicultural Affairs refused to grant the author a protection visa for lack of a well-founded fear of persecution. The Department noted that the author did not claim to have been openly involved in the Falun Gong movement while still in China, nor did he indicate any involvement beyond being an ordinary member. It further observed that the author did not identify any personal instances of discrimination or persecution in relation to his practice of Falun Gong, nor did he indicate how he was severely physically and mentally oppressed. The Department further considered that, although the author had stated that he had practised Falun Gong for five years, he did not appear to have attracted any attention during this time, as he seemed to have lived a normal life for many years. Furthermore, the Department established that the author's ability to obtain a passport in his own name without difficulty and to depart China legally were not consistent with a claim to have been the subject of adverse attention from the authorities because of his Falun Gong profile and thus demonstrated that he was not of interest to the Chinese authorities. The Department concluded that, even if the author was involved in Falun Gong activities, his profile and level of participation were not such that he would be of interest to the Chinese authorities on his return to China, and that there was no real risk that he would be subjected to serious harm amounting to persecution under the 1951 Convention relating to the Status of Refugees.

2.3 On 24 April 2006, in the framework of an appeal to the Refugee Review Tribunal, the author's counsel transmitted a letter from the Australian Red Cross, indicating that the author suffered from mental health issues and has been diagnosed with anxiety, depression and post-traumatic stress disorder. It was stated that the author appeared confused and disoriented and might have trouble providing evidence at the Tribunal's hearing. A letter from Foundation House of 27 April 2006 confirmed the diagnosis. The Tribunal hearing was therefore postponed to enable the author to receive treatment and to allow counsel to receive proper instructions. On 29 May 2006, the author made a statutory declaration and stated that as a child he had suffered from poor health. He explained that he had first heard about Falun Gong in 1992 but only got interested in it when introduced to the practice by a friend in 1999. No one in his family is a member of Falun Gong and they are not aware of his practice as, in 1997, he moved from his village to an urban area in Fuqing and his father as a member of the Communist Party would probably be opposed to his practice of Falun Gong. Enhancing his physical condition was his main aim of practising Falun Gong. From 20 July 1999, the Central Communist Party began a nationwide crackdown against Falun Gong members by detaining, beating and torturing them. On 20 November 1999, the author was arrested without charge by three men, two in plain clothes and one in uniform, and detained for about two months until his release thanks to a significant bribe paid by a friend. The author notes that during his detention, he experienced torture by beating, burning with cigarettes, suspension in hand cuffs with beating, denial of access to medical care, psychological torture by being told that Falun Gong was a "cult" and being forced to disclose the names of other Falun Gong members and coercion into signing a statement renouncing Falun Gong. After his release, he was threatened that if he ever practised Falun Gong again, he would suffer. With regard to his trip to Australia, the author explains that his friend organized a visitor's visa and a passport through a travel agent because when he initially applied for a passport, it was refused. He believed that the reason for the refusal was that the authorities did not want him to leave China and were still looking for him because of the declaration he had signed in prison. He feared that if

returned to China he would be re-detained and tortured as a member of Falun Gong. He feared more serious harm in the future, as he had signed a declaration saying he would renounce his membership.

2.4 On 23 June 2006, a medical report was submitted to the Refugee Review Tribunal, which stated that a cervical spine x-ray revealed that the author had no significant abnormality and a head computed tomography revealed a “normal examination”. A letter for the Australian Red Cross indicated that the author would be referred for a further neuropsychological examination. On 25 July 2006, the Tribunal affirmed the Department’s decision not to grant a protection visa. The Tribunal found that the author’s evidence lacked credibility and pointed to his contradictory claims about when he commenced the practice of Falun Gong: in his application for a protection visa he claimed to have started practising five years ago, which would be the end of 2000, while in his review application, he claimed that he commenced practice in May or June 1999. The Tribunal also noted the contradictory details regarding his employment record in China. The Tribunal concluded that it was not satisfied that “the author was ever a Falun Gong practitioner”. It further found that he was never arrested, detained, jailed or tortured by the Government of China because of his Falun Gong practice as claimed, that he was never made to sign a statement by the Chinese authorities promising not to practice Falun Gong in the future, that he was never reported to the police for practising Falun Gong in secret and that he was never refused a Chinese passport because he had been a Falun Gong practitioner as claimed. It also concluded that, while it accepted that the author had engaged in Falun Gong practice in private in Australia, he only begun practising in Australia as a means of enhancing his claim for refugee status and that there was no evidence that the Chinese authorities were aware of his limited activities or had an ongoing interest in the author.

2.5 On 6 July 2007, the Federal Magistrates’ Court of Australia reviewed the case and affirmed the original decision. The Court held that the author’s claims impermissibly urged the court to conduct a review of the merits of the decisions, a course of action which was not within its jurisdiction.<sup>1</sup> Questions of credibility of evidence were solely within the jurisdiction of the Refugee Review Tribunal and were not reviewable by the Court as an issue of procedural fairness unless the decision was “so unreasonable that no reasonable decision-maker could have made it”. The Federal Magistrates’ Court concluded that the Tribunal had adequately addressed the author’s claims. On 30 November 2007, the Full Federal Court affirmed the Federal Magistrates’ Court’s decision.

2.6 On 27 December 2007, the author requested a humanitarian intervention by the Minister for Immigration, Multicultural and Indigenous Affairs, pursuant to section 417 and section 48B of the 1958 Migration Act. On 13 February 2009 and 3 March 2009, the author’s request for intervention pursuant to sections 417 and 48B respectively of the 1958 Migration Act was rejected. The reasoning of the decision referred to the assessment by the Refugee Review Tribunal and the Federal Courts regarding the author’s claims of religious persecution, mental health issues and concerns about procedural fairness.

2.7 On 20 April 2010, the author submitted a second request for a humanitarian intervention to the Minister for Immigration, Multicultural and Indigenous Affairs, pursuant to sections 417 and 48B of the 1958 Migration Act. This request was based on new information, namely an arrest warrant dated 31 July 2007, and two summonses dated 23 September 2004 and 18 June 2007.<sup>2</sup> The author has not previously been aware of these documents, as they were in the possession of his grandmother, who chose not to inform him thereof. After her death in 2009, his mother found them and sent them to the author. All of these documents were issued in relation to the author’s suspected practice, learning and spreading of Falun Gong. The author argued that the fact that the Government of China has issued an arrest warrant demonstrates that he is a person of interest to the Chinese authorities. The request for humanitarian

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<sup>1</sup> An appeal to the Federal Magistrates’ Court from the Refugee Review Tribunal is not a merits review. An appeal to the court is limited to jurisdictional errors. The court is limited to looking at whether the Tribunal applied the law correctly with the information that was before it.

<sup>2</sup> As transpires from the copy of the summons issued by Fuqing Bureau of Public Security, the author was suspected of practising, learning and spreading Falun Gong “illegal organisation”.

intervention also outlined the humanitarian concerns if the author were returned to China, in the light of the outstanding arrest warrant and his fragile state of mental health. It was submitted that the author was at risk of serious human rights violations if returned. On 11 May 2010, the Minister refused to intervene in the author's case concluding that the summonses were not credible and that it was not possible that such documents had been received by the author's relatives without them informing him of their existence.

### **The complaint**

3. The author claims that he will be detained and tortured if returned to China, in violation of article 6, paragraph 1; article 7; article 9, paragraph 1; and article 17 alone and read in conjunction with article 2, paragraph 1, of the Covenant. He further claims that the existence of the summonses and, in particular, the arrest warrant demonstrates that he is a person of interest to the Chinese authorities and risks persecution on the basis of his practice of Falun Gong. The author cites numerous country reports, in which the persecution of Falun Gong members is highlighted, including by imprisonment in psychiatric institutions, labour camps or ordinary prisons accompanied by torture and ill-treatment during the deprivation of liberty. The author further argues that his profile could come to the adverse attention of the authorities through the combination of his mental illness and his religious beliefs, because mental illness carries a social stigma in China. Falun Gong practitioners are often confined to mental institutions in China and the author's risk of serious harm is compounded by the combination of mental illness and being a Falun Gong practitioner.

### **The State party's observations on admissibility**

4.1 On 16 September 2010, the State party challenged the admissibility of the communication. The State party submits that the author's allegation under article 6 lacks clarity and is insufficiently substantiated, as the author merely claims that he fears to come to harm at the hands of the authorities if he is returned to China, without however adducing any evidence to substantiate this allegation. It notes that there was no suggestion that the author has experienced any threats to his life by the Chinese authorities and the documentation he provided as to the source of any threat to his life as a result of his practice of Falun Gong is minimal. The State party refers to the decision by the Refugee Review Tribunal, which was not satisfied that the author was ever a Falun Gong practitioner and concluded that he had not been arrested, detained or tortured because of this practice. It had also concluded that the author was never made to sign a statement promising to not practice Falun Gong in the future and that he was never refused a Chinese passport due to his religious beliefs. The State party submits that the author's claim under article 6 should be rejected for failure to sufficiently substantiate it for purposes of admissibility under article 2 of the Optional Protocol.

4.2 With regard to the author's claim under article 7, the State party submits that for purposes of admissibility the author failed to substantiate his allegations under article 7. He did not adduce sufficient evidence to suggest that he would be tortured upon his return to China. The summonses and arrest warrant submitted by the author have been considered by the Department of Immigration and Citizenship, which concluded that they were not credible; in particular as at a time when the author was of particular interest to the authorities, he received a travel document and left China in December 2005. It notes that even if the summonses and the arrest warrant were authentic, they would be insufficient in themselves to evidence a real risk of irreparable harm to the author if he was returned to China.

4.3 The State party submits that its obligations of non-refoulement do not extend to potential breaches of article 9,<sup>3</sup> in particular considering the author's failure to sufficiently substantiate his claims under

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<sup>3</sup> See general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 40*, vol. I (A/59/40 (Vol. I)), annex III, para. 12.

articles 6 and 7. The State party submits that this part of the communication should also be declared inadmissible under article 2 of the Optional Protocol.

4.4 With regard to the author's claims under article 17, the State party submits that his allegations are unclear, as he did not make any reference to any risk for his family if he was returned to China. The State party also submits that the non-refoulement obligations do not extend to potential breaches of article 17 and that as such the author's claims should be declared inadmissible. Furthermore, the author also failed to substantiate his claims, as required under article 2 of the Optional Protocol.

#### **The State party's observations on the merits**

5.1 On 3 November 2011, the State party submitted its observations on the merits. It reiterates its submission on admissibility and submits that, in the event that the Committee finds the communication admissible, the author's allegations should be considered lacking merit.

5.2 With regard to the author's allegations pursuant to articles 6, paragraph 1, and 7 of the Covenant, the State party notes that the exact nature of his allegations are unclear and submits that, in accordance with article 2 of the Covenant, non-refoulement obligations only arise where the relevant risk is satisfied. The State party recalls the Committee's jurisprudence, according to which it does not question the evaluation of the evidence made in domestic processes and notes that the Refugee Review Tribunal, the Federal Magistrates' Court and the Federal Court did not identify any error in the proceedings. It reiterates that the author failed to provide sufficient evidence to substantiate his claims under articles 6 and 7 and that they should be declared inadmissible. If the Committee however finds them admissible, the State party submits that the author's communication does not contain any new material that has not already been considered by the State party's authorities. It argues that the two summonses and the arrest warrant have been assessed by the Department of Immigration and Citizenship, which concluded that there were concerns with regard to the credibility owing to the high level of fraud encountered by the Department in such documents from the Fujian province. It also took into account information received by the Immigration and Refugee Board of Canada which indicated that the Public Security Bureau rarely uses arrest warrants. The State party further maintains that the author has given contradictory accounts as to his place of residence when explaining the late submission of the summonses and the arrest warrant, which casts additional doubts on their credibility. It finally notes that the author has not provided any evidence that he has been the subject of attention by the Chinese authorities whilst in Australia due to his Falun Gong activities, which were assessed to be private and limited. The State party therefore submits that the author failed to provide credible evidence to establish that there is a real risk that he would be subject to arbitrary deprivation of his life and/or torture or cruel, inhuman or degrading treatment or punishment if returned to China.

5.3 With regard to article 9, the State party reiterates its submission that non-refoulement obligations only apply where there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant and therefore submits that the author's claims under article 9 are inadmissible *ratione materiae* pursuant to article 3 of the Optional Protocol. It also reiterates that the author failed to sufficiently substantiate his claims. On the merits, the State party submits that he has not provided credible evidence to establish a real risk that he would be subject to treatment that is prohibited under article 9 of the Covenant and should therefore be dismissed as without merit.

5.4 As to the author's claims under article 17, the State party notes that the author does not make any reference to any risk to his privacy, family or correspondence. It argues that its non-refoulement obligations do not extend to potential breaches of article 17 and therefore the claim should be found inadmissible *ratione materiae* pursuant to article 3, of the Optional Protocol. It further reiterates that the author failed to sufficiently substantiate his claims under article 17. On the merits, the State party submits that the author failed to articulate any argument, nor provided any evidence to show that there could be any arbitrary interference with his privacy, family or correspondence.

**Author's comments on the State party's observations on admissibility and merits**

6.1 On 15 June 2012, the author submitted his comments on the State party's observations on admissibility and merits. In addition to the facts as presented in the initial submission, the author notes that the originals of the two summonses and the arrest warrant were served to the Department of Immigration and Citizenship on 17 October 2011.

6.2 On admissibility, the author submits that he sufficiently substantiated his claims relying on his past experience of ill-treatment at the hands of the Chinese authorities, the official and original arrest warrant and summonses and objective country evidence.

6.3 The author provides more details to his claims and submits that, whilst in detention, he fears being killed by the Chinese authorities as a result of extreme torture and ill treatment. The torture or cruel, inhuman or degrading treatment or punishment he would face if returned to China is arrest, detention, forced labour, enforced re-education through the "Re-education through Labour" regime, organ harvesting without consent, physical harm as well as physical and mental torture. Regarding his claim under article 9, he states that there is a substantial and present risk that he will be arbitrarily arrested and detained by the Chinese authorities owing to his practice of Falun Gong, and he specifically fears being indefinitely detained without trial or being formally charged. Regarding his claim under article 17, the author submits that he fears that the authorities will arbitrarily raid and search his house and that his family's safety will be jeopardized due to the Chinese authorities' interest in him as a Falun Gong practitioner.

6.4 On the merits, the author submits that the real risk of a violation of his rights under the Covenant relies on his past ill-treatment by the Chinese authorities and the existence of an arrest warrant and summonses that were not considered at each stage of the refugee determination process. While acknowledging that the independent information about a pattern of conduct in similar cases is not in itself conclusive for a violation, he recalls that according to the Committee's jurisprudence regard should be given to the wealth of reputable country information in relation to the treatment of suspected Falun Gong practitioners in China.

6.5 While it is difficult to obtain information with regard to the ill-treatment of Falun Gong practitioners owing to the stringent policies of the Chinese authorities in relation to accessibility of sensitive information, the author notes that the practice of Falun Gong was declared illegal in 1999 and since then the authorities have established the 6-10 office within the Office of the Leadership Team of the CCP Central Committee for Handling the Falun Gong Issue under the Ministry of Justice, which may operate extralegally and with impunity.<sup>4</sup> Under the law, police and security officials are permitted to detain persons without formally arresting or charging them.<sup>5</sup>

6.6 With regard to his claim under article 6, the author submits that in order for his rights under article 6 to be violated, it is not necessary to prove that he will face the death penalty. While acknowledging that convicted Falun Gong practitioners do not usually face capital punishment, the author still faces a real risk that he will be killed as a result of practising his beliefs, as he could be detained and sustain severe injuries which could result in death.<sup>6</sup> He notes that, while not having experienced any direct threat to his life by the Chinese authorities, the risk stems from the plausible outcome of death as a result of severe torture and physical harm which he already experienced in the past and which is detailed in reputable

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<sup>4</sup> The author cites Yiyang Xia, "The illegality of China's Falun Gong crackdown – an today's rule of law repercussions", speech from Senior Director of Policy and Research at the Human Rights Law Foundation and Director of the Investigation Division of the World Organization to Investigate the Persecution of Falun Gong. Available from [www.europarl.europa.eu/meetdocs/2009\\_2014/documents/droi/dv/506\\_yiyangxia\\_/506\\_yiyangxia\\_en.pdf](http://www.europarl.europa.eu/meetdocs/2009_2014/documents/droi/dv/506_yiyangxia_/506_yiyangxia_en.pdf).

<sup>5</sup> The author refers to United States of America, Department of State, *2008 Human Rights Report – China* (2009).

<sup>6</sup> The author refers to the addendum to the report to the Human Rights Council of the Special Rapporteur on extrajudicial, summary or arbitrary executions, communications to and from Governments, A/HRC/14/24/Add.1.

country reports. Moreover, while not facing the death penalty, he faces criminal charges which would certainly result in his arrest and detention where death is a result that is neither unrealistic nor remote.

6.7 In relation to article 7, the author recalls the concluding observations by the Committee against Torture, in which it expressed its concern at allegations of targeted torture, ill-treatment, and disappearances directed against, inter alia, Falun Gong practitioners,<sup>7</sup> the report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment<sup>8</sup> and the Refugee Review Tribunal's Falun Gong (Falun Dafa) Resource Guide<sup>9</sup> and notes that these findings are consistent with the author's previous experience and his allegation of what he would face if he were returned to China. He further cites the United States Department of State *2010 Human Rights Report: China*,<sup>10</sup> the report by the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment,<sup>11</sup> the United States Commission on International Religious Freedom<sup>12</sup> and a report on organ harvesting from Falun Gong practitioners<sup>13</sup> regarding the confinement of Falun Gong practitioners to psychiatric institutions and organ harvesting from Falun Gong practitioners and submits that he would face a real risk of torture or ill-treatment if he were to be returned to China.

6.8 While acknowledging that the State party's obligations of non-refoulement do not extend to potential breaches of article 9, the author submits that where there is real risk of irreparable harm, the State party is obliged not to return the author. He argues that the real risk of irreparable harm would occur as a result of arbitrary arrest or detention. The author notes that the 6-10 office operates extra legally and the systematic treatment and enforced detention of Falun Gong practitioners is a violation of article 9. He also cites reports by the United States Commission on Religious Freedom<sup>14</sup> and the United Kingdom Home Office,<sup>15</sup> which note that the system of re-education through labour operates outside of the judicial system and criminal procedure law and that it is an administrative measure which enables Chinese law enforcement officials to detain citizens up to four years. At least half of the official recorded inmates in re-education through labour camps are Falun Gong adherents.

6.9 With regard to article 17, the author acknowledges that non-refoulement obligations do not extend to violations of article 17; however, he maintains that, upon return to China, there is a real risk that authorities will interfere with his family and/or home and that there exists little if any protection from such treatment.<sup>16</sup>

#### **State party's further observations**

7. On 3 December 2012, the State party submitted further observations and notes that it has completed its assessment of the original copies of the two summonses of 23 September 2004 and 18 June 2007 and the arrest warrant of 31 July 2007 and found them inconclusive. It reiterates that the author's claims are not sufficiently substantiated, his claims under articles 9 and 17 are inadmissible *ratione materiae* and if his claims are found to be admissible they are without merit.

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<sup>7</sup> See concluding observations of the Committee against Torture on the report of China, CAT/C/CHN/CO/4.

<sup>8</sup> Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment on his mission to China, E/CN.4/2006/6/Add.6.

<sup>9</sup> Australia, Refugee Review Tribunal (2008). Available from [www.unhcr.org/refworld/docid/4b6fe1d35.html](http://www.unhcr.org/refworld/docid/4b6fe1d35.html).

<sup>10</sup> United States, Department of State (2011).

<sup>11</sup> E/CN.4/2006/6/Add.6.

<sup>12</sup> United States, United States Commission on International Religious Freedom, "People's Republic of China" in *Annual Report 2010*.

<sup>13</sup> David Matas and David Kilgour, *Bloody Harvest: Revised Report into Allegations of Organ Harvesting of Falun Gong Practitioners in China* (2007).

<sup>14</sup> United States Commission on International Religious Freedom, "People's Republic of China" in *Annual Report 2012* (2012).

<sup>15</sup> United Kingdom of Great Britain and Northern Ireland, Home Office, *Country of Origin Information Report – China* (2009).

<sup>16</sup> United States, *2008 Human Rights Report – China*.



## Issues and proceedings before the Committee

### *Consideration of admissibility*

8.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the case is admissible under the Optional Protocol to the Covenant.

8.2 The Committee has ascertained, as required under article 5, paragraph 2 (a), of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

8.3 The Committee notes the State party's challenge to the admissibility of the communication pursuant to article 2 of the Optional Protocol on the ground of the author's failure to substantiate his claims under articles 6, paragraph 1; 7; 9, paragraph 1; and 17 of the Covenant. The Committee notes the author's contentions that he sufficiently substantiated his claims relying on his past experience of ill-treatment by the Chinese authorities, the official arrest warrant and the two summonses, as well as country information confirming his allegations regarding the treatment of Falun Gong practitioners.

8.4 With regard to the author's claim under article 6, paragraph 1, the Committee notes that the information submitted to it does not provide sufficient grounds to substantiate that the author's removal to China would expose him to a real risk of a violation of his right to life. The author's contentions in this respect are general allegations mentioning the risk of arbitrary arrest and detention, which could ultimately lead to his death due to torture, while however acknowledging that he has not experienced any direct threat to his life. In these circumstances, the Committee considers that the author has not sufficiently substantiated his claims under article 6, paragraph 1, of the Covenant and therefore declares this part of the communication inadmissible pursuant to article 2 of the Optional Protocol.

8.5 With regard to the author's claims under article 17, the Committee notes the State party's argument that its non-refoulement obligations do not extend to potential breaches of article 17. The Committee notes the author's argument that there is a real risk that the authorities in China would interfere with his family and/or home and that there exists no protection from such treatment. The Committee observes that author's allegations remain general in this regard and that he has not adduced any evidence of a potential violation. Accordingly, the Committee concludes that this part of the communication is inadmissible for failure to sufficiently substantiate his claim pursuant to article 2 of the Optional Protocol.

8.6 As for the author's claims under article 7 of the Covenant, the Committee notes that he has explained that the reasons why he feared being returned to China were based on the detention and treatment that he allegedly suffered due to his religious beliefs, on the arrest warrant and two summonses in relation to his membership of Falun Gong and on country information which contains information of torture, ill-treatment, organ harvesting and confinement to psychiatric institutions of Falun Gong practitioners. The Committee finds that, for the purposes of admissibility, the author has provided sufficient details and documentary evidence on his personal risk of torture, cruel, inhuman or degrading treatment or punishment as an alleged Falun Gong practitioner if he was returned to China and therefore finds the author's claims under article 7 admissible.

8.7 With regard to the author's claims under article 9, paragraph 1, the Committee notes the State party's argument that its non-refoulement obligations do not extend to a potential breach of this provision, in particular considering the author's failure to sufficiently substantiate his claims under articles 6 and 7. The Committee takes note of the author's allegations that, as a Falun Gong practitioner, he fears being detained indefinitely without trial or charges, which brings with it the risk of torture or cruel, inhuman or degrading treatment or punishment while in detention. The Committee observes that the risk of a violation of article 9, paragraph 1, cannot be dissociated from the real risk of a violation of article 7 of the

Covenant<sup>17</sup> and concludes that for the purposes of admissibility the author has sufficiently substantiated his claims under article 9, paragraph 1.

8.8 The Committee declares the communication admissible in so far as it appears to raise issues under articles 7 and 9, paragraph 1, alone and read in conjunction with article 2, paragraph 1, of the Covenant, and proceeds to its consideration on the merits.

*Consideration of the merits*

9.1 The Human Rights Committee has considered the communication in the light of all the information made available to it by the parties, as provided for under article 5, paragraph 1, of the Optional Protocol.

9.2 The Committee notes the author's claim that, as a Falun Gong practitioner, he would face arrest, detention, forced labour, enforced re-education through the regime of re-education through labour, organ harvesting without consent, physical harm and physical and mental torture. It notes the author's argument that the real risk of a violation of his rights relies on his past ill-treatment, which included beating, burning with cigarettes, suspension in handcuffs with beating, denial of access to medical care and psychological torture, the existence of an arrest warrant and summonses which were not considered at each stage of the refugee determination proceedings, as well as independent country information on a pattern of conduct in similar cases. It also notes the State party's observations that the Refugee Review Tribunal was not satisfied that the author was ever a Falun Gong practitioner, that he had not been detained or tortured because of his practice, that he was never made to sign a statement renouncing his practise of Falun Gong and that he was never refused a passport owing to his beliefs. It also notes the State party's argument that the domestic authorities found that the two summonses and the arrest warrant were not credible due to the high level of fraud of such documents and the fact that the Public Security Bureau rarely issues arrest warrants, as well as the explanations on the author's late submission of these documents.

9.3 The Committee recalls its general comment No. 31 in which it refers to the obligation of States parties not to extradite, deport, expel or otherwise remove a person from their territory where there are substantial grounds for believing that there is a risk of irreparable harm.<sup>18</sup> The Committee also recalls that, generally speaking, it is for the organs of States parties to the Covenant to review or evaluate facts and evidence in order to determine whether such a risk exists.<sup>19</sup>

9.4 While noting that there are reports of serious human rights violations in China for those identified as Falun Gong practitioners, in particular those who hold a prominent position in the movement, the Committee observes that the author's refugee claims were thoroughly examined by the State party's authorities, which concluded that if the author has at all been involved in the Falun Gong movement while still in China, he did not indicate any involvement beyond being an ordinary member and despite the alleged summons of 23 September 2004, the author was able to leave the country without any hindrance. It also notes the State party's authorities' assessment of the evidence which revealed several contradictions with regard to the time of commencement of the author's practice of Falun Gong, his employment record, his place of residence and the way he obtained the two summonses and the arrest warrant. The Committee also finds it inconsistent that the author, after allegedly having been detained on 20 November 1999 and ill-treated during his two months' detention, has not faced any problems and decided only six years later to leave China and seek refugee protection in Australia. With regard to his practice of Falun Gong in Australia, the Committee notes that the State party has accepted that the author was practising Falun Gong and had basic notions of the movement; however, it concluded that the

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<sup>17</sup> See communication No. 1912/2009, *Thuraisamy v. Canada*, Views adopted on 31 October 2012, para. 6.6.

<sup>18</sup> See general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, para. 12.

<sup>19</sup> See communication No. 1763/2008, *Pillai et al. v. Canada*, Views adopted on 25 March 2011, para. 11.4; see also communication No. 1819/2008, *A.A. v. Canada*, decision of inadmissibility adopted on 31 October 2011, para. 7.8.

author's practice was of private and limited scope and has not raised any suspicion of the Chinese authorities. The Committee notes that the author has not challenged this assessment. With regard to the author's medical condition, the Committee notes that his state of mental health led to a postponement of the hearing before the Refugee Review Tribunal; however, it did not impede his testimony at a later stage. The Committee nevertheless considers that the author's medical condition in itself is not of such exceptional nature to trigger the State party's non-refoulement obligations under article 7. In the light of the above, the Committee cannot conclude that the information before it shows that the author would face a real risk of treatment contrary to article 7 of the Covenant if removed to China.

9.5 With regard to the author's claim under article 9, paragraph 1, the Committee refers to its conclusions under article 7 and for the same reasons finds that the author would not face a real risk of a violation under article 9, paragraph 1.

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the author's removal to China would not violate his rights under article 7 and 9, paragraph 1 of the Covenant.

[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.]

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