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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. 416/2010

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

Submitted by:	Ke Chun Rong (represented by counsel, Veronica Mary Spasaro)
Alleged victim:	The complainant
State party:	Australia
Date of complaint:	15 March 2010 (initial submission)
Date of decision:	5 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. 416/2010

Submitted by:	Ke Chun Rong (represented by counsel, Veronica Mary Spasaro)
Alleged victim:	The complainant
State party:	Australia
Date of complaint:	15 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 5 November 2012,

Having concluded its consideration of complaint No. 416/2010, submitted to the Committee against Torture by Veronica Mary Spasaro on behalf of Ke Chun Rong 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 Ke Chun Rong, a national of China, born on 30 October 1962; at the time of the submission of the communication, he was residing in Australia. The complainant requested and was denied a Protection Visa under the Australian Migration Act 1958 and was asked to leave the country. At the time of the submission he was detained in the Villawood Immigration Detention Centre in Sydney and was facing deportation. He claims 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, Veronica Mary Spasaro from the non-governmental organization Balmain for Refugees.

1.2 Under rule 114 (former rule 108) of its rules of procedure (CAT/C/3/Rev.5), the Committee requested the State party, on 31 March 2010, to refrain from expelling the complainant to China while his communication is under consideration by the Committee.

The facts as presented by the complainant

2.1 The complainant is a Chinese citizen who claims to be a regular practitioner and leader of Falun Gong, which he joined in 1995 when he moved to Fuzhou, China. He is married and has two sons, still living in China. According to the complainant, in 1996 he returned to his home village of Cuihou, where he began organizing a local group to practice Falun Gong. He claims that he instructed new practitioners and had a leadership role. The complainant stresses that when the Chinese authorities made Falun Gong illegal in 1999, his Falun Gong materials were confiscated by the police, who threatened to close the clothing business he had opened in his home village. Since then he continued to practice Falun Gong secretly with others.

2.2 The complainant claims that, on 15 August 2001, he was arrested and detained by the police in Fuqing City Detention Centre because he was a Falun Gong group leader and had organized Falun Gong practitioners to protest against the detention of one of their members. The complainant states that he was held in detention for 16 days, and was interrogated and tortured nearly every day. On one occasion he was tortured and interrogated for four hours continuously. He claims that he was handcuffed to iron bars and suffered repeated electric shocks on his back. He also states that he was burned with cigarettes on the back of his neck and that the handcuffs cut into his wrists and hands. The complainant claims that after his release he was under police surveillance and therefore went into hiding. He decided to leave China on 12 December 2004, after hearing that a former fellow Falun Gong practitioner from his village had revealed under torture his name as his Falun Gong teacher. He obtained a legal passport and visa to go to Australia by using family connections. He arrived in Australia on 12 December 2004 and came to Sydney on 17 December 2004. The complainant claims that he left China to avoid arrest and persecution, and continued to practice Falun Gong when he arrived in Australia.

2.3 On 20 January 2005, the complainant applied for a Protection Visa under the Australian migration legislation. His application was refused by an immigration department officer on 7 March 2005 without an interview. Subsequently the Refugee Review Tribunal, on 23 May 2005, wrote to advise him that it was unable to make a favorable decision on the information in its possession and invited him to give evidence at a hearing on 22 June 2005. The complainant did not receive the invitation for the hearing and, on 22 June 2005, in his absence, the Tribunal confirmed the decision of the immigration department not to grant him a Protection Visa and found there was a lack of evidence of his practice of Falun Gong as well as a lack of details in his claims. It also pointed out the fact that the passport with which the complainant came to Australia was issued some two and a half years after his alleged detention.

2.4 On 12 October 2005, the complainant lodged an appeal to the Federal Magistrates Court against the decision of the Refugee Review Tribunal. In the appeal he complained about the fact that he was unaware of the invitation to the hearing and that he had no chance to provide information about his Falun Gong practice. The appeal was dismissed on 13 March 2007, since the Court found that the Tribunal had complied with its statutory obligations in the making of its decision and that the decision was not affected by jurisdictional error. In July 2007, the complainant left Sydney for Perth for work reasons and was arrested there, for overstaying his visa, on 11 February 2009. On 18 February 2009, he introduced a request for ministerial intervention under sections 417 and 48B of the Migration Act, on his own. On 13 March 2009, he was transferred to the Villawood Immigration Detention Centre in Sydney and on 28 April 2009 his request was refused by the Ministerial Intervention Unit, which found that the request did not comply with the Minister's Guidelines for assessment of such requests.

2.5 In May 2009, the complainant decided to seek the assistance of the non-governmental organization Balmain for Refugees. On 14 July 2009, the organization sent,

on behalf of the complainant, another ministerial intervention request to the Minister under sections 417 and 48B of the Migration Act. It contained new evidence and information on the torture he endured and his practice of Falun Gong, including further details on the complainant's persecution and torture in China, witness statements from Falun Gong practitioners in China on the complainant's practice of Falun Gong and subsequent arrest, a witness statement from the complainant's roommate in Sydney attesting to his regular practice of Falun Gong in Australia, and a medical report from an independent psychiatrist in Sydney, dated 10 June 2009, relating to the complainant's incarceration in China. On 8 January 2010, the ministerial intervention was refused. The complainant states that the Ministerial Intervention Unit found his claims were fully dealt with by the delegate of the Minister for Immigration, Multicultural and Indigenous Affairs and the Refugee Review Tribunal in 2005 and were assessed again in April 2009 in his first request for ministerial intervention. It also found that there was no evidence to suggest that he possessed the profile of someone the Chinese authorities would consider could oppose the Government in an effective and organized way, and that his low profile of Falun Gong practice in Australia meant that he was not a person of interest to the Chinese authorities if he were to be returned to China.

2.6 On 3 February 2010, following this ministerial refusal, the complainant lodged an appeal to the Federal Court of Australia against the previous decision of the Federal Magistrates Court dated 13 March 2007. Since the appeal was outside the prescribed time limits, the complainant made an application for an extension of the time within which he might file and serve a notice of appeal. On 12 March 2010, the Federal Court of Australia dismissed the complainant's application for an extension of time.

2.7 The complainant submits that he made no application to the High Court of Australia to appeal the judgment of the Federal Court of Australia, because, in line with the findings of the United Nations Human Rights Committee, any appeal to the High Court would "not have constituted an effective remedy" given that the Federal Court had already determined it was unable to consider merit arguments. A last request for ministerial intervention was submitted to the Minister for Immigration and Citizenship on 15 March 2010, with new information and evidence. This request had not been answered at the time of submission of the initial communication by the complainant.

2.8 The complainant claims that his application for a Protection Visa was obstructed from the start by the registered migration agent[1] assisting him, who failed to provide specific details and supporting evidence for his protection claims and, among others, did not detail the extent and nature of the torture he had endured. He stresses that the migration agent's negligence was also the reason why he never had the opportunity to appear before the Refugee Review Tribunal to present his claims in person and in more detail, as the latter supplied a wrong address to the Tribunal and failed to inform the complainant of the date and time of the hearing. The complainant further claims that during the hearing before the Federal Magistrates Court he was unrepresented and had no documents with him because the migration agent had refused to represent him in court.

[1] According to the official website of the Department of Migration and Citizenship of the Australian Government (www.mara.gov.au/), migration agents must be registered with the Office of the Migration Agents Registration Authority (MARA). MARA is defined as "a discrete office attached to the Department of Immigration and Citizenship", the functions of which are set out in section 316 of the Migration Act 1958. Registered migration agents are bound by a code of conduct and are required to have an in-depth knowledge of Australian migration law and procedure and meet high professional and ethical standards. Applicants for any type of visa are advised by the website to use a migration agent to submit their applications.

2.9 The complainant also submits that in July 2005, while he was in Australia, he learned that the police went again to his home in Cuihou village, trying to determine his whereabouts. He stresses that his sons were suspended from school in order to force him to give himself up to police. The complainant claims that, at the time of the submission of the communication, he was continuing his practice of Falun Gong in the Villawood Immigration Detention Centre.

The complaint

3. The complainant claims that if he is returned to China, given his arrest, detention and recorded profile as a Falun Gong leader, he would be subjected to interrogation immediately upon arrival at the airport, which may lead to a period of detention for further questioning and result in infliction of torture. The complainant claims that this forcible return would constitute a violation by Australia of article 3 of the Convention, since he would be exposed to a high risk of further torture.

State party's observations on the admissibility and the merits

4.1 On 31 October 2011, the State party submitted that the communication should be ruled inadmissible as unsubstantiated or, should the Committee be of the view that the allegations are admissible, they should be dismissed as being without merit.

4.2 The State party submits that the complainant had arrived in Australia on 12 December 2004 on a Business (Short Stay) Visa and that, on 20 January 2005, he applied for a Protection Visa under the Migration Act 1958, claiming refugee status. In his application he alleged that he had started practicing Falun Gong in 1995, became a teacher in his area and that in 2001 he had been arrested, detained and tortured for two weeks, after organizing a group of practitioners to seek the release of other detained Falun Gong practitioners.

4.3 On 5 March 2005, the complainant's application was rejected by a delegate of the Minister for Immigration, Multicultural and Indigenous Affairs. On 6 April 2005, the complainant appealed to the Refugee Review Tribunal, which, on 23 May 2005, wrote to advise him that it was unable to make a favorable decision on the information in its possession and invited him to give evidence at a hearing on 22 June 2005. Since he did not attend the hearing, on that date the Tribunal confirmed the refusal. The Tribunal decided that the complainant's claims about being a Falun Gong practitioner and having a well-founded fear of persecution in China were not credible. The complainant sought judicial review of the Tribunal's decision by the Federal Magistrates Court of Australia, claiming that he had never received the letter inviting him to attend a hearing; however, on 13 March 2007, the Court found that there was no error made by the Tribunal and dismissed the application. On 3 February 2010, the complainant applied to the Federal Court of Australia for an extension of time to appeal the Federal Magistrates Court's decision, but the latter dismissed his application on 12 March 2010.

4.4 The State party further submits that after the complainant's Bridging E Visa expired on 10 April 2007, he remained unlawfully in the country until 11 February 2009, when he was taken into immigration detention, and that he remained in the Villawood Immigration Detention Centre from 13 March 2009 to 15 August 2011, when he was placed in community detention by the Minister for Immigration and Citizenship. It further submits that between 5 October 2005 and 15 March 2010 the complainant lodged three separate

ministerial intervention requests, each of which was assessed as not meeting the Ministerial Guidelines for referral to the Minister.[2]

4.5 The State party maintains that it is the responsibility of the complainant to establish a prima facie case for admissibility, and that in the present case he had failed to substantiate that there is a foreseeable, real and personal risk that he would be subjected to torture by the Chinese authorities if returned to China. It recalls that the Refugee Review Tribunal held that the complainant's claims were not credible, that the Tribunal was not satisfied that the complainant was a Falun Gong practitioner, because his claims lacked important details, namely, he gave few details about the nature of his practice and did not display knowledge of the philosophy of Falun Gong beyond what was publicly available. Further, the Tribunal did not accept that the author had been monitored, detained or mistreated by the Chinese authorities. The Tribunal reached those conclusions due to the lack of detail in the initial claim and "without the opportunity to test the claims at a hearing, it was not prepared to accept the author's claims". The State party submits that the Refugee Review Tribunal "was not satisfied that the author was a person to whom Australia had protection obligations under the Refugee Convention" and that, on appeal, the Federal Magistrates Court was not persuaded that the applicant had not attended the Tribunal hearing "as a result of any fraud or error by his migration agent".

4.6 The State party further submits that the complainant had provided information regarding details of past ill-treatment in the course of the domestic proceedings and ministerial intervention requests, as well as documents, and that this information had been assessed by the domestic procedures. It maintains that 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. It recalls that the author appealed to the Refugee Review Tribunal, the Federal Magistrates Court and the Federal Court of Australia and no error had been identified.

4.7 The State party submits that apart from allegations of past ill-treatment the complainant does not specify what treatment he might suffer if returned to China, but that he had made "limited claims" in relation to possible treatment he might face.[3] He had further alleged that his family was targeted by the authorities due to his Falun Gong practice, but in another statement he indicated that his family was doing well. The State party submits further that a statement provided by the complainant's mother on 17 February 2010 contains only information regarding the period when he was in China, but does not provide any information on "interaction with the Chinese authorities" since his departure.[4] The State party maintains that the above statement does not provide any substantial grounds to support the complainant's allegation that he would be subjected to torture or mistreatment upon his return to China.

[2] The State party submits that the Migration Act "confers discretionary, non-delegable and non-compellable powers upon the Minister to intervene in cases if it is considered by the Minister to be in the public interest to do so". The Minister is authorized "to substitute a decision of the RRT [Refugee Review Tribunal] with a decision more favourable to the applicant", and the latter has issued guidelines that he will generally consider applications "only in cases that exhibit one or more unique or exceptional circumstance, including where there are circumstances that provide a sound basis for believing that there is a significant threat to a person's personal security, human rights or human dignity upon return to their country of origin and where there are circumstances that may bring into consideration Australia's obligations, under treaties".

[3] The State party specifies that in one of the complainant's personal statements he had stated that if he was sent back to China he would suffer mistreatment which may threaten his life.

[4] The complainant's mother's statement was submitted to support one of his ministerial intervention requests.

4.8 As to the merits of the case, the State party reiterates that there are no substantial grounds to believe that the complainant will be in danger of being subjected to torture by the Chinese authorities, that his claims for protection in Australia have been properly determined according to the Australian law, that he does not disclose any information that has not already been considered in the domestic proceedings and that he had benefited from the "robust process of merits and judicial review" to ensure that any error made by an initial decision maker had been corrected. It further maintains that the documents provided by the complainant, including witness affidavits, personal statements and medical reports, although not provided in relation to the Protection Visa application, had been duly considered by the immigration department during the consideration of the ministerial intervention requests. It maintains that there is little credible evidence provided by the complainant to establish that there is a personal and present risk of torture upon his return and reiterates that 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 6 February 2012, the complainant submitted that the State party's submission fails to acknowledge the impact of the complainant's claim that he has been the victim of the negligence, incompetence or fraud of a migration agent and as a result the Government's claim that "the domestic legal system in Australia offers a robust process of merits and judicial review" is rendered largely irrelevant in his case. He maintains that as a result of the actions of his migration agent he was unable to participate fully in the domestic legal system in order to have his protection claims fully considered. Further, he maintains that new evidence and information submitted by him, which had been omitted by his migration agent at an earlier stage, had been summarily dismissed by the Government as lacking in credibility. He also maintains that he has not been interviewed in person by an agent of the Government with responsibility for assessing his protection claims at any stage of the proceedings.

5.2 The complainant challenges the State party's submission that he failed to establish a prima facie case that he faces a foreseeable, real and personal risk of being subjected to torture upon deportation, and maintains that he submitted, with the last ministerial intervention request, the following: eye witness statements from family members and Falun Gong practitioners in China attesting to his practice, arrest, detention and torture by the police;[5] medical evidence supporting the consistency of the complainant's scar marks with the claimed torture, including burn marks and injuries sustained from a combination of shackling, burns and beatings with an electric baton;[6] psychiatric evidence supporting diagnosis of post-traumatic stress disorder, consistent with the claimed torture; and a further detailed statement from the complainant on the persecution and torture experienced by him in China, including an explanation for his delayed escape.

[5] The complainant had submitted: a witness statement from his mother, who witnessed his arrest on 15 August 2001 and attests to his detention for 15 days, as well as to two further visits of the police during which they conducted searches of the house and were seeking to locate him; a witness statement from Falun Gong practitioners who were present when he went to the local police station to petition for the release of another Falun Gong practitioner; a witness statement attesting to his arrest in 2001; witness statements from individuals who shared a Falun Gong practice with him in 1995/96; and a statement from the Falun Gong practitioner who organized the payment of bribes to secure his release from detention.

[6] The complainant submitted a medical certificate issued by Dr. Fleri of International Health and Medical Services, dated 1 February 2010.

5.3 The complainant submits that there remains in China continuing and sustained Government-initiated oppression and persecution of Falun Gong, the purpose of which is to completely eradicate the practice. He refers to the International Religious Freedom Report issued in September 2011 by the United States Department of State, which indicates that detentions of Falun Gong practitioners continue, and notes that since 1999 about 6,000 Falun Gong practitioners had been sentenced to jail sentences and some 100,000 had been subjected to "administrative sentences" of one to three years internment in camps. The report also states that neighbourhood groups were reportedly instructed to report on Falun Gong members, and refers to several cases in which Falun Gong practitioners had been arrested and disappeared and to one case where a practitioner, sentenced to internment in a camp, had been tortured. The complainant submits that the Chinese authorities have a record of his involvement in Falun Gong and that they are aware that he has been out of the country for some time. He believes that if returned he will be interrogated immediately on arrival, which may lead to his arrest, detention, internment in a labour camp and further torture. The complainant maintains that the country background information, together with his personal record of Falun Gong practice, arrest and torture in the past establish firm grounds to believe that he would personally face a foreseeable and real risk of torture if returned to China.

5.4 The complainant submits that his protection claims have not been considered properly by the domestic processes available in Australia, and in particular that they have not been subjected to a "robust process of merits review". At the stage when his protection claims were submitted, there was no opportunity granted for an interview, which he believes would have allowed him to provide convincing testimony to support his claims. He maintains that his migration agent failed to prepare properly his application for a Protection Visa, that he failed to disclose himself as a registered migration agent on the Protection Visa and Refugee Review Tribunal applications, and that he submitted to the authorities wrong information as to the address of the complainant.

5.5 The complainant further maintains that the Federal Magistrates Court and other federal courts have no jurisdiction to review the matters of his case. According to the privative clause referred to in part 8, division 1 of the Migration Act 1958, federal courts are limited to decisions relating to jurisdictional error and cannot review whether an asylum seeker is or is not a refugee under the 1951 Convention relating to the Status of Refugees. If a jurisdictional error is found, the matter is remitted to another Refugee Review Tribunal. Where there exists "migration agent fraud" in a person's protection application, that may be found to amount to jurisdictional error, but such findings are rare. Where a "lesser finding of migration agent negligence or dishonesty" is made, that is not considered a jurisdictional error and the court cannot rule that the case be returned to the Refugee Review Tribunal for a further hearing opportunity.

5.6 The complainant maintains that in his case evidence to support the misconduct of his migration agent has been disregarded[7] and that the Federal Magistrates Court does not refer to the existence or not of a migration fraud, but merely states that "the Tribunal was entitled to exercise its discretion as it did pursuant to s.426A of the Act to proceed to make its decision on the review without taking any further action to enable the applicant to appear

[7] To prove that he used a particular migration agent the complainant had submitted a business card of the agent and receipts for payment for English translation of documents, issued by his office. Nonetheless, the migration agent allegedly did not disclose that he had prepared the application and the appeal. The complainant also maintains that, although he had notified the immigration department of a change in his address on 14 March 2005, through the official change of address form, on 6 April 2005, when his appeal to the Refugee Review Tribunal was lodged, the migration agent used the old, and therefore incorrect, address that was noted on the Protection Visa application.

before it".[8] In making requests for ministerial interventions he primarily sought the approval of the Minister to enable him to reapply for a Protection Visa, but he was repeatedly denied that opportunity. The complainant submits that both the Federal Magistrates Court and the Federal Court of Australia had recognized that he was not aware of the invitation to appear for an interview before the Refugee Review Tribunal,[9] but nevertheless he was not given an opportunity for an interview. Instead, the Ministerial Intervention Unit rejected his requests based on the "existence of inconsistencies" and summarily dismissed the new evidence presented by him.[10]

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 The Committee recalls that, in accordance with article 22, paragraph 5 (b), of the Convention, it shall not consider any communications from an individual unless it has ascertained that the individual has exhausted all available domestic remedies. The Committee notes that in the instant case the State party has recognized that the complainant has exhausted all available domestic remedies.

6.3 The Committee takes note of the State party's argument that the communication should be declared inadmissible as manifestly unfounded. The Committee considers, however, that the complaint raises substantive issues under article 3 of the Convention, which should be examined on the merits. As the Committee finds no further obstacles to admissibility, it declares the communication admissible.

Consideration of the merits

7.1 In accordance with article 22, paragraph 4, of the Convention, the Committee has considered the present communication 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 would violate 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 are substantial grounds for believing that he or she would be in danger of being subjected to torture. The Committee must evaluate whether there are substantial grounds for believing that the complainant would be personally in danger of being subjected to torture upon return to China. In

[8] The complainant refers to paragraph 30 of the Federal Magistrates Court's decision, *Szhie* v. *Minister for Immigration and Citizenship and the Refugee Review Tribunal*, file number SYG2929 of 2005, dated 13 March 2007 (copy provided by the complainant).

[9] The complainant refers to paragraph 30 of the Federal Magistrates Court's decision (ibid.), which states that "the fact that the applicant was unaware of the invitation is not an error on the part of the Tribunal", and to paragraph 40 of the decision of the Federal Court of Australia, case *Szhie* v. *Minister for Immigration and Citizenship and the Refugee Review Tribunal*, file number NSD 95 of 2010, dated 12 March 2010, which states "I accept and find that the applicant was not told by any person of the date, time and place of the Tribunal hearing and that he did not receive the Tribunal's letter dated 23 May 2005" (copy provided by the complainant).

[10] See para. 5.2 and footnote 4 above.

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 (1997) on the implementation of article 3 of the Convention, 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",[11] 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.[12] The Committee recalls that under the terms of 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.

7.4 The Committee further recalls general comment No. 1 (para. 5), according to which the burden to present an arguable case is on the author of a communication. The Committee notes the State party's submission that in the present case the complainant had failed to substantiate that there is a foreseeable, real and personal risk that he would be subjected to torture by the authorities if returned to China, that his claims had been reviewed by the competent domestic authorities, in accordance with the domestic legislation, and that the latter were "not satisfied that the author was a person to whom Australia had protection obligations under the Refugee Convention". However, the Committee is of the view that the author has submitted sufficient details regarding his affiliation with the Falun Gong practice, such as information on the practice, statements of persons who have participated in it together with the complainant, statements of individuals testifying to his arrest and detention by the authorities, as well as medical evidence corroborating his account of having experienced torture while in detention.

7.5 The Committee notes that the above claims and evidence have not been sufficiently verified by the Australian immigration authorities. The Committee observes that the review on the merits of the complainants' claims regarding the risk of torture that he faced was conducted predominantly based on the content of his initial application for a Protection Visa, which he filed shortly after arriving in the country, without knowledge or understanding of the system. The Committee further observes that the complainant was not interviewed in person either by the immigration department, which rejected his initial application, or by the Refugee Review Tribunal, and therefore he did not have the opportunity to clarify any inconsistencies in his initial statement. The Committee is of the view that complete accuracy is seldom to be expected from victims of torture.[13] The Committee further observes that both the Federal Magistrates Court's decision and the decision of the Federal Court of Australia recognize that the complainant was not informed of the Refugee Review Tribunal's invitation for a hearing. The Committee also observes that the State party does not dispute that Falun Gong practitioners in China have been subjected to torture, but bases its decision to refuse protection to the complainant in the assessment of his credibility. In this context, the Committee finds that in determining

[11] *Official Records of the General Assembly, Fifty-third Session, Supplement No. 44* (A/53/44 and Corr.1), annex IX, para. 6.

[12] See, inter alia, communications No. 258/2004, *Dadar* v. *Canada*, decision adopted on 23 November 2005, and No. 226/2003, *T.A.* v. *Sweden*, decision adopted on 6 May 2005.

[13] See *Alan* v. *Switzerland*, communication No. 21/1995, Views adopted on 8 May 1996, para. 11.3.

whether there were substantial grounds for believing that the complainant would face a foreseeable, real and personal risk of being subjected to torture if deported to his country of origin, the State party has failed to duly verify the complainant's allegations and evidence, through proceedings meeting the State party's procedural obligation to provide for effective, independent and impartial review as required by article 3 of the Convention. The Committee, therefore, finds that the complainant has not had access to an effective remedy against the decision to reject his application for a Protection Visa. Accordingly, the Committee concludes that the deportation of the complainant to his country of origin would constitute a violation of article 3 of the Convention.

8. The Committee against Torture, acting under article 22, paragraph 7, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, therefore concludes that the deportation of the complainant to China would constitute a violation of article 3 of the Convention.

9. Pursuant to rule 118, paragraph 5, of its rules of procedure, the Committee invites the State party to inform it, within 90 days from the date of the transmittal of the present decision, of the steps it has taken in accordance with the above observations.

[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.]