



International Covenant on Civil and Political Rights

Distr.: General
25 August 2014

Original: English

Human Rights Committee

Communication No. 2049/2011

Views adopted by the Committee at its 111th session (7–25 July 2014)

<i>Submitted by:</i>	Z. (represented by counsel Frances Milne of Balmain for Refugees)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Australia
<i>Date of communication:</i>	15 April 2011 (initial submission)
<i>Document references:</i>	Special Rapporteur's decision under rules 92 and 97, transmitted to the State party on 18 April 2011 (not issued in document form)
<i>Date of adoption of Views:</i>	18 July 2014
<i>Subject matter:</i>	Deportation of the author to China
<i>Substantive issues:</i>	Risk of irreparable harm in country of origin
<i>Procedural issues:</i>	Substantiation of claims
<i>Articles of the Covenant:</i>	7, 18, 19
<i>Articles of the Optional Protocol:</i>	2



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 (111th session)

concerning

Communication No. 2049/2011*

Submitted by: Z. (represented by counsel Frances Milne of Balmain for Refugees)

Alleged victim: The author

State party: Australia

Date of communication: 15 April 2011 (initial submission)

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

Meeting on 18 July 2014,

Having concluded its consideration of communication No. 2049/2011, submitted to the Human Rights Committee on behalf of Z. 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 is Z., a Chinese national born in 1953 and residing in Australia. Following the rejection of his asylum claim, he was ordered to leave Australia. He submits that by forcibly returning him to China, Australia would violate his rights under articles 7, 18 and 19 of the International Covenant on Civil and Political Rights (“the Covenant”). He is represented by counsel Frances Milne.

1.2 On 18 October 2011, pursuant to rule 92 of its rules of procedure, the Committee, acting through its Special Rapporteur on new communications and interim measures, requested the State party not to remove the author to China while the communication was under consideration by the Committee. The author remains in Australia. On 12 June 2013, the Committee, acting through its Special Rapporteur on new communications, denied a

* The following members of the Committee participated in the examination of the present communication: Yadh Ben Achour, Lazhari Bouzid, Christine Chanut, Cornelis Flinterman, Yuji Iwasawa, Walter Kälin, Zonke Zanele Majodina, Gerald L. Neuman, Sir Nigel Rodley, Víctor Manuel Rodríguez Rescia, Dheerujlall Seetulsingh, Anja Seibert-Fohr, Yuval Shany, Konstantine Vardzelashvili, Margo Waterval and Andrei Paul Zlătescu.

request from the State party to split the consideration of the admissibility of the communication from its merits.

The facts as submitted by the author

2.1 The author lived and worked in his native village of Xujiadian in the Shandong Province of China. In July 2004, he began practicing Falun Gong to remedy a back injury sustained while farming. He and his friend and teacher L.S. would practise Falun Gong together in secret in their homes.

2.2 One night in August 2005, at approximately 9 p.m., the author and L.S. had just finished practising Falun Gong at the author's home when security guards from the Xujiadian village neighbourhood committee burst in and arrested both men. The two men were bound back-to-back and taken to the village security office, where they were detained overnight. Early the following morning, the Laishan district police from Jiejiazhang Town Public Security Bureau arrived and questioned the author and his friend about their involvement with Falun Gong. During the questioning, the author admitted to being an adherent to Falun Gong. The district police told them that they had committed a breach of a security order and would be taken to the district police station to be "re-educated". At that point, the author and his friend struggled with the police and the author was pushed to the ground, where he was cut badly on some glass. This left him with two large scars on his left forearm, and one under his chin.

2.3 While in detention that morning, the author's father, who had standing in the community, pleaded with the district police officers to not take the author to the District Police station. The officers agreed and instead imposed a fine of RMB 5,000 and ordered that both the author and L.S. perform in a humiliation parade. Because the author's family only had enough resources to pay one fifth of the fine, the village committee confiscated two thirds of the land belonging to the author's family in order to cover the remaining portion of the fine. The parade took place on the morning of the author's release. The author and L.S. were forced to parade through the streets of Xujiadian wearing tall hats on which the words "elements of an evil cult" were inscribed. The parade was organized by two district police officers and four or five village security officers.

2.4 With only one third of his land left, the author could no longer provide for himself or his family. The author was also asked to give up the Falun Gong practice. In August 2005, immediately following his release, the author fled and remained in hiding, moving from place to place to look for work. His wife informed him during that period that their house was under night-time police surveillance by two village security guards. She also complained of harassment and frequent questioning about her husband's whereabouts. In February 2006, she left Xujiadian herself to live with the author's daughter and her family. The author's son was also expelled from school because of the author's adherence to Falun Gong. In 2007, fearing an escalation of persecution of Falun Gong practitioners, the author and his family began saving money for him to flee to Australia.

2.5 The author arrived in Sydney on 26 May 2008. On 17 June 2008, he filed an application with the Department of Immigration and Citizenship for a protection class visa ("protection visa"). The Department rejected the application on 18 September 2008. On 30 September 2008, the author appealed the decision to the Refugee Review Tribunal, but this application was rejected on 25 November 2008. On 2 April 2010, the author filed a Ministerial Intervention request under the Migration Act of 1958, which was rejected on 28 May 2010 on the ground that the request did not meet the guidelines relating to this Act. On 13 August 2010, the author filed a second request on the ground of the existence of new evidence that had not been available to the Tribunal when it issued its 2008 decision. On 9 November 2010, the request was once again rejected for the same reason as stated in the decision of 2 April 2010.

2.6 Since coming to Australia, the author has developed a serious heart condition for which he has been admitted to hospital on several occasions (undergoing three operations: on 2 and 4 December 2010 and on 10 February 2011). He has also been diagnosed with chronic post-traumatic stress disorder, as well as high stress and anxiety, consistent with his allegations of persecution.¹ He continues to practise Falun Gong.

2.7 On 15 February 2011, the author filed a third Ministerial Intervention request on the grounds of the existence of new evidence relating to his health that was not available to the Tribunal at the time of its decision or at the time of the two first requests. The author's third request states that he had recently been hospitalized due to coronary post-angioplasty chest pain, and is on several kinds of heart medicine. It further states that as a result of his heart condition, he will not survive in China because he will be unable to afford health care, unable to continue working as a farmer, and unable to run from constant police surveillance. The author provides a statement dated 18 August 2010 from his sister stating that he has "suffered heart disease from constant fears that he might be removed to China at any time". The author also provides a statement dated 5 July 2010 from a friend who says that the author is a "genuine Falun Gong practitioner". The author further provides a statement dated 29 December 2010 from a psychiatrist who examined the author while he was in detention. The psychiatrist's report states that the author was likely suffering from a major depressive disorder characterized by pervasive sadness, insomnia, anorexia and weight loss. The author's third request was rejected on 14 April 2011. The author submits that he has exhausted available domestic remedies.

2.8 On 18 April 2011, the author filed a fourth request, but it was rejected on 8 July 2011.²

The complaint

3. The author claims that his deportation to China would constitute a violation of his rights under articles 7, 18 and 19 of the Covenant. In this context, the author asserts that China violated his rights under articles 7, 18, and 19 of the Covenant by restricting his freedom of religion, thought, conscience and expression by subjecting him to assault and humiliation amounting to cruel, inhuman or degrading treatment or punishment, and by applying legal sanctions for his practice of Falun Gong. The author maintains that in the

¹ The author provides a psychological assessment report dated 27 March 2011, issued by the New South Wales Service for the Treatment and Rehabilitation of Torture and Trauma Survivors. The author of the report states that she had been working as a counsellor and psychotherapist with refugee survivors of torture and trauma for approximately 22 years, and that she found no reason to doubt the credibility of the author's story. The report further states that the author presented chronic features of post-traumatic stress disorder and high levels of anxiety and depression, which had worsened since he was placed in detention.

² The author included this information in the fourth Ministerial Intervention request on 3 August 2011. This fourth request was initially based on new information concerning the author's mental health, namely, the psychological assessment report dated 27 March 2011. The author later submitted additional information to be included in the fourth request, namely, a discharge referral dated 1 April 2011 and standard health event documents dated 14 December 2010 and 14 February 2011. The discharge referral states that owing to single vessel right coronary artery disease, the author underwent a successful angioplasty and that the procedure was "well tolerated without complications". The standard health event document dated 14 December 2010 states that the author was referred to a counsellor for post-operation anxiety: "Client had stents and is afraid to sleep in case he dies in sleep." According to the second standard health event document, dated 14 February 2011: the client "stated that he recently had a 'very successful' heart operation which has relieved him from pain and allowed for better sleep. [...] He also stated that he no longer fears dying in his sleep due to his heart condition and expressed that worry will not assist him."

light of these past breaches, and taking into account the ongoing campaign of China against Falun Gong practitioners, he would incur a real risk of being subjected to similar violations if returned to China. The author argues that according to the Committee decision in *A.R.J. v. Australia*, the rights enshrined in the Covenant apply extraterritorially. The author further claims that if he is sent back to China, he will not receive appropriate health care, which is vital given his serious and life-threatening health complications.

The State party's observations on the admissibility and the merits of the communication

4.1 In its submission dated 20 December 2011, the State party first considers that the author's allegations under articles 7, 18 and 19 are inadmissible due to the failure to exhaust domestic remedies.³ Specifically, the author did not, as required under section 477 of the Migration Act, seek judicial review of the Tribunal decision by the Federal Magistrates Court within 35 days of the decision, and on 14 January 2011, he withdrew his application for an extension of time to seek such judicial review. The State party also says that it is not aware of any steps taken by the author to reapply for judicial review of the decision. Because successful judicial review of the decision would result in the Tribunal's reconsideration of the author's claim for a protection visa, which might ultimately remedy the author's claims under the Covenant, the author should be required to exhaust judicial review of the decision as an available and effective remedy.

4.2 The State party further considers that the author's allegations under articles 7, 18 and 19 are inadmissible because the author has failed to substantiate his claims regarding his alleged commitment to Falun Gong. The Tribunal rejected the author's claims that he had practised Falun Gong in China or come to the attention of the Chinese authorities on the basis of the author's written submissions and oral evidence, finding that he had a poor knowledge of the principles of Falun Gong and that many of his answers appeared rehearsed.⁴ The Tribunal also found that the author was untruthful in key aspects of his evidence. For example, it did not accept the author's allegations regarding his arrest and humiliation in 2005 in China.⁵ The author also gave confused and contradictory evidence about whether he continued to practise Falun Gong after the 2005 incident, and the State party considers that he appeared to have participated in Falun Gong-related activities in Australia for the sole purpose of strengthening his protection claim.⁶ The Tribunal found implausible the author's denial of his previous statement that one of the reasons he wished to remain in Australia was to earn money.⁷ The author's four requests for Ministerial Intervention were carefully considered, and it was determined that the new documentation the author provided with the first and fourth requests (including the mental health report) did not enhance his chances of obtaining a protection visa.⁸ The author had the possibility

³ The State party also refers to the facts as set forth by the author and adds that the author arrived in Australia on a business visa, travelling under a Chinese passport bearing his correct particulars.

⁴ The State party cites Refugee Review Tribunal decision record (Case No. 0806320), 25 November 2008 (hereinafter "Refugee Review Tribunal decision"), para. 69. The State party also notes that the original decision maker found that the author was not able to fluidly demonstrate Falun Gong exercises when asked to give a brief demonstration. On this point, the State party cites Protection (Class XA) Visa Decision Record, p. 7.

⁵ The State party cites Refugee Review Tribunal decision, para. 71.

⁶ The State party cites Refugee Review Tribunal decision, para. 72.

⁷ The State party cites Refugee Review Tribunal decision, para. 70.

⁸ Specifically, the State party considers that the alleged experiences outlined in the mental health report were a reiteration of the claims made by the author in the course of his visa application process; these claims had been repeatedly found by independent decision makers to be unsubstantiated and unreliable.

of applying for judicial review of the Tribunal decision, but declined to do so. The author has not provided the Committee with any new evidence regarding the risk of irreparable harm he would allegedly face due to Falun Gong adherence.

4.3 The State party further considers that the author's claims under article 7 are inadmissible because the author has not substantiated that he is personally at risk of being subjected to torture or other ill-treatment if returned to China. He stated that he was able to leave China in 2008 because the authorities did not have adverse information about him and he did not have a criminal record,⁹ and he did not experience any interference from the Chinese authorities on the basis of his Falun Gong commitment after the 2005 incident. The State party is unaware of any warrant for the author's arrest or of any other information that would suggest that the author is a person of interest to the Chinese authorities. Moreover, the author has not substantiated his allegation that his health condition would result in a violation of article 7 if he were deported to China, because International Health and Medical Services, an independent company providing medical care in immigration detention facilities in Australia, determined that the author's condition is stable and is not a barrier to a removal, and that treatment for his heart condition and for his depression is available in China. Any potential exacerbation of his condition would not be of the gravity required to amount to a violation of article 7.¹⁰ In addition, the author has not substantiated that he would be unable to earn a living wage in China, as he was able to subsist prior to his departure and to obtain the funds for his travel to Australia, and he has not shown how any financial difficulties he might encounter in China would represent treatment contrary to the provisions of article 7 of the Covenant.

4.4 The State party further considers that the author's allegations under articles 18 and 19 are inadmissible *ratione materiae* because the State party's non-refoulement obligations under the Covenant apply only in situations where there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7, and do not extend to potential breaches of articles 18 and 19.

4.5 The State party also considers that the communication is without merit, both for the reasons already stated, and for the following ones: the author's claim under article 7 does not meet the strict test of irreparable harm set forth by the Committee in *Ng v. Canada*, which states that a jurisdiction will be responsible for a violation occurring in another jurisdiction only if the violation "is certain or is the very purpose of the handing over".¹¹ The author himself states that he is an occasional practitioner of Falun Gong who performs the exercises in private and primarily for the benefit of his health. The State party considers that, in such circumstances, violations of his rights under articles 7, 18 and 19 are not the necessary and foreseeable consequence of his removal.

⁹ The State party cites Refugee Review Tribunal decision, para. 27.

¹⁰ The State party contrasts the circumstances of the author with those described in *D. v. The United Kingdom*, 146/1996/767/964, European Court of Human Rights, judgement of 21 April 1997, paragraph 53 (finding that removal of the author would constitute a breach of the European Convention for the Protection of Human Rights and Fundamental Freedoms equivalent to article 7 of the Covenant). The State party considers that the applicant in that case suffered from a terminal illness that was at a critical stage where his removal would expose him to contracting an infection that would ultimately lead to his death.

¹¹ Communication No. 469/1991, *Ng v. Canada*, Views adopted on 5 November 1993, para. 6.2. The State party also cites communications No. 470/1991, *Kindler v. Canada*, Views adopted on 30 July 1993, para. 15.3 and No. 692/1996, *A.R.J. v. Australia*, Views adopted on 28 July 1997, para. 6.8.

Author's comments on the State party's submission

5.1 On 13 March 2012, the author submitted his comments on the State party's submission.¹² Concerning exhaustion of domestic remedies, the author asserts that he withdrew his application for an extension of time to file for judicial review of the negative Tribunal decision because he received a two-page advice from a barrister appointed under the Tribunal's legal advice scheme stating that the Tribunal decision contained no error of law that would enable the court to return the author's application to the Tribunal for reconsideration, and that nothing indicated that the Tribunal had exercised its power to make findings of fact wrongly.¹³ The author states that the advice concludes: "It is my opinion that the matters raised [by your counsel] do not amount to legal error on the part of the Tribunal. If you decide not to continue with the Court action you should file a Notice of Discontinuance with the Court." The author states that based on the advice, he decided to discontinue his application in order to save costs and not waste the court's time. He further maintains that it is unlawful for anyone to encourage asylum seekers with no prospect of success to continue in the courts.¹⁴ As to why he applied for an extension of time to file for judicial review, the author states that he decided to apply when the Department of Immigration and Citizenship found that the analysis of the defects in the Tribunal decision in his request for Ministerial Intervention dated 13 August 2010 "did not meet the guidelines for a repeat request under Section 417 and 48B of the Migration Act". The author asserts that he filed for an extension because the defects in the Tribunal decision "were so crucial to reversing the adverse credibility findings [of the Tribunal]".

5.2 The author refutes the State party's observation that he failed to substantiate his claims under articles 7, 18 and 19. Regarding his commitment to Falun Gong, the author refers to his request for Ministerial Intervention dated 13 August 2010, in which he introduced new evidence to challenge the adverse credibility findings of the Tribunal as to his relation to Falun Gong. The author asserts that the new evidence systematically addressed the issues raised by the Tribunal, including his level of knowledge of Falun Gong. The author further maintains that he had stated in prior proceedings that he practised Falun Gong at home during the week and each Sunday with "the regular Falun Gong" in Central Park (Belmore Park), and that his responses to the questions on the teachings of Falun Gong were "quite adequate". The author argues that if his answers sounded rehearsed, this would not be surprising in the context of the potential life and death nature of the Tribunal decisions being made. The author submits that throughout the period of his detention in Australia, from March 2010 through February 2012, he was part of the Falun Gong group which met twice a day in Villawood Immigration Detention Centre. The group practised the exercises early in the mornings, and at night they studied and discussed the book *Zhuan Falun: The Complete Teachings of Falun Gong*, by Li Hongzhi. The author states that he "was usually most focused on pain reduction due to his constant back pain and later the increasing heart pain he had started experiencing although he also shared the spiritual aspirations of the group to cultivate their souls". The author asserts that since his

¹² The author refutes the State party's observations on the merits by referring to the arguments contained in his complaint.

¹³ The author states that the Refugee Review Tribunal Legal Advice Scheme was established by the Department of Immigration and Citizenship to help unrepresented applicants determine whether their claims have a "reasonable prospect of success." He provides a copy of the advice dated 7 July 2011. In addition to the portions quoted by the author in his submission, the advice also states, "Further, the RRT has met all the requirements of procedural fairness." He also provides a copy of his counsel's draft amended grounds for filing for judicial review, and an article by Amnesty International – Australia entitled "China: Olympic countdown to human rights reform" (22 September 2006). The article does not refer to abuses concerning Falun Gong practitioners.

¹⁴ The author cites section 486E(1)(a) of the Migration Act of 1958.

release from detention, he has continued to practise Falun Gong. Concerning his inability to subsist in China, the author submits that the mental health report attached to his fourth Ministerial Intervention request dated 18 April 2011 emphasizes the author's high risk of suicide if he is returned to China. The author also states that the medical evidence provided with his third request dated 15 February 2011 testifies to his diagnosis of triple vessel coronary heart disease and to the five bypass operations carried out while he was in detention. The author maintains that he cannot carry out the hard physical work he has relied on in the past, and has no other skills. He further submits that although he has family members and a wife in China, they are unable to support him financially.

5.3 The author asserts that the Tribunal process is unfair and that there is no effective remedy in Australia for the defects contained in the Tribunal decision owing to the limitations of the court system and the procedures for applying for Ministerial Intervention. The author maintains that judicial review is a limited process and that the courts do not have the power to review Tribunal decisions on the merits (i.e. they may only review them for procedural fairness or legal error).¹⁵ On this basis, the author asserts that judicial review does not allow the courts to decide on the fairness of the Tribunal decisions regarding persecution claims or to remedy adverse credibility findings. The author further argues that the discretionary and non-appellable powers of the Minister to intervene are rarely invoked, even when issues of procedural fairness are involved.¹⁶ He maintains that in his case, he had no understanding of the rigour required in a request for Ministerial Intervention and squandered his first request through his own inadequate effort. This disadvantaged his subsequent requests, which were deemed to be repeat requests. He also states that it was only after he filed his first request that he was able to obtain a translation of the Tribunal decision and could understand its complexities. He further argues that his second request was not properly assessed, as no reasons were given for the determination that the request did not raise new substantive issues.

Additional observations by the State party on admissibility and on the merits

6.1 In its submissions dated 17 October 2012 and 24 May 2013, the State party responded to the author's comments and provided additional information.¹⁷ The State party reiterates that the evidence provided by the author during domestic proceedings was fully assessed and reconsidered several times. The State party also considers that the author's criticism of the refugee determination process is unfounded, as the domestic decision makers are professionally trained and provided with substantial guidance to enable them to properly assess evidence, and the decision makers in the author's case relied on such relevant guidance.¹⁸ The Ministerial Intervention process was not intended to provide for a further exhaustive merits review because such a function was reserved for the courts. Rather, the process is intended to act as a "safety net" by providing the Minister with flexible powers to intervene if this should be in the public interest. These powers are typically exercised only in exceptional or unforeseen circumstances, and the Minister granted visas in 35 per cent of the cases presented during the 2011–2012 programme. The

¹⁵ The author cites the privative clause in part 8, division 1 of the Migration Act of 1958.

¹⁶ The author cites sections 417 and 48B of the Migration Act.

¹⁷ The State party repeats its arguments regarding the merits of the author's claims.

¹⁸ The State party cites the following sources relied upon by domestic decision-makers in the author's case: Office of the United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status*, Geneva, 1992 [UNHCR Handbook], paras. 195–205 (HCR/IP/4/Eng/REV.1); Migration Review Tribunal, Refugee Review Tribunal, *Guidance on the Assessment of Credibility* (2012), available from www.mrt-rrt.gov.au/Conduct-of-reviews/Conduct-of-reviews/default.aspx; *Principal Member Direction 2/2009*, para. 4; sections 424AA, 424A and 425 of the Migration Act of 1958.

author's lack of success in his requests for Ministerial Intervention does not reveal a flaw in the process but reflects that the case was not sufficiently unique or exceptional. In the light of the absence of evidence of improper application of domestic law, the State party respectfully suggests that the Committee adhere to its practice of abstaining from questioning factual assessments reached by domestic courts and tribunals.¹⁹

6.2 Regarding the new information provided by the author concerning his alleged inability to subsist owing to his family's incapability to support him financially and his alleged inability to find work in China, the State party considers that the non-refoulement obligation arising from the Covenant does not entitle non-citizens to resist deportation on the basis of claimed socioeconomic hardship. The author's circumstances fall short of the nature and severity of hardships found by the European Court of Human Rights to invoke a non-refoulement obligation: he is not in the advanced stages of a terminal illness; he is familiar with China and its administrative systems and social and cultural networks; he speaks the language and has a number of friends and family members living there for support; and he would have access to public services.²⁰ Concerning his health difficulties, a medical assessment conducted on 28 February 2013 noted that the author is fit to travel overseas, and the author will undergo a final medical assessment prior to any removal action taking place. As such, the State party considers that the author does not face any prospect of irreparable damage if removed to China.

6.3 In response to the author's new information concerning the legal advice that resulted in the withdrawal of his application for judicial review, the State party considers that, given the barrister's advice that there was no error of law or lack of procedural fairness in the RRT decision, judicial review was not a remedy that the author should be required to exhaust. The State party therefore withdraws its argument that the communication should be declared inadmissible on this basis. Nevertheless, the State party considers that the legal advice — which stated that the author's application for judicial review did not have a reasonable chance of success — further supports the State party's position that the author's claims before the Committee are inadmissible owing to the lack of substantiation. The State party emphasizes that the courts can consider a range of issues, including whether correct procedures were followed, whether the person was given a fair hearing, whether the decision-maker considered all of the claims put forward, whether the decision-maker correctly interpreted and applied the relevant law, and whether the decision-maker was unbiased.

¹⁹ The State party cites communications No. 58/1979, *Maroufidou v. Sweden*, Views adopted on 9 April 1981, para. 10.1 and No. 1208/2003, *Kurbonov v. Tajikistan*, Views adopted on 16 March 2006, paras. 6.3, 2.5.

²⁰ The State party considers that although the European Court of Human Rights has only in a very limited number of cases found that severe socioeconomic hardship that is not directly attributable to the public authorities of the receiving country may engage non-refoulement obligations, such cases are exceptional and apply only in extreme circumstances to especially vulnerable applicants. The State party contrasts the circumstances of the author with the extreme circumstances described in the European Court of Human Rights case *M.S.S. v. Belgium and Greece*, Application No. 30696/09, judgement of 21 January 2011 (finding a non-refoulement obligation under article 3 of the European Convention on Human Rights where the applicant was homeless, without shelter, lived in constant fear of being attacked, had no access to means of subsistence, sanitary facilities or food, and where the Government had provided no information on obtaining accommodation). The State party also repeats its observations concerning the applicant's ill health.

Further comments by the author

7. In a submission dated 20 January 2013, the author presented his comments on the State party's additional observations dated 17 October 2012. The author says that the State party erroneously evaluates his health difficulties and inability to subsist in China as discrete arguments for protection under the Covenant, whereas he argues that his primary claim is that he will suffer persecution in China owing to his commitment to Falun Gong, and that his health and subsistence problems "arise from his Falun Gong commitment". The author also finds that the State party downplays the seriousness of his claims regarding his health and subsistence prospects. He asserts that the information provided in his asylum application and Ministerial Intervention requests establish that he will suffer "serious harm amounting to persecution" if returned to China, in violation of articles 7, 18 and 19 of the Covenant.²¹ He also asserts that the legal advice he received concerning his prospect of success in filing for judicial review did not address whether his claim of persecution had merit, but rather assessed whether the Tribunal decision contained errors of law.

Issues and proceedings before the Committee*Consideration of admissibility*

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

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

8.3 The Committee notes the State party's argument that the author's claims with respect to articles 7, 18 and 19 of the Covenant should be held inadmissible due to insufficient substantiation. The Committee notes that he has explained that the reasons he feared being returned to China were based on the detention and treatment that he allegedly suffered as a result of his religious beliefs, and on country information concerning ill-treatment of Falun Gong practitioners. The Committee finds that, for the purposes of admissibility, the author has provided sufficient details and documentary evidence regarding his personal risk of cruel, inhuman or degrading treatment or punishment as an alleged Falun Gong practitioner if he were returned to China and therefore finds the author's claims under article 7 admissible.²² As for the allegations concerning violations of articles 18 and 19, the Committee considers that they cannot be dissociated from the author's allegations under article 7, which must be determined on the merits.²³

8.4 The Committee declares the communication admissible insofar as it appears to raise issues under articles 7, 18 and 19 of the Covenant and proceeds to consideration of 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.

²¹ The author refers to section 91R of the Migration Act of 1958.

²² See communication No. 1957/2010, *Lin v. Australia*, Views adopted on 21 March 2013, para. 8.6.

²³ See communication No. 2007/2010, *X. v. Denmark*, Views adopted on 26 March 2014, para. 8.4.

9.2 The Committee notes the author's claim that, as a Falun Gong practitioner, he would face ill-treatment if he were returned to China. It also notes the State party's observations that the Refugee Review Tribunal, whose conclusions were accepted in later proceedings, was not satisfied that the author was genuinely an adherent to Falun Gong, or that the events he described in China had actually occurred.

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 when there are substantial grounds for believing that there is a real risk of irreparable harm such as that contemplated by articles 6 and 7 of the Covenant.²⁴ 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.²⁵

9.4 While noting that there are reports of serious human rights violations in China against Falun Gong practitioners, especially 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 found that he did not demonstrate an actual commitment to the practice of Falun Gong. The Tribunal found that his account of events preceding his departure from China was contradictory and not credible, and that he gave evasive and memorized answers to questions exploring the alleged events. The Tribunal also found that he did not provide sufficient evidence that he genuinely practiced Falun Gong in Australia, where he was free to do so. The Tribunal noted that the author had had no difficulty in obtaining a passport and leaving China, and there was no information indicating that he would be of interest to the Chinese authorities if he returned. The Committee observes that the author has not identified any irregularity in the decision-making process, or any risk factor that the State party's authorities failed to take properly into account. The author disagrees with the factual conclusions of the State party's authorities, but does not show that they are manifestly unreasonable. 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 as a Falun Gong practitioner if he were removed to China.

9.5 With regard to the author's state of health, the Committee notes that the author suffers from a chronic heart condition and may require another operation in the future. The Committee nevertheless considers that the file does not show that the author's medical condition in itself is of such an exceptional nature as to trigger the State party's non-refoulement obligations under article 7.²⁶

9.6 For the foregoing reasons, the Committee cannot conclude that the State party would violate article 7 of the Covenant if it removed the author to China.

9.7 With regard to the author's claims under articles 18 and 19, the Committee refers to its conclusions in paragraph 9.4, and for the same reasons finds that it could not conclude that the author would face a real risk of treatment inconsistent with those articles if he were removed to China.

²⁴ See general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, para. 12.

²⁵ See communications No. 1763/2008, *Pillai et al. v. Canada*, Views adopted on 25 March 2011, para. 11.4 and No. 1957/2010, *Lin v. Australia*, Views adopted on 21 March 2013, para. 9.3.

²⁶ See communications No. 1957/2010, *Lin v. Australia*, Views adopted on 21 March 2013, para. 9.4 and No. 1897/2009, *S.Y.L. v. Australia*, decision on inadmissibility adopted on 24 July 2013, para. 8.4.

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 articles 7, 18, and 19 of the Covenant.
