



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

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**Committee against Torture**

**Communication No. 434/2010**

**Decision adopted by the Committee at its fifty-first session,  
28 October to 22 November 2013**

<i>Submitted by:</i>	Y.G.H. et al (represented by Janet Castle)
<i>Alleged victims:</i>	The complainants
<i>State party:</i>	Australia
<i>Date of complaint:</i>	24 October 2010 (initial submission)
<i>Date of present decision:</i>	14 November 2013
<i>Subject matter:</i>	Expulsion to China
<i>Procedural issues:</i>	Non-substantiation of the claims; manifestly ill-founded
<i>Substantive issues:</i>	Risk of torture upon return to the country of origin; cruel, inhuman or degrading treatment or punishment
<i>Articles of the Convention:</i>	3, 16

GE.13-49746



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## Annex

### **Decision of the Committee against Torture under article 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (fifty-first session)**

concerning

#### **Communication No. 434/2010**

*Submitted by:* Y.G.H. et al (represented by Janet Castle)

*Alleged victim:* The complainants

*State party:* Australia

*Date of complaint:* 24 October 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 14 November 2013,

*Having concluded* its consideration of complaint No. 434/2010, submitted to the Committee against Torture by Y.G.H. and wife X.L.Z. and their son D.H., 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 complainants, their counsel and the State party,

*Adopts* the following:

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

1.1 The main complainant is Y.G.H. (the complainant), the other complainants are his wife X.L.Z. and their son D.H. (the complainants), nationals of China, born on 27 September 1955, 22 April 1957 and 7 March 1987, respectively. They currently reside in Australia. They claim that their return to China by Australia would violate articles 3 and 16 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. They are represented by Janet Castle.

1.2 Under former rule 108, paragraph 1, of its rules of procedure (now rule 114)<sup>1</sup>, the Committee requested the State party, on 3 November 2010, to refrain from expelling the complainants to China while their complaint is under consideration by the Committee. The State party agreed to refrain temporarily from deporting the complainants.

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<sup>1</sup> Rules of procedure CAT/C/3/Rev. 5, dated 21 February 2011.

## Factual background

2.1 The main complainant, Y.G.H., originates from Longtian in Fujian Province of China, where he has been a member of the underground Quiets church since 1998. He allowed meetings of the church to be conducted in his store and was questioned by police in 2001. In 2003 he was detained for a week and fined. He claims he was forced to join a “study class” organized by the Government and sent to a detention camp, where he was subjected to both mental and physical abuse. He was again detained for almost a month in March 2004 and interrogated on several occasions before leaving China on 5 June 2004.

2.2 On 6 June 2004 the complainants arrived in Australia on visitors’ visas. A few days after their arrival, the main complainant found out from his mother, who still lived in China, that two of his former employees had been arrested and that they had disclosed information about the complainant’s role in the church and that he had been served with a summons to appear before a court due to his anti-governmental religious activities. On 23 June 2004, the complainant and his family applied for a protection visa. He claimed that he had a well-founded fear of persecution in China on account of his religion, given his involvement in the underground Christian church in China. On 28 June 2004, the application was refused by the Department of Immigration and Citizenship. On 2 November 2004, his appeal was refused by the Refugee Review Tribunal. On 7 November 2005, the Federal Magistrates Court upheld the decision. His second application to the Tribunal was refused on 20 February 2006 and his further appeal to the Federal Magistrates Court was refused on 13 September 2006 and thereafter also by the Federal Court of Australia on 21 February 2007. On 16 March 2007, he applied to the Minister for Immigration and Citizenship seeking a permanent protection visa for himself and his family, but this was refused on 22 March 2008. Thereafter, in 2008 and 2009, he, his counsel and other third persons, on behalf of him and his family, submitted several letters to the Minister with new information; however in all cases the main complainant was informed that his case would not be re-examined by the Minister, as the further requests in combination with the information known previously did not meet the specific guidelines for referral to the Minister. On an unspecified date in 2010, the complainant submitted to the immigration authorities a copy of the summons of 18 January 2010 of the Fuqing City People’s Court and a copy of the detention notice of 2 February 2010 issued by the Public Security Bureau of Fuqing City.

2.3 The State party authorities refused a protection visa to the complainants on the grounds, inter alia, that “year by year it was becoming easier for Christians to practise their beliefs, particularly in provinces (of the People’s Republic of China) near the coast.”<sup>2</sup> Despite the fact that the complainant claimed to be a key leader of the underground church, he was issued with a passport by the Chinese authorities without any obstacles in 2000 and could leave China on 5 June 2004 without any hindrance.<sup>3</sup> His claims that he was a key leader of the underground church were contradictory, as he only provided premises and some financial support; his statements were inconsistent; he could not provide any evidence to support, inter alia, the statement that he had been detained on two occasions (once for three weeks) such as an arrest warrant, detention order or document of release, or any medical documentation demonstrating that he had been subjected to ill-treatment while in detention. The underground home churches alone were estimated to have between 30 and 50 million members in China and the Refugee Review Tribunal was not able to satisfy itself

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<sup>2</sup> Decision of the Department of Immigration and Citizenship, 28 June 2004.

<sup>3</sup> Ibid.

that there was any reason to believe that there was a real risk that the complainant would experience serious harm amounting to persecution if returned to China.<sup>4</sup>

2.4 The main complainant submits that he continues to practise his faith in Australia. He also submits that his health has deteriorated during the last six years and he has been diagnosed with “major affective disorder, depressive type which amounted to dysmiania” due to his fear of being removed to China. He adds that he also suffers post-traumatic stress disorder, including insomnia, agitation and nightmares relating to his experience of political detention and torture when he was in China.

2.5 The complainant further notes that they should not be expelled because his wife is unfit to travel following a surgical intervention in February 2010 to remove an intrauterine device (IUD), which had been forcibly inserted in China and that he was also found by the Department of Immigration and Citizenship to be unfit to travel on psychiatric grounds.

2.6 The main complainant submitted numerous letters of support of his claims from his family and friends.

### **The complaint**

3.1 The complainants claim that the main complainant will be detained and tortured if returned to China. The existence of the summons demonstrates that he is a person of interest to the Chinese authorities. Given that the summons has been issued because of his religious activities, he would not be able to practise his religion freely.

3.2 The main complainant and his wife further claim that they are unfit to travel due to the main complainant’s deteriorated psychological state of health and his wife’s general state of health.

### **State party’s observations on admissibility and merits**

4.1 On 15 January 2013, the State party submitted its observations on admissibility and merits of the complaint. The State party submits that the allegations in relation to article 3 of the Convention with respect to the complainant’s wife are inadmissible and that the allegations in relation to article 16 of the Convention concerning the main complainant and his wife are also inadmissible. As no allegations are made in relation to the complainant’s son, the State party submits that the communication in respect of him is manifestly unfounded and therefore inadmissible. In the alternative, it further submits that all of the complainants’ claims should be dismissed as without merit.

4.2 The State party further briefly reiterates the facts of the present case as follows. The complainants are nationals of China. Prior to their arrival in Australia, the complainants claim that they were residents of Longtian, Fujian Province where the main complainant ran a small store. The main complainant claims to have been a practising member of the Quiets Church and to have provided the congregation access to the basement of his store. He alleges that he also participated in Church services. He claims that he was persecuted for his affiliation with the Church, including being sent to a “study class” and that he was subject to both physical and mental abuse by the Chinese authorities, which amounted to torture.

4.3 The complainant’s son arrived in Australia on 18 February 2004 on a study visa. The complainant and his wife left China for Australia, arriving on 6 June 2004. He applied for a protection visa on 23 June 2004, including for his wife and son. His application was refused by the Department of Immigration and Citizenship. The complainants sought a

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<sup>4</sup> Decision of the Refugee Review Tribunal, 2 November 2004.

review of this decision before the Refugee Review Tribunal, which upheld the decision on 1 December 2004. They appealed the decision of the Tribunal before the Federal Magistrates Court. On 7 November 2005, the Minister for Immigration and Citizenship withdrew from the matter after an examination of the record of the Tribunal decision revealed a probable error of law, namely that the Tribunal had failed to give proper consideration as to whether the complainant would continue to express his purported religious beliefs on return to China. The Federal Magistrates Court made orders setting aside the first decision of the Tribunal and the matter was remitted to the Tribunal for reconsideration. On 2 March 2006, a newly constituted Tribunal reviewed and affirmed the original decision of the Minister for Immigration and Citizenship. The complainants appealed the second Tribunal decision to the Federal Magistrates Court and subsequently to the full Federal Court. Those appeals were dismissed on 13 September 2006 and 21 February 2007 respectively.

4.4 The complainants have also unsuccessfully sought ministerial intervention eight times between 2007 and 2011.<sup>5</sup> Following examination of the main complainant's initial request, the Minister decided not to intervene. Seven subsequent requests for ministerial intervention were fully considered and rejected due to a lack of new evidence sufficient to meet the guidelines for ministerial consideration and because the information submitted by the complainant did not provide a sound basis for believing that there was a significant threat to his or his family members' personal security, human rights or human dignity upon their return to China.

4.5 Following receipt of the present communication, the Department of Immigration and Citizenship initiated a further request for ministerial intervention on 30 November 2010, with the specific purpose of considering the new information in the communication which had not been previously considered by the State party authorities, namely the complainant's allegations regarding his wife's forced abortion and forced insertion of an IUD. On 22 February 2011, the Department of Immigration and Citizenship decided that this new information did not engage Australia's non-refoulement obligations, including under the Convention. The complainant applied to the High Court on 10 July 2012 for judicial review of the Minister's decision not to intervene, but he discontinued this proceeding on 3 October 2012.

4.6 The State party further notes that the claims of the complainants in relation to the Convention are not clear and they have not provided a clear statement of allegations against the articles of the Convention. The State party has therefore had to make assumptions about the nature of their allegations and addresses their submission as primarily an allegation of violation of articles 3 and 16 of the Convention. It assumes that under article 3 of the Convention, the complainants claim that, should they be returned to China, the main complainant would face persecution from the Chinese authorities on account of his Christianity and support for the Quakers Church. They appear to allege this conduct would amount to torture. They also appear to claim that because of the complainant's wife's previous alleged forced termination of pregnancy and IUD implantation, should they be returned to China, she might be subjected to treatment amounting to torture. There are no specific allegations regarding the complainant's son. Furthermore, under article 16 of the Convention, the complainants claim that deterioration in the main complainant's mental health and his wife's general health has rendered both unfit to travel. The State party assumes that the complainants allege that their removal from the State party would amount to cruel, inhuman or degrading treatment in breach of article 16 of the Convention.

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<sup>5</sup> Requests made under section 417 of the Migration Act 1958 (Cth) on 26 March 2007, 21 May 2008, 4 February 2009, 20 October 2009 and 5 August 2010 and under Section 48B on 21 May 2008, 4 February 2009 and 5 August 2010.

4.7 The State party notes that the complainants also make claims about their treatment in the State party, which allegedly engages obligations under the International Covenant on Civil and Political Rights, the Convention on the Rights of the Child and the Convention Relating to the Status of Refugees. In this connection, the State party submits that references to rights outside the Convention are inadmissible *ratione materiae* and will not address these claims.

4.8 Further, as concerns the allegations of the complainants under article 3 of the Convention that, should the State party return the complainant and his family to China, there would be substantial grounds for believing that they would be in danger of being subjected to torture, the State party notes that it is the responsibility of the complainants to establish a *prima facie* case for the purpose of admissibility of a claim under rule 113 (b) of the rules of procedure.

4.9 In light of the above, the State party observes that the complainants appear to claim that because of the complainant's wife's alleged previous forced termination of pregnancy and insertion of an IUD, should she be returned to China she would face future treatment amounting to torture. The State party maintains that this claim is inadmissible as they have not substantiated how the complainant's wife is at risk of future adverse treatment in her present circumstances, or how possible future treatment would amount to torture within the meaning of article 1 of the Convention. The State party also maintains that the claim is manifestly ill-founded.

4.10 Furthermore, the State party submits that there are no substantial grounds for believing that the complainants would be subject to torture upon their return to China. It recalls that the onus of proving that there is "a foreseeable, real and personal risk of being subjected to torture" upon deportation rests with the complainants.<sup>6</sup> The risk need not be "highly probable", but it must be "assessed on grounds that go beyond mere theory and suspicion".<sup>7</sup> The Committee has further expressed the view that "the danger must be personal and present".<sup>8</sup>

4.11 The State party submits that the complainants have not provided credible evidence to demonstrate that the main complainant would be personally at risk of adverse treatment, or that such treatment that he alleges may occur would amount to torture under article 1 of the Convention.

4.12 The State party further notes that the Committee has stated that, in exercising its jurisdiction pursuant to article 3 of the Convention, it will give considerable weight to findings of fact that are made by the State party concerned.<sup>9</sup> While the Committee has rightly indicated that it is not bound to accept those findings and must freely make its own assessment of the facts, the State party submits that in this case the evidence before the Committee does not disclose a real risk of torture in relation to the complainant. In this respect, it notes that the Department of Immigration and Citizenship and later the Refugee Review Tribunal concluded that the main complainant will not "face any risk of harm for reasons of religion if he returns to China now or in the foreseeable future".

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<sup>6</sup> Communication No. 203/2002, *A. R. v. the Netherlands*, decision adopted on 14 November 2003, para. 7.3.

<sup>7</sup> Communication No. 355/2008, *C.M. v. Switzerland*, decision adopted on 14 May 2010, para. 10.3.

<sup>8</sup> Communication No. 280/2005, *Gamal El Rgeig v. Switzerland*, decision adopted on 15 November 2006, paras. 6 and 7.

<sup>9</sup> Committee against Torture, general comment No. 1 on article 3 of the Convention in the context of article 22, para 9 (a).

4.13 In the context of the first decision of the Tribunal, the State party notes that after reviewing his written submissions and taking oral evidence, the Tribunal rightly gave the complainant the benefit of the doubt and accepted that he was a Christian and had been a member of an underground church in China, even though he displayed a very limited knowledge of that faith. However, the Tribunal rejected his claim that he was a “particularly key member in the underground church” or that he was the target of persecution by the Chinese authorities. Despite numerous claims that he had been interrogated and detained by the local Public Security Bureau for periods of several weeks, which the complainant cited as evidence of the interest of the Chinese authorities in him, the Tribunal noted that he left China with apparent ease in June 2004. When the Tribunal put this to him, he was unable to explain why this was the case, if he was (as claimed) a key member of an underground church who had been tortured by the authorities. The State party further notes that the complainant claimed that his employees only revealed his true role in the underground church to the authorities after he left China and that a subpoena had been issued for his arrest should he return. When the Tribunal questioned him on how he came to know about the subpoena, he explained that he had discussed the matter with his mother over the telephone. The Tribunal pointed out that this was a very sensitive matter to discuss over the telephone and was not satisfied the claim was truthful. The Tribunal further noted a lack of evidence to substantiate his claims. It found it implausible that, despite claims of repeated interrogations and detention by the local authorities, the complainant did not make attempts to relocate his home or business and continued to conduct secret church services there. Taking these factors into account, the Tribunal upheld the original decision not to grant the complainant a protection visa.

4.14 Following the decision of the Federal Magistrates Court to remit the case to the Tribunal in order to consider whether the main complainant would practise Christianity on his return to China, a reconstituted Tribunal conducted a new hearing with respect to the complainant’s claims. In this connection, the State party points out that the Tribunal gave the complainant an opportunity to read through the record of the first hearing with the assistance of an interpreter and to correct any errors. The only clarification he made was with respect to a question about who baptized Jesus. Furthermore, the reconstituted Tribunal did not accept that the complainant was a member of a Christian underground church in China. In this regard, the State party notes that religious beliefs are deeply personal and are not readily subject to tests in courts or tribunals; however, the Tribunal found the complainant’s knowledge of Christianity to be superficial and considered that he gained that knowledge through attending a church in Australia. For example, he knew little about the differences between the official and unofficial churches in China, he did not know that Bibles are available for sale in China, nor did he know how Christianity differs from other religions. The State party also points out that the Tribunal noted the inconsistency between his initial claim to be a key activist and his subsequent claim to be only a supplier of premises and money. The Tribunal did not accept that the main complainant was arrested, detained or questioned on account of his religious beliefs in 2004, on the basis that he left China without difficulty in June 2004, when country information indicated there were strict departure controls for persons with adverse records held by the Public Security Bureau. Neither did the Tribunal accept his explanation that bribing an official was sufficient to ensure easy departure, if he were in fact a key activist in whom Chinese authorities were interested, given the “highly risky and expensive” nature of doing so. Taking into account all of the above information, the reconstituted Tribunal decided not to grant the main complainant a protection visa.

4.15 The State party maintains that the Tribunal carefully considers and examines all applications for protection visas. In support of this, the State party further notes that available statistics from the financial year 2011–2012 indicate that China was the country from which Australia received the highest number of applications for protection visas from

persons on shore; almost one quarter (24 per cent) of the matters decided by the Tribunal were brought by Chinese applicants and China is in the top five countries in respect of which protection visas have been granted.

4.16 In this connection, the State party notes that the Department of Immigration and Citizenship and the Tribunal consider hundreds of applications for protection visas from Chinese nationals each year. They have access to substantial resources providing country information. Accordingly, it submits that members of the Tribunal have particular expertise on China and significant experience dealing with claims for protection from Chinese nationals.

4.17 The State party further recalls that the complainant appealed the decision of the Tribunal before the Federal Magistrates Court and later to the Federal Court. Thereafter, between 26 March 2007 and 5 August 2010, he made a total of eight requests for ministerial intervention under sections 48B and 417 of the Migration Act. In this connection, the State party notes that the complainants appear to imply in their submissions that because these requests were not successful, new information provided to the Department of Immigration and Citizenship was not properly considered.

4.18 In this regard, the State party submits that the ministerial intervention process offers a genuine opportunity for new claims that may engage its non-refoulement obligations to be made and that these claims are considered in good faith. However, the ministerial intervention process is not intended to be a further exhaustive review of the merits of protection claims: this function is undertaken by the Tribunal and is subject to judicial review by the courts in relation to legal error. It explains that the ministerial intervention process is intended to act as a “safety net” by providing the Minister for Immigration and Citizenship with flexible powers to intervene in favour of an unsuccessful visa applicant if he thinks it is in the public interest to do so. In circumstances such as those of the complainants, where claims in relation to the non-refoulement obligations under the Convention have the same factual basis as claims considered in the protection visa process, the Minister’s powers are typically exercised only in exceptional or unforeseen circumstances, and therefore tend to result in visa grants in only a relatively small number of cases. The State party points out that, for example, during the financial year 2011–2012, the Minister decided 1,318 requests for intervention under section 417 of the Migration Act (with China being again the country of citizenship of the greatest number of applicants). The Minister granted visas in 35 per cent of those cases. The fact that the complainant was not successful in his repeated requests for ministerial intervention does not reveal any error in this process; rather it indicates that his case was deemed not to be sufficiently exceptional and did not raise any issues of non-refoulement obligations under the Convention to merit a different outcome than that which had been duly reached in the statutory protection visa assessment process.

4.19 The State party further emphasises that the new information received in January 2009 and in October 2009 from the complainant’s friends and family was duly considered by the national authorities. However they did not consider that these statements constituted credible evidence, as these individuals were not objective observers of the complainants’ case.

4.20 Furthermore, the State party observes that in a request for ministerial intervention on 5 August 2010, the complainant provided a court summons and detention notice from China, which he alleged to be evidence of his persecution by the Chinese authorities, and would have given weight to claims during his Tribunal hearings. It notes that the Department of Immigration and Citizenship assessed this information and concluded that it did not warrant a referral to the Minister. The assessment found that the summons and detention warrant lacked details to support the complainant’s claim that he had previously been detained by the Chinese authorities. The documents did not mention him escaping

from detention, did not indicate the location of the detention centre, or provide any other pertinent information relating to his claim. In the assessment, it noted that country information states that the availability of fraudulent documents in China, including summonses, is widespread and therefore did not consider weight should be given to those documents.

4.21 The State party reiterates that the decision not to grant the complainant a protection visa has been properly determined according to Australian law. It notes that the domestic legal system in the State party offers a robust process of merits and judicial review, as well as avenues for administrative appeal. It reiterates that the Tribunal affirmed the conclusions of the initial decision maker that the claims of the main complainant lacked credibility. He had access to and sought judicial review of the decision of the Tribunal. His eight subsequent requests for ministerial intervention, in which he advanced various arguments in support of his claim to remain in the State party, have been carefully considered. In addition, the State party notes that the Department of Immigration and Citizenship initiated a further request for ministerial intervention of its own accord upon receiving the communication, in order to consider the new claims advanced on behalf of the complainant's wife.

4.22 The State party submits that in this case, no significant error or abuse of process is revealed that would warrant the Committee issuing a different decision to that which has been duly reached.

4.23 It maintains that the complainant's claims and evidence have been considered in good faith and found not to enliven the State party's obligations under the Convention, the Convention on the Status of Refugees or the International Covenant on Civil and Political Rights, since it was not accepted that he practised Christianity while in China. In addition, even if the complainant were a committed Christian, as a general follower he could practise his faith with relative freedom within China. The State party reiterates that at the domestic level the main complainant has been inconsistent with regard to his evidence about his activism in the Christian underground church in China. If his claims to be a member of a church are accepted, then it is likely that his primary role involved the provision of a communal space to facilitate church gatherings. Moreover, he has not provided any further evidence of his membership or role in his church in Fujian province.

4.24 Furthermore, the State party notes that the Refugee Review Tribunal also considered independent country information, such as a contemporary report on international religious freedom by the Department of State of the United States of America, which observed that "perhaps 2.5 per cent [of the population] worships in Protestant house churches that are independent of government control".<sup>10</sup> The Tribunal acknowledged that there were many instances where the Chinese authorities required registration or State sanction of religious organizations. However, in respect of Fujian province, the Tribunal noted that "the official religious policy is applied relatively liberally in Fujian although there have been occasional crackdowns on house churches and "underground" Catholics". Moreover, although the complainants submitted a country report from Amnesty International that notes incidences of torture taking place in China as a result of membership of certain religious organizations, the State party submits that the information provided in this report is limited and generalized and does not provide evidence of a foreseeable, real and personal risk of the authors being subjected to torture.

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<sup>10</sup> United States Department of State, *International Religious Freedom Report 2005*, available from <http://www.state.gov/j/drl/rls/irf/2005/51509.htm>.

4.25 The State party notes that the information used by the national authorities in their assessment of the complainant's application recognized that there were significant differences in the ability of individuals to practise non-State-sanctioned Christianity from province to province within China.<sup>11</sup> Country information indicated that while there was some risk of State action that could amount to torture under article 1 of the Convention being directed toward leaders of Christian sects that were not sanctioned by the State, the risk to general followers was low.<sup>12</sup> Country information also indicated that religious practice, including Christianity, was becoming more widespread and public in China.<sup>13</sup>

4.26 In light of the above, the State party submits that the complainants' claim that the main complainant would be subject to torture by Chinese Government authorities if returned to China is without merit. The State party authorities reached the considered view that his claims were not plausible and that he did not face a well-founded fear of persecution, or a real risk of torture if returned to China. It maintains that, even if he were a committed Christian, the risk of him personally suffering torture due to his religious beliefs in all of the circumstances is not real and therefore does not engage the State party's non-refoulement obligations.

4.27 Finally, the State party notes that the complainants appear to claim that the act of returning them to China would constitute cruel, inhuman or degrading treatment, effectively breaching article 16 of the Convention, due to the effect it would have on the main complainant's mental health and his wife's general health.

4.28 The State party submits that the claim of the main complainant and his wife that their removal from Australia per se would constitute a violation of article 16 of the Convention is inadmissible, as insufficient evidence has been provided to demonstrate that they would suffer severe pain so as to meet the threshold for constituting cruel, inhuman or degrading treatment or punishment. This is consistent with the Committee's decision in *A.A.C. v. Sweden* where the Committee concluded "that the aggravation of the complainant's state of health which might be caused by his deportation is in itself insufficient to substantiate this claim, which is accordingly considered inadmissible".<sup>14</sup> Consequently, the effect on the complainants' health, should they be returned to China, would not amount to treatment inconsistent with article 16 of the Convention.

4.29 The State party submits that it has undertaken appropriate steps to ensure the complainants were fit to travel prior to removal action taking place. It notes that an assessment carried out on 29 September 2010, at the instigation of the International Organization for Migration and by independent psychologists, found that the main complainant was fit to travel. A similar assessment conducted on 26 July 2010 also found him fit to travel.

4.30 Further, the State party notes that the complainants have failed to provide evidence, such as medical certificates or opinions, to specify the precise nature of Ms. Zhang's alleged medical condition. It reiterates that, prior to any future removal action, the complainants would undergo independent medical assessment to ensure that they were fit to travel.

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<sup>11</sup> United States Commission on International Religious Freedom, *2011 Annual Report*, p. 126.

<sup>12</sup> *Ibid.*

<sup>13</sup> *Ibid.*, p. 125.

<sup>14</sup> Communication No. 227/2003, decision adopted on 16 November 2006, para. 7.3. See also, communication No. 083/1997, *GRB v. Sweden*, Views adopted on 15 May 1998, para. 6.7.

4.31 For these reasons, the State party submits that information provided by the complainants is not sufficient to substantiate a claim under article 16 and the claim is therefore inadmissible.

4.32 In the alternative, the State party submits that the impending removal of the complainants would not cause mental pain or suffering sufficient to meet the requirements of article 16 of the Convention and as such the claim should be rejected as being without merit.

4.33 On 24 May 2013, the State party requested the Rapporteur on new complaints and interim measures of the Committee to lift the request for interim measures made on behalf of the complainants and submitted further observations in the present case. It reiterates that the main claim of the complainant before the Committee appears to be based on his concern that his case has not been properly investigated by the State party authorities. In this connection, the State party notes that in its previous observations, it outlined the comprehensive domestic processes undertaken to consider the claims of the complainants, which included a review of the merits, a judicial review and an examination of the numerous requests for ministerial intervention.

4.34 Finally, the State party notes that on 24 January 2013, the complainant's son lodged an application for a partner visa and has been issued a bridging visa to permit him to remain lawfully in the State party until his application is finally determined.

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

5.1 In reply to the State party's observations on 14 June 2013, the complainants requested that they not be removed from the State party until a decision is adopted by the Committee concerning their case.

5.2 The complainants maintain that not all information submitted by them at the domestic level has been given due "attention and weight" by the national authorities. In this connection, they submit that the information referred to by the State party concerning the complainant's wife's claims about the forced abortion and forced insertion of an IUD has never been intended by them to be part of the present protection visa process.

5.3 As to the State party's reference to the independent medical assessments of the main complainant and his wife, the complainants point out that these assessments are of no relevance. For example, since the assessments took place, the complainant's wife has had surgery and ongoing treatment for thyroid cancer. In addition, the respective medical assessments were conducted in less than 15 minutes (for the complainant and his wife together) and were conducted with an interpreter. No examination was conducted and the assessment was based on reports only.

5.4 On 8 July 2013, the complainants submitted further comments. They note that the complainant's son was a minor at the time of the initial application for a protection visa and therefore was included in it, together with the main complainant and his wife. The complainant's son has since got married and applied to be included on his wife's recently granted permanent residency visa and therefore is no longer part of the present complaint. Consequently, the complainant's son is not included and referred to in the present comments.

5.5 Further, the main complainant made no claims of persecution on behalf of his wife in his application to the Department of Immigration and Citizenship for a protection visa, or in his complaint lodged with the Committee, as she is his wife and she travelled to the State party with him; as required, information about her was included in the application. In this connection, the complainants explain that the information about her was provided to the

Committee as an explanation for her continued stay in the State party, because, based on her medical condition, she was unfit to travel.

5.6 As to the main complainant's role in the Quiets Church, the complainant maintains that he did not merely provide access to the basement of his store. In this regard, he refers to the letter of October 2009 of J. J. G., in which she states that she often attended church meetings held in the complainant's basement; specifically, the Church met in the complainant's house and basement during 2001 and 2004; and that he was present at church meetings during this time and was arrested in 2001 and 2004. The complainants also note that the fact that the complainant participated in the Quiets Church services and that he was persecuted for his affiliation with the Church and physically and mentally abused by the Chinese authorities, amounting to torture, is also supported by five Chinese residents in Australia, who confirm that the main complainant attended services of the Quiets Church in his basement in China and that he was arrested along with other church members in 2004. In addition, one of the statements confirms that in 2004 the complainant was detained by the Chinese authorities in the Gutian detention centre in Fujian province. In this connection and in the context of the complainant's inability to provide documentary evidence in support of each and every statement he has made, the complainants point out that, according to the procedures and criteria for determining refugee status of the Office of the United Nations High Commissioner for Refugees (UNHCR) under the Convention on the Status of Refugees, to require applicants to support their statements with documentary or other proof is rather an exception than the rule.

5.7 In light of the above, the complainants submit that the facts presented by the main complainant have been coherent, plausible and consistent. Evidence provided by others supports the information that the complainant has provided. Moreover, independent country information from relevant and reliable sources objectively supports claims of persecution in China based on underground Christianity. Therefore, his fear is well founded.

5.8 As to the State party's submission that the complainant's seven subsequent requests for ministerial intervention were fully considered and rejected due to lack of new evidence sufficient to meet the guidelines for ministerial consideration, the complainants refer to different letters of their fellow Christians submitted as part of the subsequent requests confirming that the complainant regularly attended the Quiets Church in his basement or home; that he was arrested in 2001 and 2004; and that the Quiets Church continued to meet in the complainant's basement (after his departure for Australia) and met there in early 2009, during which time Church members were arrested by the authorities. In this connection, the complainants reiterate that there are warrants for the complainant's arrest and detention and that he will be detained upon his return to China.

5.9 The complainants further maintain that the main complainant is a Christian and if returned to China, he would continue to practise Christianity as an active member of the Quiets church. This fact would put him at risk of further arrest and detention and, based on his past experience, of torture. The complainants also note that the fact that he has lived for a considerable period of time in the State party would be considered by the Chinese authorities as "alignment with the West" and thus would put him at additional risk.

5.10 The complainants submit that, in the course of the protection visa process, the main complainant submitted to the national authorities evidence, in the form of written statements by his fellow Christians, regarding religious persecution in China. The fact that the main complainant would be persecuted and tortured if returned to China is supported by his past experience, the arrest and imprisonment of fellow Christians in 2009, who met in the basement of his shop in China, and the fact that an arrest warrant for him has been issued. The complainant further provides excerpts from different reports and mass media publications concerning, inter alia, the plan of the Chinese authorities to abolish all

unregistered churches by 2025 and persecution, detention and harassment of different religious groups in China.

5.11 In relation to the State party's submission that the removal of the complainants from Australia would not in itself constitute inhuman or degrading treatment or punishment, as the State party immigration authorities routinely conduct assessments on individuals' fitness for travel prior to removing them, the complainants note that the Department of Immigration and Citizenship has disregarded the medical reports of 26 June and 28 June 2013 by an expert clinician in psychiatry, Dr. M. R., in which it was noted that due to the deterioration in the complainant's mental health and his wife's mental health, they were not fit to travel, nor to report to the Department. It is stressed that the complainants are suffering from severe psychiatric disorders, which require the care of a treating psychiatrist and significant medication and which have deteriorated over time primarily because of the continual denial of the Department to grant them protection.

5.12 The complainants note that their mental status has rendered them incapable of working whilst they have been in the State party. Furthermore, even if there were a possibility that they would not suffer persecution upon return to China, they would not be able to relocate to a safe place in China and to receive social resources, due to household registration and the policy on allocation of resources in China. In addition, the complainants submit that it is also inhuman to remove them from the State party because their son and grandchildren reside in Australia.

5.13 As regards the State party's argument that the main complainant was issued with a passport and that he and his wife left China in June 2004 without any difficulties or hindrance, the complainants, by referring to the UNHCR procedures and criteria for determining refugee status under Convention on the Status of Refugees, maintain that the existence of a passport may not serve as an indication of the absence of fear. In this connection, the complainants believe that, in light of the responses of the Department of Immigration and Citizenship to all the new information presented by the main complainant with each subsequent request for ministerial intervention, the Department has adopted a negative approach towards him and would never adopt a positive decision in relation to him.

5.14 The complainants further express the criticism that the State party authorities did not consider the statements of support from friends and family concerning the complainant's involvement with the Quiets Church and his persecution in China as constituting credible evidence.

5.15 Further, as concerns the court summons and detention notice provided by the complainant and the subsequent assessment by the national authorities that these documents lacked any concrete details to support the main complainant's claim, the complainants note that the summons and detention warrant submitted to the national authorities on 5 August 2010 were only issued on 18 January 2010 and 1 February 2010 and that therefore they did not exist at the time of the earlier hearings. They were submitted within the ministerial intervention proceedings as evidence of anticipated future persecution, not of previous detention.

5.16 As to the State party's submission that the main complainant's claim for a protection visa were considered properly and were subject to a "robust process of merits and judicial review", the complainants firstly point out that this process involved only two opportunities to provide evidence of claims of persecution in their country of origin and their claims of future risk in that country. The first opportunity was at an interview held at the Department of Immigration and Citizenship, while the second opportunity was at a hearing before a member of the the Refugee Review Tribunal. They further note that thereafter a court reviewed the decision that had been adopted in order to determine if an error of law had

been made. A court considers whether the decision has been made according to the law and does not consider the merits of an application. If a court finds that there has been an error, the matter is remitted back to the Tribunal and allocated to another member for assessment.<sup>15</sup> Therefore, the complainants submit that neither the Federal Magistrates Court, nor any higher court, have any jurisdiction to review the merits of the complainant's case.

5.17 Furthermore, the main complainant submits that he is able personally to name at least five people from Fujian province who have been granted protection by the State party in the last decade on the grounds of religious persecution for their Christian faith.

5.18 Finally, the complainants reiterate that the main complainant has provided evidence, through statements of support, of his past persecution by the Chinese authorities. He was forced to join a "study class", organized by the communist Government, was continually harassed by Chinese officials and was sent to a detention camp, where he experienced both mental and physical abuse resulting in permanent damage. For example, he was beaten by police, as well as by inmates and guards in the prison. His jaw was fractured during his arrest in 2004. In this connection, the complainants reiterate that a detention warrant was issued in the main complainant's name in February 2010. In addition, the complainants reiterate that according to the psychiatric reports of 2010 and of 2013, due to his deteriorated mental health, the main complainant is advised not to travel.

5.19 In light of the above, the complainants maintain that the main complainant's claims under the Convention are admissible and well founded.

#### **Issues and proceedings before the Committee**

6. Preliminarily, the Committee notes the submission provided by the complainants on 8 July 2013 that the complainant's son, Da Huang, is no longer part of the present complaint. In these circumstances, the Committee decides to discontinue examination of the present communication, insofar as it concerns the complainant's son.

#### *Consideration of admissibility*

7.1 Before considering any claims 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.

7.2 The Committee notes that in the instant case the State party has recognized that the main complainant and his wife have exhausted all available domestic remedies, as required under article 22, paragraph 5 (b) of the Convention.

7.3 The Committee further takes note of the State party's argument that the communication should be declared inadmissible as manifestly unfounded.

7.4 Concerning the complainants' claim under article 16 of the Convention relating to their expulsion in light of their health, the Committee recalls its prior jurisprudence that the aggravation of the condition of an individual's physical or mental health by virtue of a deportation is generally insufficient, in the absence of additional factors, to amount to

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<sup>15</sup> A reference is made to communication No.416/2010, *Ke Chun Rong v. Australia*, decision adopted on 5 November 2012, para. 5.5.

degrading treatment in violation of article 16.<sup>16</sup> The Committee notes the medical evidence presented by the main complainant demonstrating that he suffers from a deteriorated state of mental health. The Committee considers, however, that the aggravation of the complainant's state of health, which might be caused by his deportation, is in itself insufficient to substantiate this claim. Further, as regards the complainant's wife, the Committee notes that she has not presented any medical documentation or other evidence concerning her present state of health. Consequently, the Committee considers this claim as insufficiently substantiated for the purposes of admissibility in accordance with article 22, paragraph 2, of the Convention.

7.5 The Committee considers, however, that the main complainant's claim that he would be tortured if returned to China on account of his religion raises substantive issues under article 3 of the Convention, which should be examined on the merits and declares this part of the communication admissible.

#### *Consideration of the merits*

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

8.2 The issue before the Committee is whether the removal of the main 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 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.

8.3 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",<sup>17</sup> 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.<sup>18</sup> The Committee recalls that under the terms of its general comment No. 1, it gives considerable weight to findings of fact that are made by organs of the State party concerned, while at the same time it is not bound by such findings and instead has the power, provided by article 22, paragraph 4, of the Convention, of free assessment of the facts based upon the full set of circumstances in every case.<sup>19</sup>

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<sup>16</sup> See, e.g. communication No. 227/2003, *A.C. v. Sweden*, decision adopted on 16 November 2006, para. 7.3.

<sup>17</sup> *Official Records of the General Assembly, Fifty-third Session, Supplement No. 44 (A/53/44 and Corr.1)*, annex IX, para. 6.

<sup>18</sup> 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.

<sup>19</sup> See, for example, communication No. 431/2010, *Y v. Switzerland*, decision adopted on 21 May 2013, para.7.5.

8.4 The main complainant claims that he will be detained and tortured if returned to China because of his religious activities. The Committee notes the State party's submission that in the present case the complainant has not provided credible evidence and has 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 have 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 the State party had protection obligations under the Refugee Convention" or that he will "face any risk of harm for reasons of religion if he returns to China now or in the foreseeable future". The Committee notes that in so doing, the State party authorities took the general human rights situation in China into account. While not underestimating the concerns that may legitimately be expressed with respect to the current human rights situation in China concerning freedom of religion, the State party authorities and courts have established that the situation in that country does not in itself suffice to establish that the complainant's forced return there would entail a violation of article 3 of the Convention.

8.5 In this connection, the Committee, irrespective of the question regarding the complainant's affiliation with the church, is of the view that he has not submitted sufficient evidence to substantiate that he would risk being subjected to torture by the authorities if returned to China. It notes that the complainant has only submitted a copy of the summons and detention warrant issued by the Chinese authorities on 18 January 2010 and on 1 February 2010, respectively; however these documents contain no information whatsoever as to the reasons for which they were issued. Moreover, no medical evidence is available in the case file corroborating the complainant's account of having experienced torture while in detention. In any event, the Committee recalls that, although past events may be of relevance, the principle aim of its assessment is to determine whether the complainant currently runs a risk of being subjected to torture upon his arrival in China.<sup>20</sup>

9. In the circumstances and in the absence of any other pertinent information on file, the Committee finds that the complainants have failed to provide sufficient evidence that in case of the main complainant's return to his country of origin, he would face a foreseeable, real and personal risk of being tortured.

10. Accordingly, the Committee against Torture, acting under article 22, paragraph 7, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, concludes that the removal of the complainants to China by the State party would not constitute a breach of article 3 of the Convention.

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

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<sup>20</sup> Reference is made to communication No. 61/1996, *X., Y. and Z. v. Sweden*, Views adopted on 6 May 1998, para. 11.2.