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International Covenant on Civil and Political Rights

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Human Rights Committee

Communication No. 1938/2010

Decision adopted by the Committee at its 107th session (11-28 March 2013)

Submitted by:	Q. H. L. (represented by counsel, Kon Karapanagiotidis, Asylum Seeker Resource Centre)
Alleged victim:	The author
State party:	Australia
Date of communication:	19 April 2010 (initial submission)
Document references:	Special Rapporteur's rule 97 decision, transmitted to the State party on 21 April 2010 (not issued in document form)
Date of adoption of decision:	25 March 2013
Subject matter:	Deportation to China
Substantive issues:	Right to life, right to protection from cruel, inhuman or degrading treatment or punishment; right to be free from arbitrary detention; right to a fair trial; right to protection from interference with the family and home.
Procedural issues:	Insufficient substantiation; inadmissible *ratione materiae*; non-exhaustion of domestic remedies.
Articles of the Covenant:	6, 7, 9, 14, (3 g); 17 alone and read in conjunction with 2 (1).
Articles of the Optional Protocol:	1; 2; 3; 5, paragraph 2(b).

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Annex

Decision of the Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights (107th session)

concerning

Communication No. 1938/2010*

Submitted by:	Q. H. L. (represented by counsel, Kon Karapanagiotidis, Asylum Seeker Resource Centre)
Alleged victim:	The author
State party:	Australia
Date of communication:	19 April 2010 (initial submission)

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

Meeting on 25 March 2013,

Adopts the following:

Decision on admissibility

1.1 The author of the communication is Q. H. L., a Chinese citizen, born on 21 May 1963. He alleges that he is a victim of a violation by Australia of articles 6, paragraph 1; 7; 9; paragraph 1; 14, paragraph 3 (g); and 17, all read in conjunction with article 2, paragraph 1, of the Covenant. He is represented by counsel, Kon Karapanagiotidis, of the Asylum Seeker Resource Centre.

1.2 On 21 April 2010, the Chair, acting on behalf of the Committee, requested the State party not to deport the author to China while his communication is under consideration by the Committee. He noted that the request for interim measured may be reviewed once the State party's observations have been received.

Factual background[1]

2.1 On 17 September 1999, the author arrived in Australia with a tour group and found employment in a restaurant. On 6 September 2005, he applied for a protection visa claiming

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

1 The factual background has been established on the basis of the author's account and court documents.

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that he had a well-founded fear of persecution on account of his political opinion supporting China's pro-democracy movement and his attempts to halt corruption.

2.2 The author submits that he had expressed his pro-democracy views in China and continues to be involved in pro-democracy activities in Australia. While working in Foshan, China, the author states that he publicly supported the 1989 pro-democracy movement in China and accused the managers of his work unit of corruption. He also encouraged colleagues to report corruption in the workplace. Because of these activities, the author was allegedly persecuted by government officials, who were also the managers at his workplace, who restricted his wages and ability to obtain housing and did not allow him to take an examination for the level 1 chef rating. The author was also demoted from his position as chef in the hotel restaurant to one in the staff canteen at a lower wage. After his arrival in Australia, the author was allegedly informed that his former employers wanted to put him to death because of his corruption allegations. The author nevertheless continued on a regular basis to send money and anti-government publications back to his family in China. The author submits that the money he sent was confiscated by the authorities, his telephone conversations with his family were monitored and members of the Public Security Bureau (PSB) visited his wife and warned her about the author's mailings of anti-government literature. Since December 2005, the author has attended monthly seminars during which participants discuss the Chinese Communist Party and listen to guest speakers who are party dissidents.

2.3 On 23 September 2005, the Department of Immigration and Citizenship (DIAC) refused to grant the author a Protection visa.[2] On 24 January 2006, the Refugee Review Tribunal (RRT) affirmed the Department's decision. The RRT did not accept that the author's fear of harm due to his support for the 1989 pro-democracy movement was well-founded. The Tribunal's refusal was based on several reasons, including that the author's anti-communist beliefs lacked credibility, in particular as he was not aware of the content of the anti-communist information he allegedly read or sent to his family, as he had only started to display interest in political activities in Australia after applying for a protection visa and as his application for a protection visa was delayed for six years. While accepting the author's claims that he supported the 1989 pro-democracy movement, had reported corruption in his workplace and was discriminated against by his work unit, it observed that this does not amount to persecution, as his political opinion was not a matter of interest to the Chinese authorities when he left China and due to the fact that even though the author's fear of harm from his former managers amounted to discrimination, it was not of such a nature or extent as to constitute persecution and that the author could seek protection from the State if his former manager sought to harm him. With regard to the author's difficulties finding government or government-sponsored employment, the Tribunal found that this did not amount to persecution as other employment opportunities were available in the private sector. The Tribunal stated that the author: "[…] may be briefly reprimanded or […] detained and questioned by authorities in China because he sought asylum in Australia but not subjected to persecution solely for that reason." On 22 May 2006, the Federal Magistrate's Court found that the RRT decision was free of jurisdictional error and summarily dismissed the case. On 21 November 2006, the Minister for Immigration and Citizenship refused to intervene in the author's case and did not allow him to put in a second Protection visa application. On 2 April and 14 August 2007, the Minister for Immigration and Citizenship reiterated his refusal to intervene in the author's case.

2.4 On 19 September 2007, the author attended the Chinese Consulate together with a representative of the International Organization for Migration (IOM) and presented his

[2] The author has not provided a copy of the DIAC decision refusing to grant him a Protection visa.

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previous travel document issued by the Chinese Consulate in August 2005. The Chinese Consulate sought an explanation as to the delay in departure. In the course of providing an explanation, the IOM representative disclosed her own identity and that allegedly made the Chinese authorities aware of the author's attempts to seek asylum. On 20 September 2007, the DIAC sent a letter to the Chinese Consulate setting out support for the author's application for a travel document. On 10 October 2007, the author and an IOM representative attended the Chinese Consulate with a copy of the letter from the DIAC. Later the author received a call from the Consulate requiring him to provide a written declaration of his business in Australia for the last few years. On 11 October 2007, the author was advised by a case officer at the DIAC to tell the Chinese Consulate that he was awaiting a decision in respect of a skilled migration application. The IOM representative had suggested that he advise the Consulate that he had been seeking a spouse visa; both suggestions involved providing a fabricated story to the Chinese Consulate. On 26 October 2007, the author and counsel of the present communication attended the Chinese embassy explaining that he had been trying to obtain residency on employer sponsored grounds, but that he had been unable to do so and was anxious to return home. The Chinese officials told him that they did not believe his explanation and that he would not receive any travel documents until they were given an "honest explanation" of his activities in Australia.

2.5 On 17 August 2009, upon the instructions by the DIAC, the author returned to the Chinese embassy to request the issuance of travel documents to return to China. However, he was informed that no further travel documents would be issued to him. On 18 March 2010, the author received a letter from the DIAC transmitting a request from the Chinese Consulate to answer a series of questions, together with a written statement explaining to the Chinese Consulate his activities in Australia and why he had lodged an appeal with the Federal Magistrate's Court.

2.6 On 29 March 2010, the Minister for Immigration and Citizenship again refused to intervene in his case, and informed the applicant that his Bridging E Visa was set to expire on 18 April 2010.

The complaint

3.1 The author submits that despite the persecution he suffered in China due to his anti-communist and anti-corruption beliefs, and the fact that the DIAC appears to have alerted the Chinese Consulate of his asylum bid, the Australian Government has denied him asylum. He claims that he will come to harm at the hands of the authorities in China, because of his political beliefs and his status as a failed asylum seeker, which would lead to torture and imprisonment upon return to China. The author further claims that he would have difficulties finding employment in China because he did not leave the country with the permission of his employer and that this would amount to persecution.

3.2 The author further submits that he believes the actions of the DIAC have created an additional claim for him (sur place claim), unintentionally placing him at risk due to their dealings with the Chinese Consulate.[3] The author claims that this clearly demonstrates that he is a person of interest to the Chinese authorities and that they are suspicious of his activities in Australia. The author never answered the questions, as he believes that this

[3] The DIAC has written a letter (undated) to the author asking that the following questions be answered and sent to the DIAC, which will then pass them onto the Chinese Consulate: (a) You are required to write a statement explaining to the Chinese Consulate General what you have been doing in Australia during the past 10 years. (b) You are required to explain why you did not depart Australia in 2005, after the Chinese Government issued you with a temporary travel document. (c) The Chinese Consul General has requested that you explain why you lodged an appeal to the Federal Court.

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would put him in even further danger. The author also submits that the Chinese Consulate will not issue him with travel documents, which leaves him technically stateless.

3.3 The author claims that if he were deported to China, he would be a victim of a violation of articles 6, paragraph 1; 7; 9, paragraph 1; and 17 all read in conjunction with article 2, paragraph 1, of the Covenant.

The State party's observations on admissibility and merits

4.1 On 24 November 2010, the State party submitted its observations on admissibility and merits. The State party adds to the facts as presented by the author and notes that the author was detained on 12 July 2005 and signed a voluntary removal request to return to China, which included his Chinese passport application. On 10 August 2005, the Chinese Consulate issued an Entry Permit which was valid for a period of three months. This travel document subsequently expired, after the author applied for a Protection Visa on 6 September 2005, which was refused. On 22 May 2006, the Federal Magistrates Court upheld the RRT decision. On 16 August 2007, the author indicated to an immigration official that he wished to voluntarily return to China but did not have the financial means to do so. He was assisted by an IOM representative in his application for a new passport. On 31 October 2007, an immigration official met with an officer of the Chinese Consulate. The Chinese Consulate advised that it required a statement from the author regarding the type of visa the author had applied for in Australia; the process undertaken, a statement as to why the author wanted to remain in Australia and the reasons why he did not use the travel document issued in 2005. The author was informed accordingly and was also advised that the immigration officer would not release any information to the Chinese Consulate without his consent. Between 2007 and 2010, with the author's consent, immigration officials liaised with the Chinese Consulate regarding the author's travel documents, and delays resulted from staffing changes in the Chinese Consulate and limits on processing of passports due to the Beijing Olympics. In January 2010, a written copy of questions from the Chinese consulate was provided to the author, in which he was required to explain what he had been doing in Australia for the past 10 years, why he had not departed Australia in 2005 and why he had lodged an appeal to the Federal Court. The author has not provided any answers to these questions.

4.2 The State party submits that the author failed to exhaust domestic remedies as he did not appeal the Federal Magistrates Court's decision of 22 May 2006 to the Federal Court and has not provided reasons as to why he did not pursue this remedy.

4.3 With regard to the author's allegation of a violation under article 6, paragraph 1, of the Covenant, the State party recalls that for purposes of article 2 of the Optional Protocol, a claim is an allegation supported by substantiating material and the author must establish a *prima facie* case. The State party notes that the author's communication relies on a brief chronology of events and does not claim that there is a real risk of death if he was returned to China. The State party submits that its interactions with the Chinese Consulate to obtain travel documents are typical and there is no substantial evidence to suggest that there would be a sur place claim[4] with a real risk that the author would be arbitrarily deprived of his life contrary to article 6. The State party therefore submits that the author has failed to provide sufficient evidence to substantiate his allegations under article 6.

4.4 The State party submits that, in the alternative, if the Committee finds the author's allegations admissible, they should be declared without merit. Country information

[4] See High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees (HCR/1P/4/Eng/Rev. 2).

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provided to the domestic authorities attests that the Chinese authorities consider seeking to remain in Australia through a temporary protection application as commonplace behaviour rather than an expression of political dissent. It further indicates that the likely treatment of a failed Chinese asylum seeker would be an interview on arrival and possibly surveillance or detention for a short period. The State party submits that there is no substantial evidence that the author is of interest to the Chinese authorities as a result of his political activities in Australia. Furthermore, the domestic authorities found that the author's involvement in political activities was for the purpose of enhancing his Protection visa application. The State party further notes that the author's claim that his previous employer wanted to put him to death is not sufficient ground for him to fear for his life, in particular as the author could seek protection from the State if he had any difficulties with his former manager. The State party notes the findings of the RRT that although the behaviour of his previous employer may have been discriminatory, it did not constitute harm serious enough to amount to persecution under the 1951 Refugees Convention.

4.5 With regard to the author's allegation of a violation of article 7, the State party submits that the author has failed to sufficiently substantiate his allegation, as he did not establish a *prima facie* case with regard to his fears of persecution due to his pro-democracy activities in Australia and to his fear that the Chinese authorities may discover that he is a failed asylum seeker and will therefore be subject to imprisonment and torture.

4.6 In the alternative, the State party maintains that the author has not provided any new and pertinent information with respect to his political activities which has not already been considered by the domestic authorities and that there is no substantial evidence that the author is regarded as active or outspoken against the Chinese Government. The author therefore failed to establish a real risk that he would be subject to torture or cruel, inhuman or degrading treatment if returned to China.

4.7 With regard to the author's claim that he fears detention if the Chinese authorities discover that he sought asylum in Australia, the State party argues that its non-refoulement obligations under the Covenant only apply to situations where there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7.[5] It therefore submits that the author's claim under article 9 should be declared inadmissible *ratione materiae* and insufficiently substantiated.

4.8 On the merits of the author's allegation under article 9, the State party recalls that the arbitrariness of the detention was defined as not merely being against the law but as including elements of inappropriateness, injustice and lack of predictability.[6] The State party recalls the country information that was considered by the Refugee Review Tribunal, in which it was noted that the author may be questioned, reprimanded or briefly detained by the Chinese authorities regarding his protection visa application; however such actions would not amount to persecution.

4.9 Concerning the author's claim under article 17, the State party notes that its non-refoulement obligations do not extend to breaches of article 17[7] and therefore this part of the author's claim is inadmissible *ratione materiae*. It also notes that the Refugee Review Tribunal questioned the credibility of the author's political opinions and activities and was

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

[6] See communication No. 305/1988, *Van Alphen* v. *the Netherlands*, Views adopted on 23 July 1990, para. 5.8.

[7] See general comment No. 31 on the nature of the general legal obligation imposed on States parties to the Covenant (see Note 10 above), para. 12.

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not satisfied that the author had sent dissident information to his family. On the merits, the State party submits that, during the hearings before the Refugee Review Tribunal, the author did not respond to the questions regarding why he believed that he was being monitored by the Chinese authorities and that there was insufficient evidence to substantiate his claim that the money he sent to his family was stolen by government officials.

4.10 The State party submits that the author's claims under articles 6, 7, 9 and 17 are inadmissible due to failure to exhaust domestic remedies and because they are not sufficiently substantiated. His claims under articles 9 and 17 do not engage non-refoulement obligations and are therefore inadmissible *ratione materiae*. In the alternative, the State party submits that the author's claims lack merit.

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

5.1 On 1 April 2011, the author submitted his comment on the State party observations on admissibility and merits. The author adds to the facts as presented and explains that on 10 June 2005, he received a Chinese travel document; however the travel document expired while he was awaiting the outcome of his Protection visa application from the Refugee Review Tribunal. With regard to the exhaustion of domestic remedies, the author reiterates that he has exhausted all available domestic remedies.

5.2 With regard to his claim under article 6, the author submits that his support for the 1989 pro-democracy movement and his endeavours to reduce corruption within the workplace resulted in official persecution in the form of wage restrictions and exclusion from housing programmes. While in Australia, the author continued to participate in pro-democracy seminars and rallies and he claims that there are multiple factors to suggest that these activities have come to the attention of the Chinese Government, as his mail and telephone calls were monitored. He notes that a Chinese official who defected to Australia in 2005 claimed that China had an extensive network of informants monitoring Falun Gong and other anti-Chinese activities. The author therefore claims that the request by the DIAC that the author provide the Chinese Consulate with a statement of his activities for the last 10 years implies that his pro-democracy activities have been noted by the Chinese authorities. The author also notes that the DIAC advised him to provide the Chinese Consulate with an explanation as to why he had lodged an appeal to the Federal Magistrates' Court, which shows that the Chinese Consulate suspects that he had filed an application for a Protection visa.

5.3 The author cites reports by human rights organizations on the broad application of the death penalty,[8] as well as evidence suggesting that political dissidents face persecution upon return to China after failing to obtain asylum in Australia.[9] The author notes that the country information on which the State party relies is outdated (1995) and a more recent report noted that it was not possible to comment definitely on how Chinese authorities would treat returnees to China who are failed asylum seekers. In addition to that, the author maintains that the actions of the IOM representative and the DIAC have disclosed his status as a failed asylum seeker to the Chinese Consulate, which has now requested details about his appeal to the Federal Magistrates' Court. In this regard, the author claims that the court procedures ensure the confidentiality of appeals relating to asylum applications and the instruction to provide information on this is in conflict with the Committee's general

[8] See Amnesty International, http://www.amnesty.org.au/adp/comments/25190; and Guangze Wang, "The Mystery of China's Death Penalty Figures", available from www.hrichina.org.

[9] Australian Refugee Rights Alliance, Draft Discussion Paper - Summary: Deportations to China: Australian RSD processes that return people to persecution, 2007.

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comment regarding the right to privacy.[10] The author submits that the disclosure demanded by the Chinese Consulate demonstrates that he is a person of interest to them. The author claims that the country information, combined with the lack of transparency regarding the country's record of capital punishment, together with the disclosure by the DIAC of the author's migration history to the Chinese Consulate put him at risk of a violation of article 6 if he was deported to China.

5.4 With regard to his claim under article 7, the author refers to his arguments under article 6 and claims that his deportation to China would put him at real risk of torture, in breach of article 7.

5.5 With regard to article 9, the author submits that, as a necessary consequence of a breach to his rights under articles 6 and 7, he would also experience harm in the form of arbitrary arrest or detention. He notes that the RRT accepted that he may be detained upon his return to China. Referring to the Committee's general comment No. 31,[11] the author claims that references to articles 6 and 7 serve as examples of irreparable harm. He claims that, as the examples of other failed asylum seekers show,[12] it is probable that he would be detained indefinitely and in secret.

5.6 Concerning his claim under article 14, the author cites the State party's obligations under article 14, paragraph 3, in particular paragraph 3 (g), and submits that an honest answer to the questions put by the DIAC would require disclosure of his involvement in political activities which are deemed illegal under Chinese law. He therefore submits that his answers to the questions would form a confession of the crime under article 105 of the Chinese Criminal Code.[13]

Issues and proceedings before the Committee

Consideration of admissibility

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

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

[10] General comment No. 16 (1988) on the right to respect of privacy, family, home and correspondence, and protection of honour and reputation (article 17), *Official Records of the General Assembly, Forty-third Session, Supplement No. 40* (A/43/40), annex VI, para. 10; HR1/GEN/1/Rev. 1, p. 23.

[11] See general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant (see Note 10 above), para. 12.

[12] Australian Refugee Rights Alliance, Draft Discussion Paper: Deportations to China: Australian RSD processes that return people to persecution (see Note 15 above).

[13] Article 105, of the Chinese Criminal Code: Ringleaders who organize, scheme for or carry out subverting the State's political power and overthrowing the socialist system and those whose crimes are severe shall be sentenced to life imprisonment or fixed-term imprisonment of not less than ten years. Active participants shall be sentenced to fixed-term imprisonment of not less than three years and not more than ten years. Other participants shall be sentenced to fixed-term imprisonment of not more than three years, criminal detention, public surveillance or deprivation of political rights. Whoever incites subverting the State's political power and overthrowing the socialist system through starting a rumour or slander or by other means shall be sentenced to fixed-term imprisonment of not more than five years, criminal detention, public surveillance or deprivation of political rights. Ringleaders or those whose crimes are severe shall be sentenced to fixed-term imprisonment of not less than five years.

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6.3 The Committee notes the State party's argument that the author failed to exhaust domestic remedies pursuant to article 5, paragraph 2 (b), of the Optional Protocol, as he did not appeal the Federal Magistrates' Court's decision to the Federal Court and has not provided any reasons as to why he did not pursue this remedy. The Committee notes that the author has not provided any information contesting this argument. In the absence of any information by the author on the reason why he did not appeal to the Federal Court, the Committee considers that he failed to exhaust all available and effective domestic remedies pursuant to article 5, paragraph 2 (b), of the Optional Protocol and therefore declares the communication inadmissible.

7. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under article 5, paragraph 2 (b) of the Optional Protocol;

(b) That this decision shall be communicated to the State party and to the author.

[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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