



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

**Advance unedited version**

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**Committee against Torture**

**Decision adopted by the Committee under article 22 of the  
Convention, concerning communication No. 756/2016 \*, \*\***

<i>Communication submitted by:</i>	Mr. T. T. P. (represented by counsel Mr. John Phillip Sweeney)
<i>Alleged victim:</i>	The complainant
<i>State party:</i>	Australia
<i>Date of complaint:</i>	25 May 2016 (initial submission)
<i>Document references:</i>	Decision taken pursuant to rule 115 of the Committee's rules of procedure, transmitted to the State party on 28 June 2016
<i>Date of the present decision:</i>	14 November 2018
<i>Subject matter:</i>	Deportation to Vietnam
<i>Procedural issues:</i>	Lack of substantiation of claims; non-exhaustion of domestic remedies; incompatibility with the Convention
<i>Substantive issues:</i>	Risk to life and risk of torture or ill-treatment in the event of deportation to country of origin
<i>Article of the Convention:</i>	3

\* Adopted by the Committee at its sixty-fifth session (12 November – 7 December 2018).

\*\* The following members of the Committee have participated in the consideration of the communication: Essadia Belmir, Felice Gaer, Abdelwahab Hani, Claude Heller, Jens Modvig, Ana Racu, Diego Rodríguez-Pinzón, Sébastien Touzé, Bakhtiyar Tuzmukhamedov and Honghong Zhang.



1.1 The complainant is a Vietnamese national. His request for asylum had been rejected by Australia. He claims that his deportation to Vietnam would constitute a violation, by Australia, of article 3 of the Convention. The complainant is represented by counsel, Mr. John Phillip Sweeney.

1.2 On 27 May 2016, the Committee, acting through its Rapporteur on new complaints and interim measures, rejected the complainant's request for interim measures.

1.3 On 22 March 2017, Committee, acting through its Rapporteur on new complaints and interim measures, rejected the State party's request of 27 September 2016, to consider the admissibility of the communication separately from its merits.

### **Factual background**

2.1 The complainant is from a poor family in Vietnam. His father was a fisherman. In 2011, the police confiscated his father's boat and demanded an exorbitant amount to release it. The father got into a fight with the police officer, who hit him. In order to defend his father, the complainant hit a police officer on the head with a stick. Fearing the consequences assaulting a police officer, the complainant fled to Dong Nai. Some months after the incident, his father organized the complainant's departure to Australia, based on an agreement with the smugglers that he would cook on the boat instead of paying the fees for the trip.

2.2 The complaint arrived to Australia by boat without a visa or passport on 10 May 2011. Between 10 May 2011 and 1 March 2012, he had five interviews the aim of which was mainly to establish his age and identity. The complainant's statements varied from him being a 14-15 year-old orphan who travelled to Australia with his younger brother to escape economic hardships, to being a 21 year-old son of living parents, who has four siblings, and who came to Australia alone running away from possible persecution for hitting a police officer.

2.3 On 5 October 2012, the complainant applied for a protection visa. His application was rejected by the Delegate of the Minister for Immigration and Citizenship on 10 July 2013. The Delegate found that the complainant was not a credible witness and that he has 'consistently and repeatedly provided false and misleading information'. He openly admitted to having claimed to be a minor in order to obtain a residence permit in Australia. The Delegate considered that the complainant's claims related to the possible risk he would face if returned to Vietnam, were fabricated. There was no reason to believe that the complainant or his family were of interest for the Government, or that they were subjected to discrimination by the Vietnamese authorities or had their daily activities restricted in any way. The Delegate found that the complainant's allegations that he was wanted by the Vietnamese authorities for having hit a police officer were not substantiated. The Delegate rejected the complainant's allegations that he would be arrested, detained and likely tortured for having left the country illegally, finding that the country information suggests that only those failed asylum seekers who oppose the Government might be targeted, which was not the case of the complainant.

2.4 On 26 February 2013, the complainant was granted a bridging visa E and released from detention.

2.5 The complainant filed an appeal to the Administrative Appeals Tribunal (AAT). On 22 January 2016, his application was rejected. The AAT confirmed that the complainant was not credible and considered that his claims were fabricated. Regarding the allegations related to his illegal departure from Vietnam, the AAT considered that since he was not involved in any people smuggling-related activities, he could at most be briefly detained and interviewed by the authorities upon return, but any possibility of being subjected to ill treatment or torture was remote.

2.6 On 16 April 2016, the complainant submitted a Ministerial Appeal asking the Minister to substitute the AAT's decision based on the public interest. The Department of Immigration and Border Protection rejected his appeal on 2 May 2016.

### **The complaint**

3.1 The complainant claims that in case of his deportation to Vietnam, Australia would violate its obligations under article 3 of the Convention. He claims fearing reprisals from the police because he attacked a police officer back in 2011, when he was defending his

father. In addition, he claims that he would be arrested, detained and tortured because he left the country illegally and because he would be perceived as a member of the crew of the smuggler's boat, given that he was the cook and did not pay any fees for his trip to Australia. If he were to spend a considerable time in prison, the conditions there would amount to severe pain and suffering and would be life threatening.

3.2 The complainant alleges that according to the Regulations on Exit, Entry and Transit there is a fine for leaving Vietnam illegally. Being from a poor family, he cannot afford to pay the fine and would be subjected to further harassment and extortion by the police.

3.3 He further submits that the State party will have to contact the Vietnamese Consulate in order to get him a travel document. In such situation, the Vietnamese authorities will be able to assume that he sought international protection abroad. Combined with other facts of his case, namely that he was a cook on a smuggler's boat and that he assaulted a police officer, it is likely that the authorities will impute him with anti-regime sentiments.

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

4.1 On 27 September 2016, the State party submitted its observations on the admissibility of the complaint, stating that the complainant's claims are inadmissible due to non-exhaustion of domestic remedies, *ratione materiae* and/or as being manifestly unfounded.

4.2 The State party submits that the complainant has not exhausted domestic remedies as he has not sought judicial review of the AAT's decision by either the Federal Circuit Court or the Federal Court of Australia. The State party notes that the complainant states that he did not apply for such a review as he was advised that he would have no prospect of success. The State party however submits that the complainant has provided no evidence to support this assertion.

4.3 The State party further submits that the complaint has made claims that are inadmissible *ratione materiae*. In particular, it refers to the complainant's claims regarding harassment, extortion and detention. The State party argues that article 3 does not apply to these claims because they do not involve allegations that the complainant will be subjected to harm that falls within the definition of torture under article 1 of the Convention and therefore do not constitute claims that the complainant is a victim of a violation by the State party of the Convention.

4.4 If the Committee does not accept that the complainant's claims are inadmissible *ratione materiae*, the State party also submits that the claims are manifestly unfounded. The State party notes that the complainant claims that he would risk facing a considerable time in prison in Vietnam which would amount to severe pain or suffering, due to the conditions in Vietnamese prisons. The State party argues that as determined during the review by domestic authorities, the complainant would only risk a brief detention that would not amount to harm. The State party further notes that the complainant has alleged that he would suffer further harassment and extortion at the hands of the police if returned to Vietnam. The State party notes that the domestic authorities did not find the complainant credible in this regard and further notes that he has not submitted any new substantiating or corroborating evidence in support of his claim.

4.5 The State party further submits that the claims made by the complainant in his complaint have been thoroughly considered by several domestic decision-makers and found not to engage Australia's non-refoulement obligations under the Convention. The State party also argues that the complainant has not provided any new claims or evidence in his submissions to the Committee that have not already been considered by domestic administrative and judicial processes and asks the Committee to accept that these claims have been thoroughly assessed through the domestic process.

4.6 On 27 July 2017, the State party submitted its observations on the merits.

4.7 In its observations, the State party insists on inadmissibility of the complaint and asks the Committee to consider it before it passes to the considerations of the merits, as required by the rules 113 and 118 of the Committee's rules of procedure.

4.8 The State party reiterates that the complainant's claims had been thoroughly considered by the domestic authorities who found that the author was not a credible witness and that the State party did not have protection obligations towards him. The State party refers to the Committee's statement in its General comment No.1 that, as it is not an appellate or judicial body, it gives considerable weight to findings of fact that are made by organs of a State party. The State party asks the Committee to give such weight to the findings of its domestic processes that the claims of the complainant are without merit and should be dismissed.

### **Complainant's comments to the State party's observations**

5.1 On 28 August 2018, the complainant submitted his comments to the State party's observations.

5.2 On non-exhaustion of domestic remedies, the complainant claims that he did apply to the Federal Circuit Court, but received a negative opinion as to his prospects of success from the barrister who had taken the case. The complainant explains that the barrister was acting pro-bono and gave the opinion verbally and that the complainant had no resources to pay for anything more than that. The complainant refers to Section 486I of the Migration Act, which is reproduced on every application form for the Federal Circuit Court and which points out that it is illegal to proceed if there is a negative prospects of success opinion.<sup>1</sup>

5.3 In response to the State party's observation that the complaint is inadmissible *ratione materiae* because there is no risk of torture for him, the complainant alleges that such risk exists in the form of imprisonment. He reiterates his fear of the Vietnamese police on two counts: for having assaulted a police officer and for being suspected of human smuggling as a member (cook) of the crew. He alleges that the AAT did not question the fact that he served as a cook at the boat on which he travelled to Australia. He also claims that people who travelled with him on the same boat might have returned to Vietnam and may have been interrogated about the composition of the crew. He alleges that if he returns to Vietnam, he might be already identified as a crew member and suspected of being involved in a smuggling operation, which brings a real risk of prolonged imprisonment. He further claims that imprisonment in conditions prevailing in Vietnamese prisons amounts to torture or even death.

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

#### *Consideration of admissibility*

6.1 Before considering any complaint submitted 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 (5) (a) of the Convention, that the same matter has not been and is not being examined under another procedure of international investigation or settlement.

6.2 The Committee recalls that, in accordance with article 22 (5) (b) of the Convention, it shall not consider any communication from an individual unless it has ascertained that the individual has exhausted all available domestic remedies. This rule does not apply where it has been established that the application of those remedies has been unreasonably prolonged or is unlikely to bring effective relief.<sup>2</sup>

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<sup>1</sup> Section 486I reads as follows:

Lawyer's certification

A lawyer must not file a document commencing migration litigation, unless the lawyer certifies in writing that there are reasonable grounds for believing that the migration litigation has a reasonable prospect of success.

A court must refuse to accept a document commencing migration litigation if it is a document that, under subsection (1), must be certified and it has not been.

<sup>2</sup> See e.g. communication 306/2006, *E.Y. v. Canada*, (CAT/C/43/D/306/2006/Rev.1), para. 9.2. See also the Committee's General Comment No. 4 (2017) on the implementation of article 3 of the Convention in the context of article 22 (CAT/C/GC/4), para. 34.

6.3 The Committee takes note of the State party's observation that the complainant has failed to exhaust the available domestic remedies because he did not appeal the AAT decision to the Federal Circuit Court and then to the Federal Court of Australia. The Committee as well notes the complainant's response that he obtained an oral opinion from a barrister who was taking care of his case, that an appeal to the Federal Circuit Court would not have a reasonable prospect of success. The Committee also notes the complainant's statement that in view of section 486I of the Migration Act it would be illegal to proceed with the appeal in such situation. Without an intent to interpret the provisions of the domestic legislation, the Committee notes, that section 486I of the Migration Act does not prevent a lawyer from submitting a case to the Federal Circuit Court, if the lawyer certifies in writing that there are reasonable grounds for believing that the case has a reasonable prospect of success. There is nothing in the section's wording to suggest that an appeal submitted in good faith could be considered illegal.<sup>3</sup> In the present case it seems that the complainant's lawyer did not believe that there was a reasonable prospect of success and thus did not submit an appeal on behalf of the complainant to the Federal Circuit Court. In other words, it was rather the personal view of the lawyer than the lack of effectiveness of the remedy, which prevented the complainant from exhausting the domestic remedies. The complainant does not provide information on whether he tried to find a different lawyer who would agree to defend his case, including a State-appointed lawyer. The Committee recalls its consistent jurisprudence that mere doubt about the effectiveness of a remedy does not dispense with the obligation to exhaust it.<sup>4</sup> The Committee further notes that the information provided by the parties does not indicate that the complainant was represented by a State-appointed lawyer and recalls its jurisprudence that errors made by a privately retained lawyer cannot normally be attributed to the State party.<sup>5</sup> In these circumstances, the Committee finds that the complainant has failed to exhaust domestic remedies available to him, as required by article 22(5)(b) in the sense that there were remedies, both available and effective, which the complainant has not exhausted.

6.4 In the light of this finding, the Committee does not deem it necessary to examine any other inadmissibility grounds.

7. The Committee therefore decides:

- (a) That the communication is inadmissible under article 22 (5) (b) of the Convention;
- (b) That the present decision shall be communicated to the complainant and to the State party.

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<sup>3</sup> The Committee notes that it has received numerous submissions from the counsel in the present case who has not previously claimed that access to judicial review in migration cases is restricted, in particular by section 486I of the Migration Act.

<sup>4</sup> See e.g. communications *E.S. v Canada* (CAT/C/63/D/621/2014), para 6.7 and *S.S. and P.S. v Canada* (CAT/C/62/D/702/2015), para. 6.5.

<sup>5</sup> See e.g. communications *J.S. v. Canada* (CAT/C/62/D/695/2015), para. 7.5, and *R.S.A.N. v. Canada* (CAT/C/37/D/284/2006), para. 6.4.