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

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Committee against Torture

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

Communication submitted by:	T.T.P. (represented by counsel, John Phillip Sweeney)
Alleged victim:	The complainant
State party:	Australia
Date of complaint:	25 May 2016 (initial submission)
Date of present decision:	14 November 2018
Subject matter:	Deportation to Viet Nam
Procedural issues:	Lack of substantiation of claims; non-exhaustion of domestic remedies; incompatibility with the Convention
Substantive issues:	Risk to life and risk of torture or ill-treatment in the event of deportation to country of origin
Article of the Convention:	3

1.1 The complainant is T.T.P., a national of Viet Nam. His request for asylum was rejected by Australia. He claims that his deportation to Viet Nam would constitute a violation, by Australia, of article 3 of the Convention. The complainant is represented by counsel.

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, the 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 Viet Nam. 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 a 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

* 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 Rouassant, Jens Modvig, Ana Racu, Diego Rodríguez-Pinzón, Sébastien Touzé, Bakhtiyar Tuzmukhamedov and Honghong Zhang.

consequences of having assaulted 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 smugglers that he would cook on board instead of paying the fare for the trip.

2.2 The complainant arrived in Australia by boat without a visa or passport on 10 May 2011. Between 10 May 2011 and 1 March 2012, he had five interviews, mainly to establish his age and identity. The complainant's statements varied from being a 14- or 15-year-old orphan who travelled to Australia with his younger brother to escape economic hardship, to being a 21-year-old son of living parents who had 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 had "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 Viet Nam, were fabricated. There was no reason to believe that the complainant or his family were of interest to 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 country information suggested that only those failed asylum seekers who opposed 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 with the Administrative Appeals Tribunal. On 22 January 2016, his application was rejected. The Tribunal confirmed that the complainant was not credible and considered that his claims were fabricated. Regarding the allegations related to his illegal departure from Viet Nam, the Tribunal considered that, since he was not involved in any activities related to people smuggling, he could at most be briefly detained and interviewed by the authorities upon return, but the possibility of being subjected to ill-treatment or torture was remote.

2.6 On 16 April 2016, the complainant appealed to the Minister to overturn the Administrative Appeals Tribunal's decision in 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, if he were deported to Viet Nam, Australia would violate its obligations under article 3 of the Convention. He fears reprisals from the police because he attacked a police officer 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 a smugglers' boat, given that he was the cook and did not pay any fare 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 Viet Nam illegally. Being from a poor family, he cannot afford 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 a 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 had been a cook on a smugglers' boat and had assaulted a police officer, it is likely that the authorities will impute anti-regime sentiments to him.

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 were inadmissible due to the 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 Administrative Appeals Tribunal'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 submits, however, that the complainant has provided no evidence to support this assertion.

4.3 The State party further submits that the complainant 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 a considerable time in prison in Viet Nam, 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 the domestic authorities, the complainant would risk only 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 Viet Nam. 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 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 the inadmissibility of the complaint and asks the Committee to consider the admissibility before considering the merits, as required by rules 113 and 118 of the Committee's rules of procedure.

4.8 The State party reiterates that the complainant's claims have been thoroughly considered by the domestic authorities, which 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 (1997) on the implementation of article 3 in the context of article 22 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 on the State party's observations

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

5.2 On the 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 on 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 opinion on the prospect of success.[1]

5.3 In response to the State party's observation that the complaint is inadmissible *ratione materiae* because he is not at risk of torture, 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 Administrative Appeals Tribunal did not question the fact that he served as a cook on the boat on which he travelled to Australia. He also claims that people who travelled with him on the same boat may have returned to Viet Nam and been interrogated about the composition of the crew. He alleges that, if he returns to Viet Nam, he may already be 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 the conditions prevailing in Vietnamese prisons amounts to torture and may even result in 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.[2]

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 Administrative Appeals Tribunal's decision to the Federal Circuit Court and then to the Federal Court of Australia. The Committee also notes the complainant's response that he obtained an oral opinion from a barrister who had taken on 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 a situation. Without intending 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

[1] Section 486I reads as follows:

> Lawyer's certification
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> (1) 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.
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> (2) 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.

[2] See, for example, *E.Y. v. Canada* (CAT/C/43/D/307/2006/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, para. 34.

illegal.[3] 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 the personal view of the lawyer rather than the lack of effectiveness of the remedy that prevented the complainant from exhausting domestic remedies. The complainant does not provide information on whether he tried to find a different lawyer 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.[4] 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.[5] 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.

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

[4] See, for example, *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.

[5] See, for example, *J.S. v. Canada* (CAT/C/62/D/695/2015), para. 6.5, and *R.S.A.N. v. Canada* (CAT/C/37/D/284/2006), para. 6.4.