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Ninety-seventh session
12 to 30 October 2009

VIEWS

Communication No. 1442/2005

Submitted by:	Yin Fong, Kwok (represented by counsel, Mr. Nicholas Poynder and Mr. Leonard Karp)
Alleged victim:	The author
State party:	Australia
Date of communication:	25 November 2005 (initial submission)
Document references:	Special Rapporteur's rule 92/97 decision, transmitted to the State party on 6 December 2005 (not issued in document form)
Date of adoption of Views:	23 October 2009

* Made public by decision of the Human Rights Committee.

Subject matter: Deportation to China, possible application of the death penalty

Procedural issue: None

Substantive issues: Right to life, unlawful and arbitrary detention

Articles of the Covenant: 6, paragraphs 1 and 2, 7, 9, paragraphs 1 and 4, and 14

Articles of the Optional Protocol: None

On 23 October 2009, the Human Rights Committee adopted the annexed text as the Committee's Views, under article 5, paragraph 4, of the Optional Protocol in respect of communication No. 1442/2005.

[ANNEX]

ANNEX

Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political rights

Ninety-seventh session

concerning

Communication No. 1442/2005[**]

Submitted by:	Yin Fong, Kwok (represented by counsel, Mr. Nicholas Poynder and Mr. Leonard Karp)
Alleged victim:	The author
State party:	Australia
Date of communication:	25 November 2005 (initial submission)

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

Meeting on 23 October 2009,

Having concluded its consideration of communication No. 1442/2005, submitted to the Human Rights Committee on behalf of Yin Fong, Kwok under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1.1 The author of the communication is Ms Kwok Yin Fong, a Chinese citizen, currently in community detention in Australia, awaiting deportation to the People's Republic of China. She claims to be a victim of violations by Australia of article 6 paragraphs 1 and 2; article 7; article 9, paragraphs 1 and 4; and article 14 of the International Covenant on Civil and Political Rights. She is represented by counsel; Mr Nicholas Poynder and Mr Leonard Karp.

[**] The following members of the Committee participated in the examination of the present communication: Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Yuji Iwasawa, Ms. Helen Keller, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Mr. Michael O'Flaherty, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabian Omar Salvioli and Mr. Krister Thelin.

1.2 On 6 December 2005, the Rapporteur for New Communications and Interim Measures requested the State party not to deport the author while her case is under consideration by the Committee, in accordance with rule 92 of the Committee's rules of procedures. On 11 September 2006, the State party acceded to this request.

Factual background

2.1 In 1994, the author's husband, Mr Zhang Linsheng, became the Deputy Director of the Roads and Traffic Management Centre in Guangzhou, in the People's Republic of China. In the same year, the author became a Hong Kong resident and started a business called Everwell Gain Enterprises. The author and Mr Zhang lived apart but visited each other regularly. In September or October 1999, Mr Zhang became the head of the Guangzhou City Public Security Bureau Traffic Police Branch. In his new position, it is claimed that he attempted to improve efficiency and eradicate corruption. On 5 March 2000, he was called to a meeting at the Roads and Traffic Management Centre in Guangzhou from which he did not return. The author later discovered that he had been detained and was being held without charge by the Chinese authorities, ostensibly on suspicion of bribery and corruption.

2.2 On 10 March 2000, the author left Hong Kong for Australia. She wanted to visit her sister and niece who resided there. She also stated to State party authorities that her husband had disappeared 4 days previously under unusual circumstances and she was "unsure about [her] own future". The author entered the State party legally on a temporary visitor's visa, which was extended until 31 January 2001. On 4 January 2001, she left the State party to visit her son, who was studying in Canada. Her flight to Canada included a stopover in Honolulu, where she was refused entry by US immigration, and was put back on a plane to the State party. On 5 January 2001, she arrived in the State party and was interviewed by an officer from the Department of Immigration ("the Department"). Unknown to her at the time, the reason for the interview was that a "person alert" had been issued in relation to her. This "person alert" indicated that the Federal Police had been advised by "Beijing post" that the author was wanted in the People's Republic of China for diverting over 1 million yuan of company funds and was suspected of bribery. Although the alert contained a note indicating that relevant papers were held in the "Investigations Policy & Coordination Section" of the State party's authorities, the only information given to the author at the time was that a warrant had been issued for her arrest by Chinese authorities. Following the interview, the immigration officer cancelled the author's visa on the basis that she was not intending to stay temporarily as a tourist. On 5 January 2001, she was taken into detention.

2.3 On 8 January 2001, the author lodged an application for a protection visa, on the grounds that charges against her and Mr Zhang were politically motivated . On 25 January 2001, she made similar claims in an interview with an officer from the Department. On 8 March 2001, a delegate of the Minister for Immigration refused her application for a protection visa, on the grounds that her claims were implausible and fabricated. On 12 March 2001, she lodged an application for review of the delegate's decision with the Refugee Review Tribunal ("RRT"). In her application form, she stated that to support her case, she would need information in the possession of the State party's government about the accusations made against her in the People's Republic of China. Over the next four and a half years she pursued proceedings before the RRT and in the Federal Court, in which she sought access to information relating to the charges forwarded by Chinese authorities to the State party. The State party resisted release of

this information, on the grounds that the information had been provided in confidence by the Chinese Government. On 7 June 2001, the RRT refused the application for a protection visa for the first time. The author sought judicial review of the RRT decision by the Federal Court.

2.4 On 7 September 2001, the Administrative Appeals Tribunal ("AAT") refused an application for review of an earlier decision of the Department to refuse access to the requisite information under the Freedom of Information Act 1982 (Cth). On 16 October 2001, the Federal Court dismissed the author's request for judicial review of the AAT decision. The author appealed against this decision to the Full Bench of the Federal Court. On 20 March 2002, the Full Bench allowed the appeal and directed the Department to produce to the author documents in its possession but "limited to those which reveal the name of the agency from which the document originated and any request for confidentiality by the Chinese authorities."

2.5 On 1 November 2001, the Federal Court dismissed the application for judicial review of the first RRT decision. The author appealed against this decision to the Full Bench of the Federal Court. On 18 May 2002, the Minister for Immigration conceded the appeal against the RRT decision on the grounds of "breach of procedure" by the RRT. The application for a protection visa was remitted to a differently constituted RRT for re-determination. On 6 December 2002, a re-constituted RRT refused the application for a protection visa for a second time. On this occasion, the RRT again refused to give the author access to the information requested. The author sought judicial review of this RRT decision by the Federal Court. On 16 May 2003, the Federal Court granted the application for judicial review of the RRT decision, on the grounds that the RRT had failed to give the author a copy of the advice given by the Secretary of the Department regarding the significance of the information given by the Chinese Government. The application for a protection visa was remitted to a differently constituted RRT for re-determination.

2.6 On 30 August 2003, a re-constituted RRT refused the application for a protection visa for a third time. The author went through the usual appeal procedures culminating in the Full Bench of the Federal Court granting the appeal on 17 June 2004, on the grounds that the RRT had failed to consider whether the author could be told the "gist" of the information withheld even if the information could not be released in its entirety. The application for a protection visa was remitted to a differently constituted RRT for re-determination. On 4 November 2004, the RRT refused the application for a protection visa for a fourth time. On this occasion, the RRT again refused to give the author access to the information, although it did explain the "gist" of the information. This information consisted *inter alia* of the charges which she may face if returned including, charges of corruption, which carry the death penalty in the People's Republic of China but is not mandatory. The author sought judicial review of the RRT decision by the Federal Court and availed herself of the appeal procedures available, culminating in the High Court's refusal to grant special leave to appeal on 7 October 2005.

2.7 The author subsequently made a request to the Minister for Immigration to remain in Australia, according to s 417 of the Migration Act 1958, under which the Minister has a non-enforceable discretion to substitute a more favourable decision for a decision of the RRT if "it is in the public interest to do so", including where there are circumstances that provide a sound basis for a significant threat to that person's security, human rights or human dignity on return to their country of origin, where there are circumstances that may bring Australia's obligations under the ICCPR into consideration, or where there are unintended but particularly unfair or

unreasonable consequences of legislation. The author has not yet received any decision from the Minister in relation to her request. Should the Minister decline to exercise the discretion under s. 417, the author must, pursuant to s. 198 of the Migration Act, be removed from Australia "as soon as reasonably practicable". According to the author, she is unaware of the precise nature of the offence she is alleged to have committed. While she has been given the "gist" of the factual allegations, she has not been provided with a copy of the arrest warrant or the charge sheets. The following information is known to her: newspaper reports provided by the RRT suggested that, by June 2000, it was public knowledge that Mr Zhang was under investigation for large-scale corruption. He had been accused of using his position as head of the Traffic Police in Guangzhou to solicit and accept bribes, and he had received unlawful benefits from the Guangdong Paili Driving Service Company, in which he was given a 20% stake, and his wife 40%. He had paid money into a bank account held by his wife in Hong Kong.

2.8 According to an article in the Singtao Daily newspaper, dated 5 August 2004, which was provided by the author to the RRT, Mr Zhang had been sentenced to death by the Chinese authorities for accepting bribes in October 2003. The article also made reference to the author's application for a protection visa, her fear of being persecuted by Chinese authorities, and the litigation over access to the information provided by Chinese authorities. The author denied the allegations made by Chinese authorities maintaining that the prosecution of her husband is politically motivated, and that she will suffer the same prosecution if she is returned to the People's Republic of China. She also claims that she faces further punishment if returned, as she has been publicly identified in newspaper articles as an applicant for refugee status in the State party and a critic of the Chinese authorities. The RRT, on 4 November 2004, made no finding as to the truth or otherwise of the allegations against her but rejected her contention that the charges are contrived or politically motivated . It further rejected the author's argument that she faces mistreatment in the People's Republic of China on the basis of her request for refugee status as, according to the Department of Foreign Affairs and Trade ("DFAT") in 1995, it was unaware of any substantiated claims of mistreatment of failed refugee claimants who had returned to the People's Republic of China.

The complaint

3.1 The author claims a violation of article 6 by the State party, if she is returned to the People's Republic of China, as there is a "real and foreseeable risk" that she will be convicted and sentenced to death. Although she has not been provided with any information on the legal provisions on which she may be charged, nor whether the death penalty is a mandatory sentence should she be found guilty, she has been the subject of substantially the same allegations as her husband and would thus face similar charges. Moreover, given the conviction of her husband, and the imposition of the death penalty upon him, it can be inferred that she will similarly be found guilty and face a similar penalty. The People's Republic of China applies the death penalty to "white collar" crimes such as corruption She also claims that corruption, which is the nature of the charge against her, involves no loss of life, or physical harm and thus does not meet the threshold of a "most serious" crime, within the meaning of article 6, paragraph 2.

3.2 The author claims a violation of article 7 if returned to the People's Republic of China, as there is a "real and foreseeable risk", that she will be subjected to torture or cruel, inhuman or degrading treatment or punishment. She also claims a violation of article 14 if returned, as it is unlikely that she will be afforded due process, including the right to a fair hearing by an

independent and impartial tribunal, the right to review by a higher tribunal, the right to adequate time and facilities for preparation of her defence, and the right to counsel.[1] She also claims that as she will not be protected by the legal system in the People's Republic of China, the necessary and foreseeable consequence of her deportation is that she will be exposed to a risk of her rights under article 7.

3.3 The author claims a violation of article 9, paragraphs 1 and 4, with respect to her prolonged detention for over four years. The effect of s. 189 of the Migration Act under which the author was detained is that the author could not be released from detention under any circumstances. There is no provision which would allow her to be released from detention, either administratively or by a court.

State party's admissibility and merits submission:

4.1 On 11 July 2007, the State party commented on admissibility and merits. It argues that all of the author's claims are inadmissible for lack of substantiation and that the claim in relation to article 7 is inadmissible as incompatible with the provisions of the Covenant. As to article 6, the State party submits that the author failed to make out a prima facie case that she will be subjected to arbitrary deprivation of life if returned to the People's Republic of China, in that the application of the death penalty does not *prima facie* constitute *an arbitrary* deprivation of life. It refers to the Committee's jurisprudence that, if a person is subjected to the death penalty contrary to the provisions of article 6, paragraph 2, the removing State may be found in violation of article 6, paragraph 2, read in accordance with article 6, paragraph 1, if the application of the death penalty would amount to an arbitrary deprivation of life.[2] She has not provided details as to whether the individual circumstances of her case would constitute a serious crime or whether the death penalty, if it were imposed for the crimes with which she may be charged, would not be imposed by a properly constituted court[3].

4.2 The State party submits that even if the death penalty in this instance can be interpreted to be an arbitrary deprivation of life, the author has not sufficiently substantiated her claim that she faces a real risk of being subjected to the death penalty if returned to the People's Republic of China. The State party acknowledges its obligations pursuant to the Committee's jurisprudence in *Judge v. Canada*,[4] that it should not return the author to the People's Republic of China if there is a real risk that she will face the death penalty. However, it submits that the author has

[1] To support her claim she provides a report of 22 March 2004, from Amnesty International, entitled, "People's Republic of China – Executed "according to law"? – The death penalty in China" and China (includes Tibet, Hong Kong, and Macau) Country Reports on Human Rights Practices - 2006, Released by the Bureau of Democracy, Human Rights, and Labor, March 6, 2007, from the US Department of State Country Report on China.

[2] Communication No 692/1996, *ARJ v Australia,* Views adopted on 28 July 1997, para 6.13.

[3] According to the State party, it is beyond the scope of the Committee and the Australian Government to determine whether China (which has not ratified the Covenant or the Second Optional Protocol) imposes the death penalty for other than the most serious crimes and without due process at law as this would mean making a judgment on China's internal domestic regulation. Communication No 470/1991, *Kindler v Canada,* Views adopted on 30 July 1993, para 8.6.

[4] Communication No. 829/1998, *Roger Judge v. Canada,* Views adopted on 5 August 2003.

not substantiated that, "she will be convicted of any crimes in particular as she has not yet been charged, and has not demonstrated that the People's Republic of China will impose the death penalty on her if she is convicted."

4.3 The State party rejects the author's argument that she has not been provided with "any of the legal provisions under which she has been charged, nor whether the death penalty is a mandatory requirement should she be found guilty." She has not been charged and was provided with a summary of possible charges against her by the Refugee Review Tribunal. While the copy of the Tribunal decision submitted to the Committee has some pages blacked out, the author received a complete copy of the decision and the relevant sections dealing with potential charges against her were clear. The State party admits that the charges which she may face, including charges of corruption, carry the death penalty in the People's Republic of China, but it is not mandatory, and it is not certain that she will be found guilty of these offences even if charged. As to the documents provided by the author to support her claims, the State party refers to the Committee's jurisprudence to support its argument that it is impossible to determine the intent of another country in an individual case by reference to documents of a general nature.[5] The author has not demonstrated that there is a pattern of conduct in similar cases to her own and has therefore not sufficiently substantiated her claim.[6] She herself doubts that the Chinese authorities will be able to make out a case against her and if it is unable to do so, she will not face any punishment[7].

4.4 On the article 7 claim, the State party notes that the author does not elaborate on what treatment she may receive in the People's Republic of China or how such treatment would constitute torture or cruel, inhuman or degrading treatment or punishment. It is aware of the findings of the Special Rapporteur on Torture who stated that, while the Chinese Government is ready to take steps to "combat torture and ill-treatment", he acknowledges that torture is often practiced in the criminal justice system[8]. For this reason, the State party submits that it would not return the author if it were satisfied that there is a real risk of torture or cruel, inhuman or degrading treatment or punishment. On the claim under article 14, apart from the provision of a report from the US State Department, the author makes no attempt to demonstrate why or how she will be personally subjected to treatment contrary to article 7 if returned to the People's Republic of China. [9] In the State party's view, it is particularly incumbent on the author to

[5] Communication No 445/1991, *Lynden Champagnie, Delroy Palmer and Oswald Chisholm v Jamaica*, Views of 18 July 1994, para 5.3.

[6] See *VMRB v Canada*, Communication No 236/1987, Inadmissibility decision of 18 July 1988, para 6.3. *GT v Australia* Communication 706/1996, Views of 4 November 1997, para 8.4.

[7] It refers to the author's initial submission in which she states, "It is manifest in these circumstances that such conduct cannot amount to a 'most serious' crime. As such, even if the Chinese authorities are able to prove the case against the alleged victim there is no grounds for justifying the imposition of the death penalty under Article 6."

[8] Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Mission to China, 10 March 2006, para 71.

[9] In this regard, she refers to Communication No 445/1991, *Lynden Champagnie, Delroy Palmer and Oswald Chisholm v Jamaica*, supra, where the Committee considered that the authors, by merely referring to a report outlining the conditions of detention in Jamaican prisons, had failed to substantiate the allegation that they were the victims of a violation of article 10 of the Covenant for purposes of admissibility.

provide information which demonstrates her claims, given that the allegations concern a State which is not the State party.

4.5 The State party also submits that the claim under article 7 is incompatible *ratione materiae* with the provision of the Covenant, as the author attempts to make a *non-refoulement* claim in relation to the right to a fair trial, which is not encompassed by article 7. The author appears to argue that not having a fair trial in accordance with article 14 will constitute a breach of article 7 of the Covenant. She argues that authorities in the People's Republic of China "consistently disregard due procedure" for white collar crimes, such as bribery and corruption, but in the State party's view, a breach of article 14 by another State does not constitute conduct that would breach its *non-refoulement* obligation under the Covenant. It submits that the *non-refoulement* obligation is implied under article 2, which obliges States parties to ensure that all individuals within their territory and subject to their jurisdiction have their rights recognised in accordance with the Covenant. According to the Committee's jurisprudence, the responsibility of a State party for the actions of another State only applies with respect to very serious violations of the Covenant, namely under articles 6 and 7, but does not extend to other Covenant articles such as article 14.[10] Specifically, the Committee has previously noted that due process guarantees under article 14 do not fall within the ambit of the prohibition on *non-refoulement*.[11]

4.6 As to the claims under article 9, paragraphs 1 and 4, the State party submits that the author has failed to outline any attempts she has made to seek review of her detention or challenge its lawfulness (article 9(4)) and has not demonstrated that it was in any way arbitrary or unlawful (article 9(1)). She has thus failed to substantiate these claims. She was released from Villawood Immigration Detention Centre in 2005 and is now in community detention, which means that she is able to live in the community subject to certain conditions.[12] The State party submits that the author's detention occurred and continues to occur in accordance with procedures established by the Migration Act and is therefore lawful. As an unlawful non-citizen,[13] the author was detained pursuant to section 189 of the Migration Act[14]. Her detention continued while she pursued four years of appeals, and continues while the State party considers possibilities for her safe removal.

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[10] See Communication No 470/1991, *Kindler v Canada*, Views adopted on 30 July 1993; Communication No. 539/1993, *Cox v Canada*, Views adopted on 31 October 1994; General Comment 31, relating to Article 2: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant), 29 March 2003, para 12.

[11] Communication No 692/1996, *A.R.J v Australia*, Views of 28 July 1997.

[12] The State party explains that community detention is a policy which was introduced in June 2005 following amendments to the *Migration Act 1958.* These amendments provide the Minister with a non-compellable, non-delegable public interest power to specify alternative detention arrangements for a person's detention and conditions to apply to that person. Placement in community detention enables people to move about in the community without needing to be accompanied or restrained by an immigration officer, or designated person. It is a form of immigration detention and does not give her any lawful status or the rights or entitlements of a person living in the community who is the holder of a valid visa. Efforts to arrange her removal from Australia continue while she is living in community detention.

[13] *Migration Act 1958* (Cth), s 14.

[14] Migration Act 1958 (Cth), ss 196 and 198. Section 189 (1) provides relevantly: "If an officer knows or reasonably suspects that a person in the migration zone (other than an excised offshore

4.7 The State party denies that the author's detention was arbitrary. The provisions of the Migration Act under which she is detained, and the individual facts of her case, justify her detention. She has since been released into community detention and has not been granted a visa to remain in the State party. Her release into community detention, demonstrates that her case has been under review and that all attempts were made to ensure that the policy was applied appropriately and proportionately. Mandatory immigration detention is a measure for, among others, people who arrive in the State party without a valid visa.[15] The detention of such persons is necessary to ensure that they are available for processing of any protection claims, to enable essential identity, security, character and health checks to be carried out, and to ensure that they are available for removal if found not to have a basis to lawfully remain in the State party. This approach is consistent with the fundamental principle of sovereignty in international law, which includes the right of a State to control the entry of non-citizens into its territory. Various versions of these immigration detention provisions have been considered by the High Court and were found to be constitutional.[16]

4.8 According to the State party, a person can be released from immigration detention for a number of reasons, including when there is no longer a reasonable suspicion that the person is an unlawful non-citizen, that the person becomes a lawful non-citizen or citizen, or if a court finds that detention was not lawful under the Migration Act. The author could have brought a writ of *habeas corpus* in the Federal Court or the High Court, to determine the legality of the detention and the court could have ordered her release if it found that she had been detained unlawfully under section 189 of the Migration Act.[17] A range of administrative mechanisms are also available for persons to be released from detention, including the grant of a bridging visa in appropriate circumstances and the Minister's personal power to grant a visa to a detainee in the public interest. In relation to the cancellation of her visa on 5 January 2001, the author could also have sought judicial review of this decision.

4.9 As to the author's reference to *A. v. Australia*, the State party observes that it did not accept the Committee's Views. In any event, it considers that the facts of this case are different, as the author had her visa cancelled in 2001, and had pursued four years of litigation relating to her protection visa application, which prolonged her detention. The State party could not have commenced the removal process until these proceedings had been concluded. Moreover, the author was detained in Villawood Immigration Detention Centre at all times until released into community detention and has always had access to her legal representatives, who have remained the same throughout her detention. Now that she is in community detention, she is still free to access her legal representatives at any time and to interact with the community, in accordance

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place) is an unlawful non-citizen, the officer must detain the person". Section 196 of the Migration Act provides for the duration of detention: An unlawful non-citizen detained under section 189 must be kept in immigration detention until he or she is: (a) removed from Australia under section 198 or 199; or (b) deported under section 200; or (c) granted a visa.

[15] The State party refers to its response to the Views of the Committee in Communication No. 560/1993, *A v Australia*, para 5.

[16] Chu Kheng Lim v Minister for Immigration and Ethnic Affairs (1992) 176 CLR 1, 46 (Toohey J). Minister for Immigration and Multicultural and Indigenous Affairs v Al Khafaji [2004] HCA 38. Al-Kateb v Godwin, Keenan & Minister for Immigration and Indigenous and Multicultural Affairs (2004) 219 CLR 555.

[17] Al-Kateb v Godwin & Ors (2004) 219 CLR 555, 573 (McHugh J).

with the terms and conditions of her release. In the event that the Committee finds the communication admissible, the State party provides the same arguments on the merits as it does in seeking to establish that the author has failed to substantiate her claims.

Author's comments on State party's submission:

5.1 On 19 December 2007, the author argues that she is at a distinct disadvantage compared to the State party, which has all the documentation in relation to this case, in seeking to substantiate her claims because she has only had access to limited information. However, based on this limited information, it is beyond doubt that her husband was convicted and sentenced to death for corruption, and that a warrant for her arrest was issued by the Chinese authorities[18]. None of this has been challenged by the State party. The author submits that there is nothing more she can do other than to provide independent information about the pattern of conduct in similar cases in the People's Republic of China. She argues that the test is whether there is a real risk that her rights under the Covenant will be violated in the People's Republic of China[19], and that she is not obliged, as suggested by the State party to substantiate "that she will [emphasis added] be convicted of any crimes…….and has not demonstrated that China will [emphasis added] impose the death penalty on her if she is convicted."

5.2 As to the State party's argument that the allegations under article 7 are incompatible *ratione materiae* with the provisions of the Covenant, as to her *non-refoulement* claim in relation to the right to a fair trial, the author refers to the Committee's Views in *Larranaga v. The Philippines*[20], where it was held that the imposition of the death penalty on a person after an unfair trial wrongly subjected that person to the fear that he will be executed and, in the circumstances where there is a real possibility that the sentence will be enforced, that fear must give rise to such anguish as to amount to a violation of article 7. She also refers to *Alzery v. Sweden*, where the Committee accepted that removal to a country which may have exposed the author to a manifestly unfair trial could give rise to a claim under article 14[21].

5.3 As to the State party's arguments on article 9, the author submits that the State party has been attempting for many years, without success, to justify its policy of mandatory detention for all unauthorized arrivals and refers to the Committee's jurisprudence in this regard, including *A. v. Australia*[22]. The fact that the author had her visa cancelled upon arrival in the State party does not distinguish her case so as to make her detention justifiable. In her view, the fact that she had lawfully obtained her visa prior to entering the State party should have given the authorities less reason to detain her. The State party's justification for mandatory detention has been to ensure availability for processing protection claims, to enable essential identity, security, character and health checks to be carried out and to ensure availability for removal if protection claims are denied. The author argues that there could have been no doubt as to her identity and there is no reason why the State party could not have released her into community detention sooner. As to the argument that she could have challenged the legality of her detention by writ of *habeas*

[18] In this regard, she refers to the RRT decision of 4 November 2004, at pp.67-68, pp. 72 -73 annex, and 84-85 annex.
[19] *ARJ v. Australia*, supra.
[20] Communication No. 1421/2005, Views adopted on 24 July 2006.
[21] Communication No. 1416/2005, Views adopted on 25 October 2006.
[22] Supra

corpus, the Committee has already made it clear that a person is not required to pursue futile remedies, and since the High Court has upheld the validity of the State party's mandatory detention system, there would be no prospect of success with such a claim.

Supplementary submissions from the author and the State party

6. On 18 June 2008, the author submitted a copy of a report from the Commonwealth and Immigration Ombudsman to the Minister for Immigration and Citizenship, dated 28 March 2008, as well as other documentation, which indicates that the State party has sought diplomatic assurances from China that the author will not be subjected to any violation of her rights under the Covenant if she is returned there. The same report also indicated that the author's request that the Minister exercise his non-reviewable discretion under s.417 of the Migration Act 1958 to allow her to remain in Australia may be determined by the outcome of Australia's request for diplomatic assurances from China. The fact that the State party has sought diplomatic assurances from China was not previously disclosed to the author. The author requests the Committee to "caution" the State party against the proposed use of diplomatic assurances in the present case.

7.1 On 3 October 2008, the State party responded to the author's supplementary submission. It admits that the Ombudsman's report contains errors and that the statements that the government is seeking assurances from China either with respect to the imposition of the death penalty or relating to torture are incorrect. The State party submits that it has no plans to remove the author from Australia and that it has not sought assurances from China in relation to the author. The actions described in the Ombudsman's report are at a very early stage and have not progressed to a government decision to seek assurances at this stage. It submits that the author still has an outstanding Ministerial intervention request before the Department of Immigration and Citizenship and that this request has not yet been finalized given the complexity of the case. The author remains in community detention.

7.2 The State party submits that it has provided all relevant information to both the Committee and the author on this case[23]. The author was provided with a summary of possible charges against her if she is returned to China when her case was before the Refugee Review Tribunal. She also received a copy of the RRT decision, including the relevant sections dealing with potential charges against her. And she has subsequently been the subject of four Ombudsman investigations and reports, which have been provided in full to her.

7.3 The State party submits that even if it were to seek assurances from China, while the negotiations for such assurances are continuing, it would be inappropriate, nor the practice of the State party, to disclose to the subject of those negotiations the existence of same. Such diplomatic negotiations are sensitive and confidential. However, the State party submits that it would disclose the final outcome of such negotiations to the person to be removed. It submits that it is entitled to undertake procedures to assess the viability of removing the author, including assessing whether it can remove the author to China without the risk of breaching its *non-refoulement* obligations. These assessments are still ongoing, but there has been no information received in the course of these assessments that is not known to the author.

[23] It refers to *Bleier v. Uruguay*, Communication no. 30/1978, Views adopted on 29 March 1982.

7.4 The State party submits that seeking assurances would be a permissible option in this case. There is no prohibition on an abolitionist state removing a person to a state that maintains the death penalty where there is no real risk of it being applied. The seeking of diplomatic assurances is common international practice and necessary in cases of extraction or removal where the State assesses that there is a risk that the death penalty might be imposed. The State party refers to the principle that if there is a real risk that the death penalty may be applied in a given case, a State cannot remove the person "unless the Government, which has requested the extradition, provides a legally binding assurance not to execute the person"[24]. The State party is of the view that the same principle applies to removals and refers to the Committee's jurisprudence[25]. The State party submits that a legally binding assurance is one given by the part of the government or the judiciary that would usually have the responsibility of carrying out the act or enforcing the assurance. The State party does not consider that there is a real risk that the author will face the death penalty if returned to China. However, if it should form the view that the death penalty would be imposed upon her, the government would seek assurances that she not face the death penalty were it to remove her to China.

Issues and proceedings before the Committee

Consideration of admissibility

8. 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 it is admissible under the Optional Protocol. The Committee does not accept the State party's argument that the author's claims are inadmissible on grounds of non-substantiation, as the author has made reasonable efforts to substantiate her claims of violations of the Covenant for the purposes of admissibility. Similarly, it considers all of the author's claims compatible *ratione materiae* with the Covenant. The Committee also finds that given that no issue arises with respect to the exhaustion of domestic remedies, article 5, paragraph 2 (b), of the Optional Protocol does not prohibit it from considering this case on the merits.

Consideration of the merits

9.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

9.2 The Committee notes that the author makes no claim *per se* under the Covenant with respect to the State party's decision to provide her with only limited information on the alleged charges against her, including only "the gist" of the information, submitted to it by the Chinese authorities. It also notes that the State party has denied the claim that diplomatic assurances have been requested in this case, a denial to which the author has not responded. For this reason, the Committee does not intend to consider these issues.

[24] Manfred Nowak, UN Covenant on Civil and Political Rights CCPR Commentary (2nd ed, 2005), 150.
[25] *GT v. Australia*, Communication no 706/1996, Views adopted on 4 November 1997.

9.3 With respect to the claim that the author was arbitrarily detained, in terms of article 9, paragraph 1, prior to her release into community detention, the Committee recalls its jurisprudence that, in order to avoid a characterization of arbitrariness, detention should not continue beyond the period for which the State party can provide appropriate justification.[26] In the present case, the author's detention as an unlawful non-citizen continued, in mandatory terms, for four years until she was released into community detention. While the State party has advanced general reasons to justify the author's detention, the Committee observes that it has not advanced grounds particular to her case which would justify her continued detention for such a prolonged period. In particular, the State party has not demonstrated that, in the light of the author's particular circumstances, there were no less invasive means of achieving the same ends. While welcoming her eventual release into community detention, the Committee notes that this solution was only made possible after she had already spent four years in secure detention. For these reasons, the Committee concludes that the author's detention for a period in excess of four years without any chance of substantive judicial review, was arbitrary within the meaning of article 9, paragraph 1.

9.4 With respect to the remaining claims relating to the author's possible deportation, what is at issue in the case is whether by deporting the author to the People's Republic of China, there are substantial grounds for considering that the State party would be exposing her to a real risk of irreparable harm[27], in violation of article 2, read together with article 6 and/or article 7 of the Covenant. In this regard, the Committee recalls that, a State party, which has itself abolished the death penalty, would violate an individual's right to life under article 6, paragraph 1, if it were to remove a person to a country where they are under a sentence of death.[28]The question in this case is whether there are substantial grounds for considering that there is a real risk that the author's deportation would result in the imposition on her of such a sentence i.e. a real risk of irreparable harm The Committee also recalls its jurisprudence that the imposition of a death sentence on a person after an unfair trial is to subject that person wrongfully to the fear that he/she will be executed in violation of article 7 of the Covenant.[29]

9.5 As to the facts, it would appear that the author has not yet been charged, but that at least one warrant for her arrest was issued by the Chinese authorities. The State party concedes that the likely charges, including charges of corruption, carry the death penalty in the People's Republic of China, but argues that it is not mandatory, and that it is not certain that she will be found guilty of these offences if charged (para. 4.3). The State party does not pronounce itself on

[26] *A v. Australia, C v. Australia*, supra

[27] General Comment No. 31 [80] Nature of the General Legal Obligation Imposed on States Parties to the Covenant: . 26/05/2004. CCPR/C/21/Rev.1/Add.13. (General Comment no. 31) According to paragraph 12, " the article 2 obligation requiring that States Parties respect and ensure the Covenant rights for all persons in their territory and all persons under their control entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed."

[28] *Roger Judge v. Canada, supra.*

[29] *Larranaga v. the Philippines*, Communication no. 1421/2005, Views adopted on 24 July 2006.

the likelihood of the Chinese authorities approaching it with a warrant for the author's arrest if they do not intend to charge her if she returns to its jurisdiction. While recognizing that neither the Committee nor the State party are in a position to assess the guilt or otherwise of the author or to assess the likelihood of the imposition of a non-mandatory sentence in the event that she is convicted, the Committee notes that the risk to the author's life would only be definitively established when it is too late for the State party to protect her right to life under article 6 of the Covenant.

9.6 The Committee observes that the State party does not contest the assertion that the author's husband has been convicted and sentenced to death for corruption, and that the warrant issued by the Chinese authorities for the author's arrest relates to her involvement in the same set of circumstances. The RRT itself, on 4 November 2004, while making no finding on the author's guilt or innocence, rejected the contention that the charges against her are contrived. The Committee reiterates that it is not necessary to prove, as suggested by the State party, that the author "will" be sentenced to death (para. 4.2) but that there is a "real risk" that the death penalty will be imposed on her. It does not accept the State party's apparent assumption that a person would have to be sentenced to death to prove a "real risk" of a violation of the right to life. It also notes that it is not made out from a review of the judgements available to the Committee, albeit incomplete, of the judicial and immigration instances seized of the case that arguments were heard as to whether the author's deportation to the People's Republic of China would expose her to a real risk of a violation of article 6 of the Covenant.

9.7 The Committee notes that the State party does not contest the author's claims that she is at risk of having an unfair trial if she were to be returned to the Peoples' Republic of China but merely argues that it's *non-refoulement* obligations do not extend to article 14 violations (paragraph 4.5). However, the Committee is obliged to give due weight to her argument of such a risk, as well as the fact that the author's spouse has apparently been sentenced to death for "accepting bribes" (paragraph 2.8) and that a warrant has been issued for her own arrest for similar offences (paragraphs 2.2 and 2.6). The Committee is also cognizant of the anxiety and distress that would be caused by her being exposed to such a risk. For all of the above reasons and while recognizing the State party's assertion (paragraph 7.1) that it currently has no plans to remove her from Australia, the Committee considers that an enforced return of the author to the Peoples' Republic of China, without adequate assurances, would constitute violations by Australia, as a State party which has abolished the death penalty, of the author's rights under article 6 and article 7 of the Covenant.

9.8 Having found a violation of article 9, paragraph 1, with respect to the author's detention, and potential violations of article 6 and article 7, in the event that the State party forcibly removes the author to the Peoples' Republic of China without adequate assurances, the Committee does not consider it necessary to address whether the same facts amount to a violation of article 6, paragraph 2, article 9, paragraph 4, or article 14 of the Covenant.

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts as found by the Committee reveal a violation by Australia of article 9, paragraph 1, and that the enforced removal of the author to the Peoples' Republic of China without adequate assurances would amount to violations of article 6 and article 7, of the International Covenant on Civil and Political Rights.

11. Pursuant to article 2, paragraph 3 (a) of the Covenant, the Committee concludes that the author is entitled to an appropriate remedy to include protection from removal to the People's Republic of China without adequate assurances as well as adequate compensation for the length of the detention to which the author was subjected.

12. Bearing in mind that, by becoming a State party to the Optional Protocol, the State party has recognised the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to its Views. The Committee is also requested to publish the Committee's Views.

[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.]
