



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

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Committee against Torture

Communication No. 387/2009

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

<i>Submitted by:</i>	Sathurusinghe Jagath Dewage (represented by counsel, Christopher Yoo and Luke Pistol of Balmain for Refugees)
<i>Alleged victim:</i>	The complainant
<i>State party:</i>	Australia
<i>Date of complaint:</i>	1 June 2009 (initial submission)
<i>Date of decision:</i>	14 November 2013
<i>Subject matter:</i>	Risk of deportation of complainant to Sri Lanka
<i>Substantive issues:</i>	Deportation of a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture
<i>Procedural issues:</i>	Non-substantiation and incompatibility with the Convention
<i>Articles of the Convention:</i>	3 and 22

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Annex

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

concerning

Communication No. 387/2009

Submitted by: Sathurusinghe Jagath Dewage (represented by counsel, Christopher Yoo and Luke Pistol of Balmain for Refugees)

Alleged victim: The complainant

State party: Australia

Date of complaint: 1 June 2009 (initial submission)

The Committee against Torture, established under article 17 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,

Meeting on 14 November 2013,

Having concluded its consideration of complaint No. 389/2009, submitted to the Committee against Torture by Sathurusinghe Jagath Dewage under article 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,

Having taken into account all information made available to it by the complainant and the State party,

Adopts the following:

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

1.1 The complainant is Jagath Sathurusinghe Dewage, a Sri Lankan national of Sinhalese ethnic origin, born on 23 November 1970. He claims that his deportation from Australia to Sri Lanka would constitute a violation of article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. He is represented by counsel.

1.2 On 30 June 2009, in application of rule 114 (former rule 108), paragraph 1, of its rules of procedure (CAT/C/3/Rev.5), the Committee requested the State party not to deport the complainant to Sri Lanka while his complaint was being considered by the Committee.

Factual background

2.1 The complainant was born in Aluthgama village in Matale District, Sri Lanka. He worked as an employee at the Sri Lankan Transport Board in Matale. His family was known to be prominent supporters of the United National Party (UNP), and he himself became involved with the UNP as an activist when he was 18 years old. In 1996, he was

appointed by the UNP minister in Central Province to be the UNP organizer in Aluthgama village. His role was to get new members to join the party.

2.2 In 1998, the same minister asked the complainant to stand for elections as a committee member of the National Employees Trade Union ((Jathika Sevaka Sngamaya (JSS)), which is affiliated with the UNP. He was first elected as a committee member of the Central Region organization of the Union and later, as organizer of the JSS Transport Board Central Region Committee, which was the top leadership position. His duties included maintaining JSS membership level intact and dealing with organizational matters.

2.3 Among other achievements, he created a fund to help workers who had lost their jobs, and he had a bus refurbished as an emergency vehicle to take workers to hospital. Many workers were attracted by these benefits and started joining the JSS to the detriment of the People's Liberation Front Union (Janatha Vimukthi Peramuna (JVP)) of the Sri Lanka Freedom Party (SLFP). Seeing inequalities in the participatory system of trade unionists, the complainant started openly criticizing the system in 2000 and encouraged JSS members not to report for duty while SLFP and JVP members participated in their rallies. This made him increasingly unpopular with SLFP and JVP.

2.4 As a result of losing their members, and therefore votes, members of JVP and SLFP constantly clashed with the complainant and physically harassed him on several occasions. In 2000, a JVP leader in the Pradeshiya Sabha Provincial Council in Matale, one Mr. L.A, became particularly active in harassing the complainant. Mr. L.A was known for his involvement with the militant wing of JVP, which was allegedly responsible for the killings of political opponents. He was with JVP when the movement staged a violent rebellion against the Government in 1988 and 1989. Mr. L.A. was allegedly jailed for killing UNP members at the time of the rebellion; when JVP came to power in 1994, he was released from jail. By 2000, Mr. L.A. knew about the complainant's political activities; his house was frequently visited at night by 10 to 12 men looking for him. This prompted the complainant to move from Matale to Gokarella in 2000, although he continued working in Matale and continued his activities as the UNP organizer in Aluthgama village.

2.5 In 2001, before the election of the new Prime Minister, the complainant was involved in organizing a nationwide strike to protest against the privatization of the Transport Board. After the UNP won the 2001 elections, the complainant joined the JSS Youth League and was subsequently elected to the UNP Youth League (Youn Peramuna) in Matale.

2.6 Between the 2001 and 2004 elections, he was periodically harassed at his workplace but not as frequently as he was prior to 2001. After the UNP lost the 2004 elections, SLFP and JVP merged into the United People's Freedom Alliance (UPFA) and formed a government. For about two weeks after the elections, the complainant did not report for work, knowing that he would be harassed. He finally returned to work because of the police presence at the Transport Board depot, but JVP and SLFP members would not let him sign the attendance sheet. Other UNP members, however, were allowed to sign in. The complainant went to the police and filed a complaint. As a result, the harassment intensified. In June 2004, he was transferred against his will to another depot in Teldenya, where he was the only UNP member. Despite the transfer, the harassment by JVP and SLFP members continued in various forms, including death threats.

2.7 Two months after the transfer, the complainant was told by the SLFP union secretary that he was going to be transferred to the Trincomalee depot, located in the LTTE (Liberation Tigers of Tamil Eelam) conflict zone. The complainant decided to quit his job at the Transport Board and earn his living by growing and selling vegetables.

2.8 In September 2004, he complained to the UNP about the treatment he had been subjected to by SLFP and JVP. Allegedly, after investigating his claims, the UNP Political

Revenge Committee confirmed in a letter dated 20 August 2005 that he had been subjected to severe political revenge and injustice. In the meantime, the complainant decided to leave Sri Lanka, as he was unable to find a job and people were looking for him. On 25 January 2005, he unsuccessfully tried to enter Japan and had to return to his home in Gokarella, where he started organizing activities for the UNP in preparation for the November 2005 presidential elections. One Sunday in July 2005, he was going to buy food at the market when Mr. L.A. drove up and asked him, in Sinhala, to get into the van. The complainant was confused and scared, and considered that it would be more dangerous to refuse to get into the van. On the way to Gokarella market, Mr. L.A. questioned him about his political activities and, at gunpoint, told him that he should stop working with the UNP, then he pushed him out of the van.

2.9 Since the JVP knew that he was back in Gokarella, the complainant and his wife started to fear for their lives. For a short period, they stayed at a friend's house in Trincomalee, but had to come back to Gokarella because the police started to get suspicious about the reasons for their presence in the LTTE conflict zone. The complainant then tried to obtain a visa to leave Sri Lanka through the same person (an LTTE member) who had earlier arranged his visa to Japan. The day the complainant went to this person's jewellery shop to pay him for his assistance with the visa, the shop was inspected by the police. The complainant was taken by this person's companion through a tunnel to a room full of weapons belonging to the LTTE. When the complainant realized that he would be accused by the Government of giving money to the LTTE, he asked to be let go. Instead, he was tied to a chair and gagged by the two men (allegedly LTTE members) present in the room. He fainted when they put a knife to his throat and cut it.

2.10 He was kept in the tunnel room for approximately seven hours, then in the jewellery shop for about three weeks before he was told, on 18 or 19 September 2005, that his visa was ready. His captives arranged for him to travel to Melbourne, Australia, with another man. He arrived in Australia on 22 September 2005. Since he did not know anyone in Melbourne, he stayed with a group of Tamils. On 4 November 2005, he filed an application for a protection (class XA) visa with the Australian Department of Immigration and Multicultural and Indigenous Affairs under the 1958 Migration Act.

2.11 The first time that the complainant met with an immigration officer for his protection visa, he did not tell him about the way in which he had obtained the visa to enter Australia, out of fear of being sent back to Sri Lanka. Some time later, the complainant was asked by the immigration officer about the people with whom he was staying in Melbourne. As he was still staying with LTTE supporters, who could have read his correspondence with the Australian authorities regarding the protection visa, the complainant did not tell the immigration officer about the treatment he had been subjected to in Sri Lanka by LTTE members.

2.12 Some months after Australian authorities learned about how he had obtained his visa in Colombo, his wife's house in Gokarella was broken into by Tamils who destroyed some of the belongings and left a note threatening to kill everyone in his family. The complainant's wife moved to Trincomalee and he has not heard from her since. On 9 February 2009, his mother's house was broken into by Mr. L.A. and officials from the Yatawaththa Divisional Council and the Matale Development Council. The complainant's mother was injured and reported to Matale hospital police station on 10 March 2009.¹

¹ The complainant relies on written testimony from his mother, extracted from the information book at Matale hospital police station.

2.13 In December 2005, the complainant's application for a protection visa was refused by the Australian authorities, who considered that his fear of persecution in Sri Lanka was ill-founded. The complainant applied for a review of this decision to the Refugee Review Tribunal (RRT), which was rejected on 18 April 2006. In May 2006, he appealed for judicial review of the RRT decision to the High Court of Australia, which remitted it to RRT on 28 July 2006. On 28 July 2006, he appealed to the Federal Court, but was rejected on 31 July 2007. On 28 August 2007, he again appealed to the High Court of Australia, but withdrew the appeal on 20 November 2007.²

2.14 On 19 December 2007, 28 November 2008, 11 March 2009 and 27 May 2009, the complainant applied for intervention by the Minister for Immigration, but all four applications were deemed as not meeting the guidelines and were not referred to the Minister for consideration. On 5 June 2009, the High Court of Australia decided to adjourn the hearing of the complainant's case and to stay his removal for two weeks to allow the Minister for Immigration to investigate the matter more thoroughly. At the time of submission of the original complaint to the Committee against Torture (June 2009), the matter was pending a final decision by the Australian Minister for Immigration. As the complainant was almost certain that he would be deported in the two-week time frame, he decided to submit his claim to the Committee.

The complaint

3.1 The complainant claims that his forcible deportation to Sri Lanka would amount to a violation of article 3 of the Convention as he fears that he will be tortured by the Sri Lankan authorities because of his past involvement as a local UNP and JSS Transport Board organizer.

3.2 The complainant also claims that, in his current situation, if he is returned to Sri Lanka, he would be killed or harmed by the LTTE for having divulged information on the process by which he illegally obtained a tourist visa to enter Australia.

State party's observations on admissibility and the merits

4.1 On 12 November 2010, the State party submitted its observations on the admissibility and the merits. It considers that the complaint should be declared inadmissible as it is manifestly ill-founded. The State party also states that the allegations concerning torture by the LTTE should be declared inadmissible as they are incompatible with the provisions of article 22, paragraph 2, of the Convention. In any event, the State party considers the complainant's claims to be without merit as they have not been supported by any evidence that there is a real risk that he would be subjected to torture upon return to Sri Lanka.

4.2 After outlining the facts of the case, the State party describes the procedure that the complainant followed at the national level, adding that on 22 July 2008, after the Minister for Immigration had indicated that he would not consider exercising ministerial intervention in the complainant's case, the complainant became unlawfully present in Australia. The complainant was located on 20 November 2008 and subsequently detained in Maribyrnong Immigration Detention Centre. The complainant's three subsequent requests for ministerial intervention were rejected. On 10 February 2009, the Attorney General's Office initiated a request to the Minister, under section 417 of the Migration Act, on the basis of a report on the complainant's mental health by a clinical psychologist of Victorian Foundation for Survivors of Torture Inc. (a non-government organization also known as Foundation

² The complainant does not explain why he withdrew the appeal.

House). On 25 February 2009, the Minister decided not to intervene. On 5 March 2009, the complainant was notified of the State party's intention to deport him on 14 March 2009.

4.3 In addition to submitting his complaint to the Committee against Torture, the complainant also filed an application with the High Court of Australia for review of the decision of the immigration department officer who refused to refer his request for ministerial intervention of 27 May 2009 to the Minister for Immigration. The complainant's removal was suspended and on 10 July 2009, the High Court dismissed the complainant's application. On 14 October 2009, the Minister placed the complainant in community detention.

4.4 With regard to the complainant's allegation of fear of torture by Sri Lankan authorities, the State party considers that the complainant has failed to substantiate a foreseeable, real and personal risk. During the asylum procedure, the complainant relied on documents from the United Nations High Commissioner for Refugees (UNHCR) and non-government organizations to support his claim that as a member and organizer of the UNP and JSS, he was personally at risk of maltreatment from Sri Lankan authorities. While the UNHCR guidelines issued in 2009 indicate that political figures and officials who publicly express criticism of the Sri Lankan Government are at risk of targeted action by Sri Lankan Government actors or pro-Government paramilitary groups, other material relied on by the complainant indicates that the majority of serious incidents have been directed towards electoral candidates. As the complainant has not provided evidence of continued political involvement with the UNP since leaving Sri Lanka and as there has been a significant lapse of time since his departure, these reports do not provide sufficient evidence that he would be at a foreseeable, real and personal risk of being subjected to torture upon return to Sri Lanka.

4.5 Furthermore, guidelines issued by UNHCR in 2010, in the context of an improved human rights and security situation following the end of the armed conflict between the Sri Lankan army and the Liberation Tigers of Tamil Eelam (LTTE) in May 2009, indicate that there is no longer a need for "group-based" protection mechanisms. The 2010 guidelines note, however, that it is important to bear in mind that the situation in Sri Lanka is evolving.³

4.6 The treatment to which the complainant was subjected is not torture as defined by article 1 of the Convention against Torture. He claims that he was subjected to obstruction from work, verbal and physical abuse, mistreatment of personal belongings, destruction of property and a death threat. The Committee has in the past considered that the burning of a house in the absence of other aggravating circumstances (such as people occupying the house at the time of destruction) does not constitute torture.⁴ Furthermore, the complainant had submitted a request for assistance to the UNHCR office in Canberra, which decided that there were insufficient grounds to intervene with the Australian authorities on behalf of the complainant.

4.7 The State party considers that if returned to Sri Lanka, the complainant could use his affiliation to the UNP to relocate elsewhere in the country. Indeed, the UNP has strong representatives throughout the country and governs certain local councils in the complainant's district. The State party notes that the Committee, in its jurisprudence, has

³ The State party cites *UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka*, 5 July 2010 (HCR/EG/SLK/10/03) available at <http://www.refworld.org/docid/4c31a5b82.html>.

⁴ The State party cites Committee against Torture, communication No. 161/2000, *Dzemajl et al v. Yugoslavia*, decision adopted on 21 November 2002, para. 9.2.

considered that when a person can relocate to another part of the country, article 3 of the Convention is not violated.⁵

4.8 During the asylum procedure, the Refugee Review Tribunal (RRT) took into account that the complainant was a member of the UNP and had been involved in the JSS and may have, on occasion, been harassed by his political opponents; but it was not convinced that this amounted to persecution within the meaning of the Refugee Convention. The RRT considered that the JVP was not particularly interested in the complainant and that the chances of him being persecuted for his political opinion if he were returned to Sri Lanka were remote. The RRT considered that the numerous threats that the complainant allegedly received from Mr. L.A. did not result in any concrete act. As for the recruitment, the RRT did not find this allegation credible, as a party would not have any advantage in forcefully recruiting someone who would never show allegiance to it.

4.9 The State party points at the inconsistencies between the information provided in the protection visa application and that provided at the RRT hearing. The complainant explained at the time that the divergences were linked to his mental state at the time of his first application. The State party notes, however, that according to the psychological report provided by Foundation House on 8 February 2009, the complainant's anxiety and depression were exacerbated by events in immigration detention, such as visa refusals and the prospect of repatriation. The State party also notes a series of inconsistencies and omissions in the complainant's case, including with regard to events of intimidation that he reported for the first time in his third request for ministerial intervention on 27 May 2009. There are also discrepancies concerning the complainant's disclosure — to the Australian authorities during the asylum procedure and to the psychologist of Foundation House, as contained in the second report dated 25 October 2009 — of how he obtained the visa to come to Australia. The State party notes on this aspect that this report was submitted with the complainant's fourth request for ministerial intervention dated 15 February 2010, after the communication was submitted to the Committee against Torture.

4.10 The complainant relies on written testimony from his mother, taken from the information book of the Matale hospital police station. This testimony alleges that in February 2009, people invaded the house of the complainant's mother in search of the complainant, and that the property was destroyed and his mother injured. However, this testimony differs from the testimony obtained from the information book of the Warakapola Police Station, which was provided to Australian Immigration authorities with the application for ministerial intervention dated 27 May 2009, which contains no evidence of Government involvement. The same incident was referred to in the psychological report submitted with the request for ministerial intervention on 15 February 2010, except that it states that the perpetrators were Tamil-speaking men. This detail concerning the alleged perpetrators was for the first time presented before the Committee. These discrepancies caused the State party to question the veracity of the allegations submitted by the complainant. The four-year lapse in time between the complainant's original political activity and the claim of retributive activity on the part of Sri Lankan government officials towards the complainant's mother brings into doubt the connection between the two sets of events.

4.11 As for the complainant's allegations regarding a risk of torture by the LTTE, the State party considers it inadmissible because it is incompatible with the provisions of the Convention against Torture. The acts mentioned by the complainant cannot be considered torture under article 1 of the Convention as they would not be committed by, at the

⁵ The State party refers to Committee against Torture, communication No. 245/2004, *S.S.S. v. Canada*, decision adopted on 16 November 2005, para. 8.5.

instigation of or with the consent or acquiescence of a public official or any other person acting in an official capacity. The Committee has, in its jurisprudence, considered that fear of harm from non-government entities, such as the LTTE, are not covered by article 3 of the Convention.⁶

4.12 In the alternative, the State party submits that the complainant's allegations regarding treatment by the LTTE are manifestly ill-founded and marked by inconsistencies that undermine their merit. While the medical examination of the complainant has indicated that he has a scar, there is no evidence that the scar was obtained by torture. Moreover, the complainant did not mention that he had a scar to the psychologist from Foundation House. The complainant also told the psychologist that he had been detained by the LTTE for three days, whereas in his requests for ministerial intervention dated 27 May and 4 June 2009, and in his communication to the Committee, he mentions a period of detention of three weeks. Discrepancies were also noted in his account of those events with the LTTE in the applications for ministerial intervention dated 27 May and 4 June 2009. The State party notes that the complainant was assisted by an accredited interpreter during the hearing before the RRT and therefore cannot invoke language barrier to explain those discrepancies.

4.13 In any event, since the defeat of the Liberation Tigers of Tamil Eelam (LTTE) by Sri Lanka forces in May 2009, LTTE's capacity to exert influence or commit aggressive acts has been curtailed.

Complainant's comments on the State party's observations

5.1 On 1 April 2011, the complainant provided his comments. He states that he was diagnosed with post-traumatic stress disorder (PTSD) and a major depressive disorder linked to torture and trauma suffered in Sri Lanka.⁷ The report of 8 February 2009 by a clinical psychologist of Victorian Foundation for Survivors of Torture Inc. (Foundation House) states that the source of the complainant's condition is his belief, which appeared genuinely held, that his life would be imperilled if he were repatriated, and fears for the well-being of his family. This conclusion was corroborated by four other medical reports which link his mental illness with his past experiences.⁸

5.2 To explain the way his mental health issues played a role in his attempts to make a protection claim in Australia, the complainant refers to the Refugee Review Tribunal (RRT) process. Despite the fact that he was suffering from PTSD, the complainant was not examined by any mental health professional until he was detained at Maribyrnong Immigration Detention Centre in 2008. None of the above-mentioned reports were available at the time when his protection visa application was considered or when the RRT was considering his case. The medical reports indicate that the complainant has suffered from PTSD symptoms since his arrival in Australia up to the present, which includes the

⁶ See Committee against Torture, communication No. 138/1999, *M.P.S. v. Australia*, decision adopted on 30 April 2002, para. 7.4.

⁷ The formal diagnosis was made on 17 March 2011 by consultant forensic psychiatrist, Dr. John Albert Roberts (annexed to counsel's comments).

⁸ See psychological report of 22 December 2008 by Vania Ambesi, Professional Support Services, Maribyrnong Immigration Detention Centre (MIDC); report of 8 February 2009 by clinical psychologist, Guy Coffey, Foundation House; report of 7 May 2009 by Dr. Tony Falconer, International Health and Medical Solutions Pty Ltd (IHMS); report of 25 October 2009 by clinical psychologist, Heyam Haddad, New South Wales (NSW) Service for the Treatment and Rehabilitation of Torture and Trauma Survivors (STARTTS); report of 8 February 2011 by clinical psychologist, Pearl Fernandes, STARTTS; and report of 17 March 2011 by consultant forensic psychiatrist, Dr. John Albert Roberts.

period of time during which the RRT process took place.⁹ Therefore, his subsequent detention and threats of forceful return to Sri Lanka might have exacerbated his PTSD, but were not the cause of it.

5.3 With regard to the inconsistencies and omissions noted during the RRT hearing, the medical report dated 17 March 2011 states that any assessment of any apparent inconsistencies in the complainant's account would need to be considered in the light of the fact that his capacity to concentrate and perform well under situations such as cross-examination would be affected not only by his PTSD and major depression illnesses, but also because the matters which are discussed would evoke distress and compromise his capacity to give a consistent and accurate story. In spite of this, the RRT did not take into account the complainant's mental illnesses when considering what it took to be inconsistencies and omissions in his account. The RRT only considered that the burden of proof was on the complainant to bring medical evidence before it.

5.4 The complainant contends that the UNHCR 2009 guidelines are relevant in his case as it confirms that Sinhalese who are perceived to oppose government policies, as well as political figures and officials of any party who express public criticism of the Government, are at risk of targeted action by government actors or pro-Government paramilitary groups.¹⁰ Given the complainant's profile in the UNP as an outspoken critic of the Sri Lankan Government and his leadership in trade union protests and rallies, the guidelines corroborate his claims of being at risk of targeted action. In its observations, the State party quotes the UNHCR 2010 guidelines, which state that there is no longer a need for the formerly recommended "group-based" protection measures and "presumption" of eligibility (solely on the basis of risk of "indiscriminate harm") for Tamils from the north. However, given that the complainant is not a Tamil from the North who is fleeing generalized violence, it is difficult to understand the relevance of this quotation to his claims.

5.5 With regard to the current human rights situation in Sri Lanka, the complainant considers that there is still an atmosphere of repression and impunity whereby the Sri Lankan government security apparatus targets various segments of Sri Lankan society, including trade unionists and activists in opposition political parties.¹¹ A recent United Kingdom Home Office country of origin report states that there have been frequent attacks on JVP offices and campaigners, both during the southern provincial election campaign in July and August 2009, and since the presidential campaign began in November 2010.¹²

5.6 With regard to personal risk, the complainant reiterates his allegations and contends that his political opponents in the Sri Lankan Government have identified and targeted him as a result of his political and trade union activities. The incidents set out in the statement include attacks at rallies, at which he spoke, by a group which included a member of the Sri Lankan Government; the search for him at his family home by political thugs, including a

⁹ The complainant refers to the report of 8 February 2009 by clinical psychologist, Guy Coffey, Foundation House, and the report of 25 October 2009 by clinical psychologist, Heyam Haddad, NSW-STARTTS.

¹⁰ The complainant refers to *UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka*, April 2009, pp. 23–26, available at <http://www.refworld.org/docid/49de0b6b2.html>.

¹¹ The complainant refers, inter alia, to Human Rights Watch, *World Report 2011: Sri Lanka*, January 2011; United Kingdom: Home Office, *Operational Guidance Note: Sri Lanka*, March 2011 (OGN v 11.0); REDRESS, *Submission from AHRC, RCT and REDRESS to UN Panel on Sri Lanka*, 15 December 2010.

¹² United Kingdom: Home Office, *Country of Origin Information Report – Sri Lanka*, 11 November 2010.

member of the Sri Lankan Government; his detention and beating with wire by SLFP and JVP members; several verbal death threats; his being threatened at gunpoint by a member of the Sri Lankan Government; and, in 2009, another search for him at his mother's house (his former residence) by political thugs, in which his mother was injured; and the subsequent burning of the home.

5.7 The complainant also presents new evidence, namely a letter dated 12 February 2011 by the Chief Opposition Whip in the Sri Lanka Parliament, and a letter dated 10 March 2011 by the General Secretary of the UNP trade union, JSS, describing his role in the trade union and mentioning the threats to his life if he were to return to Sri Lanka.

5.8 With regard to the State party's argument that the UNHCR Regional Office in Canberra declared that it would not intervene in his case, the complainant states that the opinion was given before he had adequate assistance, and it is difficult to comment on it since no arguments were given in support of the decision. The complainant adds that it is unlikely that any information related to his mental condition had been transmitted to UNHCR.

5.9 The complainant states that any possibility for him to relocate in Sri Lanka cannot be envisaged in the current climate, which includes a clampdown on opposition activists and the use of emergency powers to detain those who are perceived to oppose the Government. Given the tight control the Government has over its territory, internal relocation is not likely to avoid the risk of persecution.

5.10 With regard to the physical marks of torture, the medical report of the NSW Refugee Health Service dated 14 March 2011 confirms the existence of scars on the left side of his neck, right flank, over left pelvis and over the lumbar spine. They are not recent scars, although the doctor could not comment on their exact age or cause. The medical report, dated 17 March 2011 confirms scars on the complainant's lower back and abdomen, and that those scars are consistent with the alleged trauma.

5.11 With regard to the alleged discrepancies concerning the complainant's disclosure of how he obtained his visa to Australia to the Australian authorities and subsequently to the psychologist on 25 October 2009 (para. 4.9 above), both the purpose for which the psychological report was made and the manner in which it was initiated should be considered. The psychological report did not have an investigative aim, but rather sought to facilitate therapy. The complainant was never able to review the content of the report, and since he was not assisted by an interpreter for that purpose, misunderstandings might have occurred.

5.12 As noted by the State party, the same report refers to the destruction of his mother's home and identifies the alleged perpetrators as Tamil-speaking men, which allegedly contradicts the version given to the Australian authorities. The complainant alleges that there may have been confusion between him and the psychologists, as two different events were referred to during the interview, namely the invasion of the house that the complainant and his wife had rented in Gokarella, and the invasion and destruction of his mother's property.¹³ Contrary to the State party's contention, the latter event cannot be dissociated from the other harassment episodes experienced by the complainant before he left Sri Lanka.

5.13 As for his alleged torture by the LTTE, the complainant acknowledges that the 2009 defeat of the LTTE has curtailed its capacity to exert influence or commit aggressive acts. Moreover, in terms of the priorities of the entire LTTE organization, it is improbable that he

¹³ Both events are referred to in the complainant's statement dated 27 May 2009.

would be a high priority target for reprisal. Nonetheless, the complainant is genuinely apprehensive that the people with whom he had personal dealings and who were connected to the LTTE, as well as other people in their network may wish to harm him if they become aware that he had returned to Sri Lanka. Regarding the status of the LTTE as a non-State actor, article 1 of the Convention against Torture also refers to acts committed at “the instigation of or with the consent or acquiescence of” public officials. Given that the complainant is at risk from the Sri Lankan Government itself, it is foreseeable that should he advise the Government of his predicament and fears (concerning attack by the LTTE), the Sri Lankan Government is not likely to actively seek to protect him.

5.14 On the discrepancies related to his past detention by the LTTE (para. 4.12 above), contrary to the State party’s assertion, the complainant did show his scars to the Foundation House psychologist, as evidenced by a letter dated 18 June 2009 by the complainant’s counsel to the Department of Immigration and Citizenship (DIAC), with an explanation that DIAC found satisfactory at the time.¹⁴ The complainant considers that many of the inconsistencies pointed out by the State party are linked to his lack of command of English and the PTSD from which he was already suffering at the time.

State party’s further observations

6.1 On 16 December 2011, the State party considers that the new information provided by the complainant does not contain any evidence to support the admissibility of his allegations. The complainant relies heavily on the UNHCR 2010 guidelines on Sri Lanka; however, the guidelines, in this context, primarily refer to violence directed towards human rights activists and journalists.¹⁵ Trade unionists and supporters of the UNP are not specifically identified in the guidelines as being at risk of violence from Sri Lankan Government authorities.

6.2 With regard to the general situation in Sri Lanka, recent reports indicate an improved human rights and security situation following the end of the armed conflict between the Sri Lankan army and the LTTE in May 2009. Reports of behaviour which might constitute torture for the purposes of article 1 of the Convention — that is, with the consent or acquiescence of a Sri Lankan public official or other person acting in official capacity — have largely been directed towards people suspected of being LTTE sympathizers or operatives.¹⁶ A significant period of time has passed since the complainant’s departure from Sri Lanka in 2005. During the presidential elections in January 2010, the people affiliated with the UNP who were targeted were not solely targeted because they were members of the UNP, but also because they were members of the left-wing Sinhalese-nationalist People’s Liberation Front (JVP) or the Tamil National Alliance (TNA), which is not the complainant’s case.

6.3 The complainant provided two letters: one from a Member of Parliament from the UNP and one from the General Secretary of the trade union, Jathika Sevaka Sngamaya. While these letters confirm the complainant’s involvement with the UNP and JSS, they do not provide any new evidence that the complainant is at a foreseeable, real and personal risk of torture by the Sri Lankan authorities. For example, the letters do not identify who might harm the complainant, aside from generally referring to “political vigilante groups” and “political opponents.” On the whole, recent country information and letters provided

¹⁴ See the minutes of the Department of Immigration and Citizenship dated 19 June 2009, annex R to the complainant’s comments.

¹⁵ The State party refers to the *UNHCR Eligibility Guidelines*, 5 July 2010 (HCR/EG/10/02), pp. 6-7.

¹⁶ The State party refers, inter alia, to the United States Department of State, *2010 Country Reports on Human Rights Practices – Sri Lanka*, 8 April 2011.

merely indicate that the complainant might be at a generalized risk of harm if he was returned to Sri Lanka, because of the current political and social climate, but does not indicate any personal and present danger of encountering harm by Sri Lankan authorities.

6.4 The complainant asserts that he would not be able to relocate within Sri Lanka and substantiates this claim with a conclusion drawn in a United Kingdom Home Office operational guidance note to the effect that applicants perceived to be active or influential in opposition to the Sri Lankan Government may be at risk of persecution by the State. However, this conclusion largely concerns journalists, lawyers, human rights activists and supporters of the current political opposition — a coalition led by General Sarath Fonseka —, which has a different composition to the UNP that the complainant supported when he was in Sri Lanka. Finally, there is little evidence to suggest that the complainant would be at risk of torture by the Sri Lankan authorities if he were to return to Matale District (where the complainant lived and which is in the south-central part of the country). The main areas of unrest in Sri Lanka are in the north and east, where the civil conflict with the LTTE took place.

6.5 With regard to the psychological reports submitted to the Committee, they only establish that the complainant experienced some kind of trauma in the past (which the State party submits was not the result of torture by the Sri Lankan Government). No new evidence has been provided to suggest that he is presently at risk of torture by the Sri Lankan Government if he were to return to Sri Lanka. The psychological report dated 1 April 2011 notes that the complainant's current mental health issues are predominantly linked to his current predicament (i.e., his community detention) and the uncertainty surrounding his appeal for a protection visa. While the report notes that he experiences recollections of his alleged incarceration by the LTTE, there is no new evidence linking the complainant's mental health to torture carried out by Sri Lankan government authorities. While the State party acknowledges that the complainant has a history of mental illness in connection with his ongoing detention, his difficulties in articulating his experiences in Sri Lanka and the subsequent psychological evidence provided do not have a material impact on the merits of his claims that he is at a real and personal risk of torture if he is returned to Sri Lanka.

6.6 While the medical reports establish that the complainant has scars on his body, they do not provide conclusive proof that they were caused by groups opposed to the UNP, that these groups were affiliated with or agents of the Sri Lankan Government or that the complainant is in personal and present danger of experiencing torture if returned to Sri Lanka.

6.7 Notwithstanding its position in relation to the admissibility of the complainant's claim of torture by the LTTE, the State party considers that the complainant's comments do not provide any new evidence to suggest a continuing real, personal and present risk of torture by the LTTE since he arrived in Australia, and accordingly, his allegations are unmeritorious.

Complainant's further information

7.1 On 21 March 2012, the complainant submitted additional documents to the Committee, including newspaper articles stating that Mr. L.A., the government official who had allegedly threatened the complainant at gunpoint, had surrendered to the police in August 2010, after allegedly abducting and assaulting three people. Another article dated 28 March 2011 states that after that incident, Mr. L.A. was re-elected to his position as Chairman of Yatawatta Pradeshiya Sabha in Matale District. The last article dated 1 February 2011 indicates that Mr. L.A. stood as a United People's Freedom Alliance (UPFA) candidate in the March 2011 local government elections. The complainant

confirmed that the above information was not presented to the Australian immigration authorities.

7.2 On 27 April 2012, the complainant submitted a report from the Edmund Rice Centre (ERC)¹⁷ on its investigations in Sri Lanka with regard to the complainant's situation, which included discussions with human rights lawyers, senior opposition, political figures, trade union officials and others. The report substantiates the credibility of the complainant's account that he would face a very significant risk of torture at the hands of Government actors, including Mr. L.A. or persons affiliated with the Government through the trade union of the government party. The Chief Opposition Whip in the Sri Lankan Parliament (see para. 5.7 above) with whom the NGO team met stated that the Government is persistent in hunting down political opponents and that after an election, the party which comes to power harasses opposition supporters to punish them for supporting their political opponents. A discussion with senior JSS representatives confirmed that the wounds noted on the complainant's body at the time were the result of an assault with a cable and other forms of humiliation aimed at forcing him to worship the President. The complainant's complaint was being investigated by the UNP Political Revenge Committee. According to the ERC report, there is an additional risk for the complainant, linked to his status as failed asylum seeker who could be suspected of having links with the LTTE.

7.3 Given that the State party is in contact with the Sri Lankan authorities in its fight to halt the smuggling of asylum seekers, the complainant is concerned that the information he provided to the Australian Government may have been provided to the Sri Lankan authorities following his disclosure in May 2006. If the State party returns the complainant to Sri Lanka he will be questioned upon arrival at the international airport by the authorities, including the Criminal Investigation Department (CID), who might take him into custody and interrogate him. Sri Lankan authorities routinely use torture, including on returned asylum seekers following their arrival at the international airport, as evidenced by a number of reports by NGOs, including Human Rights Watch.¹⁸ Building on individual accounts from failed asylum seekers who had been imprisoned and tortured after returning to Sri Lanka from Australia, ERC concludes that the complainant is likely to face similar risks of torture. The torture allegedly practiced by CID Colombo includes blunt trauma, burning (with molten metal), suspension, sexual assault, rape and mock execution.¹⁹ The complainant is at a heightened risk of torture during interrogation as a returning asylum seeker because he actually had connections with the LTTE before and after leaving Sri Lanka.

7.4 Due to his severe mental illnesses, the complainant is more likely to have difficulties in an interrogation with authorities such as the CID, as set out in the report from the Service for the Treatment and Rehabilitation of Torture and Trauma Survivors (STARTTS).²⁰ His history of trauma will make him vulnerable to the aggressive suspicions of a very unprofessional police force.²¹

7.5 On 14 November 2012, the complainant submitted additional clarification relating to the admissibility of the communication. He considers that the Committee should admit the

¹⁷ The Edmund Rice Centre is involved in a range of projects and activities across the four areas of its operation in research, community education, advocacy and networking (see <http://www.erc.org.au/>).

¹⁸ See Human Rights Watch, "UK: Halt Deportations of Tamils to Sri Lanka – Credible Allegations of Arrest and Torture upon Return", 25 February 2012.

¹⁹ See Freedom from Torture, "Freedom from Torture submission to the Committee against Torture for its follow-up to the concluding observations from its examination of Sri Lanka in November 2011".

²⁰ Report attached to the complainant's further submission to the Committee of 27 April 2012.

²¹ The complainant quotes report from Edmund Rice Centre, (p. 3, para. 13) (see above).

new evidence submitted as his situation can be distinguished from previous Committee decisions in which evidence has been found inadmissible on the basis of non-exhaustion of domestic remedies. Moreover, the Committee should admit his complaint regarding torture by individual members of the LTTE who assisted him with entering Australia, on the basis that the Sri Lankan Government will “acquiesce” to pain or suffering intentionally inflicted by private actors, thereby bringing the complaint within the scope of article 3 of the Convention.

7.6 The complainant notes that in each instance where the Committee has found evidence inadmissible pursuant to article 22, paragraph 5 (b), of the Convention, it has made its decision on the basis that such evidence was previously available to the complainant, who elected not to present it to the domestic authorities²² and/or as a result of the new material or otherwise, the complainant had further domestic remedies available to them.²³ In the present case, the new evidence submitted by the complainant was not available to him at the time he originally pursued his domestic remedies and therefore he could not have submitted it to the Australian authorities at that time. Furthermore, the new evidence does not entitle the complainant to file a new application or to have his application reviewed or reheard in Australia. The only domestic remedy available to the complainant is ministerial intervention pursuant to sections 48 B or 417 of the Migration Act 1958 (Cth).

7.7 However, this is not a remedy required to be exhausted under the Convention, because it is highly discretionary, non-compellable, non-reviewable and unlikely to bring effective relief.

Additional submission from the State party

8.1 On 6 May 2013, the State party commented on the complainant’s further arguments regarding the alleged acquiescence of Sri Lankan authorities to torture by the LTTE. It refers to the Committee’s general comment No. 2, which indicates that consent or acquiescence to torture is comprised of two elements: (1) that the State or its officials know or have reasonable grounds to believe that acts of torture or ill-treatment are being committed by non-State or private actors; and (2) that the State and its officials fail to exercise due diligence to prevent, investigate, prosecute and punish such non-State actors.²⁴

8.2 In the light of the above, the State party considers that the complainant has failed to substantiate his allegation in this regard. It contends that the complainant’s submissions, which set out the alleged acts of torture carried out by the LTTE in August 2005, do not refer to or indicate that a public official or other person acting in an official capacity was aware or had reasonable grounds to believe that the alleged acts of torture would or did take place, or that a public official or other person acting in an official capacity failed to prevent, investigate, prosecute or punish the alleged acts of torture. For instance, the complainant does not allege that he attempted to alert Sri Lankan officials to the alleged acts of torture by the LTTE or that Sri Lankan officials were aware of the alleged torture and failed to investigate. Accordingly, no State acquiescence can be attributed to the alleged acts of torture carried out by the LTTE in August 2005.

²² See Committee against Torture, communications No. 399/2009, *F.M-M v. Switzerland*, decision adopted on 26 May 2011; No. 364/2008, *J.L.L. v. Switzerland*, decision adopted on 18 May 2012.

²³ See Committee against Torture, communications No. 35/1995, *K.K.H. v. Canada*, decision adopted on 22 November 1995; No. 30/1995, *P.M.P.K. v. Sweden*, decision adopted on 20 November 1995; No. 365/2008, *S.K. and R.K. v. Sweden*, decision adopted on 16 January 2012.

²⁴ Committee against Torture, general comment No. 2 (2008) on the implementation of article 2 by States parties, para. 18.

8.3 Furthermore, the complainant's submissions do not support his claim that the Sri Lankan Government will acquiesce to the LTTE carrying out acts of torture upon his return to Sri Lanka. The complainant merely states that the Sri Lankan Government is not likely to actively seek to protect him, and he relies on the separate claim that he is at risk of persecution from the Sri Lankan Government to support his proposition. The State party considers this argument speculative and that it does not satisfy the test for "acquiescence" as set out by the Committee in its general comment No. 2. In addition to the unmeritorious nature of the complainant's claim with regard to a risk of persecution at the hands of the Sri Lankan Government, no evidence has been put forward to explain how the Sri Lankan Government would know or have reasonable grounds to believe that the complainant is at risk of torture by the LTTE. The complainant has also not provided any evidence to suggest that the Sri Lankan Government generally consents or acquiesces to the conduct of torture by the LTTE. The State party does not consider in any case that the complainant is at risk of torture by the LTTE as mentioned in its previous submissions.

Issues and proceedings before the Committee

Consideration of admissibility

9.1 Before considering any complaint contained in a communication, the Committee must decide whether or not it is admissible under article 22 of the Convention.

9.2 The Committee has ascertained, as it is required to do under article 22, paragraph 5 (a), of the Convention that the same matter has not been and is not being examined under another procedure of international investigation or settlement.

9.3 The Committee considers that the communication has been substantiated for purposes of admissibility, as the complainant has sufficiently elaborated the facts and the basis of the claim for a decision by the Committee. As to the State party's arguments regarding the inadmissibility *ratione materiae* of the communication, the Committee considers that, as this issue is linked to the merits of the case, it will not deal with it at the admissibility stage. The Committee finally notes that the State party has not challenged the admissibility of the communication pursuant to article 22, paragraph 5 (b), of the Convention.

9.4 Accordingly, the Committee finds that no obstacles to the admissibility of the communication exist and thus declares it admissible.

Consideration of the merits

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

10.2 The issue before the Committee is whether the expulsion of the complainant to Sri Lanka would constitute a violation of the State party's obligation under article 3 of the Convention not to expel or return ("refouler") a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

10.3 The Committee must evaluate whether there are substantial grounds for believing that the complainant would be personally in danger of being subjected to torture upon return to Sri Lanka. In assessing this risk, the Committee must take into account all relevant considerations, pursuant to article 3, paragraph 2, of the Convention, including the existence of a consistent pattern of gross, flagrant or mass violations of human rights. However, the Committee recalls that the aim of such determination is to establish whether the individual concerned would be personally at a foreseeable and real risk of being subjected to torture in the country to which he or she would return.

10.4 The Committee recalls its general comment No. 1²⁵ in which it states that the risk of torture must be assessed on grounds that go beyond mere theory or suspicion, but the risk does not have to meet the test of being highly probable; it is enough that the danger is personal and present (paras. 6 and 7). In its jurisprudence, the Committee has determined that the risk of torture must be foreseeable, real and personal. The Committee recalls that under the terms of general comment No. 1, considerable weight will be given to findings of fact that are made by organs of the State party concerned, but the Committee is not bound by such findings; rather it has the power, provided by article 22, paragraph 4, of the Convention, to freely assess the facts based upon the full set of circumstances in every case (para. 9). The Committee further recalls that the burden to present an arguable case is on the author of a communication (para. 5).

10.5 With respect to the risk that the complainant might be subjected to torture at the hands of government officials upon return to Sri Lanka, the Committee notes the complainant's claim that he had been harassed and threatened at gunpoint in the past by Government officials because he was an active UNP trade unionist. The Committee takes particular note of the profile of the main alleged perpetrator, Mr. L.A., who, according to the complainant, harassed him about his political activities and held and threatened him at gunpoint. Mr. L.A. was also jailed for killing UNP members; he gave himself up to the police in August 2012, after he allegedly abducted and assaulted three people; and was subsequently re-elected to his position as Chairman of Yatawatta Pradeshiya Sabha in Matale District. The Committee further notes that Mr. L.A. reportedly stood as a United People's Freedom Alliance (UPFA) candidate in the local government elections held in March 2011.

10.6 The Committee considers that the risk alleged by the complainant is real, personal and foreseeable. The Committee takes particular note of the fact that the complainant was diagnosed with post-traumatic stress disorder (PTSD) and a major depressive disorder linked to trauma suffered in Sri Lanka. It also takes note of the report from the Edmund Rice Centre (ERC) confirming his well-founded fear of being tortured and persecuted by Sri Lankan officials upon return to Sri Lanka. The State party was unable to disprove the evidence submitted by the complainant.

10.7 The report of 8 February 2009 from a clinical psychologist of Victorian Foundation for Survivors of Torture Inc (Foundation House) states that the source of the complainant's condition was the belief — which appeared genuinely held — that his life would be imperilled if he were repatriated, and fears for the well-being of his family. This conclusion was corroborated by four other medical reports that address the consistency of his mental illness with his past experiences. With regard to the physical marks of torture, the medical report of the NSW Refugee Health Service, dated 14 March 2011, confirms the existence of scars on the left side of his neck, right flank, over left pelvis and over the lumbar spine. While they were not recent scars, the doctor could not comment on their exact age or cause. The medical report dated 17 March 2011 confirms scars on the complainant's lower back and abdomen, and indicates that those scars are consistent with the alleged trauma.

10.8 As for the report from the Edmund Rice Centre (ERC) submitted on 27 April 2012, it considers that the complainant's account is credible and that he would face a very significant risk of torture at the hands of Government actors, including Mr. L.A. or persons affiliated with the Government through the trade union of the government party. The Chief Opposition Whip in the Sri Lankan Parliament (see para. 5.7 above) with whom the NGO team met stated that the Government is persistent in hunting down political opponents and that after an election, the party that comes to power harasses opposition supporters to

²⁵ Committee against Torture, general comment No. 1 (1997) on the implementation of article 3 of the Convention in the context of article 22 (refoulement and communications).

punish them for supporting their political opponents. A discussion with senior JSS representatives confirmed that the wounds noted on the complainant's body at the time were the result of an assault with a cable and other forms of "humiliation", aimed at forcing him to worship the President. The complainant's complaint was being investigated by the UNP Political Revenge Committee, so far without any known result. The ERC report further states that there is an additional risk for the complainant, linked to his status as failed asylum seeker who could be suspected of having links with the LTTE. Again, the State party did not offer any persuasive arguments concerning the issues raised by the complainant nor, especially, on the allegations submitted in the above-mentioned reports.

10.9 Moreover, the Committee considered the State party's argument that the author's claim related to non-State actors and therefore falls outside the scope of article 3 of the Convention.²⁶ However, the Committee recalls that it has, in its jurisprudence and in general comment No. 2, addressed risk of torture by non-State actors and failure on the part of a State party to exercise due diligence to intervene and stop the abuses that were impermissible under the Convention.²⁷ In the present communication, the Committee took into account all the factors involved, well beyond a mere risk of torture at the hands of a non-government entity. The Committee assessed reports of continued and consistent allegations of widespread use of torture and other cruel, inhuman or degrading treatment in Sri Lanka,²⁸ as well as reports concerning mistreatment of failed asylum seekers who have profiles similar to the author's,²⁹ and considered that, in addition to torture by the LTTE — signs of which were corroborated by medical reports —, the complainant was subjected to constant harassment and threats, including death threats, by government authorities and that this mistreatment intensified as he made further complaints.

10.10 In the light of the foregoing and on the basis of all the information before it, the Committee against Torture concludes that there are substantial grounds for believing that the complainant would face a foreseeable, real and personal risk of being subjected to torture by Government officials if returned to Sri Lanka. The Committee therefore concludes that the removal of the complainant to Sri Lanka would constitute a breach of article 3 of the Convention.

11. The Committee is of the view that the State party has an obligation to refrain from forcibly returning the author to Sri Lanka or to any other country where he runs a real risk of being expelled or returned to Sri Lanka. Pursuant to rule 118, paragraph 5, of its rules of procedure, the Committee invites the State party to inform it, within 90 days from the date of the transmittal of this decision, of the steps it has taken in response to the present decision.

[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.]

²⁶ See, inter alia, Committee against Torture, communications No. 177/2001, *H.M.H.I. v. Australia*, decision adopted on 1 May 2002, para. 6.4; No. 218/2002, *Chorlango v. Sweden*, decision adopted on 22 November 2004, para. 5.2.

²⁷ See Committee against Torture, communications No. 379/2009, *Bakatu-Bia v. Sweden*, decision adopted on 3 June 2011, para. 10.6; No. 322/2007, *Njamba and Balikosa v. Sweden*, decision adopted on 14 May 2010, para. 9.5; also general comment No. 2 (2008), para. 18.

²⁸ See CAT/C/LKA/CO/3-4, para. 6.

²⁹ See CAT/C/GBR/CO/5, para. 20.